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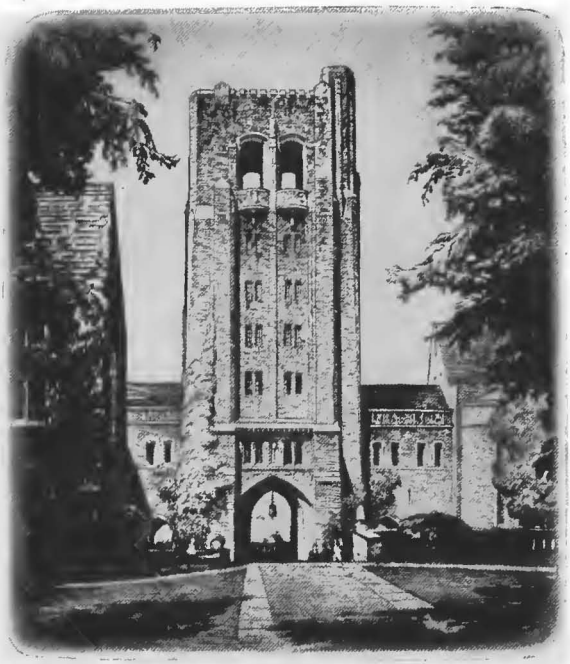

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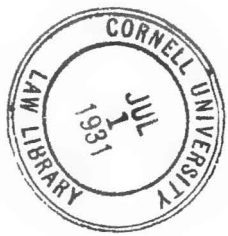

DICTIONARY

OF

TERMS AND PHRASES

USED IN

AMERICAN OR ENGLISH JURISPRUDENCE.

BY

BENJ. VAUGHAN ABBOTT.

VOL. I.

A—K.

BOSTON:

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TO

ELBRIDGE T. GERRY,

OF THE NEW YORK BAR,

THIS WORK IS INSCRIBED

IN APPRECIATION OF HIS EXTENSIVE AND VARIED ATTAINMENTS IN THE KNOWLEDGE OF JURISPRUDENCE,

AND

AS A TOKEN OF REGARD INSPIRED BY A FRIENDSHIF OF MANY YEARS.



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PREFACE.

THIS work is strictly a Law Dictionary, rather than what may be called a Dictionary of the Law. It deals with the meanings of Law Terms. It has in view the wants of students and readers in topics new to them, who require an explanation of expressions which they meet for the first time; of practitioners, who find in instruments brought before them for construction words employed in unusual senses or connections, and desire to know all the shades and limits of their meaning; of compilers and draughtsmen, who are concerned to choose precisely the right phraseology to express a definite legal idea. Being devoted to these wants, it is not occupied with essays upon the substantial rules of the law. When the technical meaning of a word or phrase has been fairly given, with sufficient illustrations of its application and use to enable the reader to determine what it may mean, or how he should employ it, the duty undertaken has been deemed fulfilled.

Every reader of the Reports knows that there are numerous decisions which expound the judicial view of the meaning of some term involved. They are of great value in legal lexicography, but have never been systematically collected, or even indexed. The great foundation of this dictionary is in these decisions. The leading American Reports, to the extent of at least half, have been patiently examined, page by page, by the author, or assistants working in company with him, for cases of this character. Other Reports, including the notable English ones, have been examined, as thoroughly as practicable, by aid of all ready guides to their contents. The judicial definitions thus collected have formed the basis of the present work. There have been added a liberal selection of extracts from

kindred works; thus making the volumes in a good degree a digest of the modern English law dictionaries. Extracts accredited to a writer by his name only are from his dictionary; thus, references to BOUVIER, BURRILL, or WHARTON, not naming book and page, are to the dictionary of the writer named, not to Bouvier's Institutes, Burrill on Assignments, or Wharton's Principles of Conveyancing. The privilege of making extracts from the chapter of definitions in Abbott's New York Digest (which has been continued and enlarged in a new edition and supplements by Mr. AUSTIN ABBOTT), has materially aided completeness, and ought to be specially acknowledged here, because the definitions are cited from the reports themselves rather than from the Digest. Like aid has been derived from the United States Digest.

The difference in the type employed at different parts of the page needs explanation. The matter in large type (bourgeois leaded) is what has been compiled for this work. Not always strictly original (for, especially in respect to English subjects, portions of an approved account are sometimes adopted from another work, as more likely to be useful than what could be written anew), it expresses the author's views, for the soundness of which he is responsible. The matter in small type (brevier solid) consists of extracts from writings and decisions presenting additional, sometimes inconsistent views; for these, the author only assumes the duty of correct condensation. The large type is in the nature of a treatise text; the small type is rather a digest of the decisions. Small type is used not as a means of saving space upon paragraphs of minor importance, but to distinguish the extracts, or the Digest portion of the work.

BENJ. VAUGHAN ABBOTT.

NEW YORK, JUNE, 1879.

A TABLE OF ABBREVIATIONS

USED IN JURISPRUDENCE.

A.	Anonymous. In a reference, when annexed to the number of a leaf of a volume of which the leaves instead of the pages are numbered, "a" denotes the front of the leaf; "b," the back of the leaf.
A. B.	Anonymous Reports at end of Benloe's Reports, usually called New Benloe.
A. C.	Appeal Court, English Chancery.
A. D.	*Anno Domini*; in the year of the Lord.
A. K. Marsh.	A. K. Marshall's Reports, Kentucky Court of Appeals.
A. P. B. Ashurst MSS. L. I. L.	Ashurst's Paper Books; the manuscript paper books of Ashurst, J., Buller, J., Lawrence, J., and Dampier, J., in Lincoln's Inn Library.
A. R.	*Anno regni*; in the year of the reign.
A. & E.	Adolphus & Ellis' Reports, English King's Bench.
Ab. Sh.	Abbott on Shipping.
Abb. Adm.	Abbott's Admiralty Reports, United States District Court.
Abb. App. Dec., Abb. Ct. of App., or Abb. N. Y. Ct. of App.	Abbott's New York Court of Appeals Decisions.
Abb. N. Y. Dig.	Abbott's Digest of New York Reports and Statutes.
Abb. N. Y. Pr. or Abb. Pr.	Abbott's Practice Reports, various New York Courts.
Abb. N. Y. Pr. N. S. or Abb. Pr. N. S.	Abbott's Practice Reports, New Series, various New York courts.
Abb. Nat. Dig.	Abbott's National Digest.
Abb. New Cas.	Abbott's New Cases, various New York Courts.
Abb. U. S.	Abbott's United States Reports, United States Circuit and District Courts.
Abb. U. S. Pr.	Abbott's United States Courts Practice.
Abr. Cas. Eq.	Equity Cases Abridged.
Acc.	*Accordant.* Used in the reports, to denote the *accordance* or agreement between one adjudged case and another, in establishing or confirming the same doctrine, in the same way as the disagreement or opposition of cases is denoted by *contra.*
Act. or Act. Pr. C.	Acton's Prize Causes, English Privy Council.
Act. Reg.	*Acta Regia.*
Ad. Con.	Addison on Contracts.
Ad. E.	Adams on Ejectment.
Ad fin.	*Ad finem*; at the end.
Ad. Torts	Addison on Torts.
Ad. & E.	Adolphus & Ellis' Reports, English King's Bench.
Adams (Me.)	Adams' Reports, Maine Supreme Court; Maine Reports, vols. 41, 42.
Adams (N. H.)	Adams' Reports, New Hampshire Supreme Court; New Hampshire Reports, vol. 1.
Add. or Add. (Pa.)	Addison's Reports, Pennsylvania County Court and Court of Errors.
Add. Con.	Addison on Contracts.
Add. Eccl.	Addams' Ecclesiastical Reports.
Add. Torts	Addison on Torts.
Adm.	Admiralty.
Admr.	Administrator.

Admx.	Administratrix.
Adolph. & E.	Adolphus & Ellis' Reports, English King's Bench.
Ads.	*Ad sectam;* at the suit of.
Aik.	Aikens' Reports, Vermont Supreme Court.
Al.	Aleyn's Select Cases, English King's Bench.
Al. & Nap.	Alcock & Napier's Reports, Irish King's Bench and Exchequer.
Ala.	Alabama. Alabama Reports, Supreme Court.
Ala. N. S.	Alabama Reports, Supreme Court.
Ala. Sel. Cas.	Alabama Select Cases.
Alb. Law Jour.	Albany Law Journal.
Alc. Reg. Cas.	Alcock's Registry Cases, Irish.
Alc. & N.	Alcock & Napier's Reports, Irish King's Bench and Exchequer.
Ald.	Alden's Condensed Reports, Pennsylvania.
Alison Prac.	Alison's Practice of the Criminal Law of Scotland.
Alison Princ.	Alison's Principles of the Criminal Law of Scotland.
All. or Allen	Allen's Reports, Massachusetts Supreme Court; Massachusetts Reports, vols. 83–96.
All. (N. B.) or Allen (N. B.)	Allen's Reports, New Brunswick Supreme Court.
Am. Corp. Cas.	Withrow's American Corporation Cases.
Am. Jur.	American Jurist.
Am. Law Jour.	American Law Journal.
Am. Law Mag.	American Law Magazine.
Am. Law Reg.	American Law Register.
Am. Law Rev.	American Law Review.
Am. Law T. R.	American Law Times Reports.
Am. Lead. Cas.	Hare & Wallace's American Leading Cases.
Am. R.	American Reports.
Am. Railw. Cas.	American Railway Cases.
Am. Railw. R.	American Railway Reports.
Am. Tr. Cas.	Cox's American Trademark Cases.
Amb.	Ambler's Reports, English Court of Chancery.
Ames	Ames' Reports, Rhode Island Supreme Court; Rhode Island Reports, vols. 4–7.
Ames, K. & B.	Ames, Knowles, & Bradley's Reports, Rhode Island Supreme Court; Rhode Island Reports, vol. 8.
Amos & F. Fix.	Amos & Ferard on Fixtures.
An.	Anonymous.
And.	Anderson's Reports, English Common Pleas and Court of Wards.
Andr.	Andrew's Reports, English King's Bench.
Ang.	Angell's Reports, Rhode Island Supreme Court; Rhode Island Reports, vol. 1.
Ang. Carr.	Angell on Carriers.
Ang. Lim.	Angell on Limitations.
Ang. Waterc.	Angell on Watercourses.
Ang. & A. Corp.	Angell & Ames on Corporations.
Ann. or Anne	Queen Anne; thus 1 Ann. denotes the first year of the reign of Queen Anne.
Annaly	Annaly's Reports, English King's Bench; Cases tempore Hardwicke.
Anon.	Anonymous.
Anst.	Anstruther's Reports, English Exchequer.
Anth. or Anth. N. P.	Anthon's Nisi Prius Reports, various New York Courts.
App.	Appleton's Reports, Maine Supreme Court; Maine Reports, vols. 19, 20.
Apud	In; contained in; quoted in.
Arch. Civ. Pl.	Archbold on Civil Pleading.
Arch. Cr. Pl.	Archbold on Criminal Pleading and Evidence.
Arch. Land. & T.	Archbold on Landlord and Tenant.
Arch. N. P.	Archbold's Nisi Prius Law.
Arch. Pr.	Archbold on Practice.
Archer	Archer's Reports, Florida Supreme Court; Florida Reports, vol. 2.
Arg.	*Arguendo;* in arguing; in the course of reasoning.
Ark.	Arkansas. Arkansas Reports, Supreme Court.
Arkl.	Arkley's Reports, Scotch Justiciary Court.
Arms. M. & O.	Armstrong, Macartney & Ogle's Reports, Irish Nisi Prius Cases.
Arn.	Arnold's Reports, English Common Pleas.
Arn. Ins.	Arnould on Insurance.

Arn. & H.	Arnold & Hodges' Reports, English Queen's Bench.
Arn. & H. B. C.	Arnold & Hodges' Reports, English Bail Court.
Ashm.	Ashmead's Reports, various Pennsylvania Courts.
Ass.	Book of Assizes; part 5 of the Year Books.
Ass. de Jerus.	Assizes of Jerusalem.
Ast.	Aston's Entries.
Atherl. Mar. Sett.	Atherly on Marriage Settlements.
Atk.	Atkyn's Reports, English Chancery.
Atty.	Attorney.
Atty.-Gen.	Attorney-General.
Aust. Juris.	Austin on Jurisprudence.
Ayl. Pan.	Ayliffe's Pandects.
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani.
Azuni Mar. Law	Azuni on Maritime Law.
B.	Bancus; the Common Bench. Book. The back of a leaf; compare A.
B. C.	Bail Court. Bell's Commentaries on Law of Scotland.
B. C. C.	Lowndes & Maxwell's Bail Court Cases, English Bail Court.
B. C. R.	Saunders & Cole's Bail Court Reports, English Bail Court.
B. Ecc. Law	Burn on Ecclesiastical Law.
B. Just.	Burn's Justice of the Peace.
B. Monr.	B. Monroe's Reports, Kentucky Court of Appeals.
B. N. C.	Brooke's New Cases, English King's Bench.
B. N. P.	Buller on the Law of Nisi Prius.
B. P. B.	Buller's Paper Book. Compare A. P. B.
B. R.	Bancus Regis; the King's Bench.
B. R. H.	Cases tempore Hardwicke, English King's Bench.
B. & A. or B. & Ald.	Barnewall & Alderson's Reports, English King's Bench.
B. & Ad.	Barnewall & Adolphus' Reports, English King's Bench.
B. & B.	Broderip & Bingham's Reports, English Common Pleas.
B. & C.	Barnewall & Cresswell's Reports, English King's Bench.
B. & L.	Browning and Lushington's Reports, English Admiralty Court.
B. & P.	Bosanquet & Puller's Reports, English Common Pleas.
B. & S.	Best & Smith's Reports, English Queen's Bench.
Bab. Auct.	Babington on Auctions.
Bac. Abr.	Bacon's Abridgment.
Bac. Max.	Bacon's Maxims.
Bagl. or Bagl. & H.	Bagley & Harman's Reports, California Supreme Court; California Reports, vols. 16–19.
Bail Ct. Cas.	Lowndes & Maxwell's Bail Court Cases, English Bail Court.
Bailey	Bailey's Law Reports, South Carolina Court of Appeals.
Bailey Eq.	Bailey's Equity Reports, South Carolina Court of Appeals.
Baldw.	Baldwin's Reports, United States Circuit Court.
Balf.	Balfour's Practice of the Law of Scotland.
Ball & B.	Ball & Beatty's Reports, Irish Chancery.
Bank. Inst.	Bankton's Institutes of the Law of Scotland.
Bank. Mag.	Banker's Magazine.
Bankr. Reg.	National Bankruptcy Register.
Banks	Banks' Reports, Kansas Supreme Court; Kansas Reports, vols. 1–5.
Barb.	Barbour's Reports, New York Supreme Court.
Barb. Ch.	Barbour's Chancery Reports, New York Court of Chancery.
Barb. Ch. Pr.	Barbour's Chancery Practice.
Barber or Barb. (Ark.)	Barber's Reports, Arkansas Supreme Court; Arkansas Reports, vols. 14–26.
Barn.	Barnardiston's Reports, English King's Bench.
Barn. Ch.	Barnardiston's Chancery Reports, English Chancery.
Barn. & A. or Barn. & Ald.	Barnewall & Alderson's Reports, English King's Bench.
Barn. & Ad.	Barnewall & Adolphus' Reports, English King's Bench.
Barn. & C.	Barnewall & Cresswell's Reports, English King's Bench.
Barnes	Barnes' Notes of Cases, English Common Pleas.
Barr	Barr's Reports, Pennsylvania Supreme Court; Pennsylvania State Reports, vols. 1–10.
Barr. Ob. Stat.	Barrington's Observations on Statutes.
Barr. & Arn.	Barron & Arnold's Election Cases.
Barr. & Aus.	Barron & Austin's Election Cases.
Batty	Batty's Reports, Irish King's Bench.
Bay	Bay's Reports, South Carolina Supreme Court.

Bay (Mo.)	Bay's Reports, Missouri Supreme Court; Missouri Reports, vols. 1–3, 5–8.
Bayl. Bills	Bayley on Bills and Notes.
Beas.	Beasley's Reports, New Jersey Chancery.
Beat.	Beatty's Reports, Irish Chancery.
Beav.	Beavans Reports, English Rolls Court.
Beaw.	Beawes' Lex Mercatoria.
Becc.	Beccaria on Crimes and Punishments.
Beck Med. Jur.	Beck on Medical Jurisprudence.
Bee or Bee Adm.	Bee's Admiralty Reports, United States District Court.
Bel.	Bellewe's Cases, English King's Bench.
Bell Ap. Cas.	Bell's House of Lords Cases, Scotch Appeals.
Bell C.	Bell's Cases, Scotch Court of Session.
Bell Com.	Bell's Commentaries on the Law of Scotland.
Bell Cr. Cas.	Bell's Crown Cases.
Bell Dict.	Bell's Dictionary of the Law of Scotland.
Bell H. L.	Bell's House of Lords Cases, Scotch Appeals.
Bell Illus.	Bell's Illustrations of Principles.
Bell Prin.	Bell's Principles of the Law of Scotland.
Bell Styles	Bell's System of the Forms of Deeds.
Belt Sup. Ves.	Belt's Supplement to Vesey's Reports.
Ben.	Benedict's Reports, United States District Court.
Ben. Adm. Pr.	Benedict on Admiralty Practice.
Ben. Monr.	B. Monroe's Reports, Kentucky Court of Appeals.
Benl. or Bendl.	Benloe's Reports, English King's Bench.
Benl. & D.	Benloe & Dalison's Reports, English Common Pleas.
Benn. (Cal.)	Bennett's Reports, California Supreme Court; California Reports, vol. 1.
Benn. Fire Ins. Cas.	Bennett's Fire Insurance Cases.
Benn. (Mo.)	Bennett's Reports, Missouri Supreme Court; Missouri Reports, vols. 16–21.
Benn. & H. Cr. Cas.	Bennett & Heard's Criminal Cases.
Benn. & H. Dig.	Bennett & Heard's Massachusetts Digest.
Benth. Jud. Ev.	Bentham on Rationale of Judicial Evidence.
Benth. Leg.	Bentham on Theory of Legislation.
Bert.	Berton's Reports, New Brunswick Supreme Court.
Best Ev.	Best on Evidence.
Best Pres.	Best on Presumptions.
Best & S.	Best & Smith's Reports, English Queen's Bench.
Bibb	Bibb's Reports, Kentucky Court of Appeals.
Big. L. & A. Ins. Cas.	Bigelow's Life and Accident Insurance Cases.
Bing.	Bingham's Reports, English Common Pleas.
Bing. N. C.	Bingham's New Cases, English Common Pleas.
Binn.	Binney's Reports, Pennsylvania Supreme Court.
Bish. Cr. Law	Bishop on Criminal Law.
Bish. Cr. Pro.	Bishop on Criminal Procedure.
Bish. Mar. & D.	Bishop on Marriage and Divorce.
Bisp. Pr. Eq.	Bispham on Principles of Equity.
Biss.	Bissell's Reports, United States Circuit Court.
Biss. Part.	Bisset on Partnership.
Bl. Com.	Blackstone's Commentaries.
Bl. D. & O.	Blackham, Dundas, & Osborne's Reports, Irish Nisi Prius Cases.
Bl. R.	William Blackstone's Reports, English Common Law Courts.
Black	Black's Reports, United States Supreme Court.
Black (Ind.)	Black's Reports, Indiana Supreme Court; Indiana Reports, vols. 30–55.
Blackf. (Ind.)	Blackford's Reports, Indiana Supreme Court.
Blacks. Com.	Blackstone's Commentaries.
Blacks. R.	William Blackstone's Reports, English Common Law Courts.
Blake	Blake's Reports, Montana Territorial Courts.
Bland	Bland's Reports, Maryland Chancery.
Blatchf.	Blatchford's Reports, United States Circuit Court.
Blatchf. Pr. Cas.	Blatchford's Prize Cases, United States District Court.
Blatchf. & H.	Blatchford & Howland's Admiralty Reports, United States District Court.
Bleck.	Bleckley's Reports, Georgia Supreme Court; Georgia Reports, vols. 34, 35.
Bli. or Bligh	Bligh's Reports, English House of Lords.
Bli. N. S. or Bligh N.S.	Bligh's Reports, New Series, English House of Lords.
Bloomf. Cas.	Bloomfield's Negro Cases, New Jersey Courts.

Bond	Bond's Reports, United States Circuit Court.
Boor.	Booraem's Reports, California Supreme Court; California Reports, vols. 6–8.
Booth Real Ac.	Booth on Real Actions.
Bos. & P.	Bosanquet & Puller's Reports, English Common Pleas.
Bos. & P. N. R.	Bosanquet & Puller's New Reports, English Common Pleas.
Bost. Law Rep.	Boston Law Reporter.
Bosw.	Bosworth's Reports, New York City Superior Court.
Bott	Bott on Poor Laws.
Bouv. Dict. or Bouvier	Bouvier's Law Dictionary.
Bouv. Inst.	Bouvier's Institutes of American Law.
Br. Abr.	Brooke's Abridgment.
Br. Brev. Jud.	Brownlow's Brevia Judicialia.
Br. Ch. C.	Brown's Chancery Cases, English Chancery.
Br. N. C.	Brooke's New Cases, English King's Bench.
Br. P. C.	Brown's Parliamentary Cases, English House of Lords.
Brac. or Bract.	Bracton de Legibus et Consuetudinibus Angliæ.
Brad. or Bradf. Surr.	Bradford's Reports, New York Surrogate.
Branch	Branch's Reports, Florida Supreme Court; Florida Reports, vol. 1.
Branch Pr. or Branch Max.	Branch's Principia Legis et Æquitatis; Branch's Maxims.
Brayt.	Brayton's Reports, Vermont Supreme Court.
Breese	Breese's Reports, Illinois Supreme Court.
Brev.	Brevard's Reports, South Carolina Supreme Court.
Brew.	Brewer's Reports, Maryland Supreme Court; Maryland Reports, vols. 19–26.
Brews.	Brewster's Reports, various Pennsylvania Courts.
Bridg.	J. Bridgman's Reports, English Common Pleas.
Bridg. O.	Orlando Bridgman's Reports, English Common Pleas.
Bright H. & W.	Bright on Husband and Wife.
Brightly	Brightly's Reports, various Pennsylvania Courts.
Brightly Dig.	Brightly's Digest of the Laws of the United States.
Brightly Fed. Digest.	Brightly's Federal Digest.
Britt.	Britton on Ancient Pleadings.
Bro. Abr.	Brooke's Abridgment.
Bro. Ch C.	Brown's Chancery Cases, English Chancery.
Bro. Civ. Law	Browne on Civil and Admiralty Law.
Bro. Ent.	Brown's Entries.
Bro. N. C.	Brooke's New Cases, English King's Bench.
Bro. P. C.	Brown's Parliamentary Cases, English House of Lords.
Bro. Sales	Brown on Sales.
Bro. Stair	Brodie's Notes and Supplement to Stair's Institutions of the Law of Scotland.
Bro. Supp.	Brown's Supplement to Morrison's Dictionary.
Bro. Syn.	Brown's Synopsis of Decisions of Scotch Court of Session.
Bro. V. M.	Brown's Vade Mecum.
Brock. or Brock. C. C. or Brock. Marsh.	Brockenborough's Reports, Marshall's United States Circuit Court Decisions.
Brod. & B.	Broderip & Bingham's Reports, English Common Pleas.
Broom Com. Law	Broom on Common Law.
Broom Const. Law	Broom on Constitutional Law.
Broom Max.	Broom on Legal Maxims.
Broom & H. Com.	Broom & Hadley's Commentaries on the Laws of England.
Broun or Broun Just.	Broun's Reports, Scotch Justiciary Court.
Brown or Brown N. P.	Brown's Reports, Michigan Nisi Prius Cases.
Brown Ch. C.	Brown's Chancery Cases, English Chancery.
Brown Dict. or Brown	Brown's Law Dictionary.
Brown Ent.	Brown's Entries.
Brown P. C.	Brown's Parliamentary Cases, English House of Lords.
Brown Sales	Brown on Sales.
Brown Supp.	Brown's Supplement to Morrison's Dictionary.
Brown Syn.	Brown's Synopsis of Decisions of Scotch Court of Session.
Brown V. M.	Brown's Vade Mecum.
Brown & L.	Browning & Lushington's Reports, English Admiralty.
Browne	Browne's Reports, Massachusetts Supreme Court; Massachusetts Reports, vols. 97–109.
Browne Act.	Browne on Actions.
Browne Civ. Law	Browne on Civil and Admiralty Law.
Browne Frauds	Browne on the Statute of Frauds.
Browne (Pa.).	Browne's Reports, Pennsylvania Common Pleas.

Browne Tradem.	Browne on Trademarks.
Browne & G.	Browne & Gray's Reports, Massachusetts Supreme Court; Massachusetts Reports, vols. 110–114.
Browning, Mar. & D.	Browning on Marriage and Divorce.
Browning & L.	Browning & Lushington's Reports, English Admiralty.
Brownl. or Brownl. & G.	Brownlow & Goldsborough's Reports, English Common Pleas.
Brownl. Brev. Jud.	Brownlow Brevia Judicialia.
Bruce	Bruce's Cases, Scotch Court of Session.
Buck	Buck's Bankruptcy Cases.
Bull. N. P.	Buller on the Law of Nisi Prius.
Bullen & L.	Bullen & Leake's Precedents of Pleadings.
Bulst.	Bulstrode's Reports, English King's Bench.
Bump Bankr. Pr.	Bump on Bankruptcy Practice.
Bunb.	Bunbury's Reports, English Exchequer.
Burge Col. & For. Law	Burge on Colonial and Foreign Law.
Burge Sur.	Burge on Suretyship.
Burlam. Nat. Law	Burlamaqui on Natural and Public Law.
Burn Dict.	Burn's Law Dictionary.
Burn Eccl. Law	Burn on Ecclesiastical Law.
Burn Just.	Burn's Justice of the Peace.
Burn. (Wisc.)	Burnett's Reports, Wisconsin Territorial Courts.
Burr.	Burrow's Reports, English King's Bench.
Burr. Sett. Cas.	Burrow's Settlement Cases.
Burrill Ass.	Burrill on Voluntary Assignments.
Burrill Circ. Ev.	Burrill on Circumstantial Evidence.
Burrill Dict. or Burrill	Burrill's Law Dictionary.
Busb.	Busbee's Law Reports, North Carolina Supreme Court.
Busb. Eq.	Busbee's Equity Reports, North Carolina Supreme Court.
Bush	Bush's Reports, Kentucky Court of Appeals.
Butler Co. Litt.	Butler's Notes to Coke on Littleton.
Byles Bills	Byles on Bills.
Bynk. War	Bynkershoek on the Law of War.
Bynk. Jur. Pub.	Bynkershoek's Quaestiones Juris Publici.
Byth. Prec.	Bythewood's Precedents.
C.	Chapter. Chancellor. Chancery. Codex Juris Civilis.
C. B.	Chief Baron. Common Bench. English Common Bench Reports.
C. B. N. S.	English Common Bench Reports, New Series.
C. C.	Chancery Cases. Circuit Court. Civil Code. Code Napoleon. Crown Cases.
C. C. A.	County Court Appeals.
C. C. P.	Code of Civil Procedure.
C. C. R.	Crown Cases Reserved.
C. Cr. P.	Code of Criminal Procedure.
C. J.	Chief Judge. Chief Justice.
C. J. C.	Cowper's Justiciary Cases, Scotch Justiciary Court.
C. L. P. Act	English Common Law Procedure Act.
C. L. R.	Common Law Reports.
C. M. & R.	Crompton, Meeson, & Roscoe's Reports, English Exchequer.
C. P.	Code of Procedure. Common Pleas.
C. S.	Scotch Court of Session.
C. t. N.	Cases tempore Northington.
C. & F.	Clark & Finnelly's Reports, English House of Lords.
C. & K.	Carrington & Kirwan's Reports, English Nisi Prius.
C. & M.	Carrington & Marshman's Reports, English Nisi Prius.
C. & P.	Carrington & Payne's Reports, English Nisi Prius.
Ca.	Case. Placita. Cases. See Cas. et seq.
Ca. resp.	Capias ad respoudendum.
Ca. sa.	Capias ad satisfaciendum.
Cai.	Caines' Reports, New York Supreme Court.
Cai. Cas.	Caines' Cases, New York Court of Errors.
Cal.	California. California Reports, Supreme Court.
Cald.	Caldecott's Reports, English Justice of the Peace Cases.
Caldw. Arb.	Caldwell on Arbitration.
Call	Call's Reports, Virginia Court of Appeals.
Calth.	Calthorpe's Reports, English King's Bench.
Calv. Lex.	Calvin's Lexicon Juridicum.
Calv. Par.	Calvert on Parties to Suits in Equity.
Cam.	Cameron's Reports, Upper Canada Queen's Bench.

Cam. Brit.	Camden's Britannia.
Cam. Scacc.	Camera Scaccarii; Exchequer Chamber.
Cam. & N.	Cameron & Norwood's Reports, North Carolina Court of Conference; Conference Reports.
Camp.	Campbell's Reports, English Nisi Prius.
Can.	Canada.
Car. H. & A.	Carrow, Hamerton, & Allen's Reports, Magistrates' Cases, English Courts.
Car. Law Rep.	Carolina Law Repository.
Car. O. & B.	Carrow, Oliver, & Beavan's Railway and Canal Cases.
Car. & K.	Carrington & Kirwan's Reports, English Nisi Prius.
Car. & M.	Carrington & Marshman's Reports, English Nisi Prius.
Car. & O.	Carrow & Oliver's Railway and Canal Cases.
Car. & P.	Carrington & Payne's Reports, English Nisi Prius.
Carp.	Carpmael's Patent Cases.
Cart.	Carter's Reports, English Common Pleas.
Cart. (Ind.)	Carter's Reports, Indiana Supreme Court; Indiana Reports, vols. 1, 2.
Carth.	Carthew's Reports, English King's Bench.
Cary.	Cary's Reports, English Chancery.
Cas. B. R.	Cases Banco Regis; Modern Reports, vol. 12.
Cas. Ch.	Cases in Chancery.
Cas. L. & Eq.	Cases in Law and Equity; Modern Reports, vol. 10.
Cas. Pr. C. P.	Cases of Practice, English Common Pleas; Cooke's Practice Cases.
Cas. Pr. K. B.	Cases of Practice, English King's Bench.
Cas. Set.	Cases of Settlement, English King's Bench.
Cas. Six Circ.	Cases on the Six Circuits, Irish King's Bench.
Cas. t. F.	Cases tempore Finch, English Chancery; Reports tempore Finch.
Cas. t. H.	Cases tempore Hardwicke, English King's Bench.
Cas. t. Holt	Cases tempore Holt, English King's Bench; Holt's Reports.
Cas. t. King	Cases tempore King, English Chancery.
Cas. t. Macc.	Cases tempore Macclesfield, English Law and Equity Cases; Modern Reports, vol. 10.
Cas. t. Talbot	Cases tempore Talbot, English Chancery.
Cas. t. Will. III.	Cases tempore William III.; Modern Reports, vol. 12.
Cas. w. Op. or Cas. & Op.	Cases with Opinions of Eminent Counsel.
Casey	Casey's Reports, Pennsylvania Supreme Court; Pennsylvania State Reports, vols. 25–36.
Ch. Cas.	Cases in Chancery.
Ch. Cas. Ch.	Choyce Cases in Chancery.
Ch. J.	Chief Judge. Chief Justice.
Ch. Pre.	Precedents in Chancery.
Ch. R.	Chancery Reports.
Chamb.	Chamber Reports, Upper Canada.
Chand. (N. H.)	Chandler's Reports, New Hampshire Supreme Court; New Hampshire Reports, vols. 20, 38–44.
Chand. (Wis.)	Chandler's Reports, Wisconsin Supreme Court.
Charlt. R. M.	R. M. Charlton's Reports, Georgia Supreme Court.
Charlt. T. U. P.	T. U. P. Charlton's Reports, Georgia Supreme Court.
Cheves	Cheves's Cases at Law, South Carolina Court of Appeals.
Cheves Eq.	Cheves's Cases in Equity, South Carolina Court of Appeals.
Chic. Leg. News	Chicago Legal News.
Chip. D.	D. Chipman's Reports, Vermont Supreme Court.
Chip. N.	N. Chipman's Reports, Vermont Supreme Court.
Chit. Arch. Pr.	Chitty's Archbold's Practice.
Chit. B. C.	Chitty's Bail Court Reports; English Bail Court.
Chit. Bills	Chitty on Bills.
Chit. Bl. Com.	Chitty's Blackstone's Commentaries.
Chit. Burn J.	Chitty's Burn's Justice.
Chit. Con.	Chitty on Contracts.
Chit. Crim. L.	Chitty on Criminal Law.
Chit. Jr. Bills	Chitty Junior on Bills.
Chit. Pl.	Chitty on Pleading.
Chit. Pr.	Chitty on General Practice.
Cho. Cas. Ch.	Choyce Cases in Chancery.
Cinc.	Cincinnati Reports, Superior Court of Cincinnati, Ohio.
City Hall Rec.	City Hall Recorder, New York City Courts.
Civ. Code	Civil Code.

Cl. Ass.	Clerk's Assistant.
Clark	Clark's Reports, English House of Lords; House of Lords Cases, vols. 3–11.
Clark & F.	Clark & Finnelly's Reports, English House of Lords.
Clark & F. N. S.	Clark & Finnelly's Reports, New Series, English House of Lords; House of Lords Cases, vols. 1, 2.
Clarke (Iowa)	Clarke's Reports, Iowa Supreme Court; Iowa Reports, vols. 1–8.
Clarke (Mich.)	Clarke's Reports, Michigan Supreme Court; Michigan Reports, vols. 19–22.
Clarke (N. Y.) Ch.	Clarke's Chancery Reports, New York Chancery.
Clayt.	Clayton's Reports, English Assizes.
Cliff.	Clifford's Reports, United States Circuit Court.
Clift Ent.	Clift's Entries.
Co.	Coke's Reports.
Co. Ent.	Coke's Entries.
Co. Litt.	Coke on Littleton.
Cobb	Cobb's Reports, Georgia Supreme Court; Georgia Reports, vols. 6–20.
Cock. & R.	Cockburn & Rowe's Election Cases.
Cocke (Ala.)	Cocke's Reports, Alabama Supreme Court; Alabama Reports, vols. 16–18.
Cocke (Fla.)	Cocke's Reports, Florida Supreme Court; Florida Reports, vols 14, 15.
Cod. Jur. Civ.	Codex Juris Civilis; Justinian Codex.
Code Civ. or Code N.	Code Civil; Code Napoleon.
Code P.	Code Penal.
Code P. C.	Code de Procedure Civile.
Code Pro.	Code of Procedure.
Code R. N. S.	Code Reports, various New York Courts.
Code Rep.	Code Reporter, various New York Courts.
Col.	Colorado. Colorado Reports, Territorial Courts.
Col. Cas.	Coleman's Cases, New York Supreme Court.
Col. & C. Cas.	Coleman & Caines' Cases, New York Supreme Court.
Coldw.	Coldwell's Reports, Tennessee Supreme Court.
Cole Inf.	Cole on Criminal Informations.
Coll.	Collyer's Reports, English Chancery.
Coll. Parl. Cas.	Colles' Parliamentary Cases.
Coll. Part.	Collyer on Partnership.
Com.	Comyns' Reports, English King's Bench and Common Pleas.
Com. Dig.	Comyns' Digest.
Com. B.	English Common Bench Reports.
Com. B. N. S.	English Common Bench Reports, New Series
Com. Law R.	Common Law Reports, English Common Law Courts.
Comb.	Comberbach's Reports, English King's Bench.
Coms.	Comstock's Reports, New York Court of Appeals; New York Reports, vols. 1–4.
Con. (Wis.)	Conover's Reports, Wisconsin Supreme Court; Wisconsin Reports, vols. 16–41.
Con. & L.	Connor & Lawson's Reports, Irish Chancery.
Conf.	Cameron & Norwood's Conference Reports, North Carolina Court of Conference.
Conn.	Connecticut. Connecticut Reports, Supreme Court of Errors.
Cons. del Mare	Consolato del Mare.
Consist.	Haggard's Consistory Reports, English Consistory Court.
Const.	Treadway's Constitutional Reports, South Carolina Constitutional Court.
Const. N. S.	Mill's Constitutional Reports, New Series, South Carolina Constitutional Court.
Cont.	*Contra;* opposed; to the contrary. Compare Acc.
Cooke	Cooke's Practice Cases, English Common Pleas.
Cooke (Tenn.)	Cooke's Reports, Tennessee Supreme Court.
Cooke & A.	Cooke & Alcock's Reports, Irish King's Bench and Exchequer Chamber.
Cooley	Cooley's Reports, Michigan Supreme Court; Michigan Reports, vols. 5–12.
Cooley Const. Lim.	Cooley on Constitutional Limitations.
Coop.	Cooper's Reports, English Chancery.
Coop. Inst.	Cooper's Institutes of Justinian.
Coop. Pr. Cas.	Cooper's Practice Cases, English Chancery.
Coop. t. Brough.	Cooper's Reports tempore Brougham, English Chancery.

Coop. t. Cotten.	Cooper's Reports tempore Cottenham, English Chancery.
Coote Mort.	Coote on Mortgages.
Corb. & D.	Corbett & Daniell's Election Cases.
Corp. Jur. Civ.	Corpus Juris Civilis.
Corpus Jur. Can.	Corpus Juris Canonici.
Cow.	Cowen's Reports, New York Supreme Court and Court of Errors.
Cowell or Cowell Dict.	Cowell's Law Dictionary; Cowell's Interpreter.
Cowp	Cowper's Reports, English King's Bench.
Cox, or Cox Ch.	Cox's Reports, English Chancery.
Cox (Ark.)	Cox's Reports, Arkansas Supreme Court; Arkansas Reports, vols. 25–27.
Cox Cr. Cas.	Cox's Criminal Cases, English and Irish Courts.
Cox Tr. Cas.	Cox's American Trademark Cases.
Coxe	Coxe's Reports, New Jersey Supreme Court and Court of Errors; New Jersey Law Reports, vol. 1.
Crabbe	Crabbe's Reports, United States District Court.
Craig & P.	Craig & Phillips' Reports, English Chancery.
Craig. & S.	Craigie, Stewart, & Paton's Reports, Scotch Appeals, English House of Lords.
Cranch	Cranch's Reports, United States Supreme Court.
Cranch C. C.	Cranch's Reports, Circuit Court of District of Columbia.
Craw. & D.	Crawford & Dix's Reports, Irish Circuit Cases.
Craw. & D. Abr. Cas.	Crawford & Dix's Abridged Notes of Cases, Irish Law and Equity Courts.
Critchf.	Critchfield's Reports, Ohio Supreme Court; Ohio State Reports, vols. 5–21.
Cro.	Croke's Reports, English King's Bench and Common Pleas, the separate volumes of which are usually cited Cro. Eliz., Cro. Jac., and Cro. Car. Sometimes Cro. refers to Keilway's Reports, published by Serjeant Croke.
Crock. Sher.	Crocker on Sheriffs.
Cromp.	Star Chamber Cases.
Cromp. M. & R.	Crompton, Meeson, & Roscoe's Reports, English Exchequer.
Cromp. & J.	Crompton & Jervis's Reports, English Exchequer.
Cromp. & M.	Crompton & Meeson's Reports, English Exchequer.
Cruise Dig.	Cruise's Digest of the Law of Real Property.
Ct. of Cl.	Court of Claims Reports, United States Court of Claims.
Cummins	Cummins' Reports, Idaho Territorial Courts; Idaho Reports, vol. 1.
Cun.	Cunningham's Reports, English King's Bench.
Curry	Curry's Reports, Louisiana Supreme Court; Louisiana Reports, vols. 6–19.
Curt. C. C.	Curtis's Reports, United States Circuit Court.
Curt. Cond.	Curtis's Condensed Reports, United States Supreme Court.
Curt. Copyright	Curtis on Copyright.
Curt. Ecc. or Curteis	Curteis's Ecclesiastical Reports, English Ecclesiastical Courts.
Curt. Pat.	Curtis on Patents.
Cush.	Cushing's Reports, Massachusetts Supreme Court; Massachusetts Reports, vols. 55–66.
Cush. El. Cas.	Cushing's Election Cases, Massachusetts Courts.
Cushm.	Cushman's Reports, Mississippi High Court of Errors and Appeals; Mississippi Reports, vols. 23–29.
D.	Digest, particularly the Digest of Justinian. Dictionary, particularly Morrison's Dictionary of the Law of Scotland. Dictum.
D. C.	District Court.
D. Chip.	D. Chipman's Reports, Vermont Supreme Court.
D. N. S.	Dowling's Bail Court Reports, New Series, English Bail Court.
D. P. B.	Dampier's Paper Book; Compare A. P. B.
D. & C.	Deacon & Chitty's Reports, English Bankruptcy Cases.
D. & L.	Dowling & Lowndes' Reports, English Practice Cases.
D. & M.	Davison & Merivale's Reports, English Queen's Bench.
D. & R.	Dowling & Ryland's Reports, English King's Bench.
D. & S.	Doctor and Student.
Dal.	Dalison's Reports, English Common Pleas.
Dall.	Dallas' Reports, United States and Pennsylvania Courts.
Dalr.	Dalrymple's Cases, Scotch Court of Session.
Dalr. Feud. Prop.	Dalrymple on Feudal Property.
Dalt. Just.	Dalton's Justice.

Dalt. Sher.	Dalton's Sheriff.
Daly	Daly's Reports, New York Common Pleas.
D'An.	D'Anvers' Abridgment.
Dan.	Daniell's Reports, English Exchequer Equity.
Dan. Ch. Pr.	Daniell's Chancery Practice.
Dana	Dana's Reports, Kentucky Court of Appeals.
Dane Abr.	Dane's Abridgment.
Danner	Danner's Reports, Alabama Supreme Court; Alabama Reports, vol. 42.
Dans. & Ll.	Danson & Lloyd's Mercantile Cases.
D'Anv. Abr.	D'Anvers' Abridgment.
Das.	Dasent's Reports; Common Law Reports, vol. 3.
Dav. or Davies	Davies' Reports, Irish King's Bench.
Dav. Pat. Cas.	Davis' Patent Cases, English Courts.
Dav. & M.	Davison & Merivale's Reports, English Queen's Bench.
Daveis	Daveis' Reports, United States District Court.
Day	Day's Reports, Connecticut Supreme Court of Errors; Connecticut Reports, vols. 1–21.
Dayt. Surr.	Dayton on Surrogates.
De G.	De Gex's Reports, English Bankruptcy Cases.
De G. F. & J.	De Gex, Fisher, & Jones' Reports, English Chancery.
De G. J. & S.	De Gex, Jones, & Smith's Reports, English Chancery.
De G. M. & G.	De Gex, Macnaghten, & Gordon's Reports, English Chancery.
De G. & J.	De Gex & Jones' Reports, English Chancery.
De G. & S.	De Gex & Smale's Reports, English Chancery.
Dea. & Sw.	Deane & Swabey's Reports, English Probate and Divorce Courts.
Deac.	Deacon's Reports, English Bankruptcy Cases.
Deac. Bankr.	Deacon on Bankruptcy.
Deac. & C.	Deacon & Chitty's Reports, English Bankruptcy Cases.
Deady	Deady's Reports, United States Circuit and District Courts.
Deane or Deane Ec.	Deane & Swabey's Reports, English Probate and Divorce Courts.
Deane (Vt.)	Deane's Reports, Vermont Supreme Court; Vermont Reports, vols. 24–26.
Dears.	Dearsly's Crown Cases Reserved, English Courts.
Dears. & B.	Dearsly & Bell's Crown Cases Reserved, English Courts.
Deas & And.	Deas & Anderson's Reports, Scotch Court of Session Cases.
Den. or Denio	Denio's Reports, New York Supreme Court and Court of Appeals.
Den. C. C.	Denison's Crown Cases Reserved, English Courts.
Des. or Desaus.	Desaussure's Reports, South Carolina Chancery and Court of Appeals.
Dev.	Devereux's Reports, United States Court of Claims.
Dev. Eq.	Devereux's Equity Reports, North Carolina Supreme Court.
Dev. L.	Devereux's Law Reports, North Carolina Supreme Court.
Dev. & B. Eq.	Devereux & Battle's Equity Reports, North Carolina Supreme Court.
Dev. & B. L.	Devereux's & Battle's Law Reports, North Carolina Supreme Court.
Dewitt	Dewitt's Reports, Ohio Supreme Court; Ohio State Reports, vols. 24–27.
Di.	Dyer's Reports, English King's Bench.
Dicey Part.	Dicey on Parties to Actions.
Dick.	Dicken's Reports, English Chancery.
Dick. Just.	Dickenson's Justice.
Dick. Qr. Sess.	Dickenson's Quarter Sessions Guide.
Dig.	Digest, particularly the Digest of Justinian.
Dill.	Dillon's Reports, United States Circuit Court.
Dirl.	Dirleton's Decisions, Scotch Court of Session.
Disney	Disney's Reports, Superior Court of Cincinnati, Ohio.
Doct. & S.	Doctor & Student.
Dods.	Dodson's Reports, English Admiralty Courts.
Domat	Domat on Civil Law.
Domesd.	Domesday Book.
Doug.	Douglas' Reports, English King's Bench.
Doug. El. Cas.	Douglas' Election Cases.
Doug. (Mich.)	Douglass' Reports, Michigan Supreme Court.
Dow	Dow's Cases, English House of Lords.
Dow & C.	Dow & Clark's Cases, English House of Lords.

Dowl.	Dowling's Bail Court Reports, English Bail Court.
Dowl. N. S.	Dowling's Bail Court Reports, New Series, English Bail Court.
Dowl. Pr. C.	Dowling's Reports, English Practice Cases.
Dowl. Pr. C. N. S.	Dowling's Reports, New Series, English Practice Cases.
Dowl. & L.	Dowling & Lowndes, Bail Court Reports, English Bail Court. Dowling & Lowndes Reports, English Practice Cases.
Dowl. & Ry.	Dowling & Ryland's Reports, English King's Bench.
Dowl. & Ry. M. C.	Dowling & Ryland's Magistrates' Cases, English King's Bench.
Dowl. & Ry. N. P.	Dowling & Ryland's Nisi Prius Cases, English Courts.
Drake Attach.	Drake on Attachments.
Draper	Draper's Reports, Upper Canada King's Bench.
Drew (Fla.)	Drew's Reports, Florida Supreme Court; Florida Reports, vol. 13.
Drewry or Drew.	Drewry's Reports, English Chancery.
Drewry & S. or Drew. & S.	Drewry & Smale's Reports, English Chancery.
Dru. or Drury	Drury's Reports, Irish Chancery.
Dru. & Wal.	Drury & Walshe's Reports, Irish Chancery.
Dru. & War.	Drury & Warren's Reports, Irish Chancery.
Dub.	*Dubitatur*; it is doubted; it is doubtful.
Dudley	Dudley's Reports, Georgia Superior Courts.
Dudley Eq.	Dudley's Equity Reports, South Carolina Court of Appeals.
Dudley L.	Dudley's Law Reports, South Carolina Court of Appeals.
Duer	Duer's Reports, New York City Superior Court.
Dugd. Orig.	Dugdale's Origines Juridiciales.
Duke Char. Uses	Duke on Charitable Uses.
Dun. Adm. Pr.	Dunlap's Admiralty Practice.
Dunl. or Dun.	Dunlop, Bell, & Murray's Reports, Scotch Court of Session.
Durf.	Durfee's Reports, Rhode Island Supreme Court; Rhode Island Reports, vol. 2.
Durie	Durie's Reports, Scotch Court of Session.
Durnf. & E.	Durnford & East's Reports, English King's Bench; Term Reports.
Dutch.	Dutcher's Reports, New Jersey Supreme Court; New Jersey Law Reports, vols. 25–29.
Duv.	Duvall's Reports, Kentucky Court of Appeals.
Dwar. Stat.	Dwarris on Statutes.
Dy. or Dyer	Dyer's Reports, English King's Bench.
E.	Easter Term.
E. C. L.	English Common Law Reports.
E. E. R.	English Ecclesiastical Reports.
E. L. & Eq.	English Law and Equity Reports.
E. T.	Easter Term.
E. & A.	Spinks' Ecclesiastical and Admiralty Reports.
Eag. & Yo.	Eagle & Younge's Tithe Cases.
East	East's Reports, English King's Bench.
East P. C.	East's Pleas of the Crown.
Ec. & Ad.	Spinks' Ecclesiastical and Admiralty Reports.
Eden	Eden's Reports, English Chancery.
Edg.	Edgar's Reports, Scotch Court of Session.
Edic.	Edicta by Justinian.
Edm. Sel. Cas.	Edmond's Select Cases, New York Courts.
Edw.	King Edward; thus 1 Edw. I. signifies the first year of the reign of King Edward I.
Edw. Adm.	Edward's Admiralty Reports, English Admiralty.
Edw. Ch.	Edwards' Chancery Reports, New York Chancery and Supreme Court.
Edw. (Mo.)	Edward's Reports, Missouri Supreme Court; Missouri Reports, vols. 2, 3.
El. B. & E.	Ellis, Blackburn, & Ellis' Reports, English Queen's Bench.
El. B. & S.	Ellis, Best, & Smith's Reports, English Queen's Bench.
El. & B.	Ellis & Blackburn's Reports, English Queen's Bench.
El. & E.	Ellis & Ellis' Reports, English Queen's Bench.
Elchie	Elchie's Decisions, Scotch Court of Session.
Emer. Ins.	Emerigon on Insurances.
Eng.	English's Reports, Arkansas Supreme Court; Arkansas Reports, vols. 6–13.
Eng. Com. L.	English Common Law Reports.
Eng. Ec.	English Ecclesiastical Reports.

Eng. Exch.	English Exchequer Reports.
Eng. L. & Eq.	English Law and Equity Reports.
Eq. Cas. Abr.	Equity Cases Abridged.
Eq. R.	Equity Reports, English Chancery, and Appeals from Colonial Courts.
Ersk. Inst.	Erskine's Institute of the Law of Scotland.
Ersk. Prin.	Erskine's Principles of the Law of Scotland.
Esp. or Esp. N. P.	Espinasse's Reports, English Nisi Prius Cases.
Eunom.	Wynne's Eunomus.
Exch.	Exchequer Reports, English Exchequer.
Eyre	Eyre's Reports, English King's Bench tempore Wm. III.
F.	Fitzherbert's Abridgment.
F. C.	Faculty of Advocates Collection, Scotch Court of Session Cases.
F. B. C.	Fonblanque's Bankruptcy Cases.
F. N. B.	Fitzherbert's Natura Brevium.
F. & F.	Foster & Finlason's Reports, English Nisi Prius Cases.
Fac. Coll.	Faculty of Advocates Collection, Scotch Court of Session Cases.
Fairf.	Fairfield's Reports, Maine Supreme Court; Maine Reports, vols. 10–12.
Falc.	Falconer's Reports, Scotch Court of Session.
Falc. & F.	Falconer & Fitzherbert's Election Cases.
Farr.	Farresley's Reports, English King's Bench; Modern Reports, vol. 7.
Fearne or Fearne Rem.	Fearne on Contingent Remainders and Executory Devises.
Fed.	The Federalist.
Ferard Fix.	Amos & Ferard on Fixtures.
Ferg.	Ferguson's Reports, Scotch Consistorial Court.
Ff.	Pandects of Justinian.
Fi. fa.	Fieri facias.
Fin. or Finch	Finch's Reports, English Chancery; Reports tempore Finch.
Finch Law	Finch's Law.
Fish. Dig.	Fisher's Digest, English Reports.
Fish. Pat. Cas.	Fisher's Patent Cases, United States Circuit Courts.
Fitz. Abr.	Fitzherbert's Abridgment.
Fitz. N. B.	Fitzherbert's Natura Brevium.
Fitz-G.	Fitz Gibbon's Reports, English Courts.
Fl.	Fleta, Commentarius Juris Anglicani.
Fla.	Florida. Florida Reports, Supreme Court.
Flan. & K.	Flanagan & Kelly's Reports, Irish Rolls Court.
Fogg.	Fogg's Reports, New Hampshire Supreme Court; New Hampshire Reports, vols. 32–37.
Fol.	Foley's Poor Law Reports, English Courts.
Fol. Dict.	Kames & Woodhouslee's Dictionary Scotch Court of Session Cases.
Fonbl. or Fonb. Eq.	Fonblanque on Equity.
Forbes	Forbes' Reports, Scotch Court of Session.
Forrest or Forr.	Forrest's Reports, English Exchequer.
Forrester or Forr. Ch.	Forrester's Reports, English Chancery; Cases tempore Talbot.
Fortes.	Fortescue's Reports, English Courts.
Fortes. de Laud.	Fortescue de Laudibus Angliæ Legum.
Fost.	Foster's Reports and Crown Law, English Courts.
Fost. (N. H.)	Foster's Reports, New Hampshire Supreme Court; New Hampshire Reports, vols. 21–31.
Fost. & F.	Foster & Finlason's Reports, English Nisi Prius Cases.
Fount.	Fountainhall's Reports, Scotch Court of Session.
Fox & S.	Fox & Smith's Reports, Irish King's Bench and Court of Error.
Fr.	Fragment; Law, in titles of Pandects of Justinian.
Fr. Max. or Fran. Max.	Francis' Maxims.
Fras. Dom. Rel.	Fraser on Personal and Domestic Relations.
Fras. El. Cas.	Fraser's Election Cases.
Freem.	Freeman's Reports, English King's Bench and Chancery.
Freem. Ch.	Freeman's Reports, vol. 2, English Chancery.
Freem. (Ill.)	Freeman's Reports, Illinois Supreme Court; Illinois Reports, vols. 31–80.
Freem. (Miss.)	Freeman's Reports, Mississippi Superior Court of Chancery.
G.	King George; thus 1 G. I. signifies the first year of the reign of King George I.
G. & J.	Glyn & Jameson's Bankruptcy Cases, English Courts.

Ga.	Georgia. Georgia Reports, Supreme Court.
Ga. Dec.	Georgia Decisions, Superior Courts.
Gaius	Gaius' Institutes.
Galb.	Galbraith's Reports, Florida Supreme Court; Florida Reports, vols. 9–11.
Galb. & M.	Galbraith & Meek's Reports, Florida Supreme Court; Florida Reports, vol. 12.
Gale	Gale's Reports, English Exchequer.
Gale & D.	Gale & Davison's Reports, English Queen's Bench.
Gale & W.	Gale & Whatley on Easements.
Gall. or Gallis.	Gallison's Reports, United States Circuit Court.
Gardenh.	Gardenhire's Reports, Missouri Supreme Court; Missouri Reports, vols. 14, 15.
Geo.	King George; see G. Georgia; see GA.
George	George's Reports, Mississippi High Court of Errors and Appeals; Mississippi Reports, vols. 30–37.
Ger. Real Est.	Gerard on Titles to Real Estate.
Gibbs	Gibbs' Reports, Michigan Supreme Court; Michigan Reports, vols. 2–4.
Gibs. Cod.	Gibson's Codex Juris Ecclesiastici Anglicani.
Giff.	Giffard's Reports, English Chancery.
Gilb. or Gilb. Ch.	Gilbert's Reports, English Chancery.
Gilb. Cas.	Gilbert's Cases in Law and Equity.
Gill	Gill's Reports, Maryland Court of Appeals.
Gill & J.	Gill & Johnson's Reports, Maryland Court of Appeals.
Gilm.	Gilmour's Reports, Scotch Court of Session.
Gilm. (Ill.) or Gilman.	Gilman's Reports, Illinois Supreme Court; Illinois Reports, vols. 6–10.
Gilm. (Va.) or Gilmer.	Gilmer's Reports, Virginia Court of Appeals.
Gilp.	Gilpin's Reports, United States District Court.
Gl.	*Glossa;* a gloss; an interpretation.
Glanv.	Glanville de Legibus.
Glasc.	Glascock's Reports, Irish Courts.
Glenn	Glenn's Reports, Louisiana Supreme Court; Louisiana Annual, vols. 16–18.
Glyn & J.	Glyn & Jameson's Bankruptcy Cases, English Courts.
Godb.	Godbolt's Reports, English Courts.
Godolph.	Godolphin's Abridgment of Ecclesiastical Law.
Gosf.	Gosford's Reports, Scotch Court of Session.
Gould Pl.	Gould on Pleading.
Gouldsb.	Gouldsborough's Reports, Eoglish Courts.
Gow or Gow N. P.	Gow's Nisi Prius Cases, English Common Pleas.
Graham & W. New Tri.	Graham & Waterman on New Trials.
Grand Coust. Norm.	Grand Coustoumier of Normandy.
Grang.	Granger's Reports, Ohio Supreme Court; Ohio State Reports, vols. 22, 23.
Grant Cas. or Grant (Pa.)	Grant's Cases, Pennsylvania Supreme Court.
Grant Corp.	Grant on Corporations.
Grant U. C. Ch.	Grant's Reports, Upper Canada Chancery.
Gratt.	Grattan's Reports, Virginia Court of Appeals and General Court
Gray	Gray's Reports, Massachusetts Supreme Court; Massachusetts Supreme Court, vols. 67–82.
Green C. E.	C. E. Green's Reports, New Jersey Chancery and Court of Errors and Appeals; New Jersey Equity Reports, vols. 16–28.
Green Eq.	Green's Reports, New Jersey Chancery; New Jersey Equity Reports, vols. 2–4.
Green L.	Green's Reports, New Jersey Supreme Court and Court of Errors and Appeals; New Jersey Law Reports, vols. 13–15.
Greene, or Greene (Iowa)	Greene's Reports, Iowa Supreme Court.
Greenl.	Greenleaf's Reports, Maine Supreme Court; Maine Reports, vols. 1–9.
Greenl. Cru. Dig.	Greenleaf's Cruise's Digest.
Greenl. Evid.	Greenleaf on Evidence.
Grisw.	Griswold's Reports, Ohio Supreme Court; Ohio Reports, vols. 14–19.
Gro. B. et P. or Gro. de J. B.	Grotius de Jure Belli et Pacis.
Gundry	Gundry Manuscripts, in Lincoln's Inn Library.

Guy Med. Jur.	Guy on Medical Jurisprudence.
Gwill. or Gwm.	Gwillim's Tithe Cases.
H.	King Henry; thus 1 H. I. signifies the first year of the reign of King Henry I. Hilary Term.
H. Bl.	Henry Blackstone's Reports, English Common Pleas and Exchequer Chamber.
H. L.	House of Lords. House of Lords Cases.
H. P. C.	Hale's Pleas of the Crown.
H. & C.	Hurlstone & Coltman's Reports, English Exchequer.
H. & G.	Harris & Gill's Reports, Maryland Court of Appeals.
H. & J.	Harris & Johnson's Reports, Maryland Court of Appeals.
H. & M.	Harris & McHenry's Reports, Maryland Provincial Court, and Court of Appeals.
H. & N.	Hurlstone & Norman's Reports, English Exchequer.
Hadd.	Haddington's Reports, Scotch Court of Session.
Hadl.	Hadley's Reports, New Hampshire Supreme Court; New Hampshire Reports, vols. 45–48.
Hagans	Hagan's Reports, West Virginia Supreme Court of Appeals; West Virginia Reports, vols. 1–5.
Hagg. Adm.	Haggard's Admiralty Reports, English Admiralty.
Hagg. Cons.	Haggard's Consistory Reports, English Consistory Court.
Hagg. Ec.	Haggard's Ecclesiastical Reports, English Ecclesiastical Courts.
Hailes	Hailes' Decisions, Scotch Court of Session.
Hale	Hale's Reports, California Supreme Court; California Reports, vols. 33–37.
Hale C. L.	Hale's History of the Common Law.
Hale P. C.	Hale's Pleas of the Crown.
Hall	Hall's Reports, New York City Superior Court.
Hall & T.	Hall & Twell's Reports, English Chancery.
Halst. Ch. or Halst. Eq.	Halstead's Reports, New Jersey Chancery and Court of Errors and Appeals; New Jersey Equity Reports, vols. 5–8.
Halst. L.	Halstead's Reports, New Jersey Supreme Court and Court of Errors and Appeals; New Jersey Law Reports, vols. 6–12.
Ham. A. & O.	Hamerton, Allen, & Otter's Magistrates' Cases, English Courts; New Sessions Cases, vol. 3.
Hamm. (Ga.)	Hammond's Reports, Georgia Supreme Court; Georgia Reports, vols. 36–44.
Hamm. (O.)	Hammond's Reports, Ohio Supreme Court; Ohio Reports, vols. 1–9.
Hamm. & J.	Hammond & Jackson's Reports, Georgia Supreme Court; Georgia Reports, vol. 45.
Hand	Hand's Reports, New York Court of Appeals; New York Reports, vols. 40–45.
Handy	Handy's Reports, Cincinnati Superior Court.
Hanm.	Hanmer's Lord Kenyon's Notes, English King's Bench.
Hans.	Hansard's Entries.
Har. & G.	Harris & Gill, Maryland Court of Appeals.
Har. & J.	Harris & Johnson, Maryland Court of Appeals.
Har. & M.	Harris & McHenry, Maryland Provincial Court and Court of Appeals.
Harc.	Harcarse's Decisions, Scotch Court of Session.
Hard.	Hardres' Reports, English Exchequer.
Hardin or Hard. (Ky.)	Hardin's Reports, Kentucky Court of Appeals.
Hare	Hare's Reports, English Chancery.
Hare & W.	Hare & Wallace's American Leading Cases.
Harg. St. Tr.	Hargrave's State Trials.
Hargrove or Harg. N.C.	Hargrove's Reports, North Carolina Supreme Court; North Carolina Reports, vols. 68–76.
Harm.	Harmon's Reports, California Supreme Court; California Reports, vols. 13–15.
Harp.	Harper's Reports, South Carolina Constitutional Court.
Harp. Eq.	Harper's Equity Reports, South Carolina Court of Appeals.
Harr. (Del.)	Harrington's Reports, Delaware Superior Court and Court of Errors and Appeals.
Harr. Dig.	Harrison's Digest of English Common Law Reports.
Harr. (Ind.)	Harrison's Reports, Indiana Supreme Court; Indiana Reports, vols. 15–17, 23–29.
Harr. (Mich.)	Harrington's Reports, Michigan Chancery.
Harr. (N. J.)	Harrison's Reports, New Jersey Supreme Court; New Jersey Law Reports, vols. 16–19.

Harr. (Pa.)	Harris's Reports, Pennsylvania Supreme Court; Pennsylvania State Reports, vols. 13–24.
Harr. & G.	Harris & Gill's Reports, Maryland Court of Appeals.
Harr. & J.	Harris & Johnson's Reports, Maryland Court of Appeals.
Harr. & M.	Harris & McHenry's Reports, Maryland Provisional Court, and Court of Appeals.
Harr. & R.	Harrison & Rutherford's Reports, English Common Pleas.
Harr. & S.	Harris & Simrall's Reports, Mississippi Supreme Court; Mississippi Reports, vols. 49–51.
Harr. & W.	Harrison & Wollaston's Reports, English King's Bench.
Hartley	Hartley's Reports, Texas Supreme Court; Texas Reports, vols. 4–21.
Hawk.	Hawkins' Reports, Louisiana Supreme Court; Louisiana Annual Reports, vols. 19–25.
Hawk. Co. Litt.	Hawkins' Coke upon Littleton.
Hawk. P. C.	Hawkins' Pleas of the Crown.
Hawks	Hawks' Reports, North Carolina Supreme Court.
Hayes	Hayes' Reports, Irish Exchequer.
Hayes & J.	Hayes & Jones' Reports, Irish Exchequer.
Hayes & J. Wills	Hayes & Jarman on Wills.
Hayw. (N. C.)	Haywood's Reports, North Carolina Superior Courts of Law and Equity.
Hayw. (Tenn.)	Haywood's Reports, Tennessee Supreme Court of Errors and Appeals.
Head	Head's Reports, Tennessee Supreme Court.
Heath	Heath's Reports, Maine Supreme Court; Maine Reports, vols. 36–40.
Hein.	Heineccius.
Heisk.	Heiskell's Reports, Tennessee Supreme Court.
Helm	Helm's Reports, Nevada Supreme Court; Nevada Reports, vols. 2–9.
Hemm. & M.	Hemming & Miller's Reports, English Chancery.
Hempst.	Hempstead's Reports, United States Circuit Courts and Arkansas Territorial Courts.
Hen.	King Henry; thus 1 Hen. I. signifies the first year of the reign of King Henry I.
Hen. Bl.	Henry Blackstone's Reports, English Common Pleas and Exchequer Chamber.
Hen. & M.	Hening & Mumford's Reports, Virginia Court of Appeals.
Hepb.	Hepburn's Reports, California Supreme Court; California Reports, vols. 2–4.
Her.	Herne's Pleader.
Het.	Hetley's Reports, English Common Pleas.
Hill (N. Y.)	Hill's Reports, New York Supreme Court and Court of Appeals.
Hill (S. C.)	Hill's Reports, South Carolina Court of Appeals.
Hill (S. C.) Ch. or Hill Ch.	Hill's Chancery Reports, South Carolina Court of Appeals.
Hill Trust.	Hill on Trustees.
Hill & D. Supp.	Lalor's Supplement to Hill and Denio's Reports, New York Supreme Court and Court of Appeals.
Hilliard Real Prop.	Hilliard on Real Property.
Hillyer	Hillyer's Reports, California Supreme Court; California Reports, vols. 20–22.
Hil. T.	Hilary Term.
Hilt.	Hilton's Reports, New York Common Pleas.
Hob.	Hobart's Reports, English King's Bench.
Hodg.	Hodges' Reports, English Common Pleas.
Hoffm. Ch. or Hoffm. (N. Y.)	Hoffman's Reports, New York Chancery.
Hoffm. Land Cas.	Hoffman's Land Cases, United States District Court.
Hog.	Hogan's Reports, Irish Rolls Court.
Hogan (Pa.) St. Tr.	Hogan's Pennsylvania State Trials.
Hogue	Hogue's Reports, Florida Supreme Court; Florida Reports, vols. 3, 4.
Holc. Lead. Cas.	Holcombe's Leading Cases on Commercial Law.
Holt	Holt's Reports, English King's Bench.
Holt N. P.	Holt's Nisi Prius Reports, English Courts.
Holthouse Dict.	Holthouse's Law Dictionary.
Home	Clerk Home's Reports, Scotch Court of Session.

Hooker	Hooker's Reports, Connecticut Supreme Court of Errors; Connecticut Reports, vols. 25–43.
Hope	Thomas Hope's Reports, Scotch Court of Session.
Hopk. Adm.	Hopkinson's Reports, Pennsylvania Admiralty Court.
Hopk. Ch.	Hopkins' Reports, New York Chancery.
Hopw. & C.	Hopwood & Coltman's Reports, English Registration Appeal Cases.
Hopw. & P.	Hopwood & Philbrick's Reports, English Registration Appeal Cases.
Horn & H.	Horn & Hurlstone's Reports, English Exchequer.
Horne Mir.	Mirrour of Justices.
House of L.	House of Lords. House of Lords Cases.
Houst.	Houston's Reports, Delaware Superior Court and Court of Errors and Appeals.
Hov. Sup. Ves.	Hoveden's Supplement to Vesey.
How.	Howard's Reports, United States Supreme Court.
How. Ap. Cas. or How. (N. Y.) Cas.	Howard's Appeal Cases, New York Court of Appeals.
How. (Miss.)	Howard's Reports, Mississippi High Court of Errors and Appeals; Mississippi Reports, vols. 2–8.
How. (N. Y.) Pr. or How. Pr.	Howard's Practice Reports, New York Courts.
How. St. Tr.	Howell's State Trials.
Hubb.	Hubbard's Reports, Maine Supreme Court; Maine Reports, vols. 45–51.
Huds. & B.	Hudson & Brooke's Reports, Irish King's Bench.
Hughes	Hughes' Reports, Kentucky Courts.
Hume	Hume's Decisions, Scotch Court of Session.
Hume Com. or Hume Cr. L.	Hume's Commentaries on Criminal Law of Scotland.
Humph.	Humphrey's Reports, Tennessee Supreme Court.
Hun	Hun's Reports, New York Supreme Court; New York Supreme Court Reports.
Hunt. Land. & T.	Hunter on Landlord and Tenant.
Hunt. Rom. L.	Hunter on Roman Law.
Hurlst. & C.	Hurlstone & Coltman's Reports, English Exchequer.
Hurlst. & G.	Hurlstone & Gordon's Reports, English Exchequer; Exchequer Reports.
Hurlst. & N.	Hurlstone & Norman's Reports, English Exchequer.
Hurlst & W.	Hurlstone & Walmsley's Reports, English Exchequer.
Hutt.	Hutton's Reports, English Common Pleas.
I. J. C.	Irvine's Justiciary Cases, Scotch Justiciary Court.
I. O. U.	I owe you.
I. R. C. L.	Irish Common Law Reports.
I. R. Eq.	Irish Equity Reports.
Idaho	Idaho Reports, Idaho Territorial Courts.
Ill.	Illinois Reports, Illinois Supreme Court.
Imp. Pl.	Impey's Pleader.
Imp. Pr. C. P.	Impey's Practice in Common Pleas.
Imp. Pr. K. B.	Impey's Practice in King's Bench.
Imp. Sh.	Impey on Sheriffs and Coroners.
In f.	In fine; at the end of a Law title or parsgraph.
In. pr.	*In principio;* at the beginning of a law; before the first paragraph.
Ind.	Indiana Reports, Indiana Supreme Court.
Inst.	Institutes; when preceded by a number denoting a volume, the reference is to Coke's Institutes; when followed by several numbers, the reference is to the Institutes of Justinian, and to the books, titles, and paragraphs into which that work is divided.
Iowa	Iowa Reports, Iowa Supreme Court.
Ir. C. L. or Ir. L. N. S.	Irish Common Law Reports.
Ir. Ch. or Ir. Ch. N. S.	Irish Chancery Reports.
Ir. Eq.	Irish Equity Reports.
Ir. L.	Irish Law Reports.
Ired.	Iredell's Law Reports, North Carolina Supreme Court.
Ired. Eq.	Iredell's Equity Reports, North Carolina Supreme Court.
Irvine or Irv. Just.	Irvine's Justiciary Cases, Scotch Justiciary Court.

J. J. Marsh.	J. J. Marshall's Reports, Kentucky Court of Appeals.
J. Kel.	J. Kelyng's Reports, English King's Bench.
J. & W.	Jacob & Walker's Reports, English Chancery.
Jac.	King James; thus 1 Jac. I. signifies the first year of the reign of King James I. Jacob's Reports, English Chancery.
Jac. Dict.	Jacobs' Law Dictionary.
Jac. & W.	Jacob & Walker's Reports, English Chancery.
Jacks.	Jackson's Reports, Supreme Court of Georgia; Georgia Reports, vols. 46–57.
Jarm. Wills	Jarman on Wills.
Jctus	Jurisconsultus.
Jebb Cr. Cas.	Jebb's Crown Cases, Irish Courts.
Jebb & B.	Jebb & Bourke's Reports, Irish Queen's Bench.
Jebb & S.	Jebb & Symes' Reports, Irish Queen's Bench.
Jeff.	Jefferson's Reports, Virginia General Court.
Jenk. or Jenk. Cent.	Jenkins' Reports, English Exchequer.
Jenn.	Jennison's Reports, Michigan Supreme Court; Michigan Reports, vols. 14–18.
Johns. Cas. or Johns. (N. Y.) Cas.	Johnson's Cases, New York Supreme Court and Court of Errors.
Johns. Ch.	Johnson's Reports, English Chancery.
Johns. (Md.) Ch.	Johnson's Reports, Maryland Chancery; Maryland Chancery Reports.
Johns. (N. Y.)	Johnson's Reports, New York Supreme Court and Court of Errors.
Johns. (N. Y.) Ch.	Johnson's Reports, New York Chancery.
Johns. & H.	Johnson & Heming's Reports, English Chancery.
Jones (Ala.)	Jones's Reports, Alabama Supreme Court; Alabama Reports, vols. 43–48.
Jones, B. & W.	Jones, Barclay, & Whittelsey's Reports, Missouri Supreme Court; Missouri Reports, vol. 31.
Jones Bailm.	Jones on Bailments.
Jones Ir.	Jones' Reports, Irish Exchequer.
Jones (Mo.)	Jones' Reports, Missouri Supreme Court; Missouri Reports, vols. 22–30.
Jones (N. C.)	Jones' Law Reports, North Carolina Supreme Court.
Jones (N. C.) Eq.	Jones' Equity Reports, North Carolina Supreme Court.
Jones (Pa.)	Jones' Reports, Pennsylvania Supreme Court; Pennsylvania State Reports, vols. 11, 12.
Jones T. or 2 Jones	T. Jones' Reports, English King's Bench and Common Pleas.
Jones (U. C.)	Jones' Reports, Upper Canada Common Pleas; Upper Canada Common Pleas Reports.
Jones W. or 1 Jones	W. Jones' Reports, English King's Bench and Common Pleas.
Jones & C.	Jones & Carey's Reports, Irish Exchequer.
Jones & La T.	Jones & La Touche's Reports, Irish Chancery.
Jones & S.	Jones & Spencer's Reports, New York City Superior Court; New York Superior Court Reports, vols. 33–44.
Jud.	Book of Judgments, English Courts.
Jur.	The Jurist.
Jur. N. S.	The Jurist, New Series.
Jur. Sc.	The Scotch Jurist, Scotch Court of Session Cases.
Just. Inst.	Institutes of Justinian.
K. B.	King's Bench.
K. C.	King's Council.
K. C. R.	Reports tempore King, English Chancery.
K. & G. R. C.	Keane & Grant's Registration Appeal Cases.
K. & J.	Kay & Johnson's Reports, English Chancery.
K. & O.	Knapp & Ombler's Election Cases.
Kames or Kam. Dec.	Kames' Decisions, Scotch Court of Session.
Kames Eluc.	Kames' Elucidations of the Law of Scotland.
Kames Eq.	Kames on Principles of Equity.
Kames Rem. Dec.	Kames' Remarkable Decisions, Scotch Court of Session.
Kames Sel. Dec.	Kames' Select Decisions, Scotch Court of Session.
Kames Tr.	Kames' Law Tracts.
Kan. or Kans.	Kansas Reports, Kansas Supreme Court.
Kay	Kay's Reports, English Chancery.
Kay & J.	Kay & Johnson's Reports, English Chancery.
Keane & G. R. C.	Keane & Grant's Registration Appeal Cases.
Keb. or Keble	Keble's Reports, English King's Bench.

Keb. J.	Keble on Justices of the Peace.
Keb. Stat.	Keble's Statutes.
Keen	Keen's Reports, English Rolls Court.
Keil. or Keilw.	Keilway's Reports, English King's Bench and Common Pleas.
Kel. J. or 1 Kel.	J. Kelyng's Reports, English King's Bench.
Kel. W. or 2 Kel.	W. Kelynge's Reports, English Chancery.
Kelly	Kelly's Reports, Georgia Supreme Court; Georgia Reports, vols. 1–3.
Kelly Ann.	Kelly on Annuities.
Kelly Us.	Kelly on Usury.
Kelly & C.	Kelly & Cobb's Reports, Georgia Supreme Court; Georgia Reports, vols. 4, 5.
Kenn. Gloss.	Kennett's Glossary.
Kenn. Imp.	Kennett on Impropriations.
Kent Com.	Kent's Commentaries.
Keny.	Kenyon's Notes, English King's Bench.
Kern.	Kernan's Reports, New York Court of Appeals; New York Reports, vols. 11–14.
Kerr Ac.	Kerr on Actions at Law.
Kerr Anc. L.	Kerr on Ancient Lights.
Kerr Disc.	Kerr on Discovery.
Kerr Fr.	Kerr on Fraud and Mistake.
Kerr (Ind.)	Kerr's Reports, Indiana Supreme Court; Indiana Reports, vols. 18–22.
Kerr Inj.	Kerr on Injunctions.
Kerr (N. B.)	Kerr's Reports, New Brunswick Supreme Court.
Kerr Rec.	Kerr on Receivers.
Keyes	Keyes' Reports, New York Court of Appeals.
Kilk.	Kilkerran's Decisions, Scotch Court of Session.
King	King's Reports, Louisiana Supreme Court; Louisiana Annual Reports, vols. 5, 6.
Kirby	Kirby's Reports, Connecticut Superior Court.
Kit.	Kitchin on Courts.
Kn. or Knapp	Knapp's Reports, English Privy Council.
Kn. & O. or Knapp & O.	Knapp & Ombler's Election Cases.
Knowles	Knowles's Reports, Rhode Island Supreme Court; Rhode Island Reports, vol. 3.
Ky. Dec.	Sneed's Kentucky Decisions, Kentucky Court of Appeals.
Kyd Aw.	Kyd on Awards.
Kyd Corp.	Kyd on Corporations.
L.	Law. Liber.
L. C.	Lord Chancellor.
L. C. B.	Lord Chief Baron.
L. C. C. C.	Lower Canada Civil Code.
L. C. C. P.	Lower Canada Civil Procedure.
L. C. G.	Toronto Local Courts' Gazette.
L. C. J.	Lord Chief Justice. Lower Canada Jurist.
L. C. R.	Lower Canada Reports.
L. H. C.	Lord High Chancellor.
L. I. L.	Lincoln's Inn Library.
L. J.	House of Lords' Journal. Lords Justices' Court.
L. J. or L. J. o. s.	Law Journal Reports, in all the English Courts.
L. J. Adm.	Law Journal, New Series, English Admiralty.
L. J. Bankr.	Law Journal, New Series, English Bankruptcy.
L. J. C. P.	Law Journal, New Series, English Common Pleas.
L. J. Ch.	Law Journal, New Series, English Chancery.
L. J. Ecc.	Law Journal, New Series, English Ecclesiastical Courts.
L. J. Exch.	Law Journal, New Series, English Exchequer.
L. J. H. L.	Law Journal, New Series, English House of Lords.
L. J. M. C. or L. J. Mag. Cas.	Law Journal, New Series, English Magistrates' Cases.
L. J. Mat. Cas.	Law Journal, New Series, English Divorce and Matrimonial Causes.
L. J. P. or L. J. Prob.	Law Journal, New Series, English Probate.
L. J. P. C.	Law Journal, New Series, English Privy Council.
L. J. Q. B.	Law Journal, New Series, English Queen's Bench.
L. L.	Law Latin.
L. M. & P.	Lowndes, Maxwell, & Pollock's Reports, English Bail Court.
L. Mag.	Law Magazine.

L. Mag. & L. R.	Law Magazine and Law Review.
L. Mag. & Rev.	Law Magazine and Review.
L. O.	Legal Observer.
L. P. B.	Lawrence's Paper Book; compare A. P. B.
L. P. C.	Lord of the Privy Council.
L. R.	Law Recorder, Reports in all the Irish Courts. Law Reporter. Law Reports. Law Review. Law Times Reports.
L. R. A. & E.	Law Reports, English Admiralty and Ecclesiastical.
L. R. App. Cas.	Law Reports, English Appeal Cases.
L. R. C. C.	Law Reports, English Crown Cases Reserved.
L. R. C. P.	Law Reports, English Common Pleas.
L. R. C. P. D.	Law Reports, Common Pleas Division English Supreme Court of Judicature.
L. R. Ch.	Law Reports, English Chancery Appeal Cases.
L. R. Ch. D.	Law Reports, Chancery Division English Supreme Court of Judicature.
L. R. Eq.	Law Reports, English Equity Cases.
L. R. Ex. or L. R. Exch.	Law Reports, English Exchequer.
L. R. Ex. D.	Law Reports, Exchequer Division English Supreme Court of Judicature.
L. R. H. L.	Law Reports, English and Irish Appeal Cases, House of Lords.
L. R. H. L. Sc.	Law Reports, Scotch and Divorce Appeal Cases, House of Lords.
L. R. Misc. D.	Law Reports, Miscellaneous Division, English Supreme Court of Judicature.
L. R. P. C.	Law Reports, English Privy Council Appeal Cases.
L. R. P. & D.	Law Reports, English Probate and Divorce Cases.
L. R. Q. B.	Law Reports, English Queen's Bench.
L. R. Q. B. D.	Law Reports, Queen's Bench Division English Supreme Court of Judicature.
L. T.	Law Times, Cases in all the English Courts.
L. T. N. S. or L. T. Rep. N. S.	Law Times Reports, New Series, English Courts, with Irish and Scotch Cases.
L. & C. C. C.	Leigh & Cave's Crown Cases, English Courts.
L. & G. t. Plunk.	Lloyd & Goold's Cases tempore Plunkett, Irish Chancery.
L. & M.	Lowndes, Maxwell, & Pollock's Reports, English Bail Court.
L. & T.	Longfield & Townsend's Reports, English Exchequer.
L. & Welsb. or L. & Welsb. Mer. Cas.	Lloyd & Welsby's Mercantile Cases, English Courts.
La.	Lane's Reports, English Exchequer. Louisiana. Louisiana Reports, Supreme Court.
La. Ann.	Louisiana Annual Reports, Louisiana Supreme Court.
Lalor Supp. Hill & D.	Lalor's Supplement to Hill & Denio's Reports, New York Supreme Court and Court of Appeals; Hill & Denio's Supplement.
Lamb. or Lamb. J. P.	Lambard's Eirenarcha, or Justice of the Peace.
Lane	Lane's Reports, English Exchequer.
Lans.	Lansing's Reports, New York Supreme Court; New York Supreme Court Reports.
Lat. or Latch	Latch's Reports, English King's Bench.
Lathrop	Lathrop's Reports, Massachusetts Supreme Court; Massachusetts Reports, vols. 115–121.
Law Chron.	Law Chronicle.
Law Forms	Law's Forms of Ecclesiastical Law.
Law Jour.	Law Journal, Reports in all the English Courts.
Law Jour. Adm.	Law Journal, New Series, English Admiralty.
Law Jour. Bankr.	Law Journal, New Series, English Bankruptcy
Law Jour. C. P.	Law Journal, New Series, English Common Pleas.
Law Jour. Ch.	Law Journal, New Series, English Chancery.
Law Jour. Ecc.	Law Journal, New Series, English Ecclesiastical Courts.
Law Jour. Exch.	Law Journal, New Series, English Exchequer.
Law Jour. H. L.	Law Journal, New Series, English House of Lords.
Law Jour. M. C. or Law Jour. Mag. Cas.	Law Journal, New Series, English Magistrates' Cases.
Law Jour. Mat. Cas.	Law Journal, New Series, English Divorce and Matrimonial Cases.
Law Jour. P. or Prob.	Law Journal, New Series, English Probate.
Law Jour. P. C.	Law Journal, New Series, English Privy Council.
Law Jour. Q. B.	Law Journal, New Series, English Queen's Bench.
Law Lib.	Law Library.
Law News	St. Louis Law News.

Law Rec.	Law Recorder, Reports in all the Irish Courts.
Law Rep.	Law Reporter. Law Reports.
Law Rep. A. & E.	Law Reports, English Admiralty and Ecclesiastical.
Law Rep. App. Cas.	Law Reports, English Appeal Cases.
Law Rep. C. C.	Law Reports, English Crown Cases Reserved.
Law Rep. C. P.	Law Reports, English Common Pleas.
Law Rep. C. P. D.	Law Reports, Common Pleas Division English Supreme Court of Judicature.
Law Rep. Ch.	Law Reports, English Chancery Appeal Cases.
Law Rep. Ch. D.	Law Reports, Chancery Divisinn English Supreme Court of Judicature.
Law Rep. Eq.	Law Reports, English Equity Cases.
Law Rep. Ex.	Law Reports, English Exchequer.
Law Rep. Ex. D.	Law Reports, Exchequer Division English Supreme Court of Judicature.
Law Rep. H. L.	Law Reports, English and Irish Appeal Cases, House of Lords.
Law Rep. H. L. Sc.	Law Reports, Scotch and Divorce Appeal Cases, House of Lords.
Law Rep. Misc. D.	Law Reports, Miscellaneous Division, English Supreme Court of Judicature.
Law Rep. P. C.	Law Reports, English Privy Council Appeal Cases.
Law Rep. P. & D.	Law Reports, English Probate and Divorce Cases.
Law Rep. Q. B.	Law Reports, English Queen's Bench.
Law Rep. Q. B. D.	Law Reports, Queen's Bench Division English Supreme Court of Judicature.
Law Repos.	Carolina Law Repository, North Carolina Supreme Court.
Law Rev. Qu.	Law Review Quarterly.
Law Stud. Mag.	Law Students' Magazine.
Law Times	Law Times, Cases in all the English Courts.
Law Times, N.S. or Law Times Rep. N.S.	Law Times Reports, New Series, English Courts, with Irish and Scotch Cases.
Lawes C.	Lawes on Charter Parties.
Lawes Pl.	Lawes on Pleadings.
Lawrence	Lawrence's Reports, Ohio Supreme Court; Ohio Reports, vol. 20.
Ld. Ken.	Kenyon's Notes, English King's Bench.
Ld. Raym.	Lord Raymond's Reports, English King's Bench.
Leach or Leach C. C.	Leach's Crown Cases, English Courts.
Lead. Cas. Eq.	White & Tudor's Leading Cases in Equity.
Lee or Lee Cas.	Lee's Cases, English Ecclesiastical Courts.
Lee Ab.	Lee on Abstracts of Title.
Lee Bankr.	Lee on Bankruptcy.
Lee Cal.	Lee's Reports, California Supreme Court; California Reports, vols. 9–12.
Lee Cap.	Lee on Captures.
Lee Cas. t. H.	Cases tempore Hardwicke, English King's Bench.
Leg. Chr.	Legal Chronicle, Pennsylvania.
Leg. Exam.	Legal Examiner, London.
Leg. Exch.	Legal Exchange, Iowa.
Leg. Gaz.	Legal Gazette, Pennsylvania.
Leg. Gaz. Rep.	Legal Gazette Reports, Pennsylvania Courts.
Leg. Inq.	Legal Inquirer, London.
Leg. Int.	Legal Intelligencer, Pennsylvania.
Leg. Obs.	Legal Observer, London.
Leg. Op.	Legal Opinion, Pennsylvania.
Leg. Rep.	Legal Reporter, Irish Courts.
Leg. Rev.	Legal Review, London.
Leigh	Leigh's Reports, Virginia Court of Appeals and General Court.
Leigh N. P.	Leigh's Nisi Prius.
Leigh & C.	Leigh & Cave's Crown Cases, English Courts.
Leigh & D. Conv.	Leigh & Dalzell on Conversion.
Leon.	Leonard's Reports, English King's Bench.
Lester	Lester's Reports, Georgia Supreme Court; Georgia Reports, vols. 31, 32.
Lester & B.	Lester & Butler's Reports, Georgia Supreme Court; Georgia Reports, vol. 33.
Lev.	Levinz' Reports, English King's Bench.
Lew. Ap.	Lewin on Apportionment.
Lew. Cr. C.	Lewin's Crown Cases, English Courts.
Lew. (Nev.)	Lewis's Reports, Nevada Supreme Court; Nevada Reports, vol. 1.
Lew. Perp.	Lewis on Perpetuity.
Lex Merc.	Lex Mercatoria.

Ley	Ley's Reports, English Court of Wards and other Courts.
Lib.	*Liber;* book.
Lib. Ass.	Liber Assisarum; Book of Assizes; part 5 of the Year Books.
Lib. Feud.	Liber Feudorum; Consuetudines Feudorum, at end of Corpus Juris Civilis.
Lib. Intr.	Liber Intrationum; Old Book of Entries.
Lib. Pl.	Liber Placitandi.
Lib. Reg.	Register Book.
Lil.	Lilly's Reports, English Assizes.
Lil. Abr.	Lilly's Abridgment; Lilly's Practical Register.
Lind. Part.	Lindley on Partnership.
Lind. Prov.	Lyndwood's Provinciales.
Lit.	Littleton's Reports, English Common Pleas and Exchequer.
Lit. Ten.	Littleton's Tenures.
Litt. (Ky.) or Littell	Littell's Reports, Kentucky Court of Appeals.
Litt. Sel. Cas. or Litt. (Ky.) Sel. Cas.	Littell's Selected Cases, Kentucky Court of Appeals.
Liv. Jud. Op.	Livingston's Judicial Opinions, New York City Mayor's Court.
Ll.	*Leges;* laws.
Ll. Ch. St.	Lloyd's Chitty's Statutes.
Ll. Comp.	Lloyd on Law of Compensation.
Ll. & G. t. S.	Lloyd & Goold's Reports tempore Sugden, Irish Chancery.
Ll. & G. t. P.	Lloyd & Goold's Reports tempore Plunkett, Irish Chancery.
Ll. & W. or Lloyd & W. or Ll. & W. Mer. Cas.	Lloyd & Welsby's Mercantile Cases, English Courts.
Loc. Ct. Gaz.	Local Courts Gazette, Toronto.
Lock. Rev. Cas.	Lockwood's Reversed Cases.
Lofft	Lofft's Reports, English King's Bench.
Lond. Jur.	London Jurist.
Lond. L. M.	London Law Magazine.
Long Quinto	Year Book, part 10.
Long Sales	Long on Sales.
Longf. & T.	Longfield & Townsend's Reports, Irish Exchequer.
Lor. Inst.	Lorimer's Institutes.
Love. Wills	Lovelass on Wills.
Low.	Lowell's Reports, United States District Court.
Low. C.	Lower Canada Reports.
Low. C. Jur.	Lower Canada Jurist.
Lowndes Av.	Lowndes on Average.
Lowndes Col.	Lowndes on Collisions.
Lowndes, M. & P.	Lowndes, Maxwell, & Pollock's Reports, English Bail Court.
Luc.	Lucas' Cases in Law and Equity, English Courts; Modern Reports, vol. 10.
Lud. El. Cas.	Luder's Election Cases.
Lud. & Jenk.	Ludlow & Jenkyns on Trademarks.
Ludden	Ludden's Reports, Maine Supreme Court; Maine Reports, vols. 43, 44.
Lum. An.	Lumley on Annuities.
Lum. Cas.	Lumley's Poor Law Cases.
Lund Pat.	Lund on Patents.
Lush. or Lush. Adm.	Lushington's Admiralty Reports, English Admiralty.
Lush. P. L.	Lushington on Prize Law.
Lutw.	Lutwyche's Reports, English Common Pleas; Lutwyche's Cases tempore Queen Anne, English Courts; Modern Reports, vol. 11.
Lutw. R. C.	Lutwyche's Registration Cases.
Lynd. Prov.	Lyndwood's Provinciales.
M.	Queen Mary; thus 1 M. signifies the first year of the reign of Queen Mary. Michaelmas Term. Morison's Dictionary of Decisions, Scotch Court of Session.
M. C.	Magistrates' Cases.
M. C. C.	Moody's Crown Cases, English Courts.
M. D. & D.	Montague, Deacon, & De Gex's Reports, English Bankruptcy.
M. G. & S.	Manning, Granger, & Scott's Reports, English Common Pleas; Common Bench Reports, vols. 1–8.
M. R.	Master of the Rolls.
M. St.	More's Notes on Stair's Institutes.
M. T.	Michaelmas Term.
M. & Ayr	Montagu & Ayr's Reports, English Bankruptcy Court.

M. & Ayr B. L.	Montagu & Ayr on Bankrupt Law.
M. & B.	Montagu & Bligh's Reports, English Bankruptcy.
M. & C.	Mylne & Craig's Reports, English Chancery.
M. & G.	Manning & Granger's Reports, English Common Pleas.
M. & Gord.	Macnaghten & Gordon's Reports, English Common Pleas.
M. & M.	Moody & Malkin's Nisi Prius Cases, English Courts.
M. & MacA.	Moody & MacArthur's Reports, English Bankruptcy.
M. & P.	Moore & Payne's Reports, English Common Pleas and Exchequer.
M. & R.	Manning & Ryland's Reports, English King's Bench.
M. & R. M. C.	Manning & Ryland's Magistrates' Cases, English King's Bench.
M. & Rob.	Moody & Robinson's Nisi Prius Cases, English Courts.
M. & S.	Maude & Selwyn's Reports, English King's Bench.
M. & Sc.	Moore & Scott's Reports, English Common Pleas.
M. & W.	Meeson & Welsby's Reports, English Exchequer.
Maccl.	Cases in Law and Equity tempore Macclesfield; Modern Reports, vol. 10.
Macf.	Macfarlane's Reports, Scotch Jury Court.
Mack. Civ. L.	Mackeldy on Civil Law.
Mack. Cr. L.	Mackenzie on Criminal Law of Scotland.
Mack. Inst.	Mackenzie's Institutes of the Law of Scotland.
Mack. Obs.	Mackenzie's Observations on Acts of Parliament.
Mack. Rom. L.	Mackenzie on Roman Law.
Macl. Dec.	Maclaurin's Decisions, Scotch Courts.
Macl. Ship.	Maclachlan on Shipping.
Macl. & R. or M'L. & R.	Maclean & Robinson's Reports, English House of Lords, Appeals from Scotland.
Macn.	Macnaghten's Reports, Indian Courts.
Macn. F.	F. Macnaghten's Reports, Indian Courts.
Macn. Null.	Macnamara on Nullities and Irregularities.
Macn. & G.	Macnaghten & Gordon's Reports, English Chancery.
Macph.	Macpherson's Cases, Scotch Court of Session.
Macph. Inf.	Macpherson on Infancy.
Macq. H. L Cas.	Macqueen's House of Lords Cases, Appeals from Scotland.
Macq. H. & W.	Macqueen on Husband and Wife.
Macq. M. & D.	Macqueen on Marriage and Divorce.
Mad. or Madd.	Maddock's Reports, English Chancery.
Mad. Ch.	Maddock's Chancery Practice.
Mad. Exch.	Madox's History of the Exchequer.
Mad. Form.	Madox's Formulae Anglicanum.
Mad. H. Ct. R.	Madras High Court Reports.
Mad. Jur.	Madras Jurist.
Mad. S. D. R.	Madras Sudder Dewarry Reports.
Mad. Sel. D.	Madras Select Decrees.
Mag.	The Magistrate.
Mag. Cas.	Magistrates' Cases.
Mag. Char.	Magna Charta.
Mag. (Md.)	Magruder's Reports, Maryland Supreme Court; Maryland Reports, vols. 1, 2.
Maine	Maine Reports, Supreme Court.
Maine Anc. Law	Maine on Ancient Law.
Maine Vil. Com.	Maine on Village Communities.
Mal.	Malyne's Lex Mercatoria.
Mall. Ent.	Mallory's Modern Entries.
Man. Dem.	Mansel on Demurrer.
Man. G. & S.	Manning, Granger, & Scott's Reports, English Common Pleas; Common Bench Reports, vols. 1–8.
Man. & G.	Manning & Granger's Reports, English Common Pleas.
Man. & R.	Manning & Ryland's Reports, English King's Bench.
Man. & R. Mag. Cas.	Manning & Ryland's Magistrates' Cases, English King's Bench.
Mann. Mich. or Manning	Manning's Reports, Michigan Supreme Court; Michigan Reports, vol. 1.
Manw.	Manwood's Forest Laws.
Mar.	March's Reports, English King's Bench.
Mar. Br.	March's Brooke's New Cases.
Marr. or Marr. Adm.	Marriott's Reports, English Admiralty.
Marsh.	Marshall's Reports, English Common Pleas.
Marsh. Dec.	Brockenborough's Reports, Marshall's United States Circuit Court Decisions.
Marsh. J. J. (Ky.) or J. J. Marsh.	J. J. Marshall's Reports, Kentucky Court of Appeals.

Marsh. (Ky.) or A. K. Marsh.	A. K. Marshall's Reports, Kentucky Court of Appeals.
Mart. (Ga.)	Martin's Reports, Georgia Supreme Court; Georgia Reports, vols. 21–29.
Mart. (La.)	Martin's Reports, Louisiana Supreme Court.
Mart. (La.) N. S.	Martin's Reports, New Series, Louisiana Supreme Court.
Mart. (N. C.)	Martin's Reports, North Carolina Supreme Court.
Mart. & Y.	Martin & Yerger's Reports, Tennessee Supreme Court.
Marv. Av.	Marvin on General Average.
Marv. Leg. Bibl.	Marvin's Legal Bibliography.
Marv. Wr. & S.	Marvin on Wreck and Salvage.
Mas.	Mason's Reports, United States Circuit Court.
Mass.	Massachusetts Reports, Massachusetts Supreme Court.
Math. Ev.	Mathews on Presumptive Evidence.
Mats.	Matson's Reports, Connecticut Supreme Court of Errors; Connecticut Reports, vols. 22–24.
Matt. or Matth. (W. Va.)	Matthew's Reports, West Virginia Supreme Court; West Virginia Reports, vol. 6.
Mau. & Pol. Sh.	Maude & Pollock on Shipping.
Mau. & Sel.	Maule & Selwyn's Reports, English King's Bench.
May Fr. Conv.	May on Fraudulent Conveyances.
May P. L.	May on Parliamentary Law.
Mayne Dam.	Mayne on Damages.
McAll.	McAllister's Reports, United States District Court.
McArth.	McArthur's Reports, District of Columbia Courts.
McCahon	McCahon's Reports, United States District Court.
McCart.	McCarter's Reports, New Jersey Chancery and Court of Errors and Appeals; New Jersey Equity Reports, vols. 14, 15.
McClel.	McCleland's Reports, English Exchequer.
McClel. & Y.	McCleland & Younge's Reports, English Exchequer.
McCook.	McCook's Reports, Ohio Supreme Court; Ohio State Reports, vol. 1.
McCord or McCord (S. C.)	McCord's Law Reports, South Carolina Constitutional Court and Court of Appeals.
McCord Ch. or McCord (S. C.) Ch.	McCord's Chancery Reports, South Carolina Court of Appeals.
McCork. or McCork. (N. C.)	McCorkle's Reports, North Carolina Supreme Court; North Carolina Reports, vol. 65.
McCull. Dict.	McCullough's Commercial Dictionary.
McLean	McLean's Reports, United States Circuit Court.
McMull. or McMull. (S. C.)	McMullan's Law Reports, South Carolina Court of Appeals.
McMull. Eq. or McMull. (S. C.) Eq.	McMullan's Equity Reports, South Carolina Court of Appeals.
McNal. Ev.	McNally on Evidence.
Md.	Maryland. Maryland Reports, Court of Appeals.
Md. Ch.	Maryland Chancery Decisions, Maryland High Court of Chancery.
Me.	Maine. Maine Reports, Supreme Court.
Meddaugh	Meddaugh's Reports, Michigan Supreme Court; Michigan Reports, vol. 13.
Mees. & W.	Meeson & Welsby's Reports, English Exchequer.
Meigs	Meigs' Reports, Tennessee Supreme Court.
Mer. or Meriv.	Merivale's Reports, English Chancery.
Metc. (Ky.)	Metcalfe's Reports, Kentucky Court of Appeals.
Metc. (Mass.)	Metcalf's Reports, Massachusetts Supreme Court; Massachusetts Reports, vols. 42–54.
Mich.	Michigan. Michigan Reports, Supreme Court.
Mich. N. P.	Michigan Nisi Prius Cases.
Mich. T.	Michaelmas Term.
Midd. Sitt.	Middlesex Sittings at Nisi Prius.
Miles or Miles (Pa.)	Miles' Reports, Philadelphia District Court.
Mill Const. or Mill (S. C.)	Mill's Reports, South Carolina Constitutional Court.
Mill. Dec.	Miller's Decisions, United States Circuit Court; Woolworth's Reports.
Mill. Eq. Mort.	Miller on Equitable Mortgages.
Mill. (La.)	Miller's Reports, Louisiana Supreme Court; Louisiana Reports, vols. 1–5.
Mill. (Md.)	Miller's Reports, Maryland Court of Appeals; Maryland Reports, vols. 3–18.

Milw. or Milw. Ecc.	Milward's Reports, Irish Prerogative Court.
Minn.	Minnesota. Minnesota Reports, Supreme Court.
Minor or Min. (Ala.)	Minor's Reports, Alabama Supreme Court.
Mirr. J.	Mirrour of Justices.
Miss.	Mississippi. Mississippi Reports, High Court of Errors and Appeals and Supreme Court.
Mitf.	Mitford on Chancery Pleading.
Mo.	Moore's Reports, English Courts. Missouri. Missouri Reports, Supreme Court.
Mo. L. Mag.	Monthly Law Magazine.
Mod.	Modern Reports, English Courts.
Mod. Cas.	Modern Reports, vols. 2, 6, 8, 9.
Mod. Cas. L. & Eq.	Modern Reports, vols. 8, 9.
Mod. Ent.	Modern Entries.
Mol.	Molloy's Reports, Irish Chancery.
Mol. de J. M.	Molloy de Jure Maritimo.
Mon. T.	Montana Territory. Montana Territorial Reports.
Monr. or Monr. T. B.	T. B. Monroe's Reports, Kentucky Court of Appeals.
Monr. B.	B. Monroe's Reports, Kentucky Court of Appeals.
Mont.	Montagu's Reports, English Bankruptcy.
Mont. D. & DeG.	Montagu, Deacon, & De Gex's Reports, English Bankruptcy.
Mont. Set Off	Montagu on Set Off.
Mont. & A.	Montagu & Ayrton's Reports, English Bankruptcy.
Mont. & B.	Montagu & Bligh's Reports, English Bankruptcy.
Mont. & C.	Montagu & Chitty's Reports, English Bankruptcy.
Mont. & Mc.	Montagu & McArthur's Reports, English Bankruptcy.
Moo.	Moore's Reports, English Courts.
Moo. C. C.	Moody's Crown Cases, English Courts.
Moo. C. P. or Moo. J. B.	Moore's Reports, English Common Pleas.
Moo. I. A.	Moore's Indian Appeals.
Moo. P. C. C.	Moore's Privy Council Cases, English Privy Council.
Moo. P. C. C. N. S.	Moore's Privy Council Cases, New Series, English Privy Council.
Moo. Tr.	Moore's Trials, Divorce Cases.
Moo. & M.	Moody & Malkin's Nisi Prius Cases, English Courts.
Moo. & P.	Moore & Payne's Reports, English Common Pleas.
Moo. & R.	Moody & Robinson's Nisi Prius Cases, English Courts.
Moo. & Sc.	Moore & Scott's Reports, English Common Pleas.
Moore & W.	Moore & Walker's Reports, Texas Supreme Court; Texas Reports, vols. 22–24.
Mor. or Morr.	Morison's Dictionary of Decisions, Scotch Court of Session.
More St.	More's Notes on Stair's Institutions.
Morr.	Morris's Reports, Iowa Supreme Court.
Morr. (Cal.)	Morris's Reports, California Supreme Court; California Reports, vol. 5.
Morr. (Miss.)	Morris's Reports, Mississippi High Court of Errors and Appeals; Mississippi Reports, vols. 43–48.
Mos.	Moseley's Reports, English Chancery.
Mozley & W.	Mozley & Whiteley's Law Dictionary.
Munf.	Munford's Reports, Virginia Court of Appeals.
Murph.	Murphey's Reports, North Carolina Supreme Court.
Murph. & H.	Murphy & Hurlstone's Reports, English Exchequer.
Murr.	Murray's Reports, Scotch Jury Court.
Myl. & C.	Mylne & Craig's Reports, English Chancery.
Myl. & K.	Mylne & Keen's Reports, English Chancery.

N.	Novellæ; the Novels, or New Constitutions.
N. B.	Nota Bene. New Brunswick. New Brunswick Reports.
N. B. R.	National Bankruptcy Register.
N. Benl.	New Benloe, English King's Bench; Anonymous Reports at end of Benloe's Reports.
N. C.	Notes of Cases, English Ecclesiastical and Maritime Courts. North Carolina. North Carolina Reports, Supreme Court.
N. Chip.	N. Chipman's Reports, Vermont Supreme Court.
N. E.	New Edition.
N. F.	Newfoundland. Newfoundland Reports.
N. H.	New Hampshire. New Hampshire Reports, Supreme Court.
N. J.	New Jersey. New Jersey Reports.

N. J. Eq. or N. J. Ch.	New Jersey Equity Reports, Chancery and Court of Errors and Appeals.
N. J. L.	New Jersey Law Reports, Supreme Court and Court of Errors and Appeals.
N. L.	Nelson's Lutwyche's Reports, English Common Pleas; Lutwyche's Reports.
N. P.	Nisi Prius. Nova Placita. Notary Public.
N. P. C.	Nisi Prius Cases.
N. R.	New Reports, English Common Pleas; Bosanquet & Puller's Reports.
N. S.	Nova Scotia. New Series.
N. Y.	New York. New York Reports, Court of Appeals.
N. Y. Leg. Obs.	New York Legal Observer.
N. Y. Super. Ct.	New York Superior Court Reports, New York City Superior Court.
N. Y. Supr. Ct.	New York Supreme Court Reports.
Napton	Napton's Reports, Missouri Supreme Court; Missouri Reports, vol. 4.
Nels.	Nelson's Reports, English Chancery.
Nev.	Nevada. Nevada Reports, Supreme Court.
Nev. & M.	Neville & Manning's Reports, English King's Bench.
Nev. & P.	Neville & Perry's Reports, English King's Bench.
New Mag. Cas.	New Magistrates' Cases, English Courts.
New Pr. Cas.	New Practice Cases, English Courts.
New Rep.	New Reports, English Common Pleas; Bosanquet & Puller's Reports. New Reports in all the English Courts.
New Sess. Cas.	New Sessions Cases, English Courts; Carrow, Hamerton, & Allen's Reports.
New York City H. Rec.	New York City Hall Recorder.
Newb. or Newb. Adm.	Newberry's Admiralty Reports, United States District Courts.
Newf.	Newfoundland Reports.
Newl. Ch.	Newland on Chancery Practice.
Newl. Cont.	Newland on Contracts.
Nich. H. & C.	Nicholl, Hare, & Carrow's Railway Cases, English Courts.
No. Cas.	Notes of Cases, English Ecclesiastical and Maritime Courts.
No. N.	Novæ Narrationes.
Nol. or Nol. Sett.	Nolan's Settlement Cases.
Nol. P. L.	Nolan on Poor Laws.
North.	Northington's Reports, English Chancery.
Nott & H.	Nott & Huntington's Reports, United States Court of Claims.
Nott & M.	Nott & McCord's Reports, South Carolina Constitutional Court.
Nov.	Novellæ; the Novels, or New Constitutions.
Nov. Sc.	Nova Scotia.
Noy	Noy's Reports, English Courts.
Noy Max.	Noy's Maxims.
O.	Ordonnance. Ohio. Ohio Reports, Supreme Court.
O. Benl.	Old Benloe's Reports, English Courts; Benloe's Reports.
O. Bridg.	Orlando Bridgman's Reports, English Common Pleas.
O. N. B.	Old Natura Brevium.
O. St.	Ohio State Reports, Supreme Court.
Off. Brev.	Officina Brevium.
Off. Minn.	Officer's Reports, Minnesota Supreme Court; Minnesota Reports, vols. 1–9.
Ogd.	Ogden's Reports, Louisiana Supreme Court; Louisiana Annual Reports, vols. 12–15.
Ohio	Ohio Reports, Supreme Court.
Ohio St.	Ohio State Reports, Supreme Court.
Olc. or Olc. Adm.	Olcott's Admiralty Reports, United States District Court.
Old.	Oldright's Reports, Nova Scotia Supreme Court.
Oliver, B. & L.	Oliver, Beavan, & Lefroy's Reports; Railway and Canal Cases, vols. 5–7.
O'Mal. & H.	O'Malley & Hardcastle's Election Cases.
Onsl. N. P.	Onslow's Nisi Prius.
Op. Att.-Gen.	Opinions of Attorneys-General of the United States.
Ord. Ch.	Orders in Chancery.
Ord. Cla.	Orders of Lord Clarendon.
Oreg.	Oregon. Oregon Reports, Supreme Court.
Orf. M. L.	Orfila Médicine Légale.
Orl. Bridg.	Orlando Bridgman's Reports, English Common Pleas.

Orm.	Ormond's Reports, Alabama Supreme Court; Alabama Reports, vols. 12–15.
Ought.	Oughton's Ordo Judiciorum.
Overt.	Overton's Reports, Tennessee Courts.
Ow. or Owen	Owen's Reports, English King's Bench and Common Pleas.
P.	Easter Term.
P. C.	Privy Council. Probate Court. Cases in Parliament. Pleas of the Crown. Practice Cases. Precedents in Chancery. Penal Code. Political Code.
P. C. C.	Privy Council Cases.
P. L.	Public Laws. Pamphlet Laws.
P. L. C.	Poor Law Commissioners.
P. R.	Parliamentary Reports.
P. R. C. P.	Practical Register in Chancery.
P. R. Ch.	Practical Register in Common Pleas.
P. W. or P. Wms. . .	Peere Williams's Reports, English Chancery.
P. & D.	Perry & Davison's Reports, English Queen's Bench.
P. & K.	Perry & Knapp's Election Cases.
Pa.	Pennsylvania. Pennsylvania Reports, Supreme Court.
Pa. L. G. or Pa. Leg. Gaz.	Pennsylvania Legal Gazette Reports, Pennsylvania Courts.
Pa. L. J. or Pa. Law Jour.	Pennsylvania Law Journal Reports, Pennsylvania Courts.
Page Div.	Page on Divorce.
Paige or Paige Ch. . .	Paige's Reports, New York Chancery.
Paine	Paine's Reports, United States Circuit Court.
Pal. or Palm. . . .	Palmer's Reports, English Courts.
Pal. Ag. or Paley Ag. .	Paley on Agency.
Papy	Papy's Reports, Florida Supreme Court; Florida Reports, vols. 5–8.
Park.	Parker's Reports, English Exchequer.
Park. Cr. or Park. (N. Y.) Cr.	Parker's Criminal Reports, New York Courts.
Park Ins.	Park on Insurance.
Pars. or Pars. Eq. Cas. or Pars. Sel. Cas. .	Parson's Select Cases in Equity, Pennsylvania Common Pleas.
Pars. Bills & N. . . .	Parsons on Bills and Notes.
Pars. Cont.	Parsons on Contracts.
Pars. Partn.	Parsons on Partnership.
Pars. Wills.	Parsons on Wills.
Pas. or Pas. T. . . .	Easter Term.
Pasch.	Paschal's Reports, Texas Supreme Court; Texas Reports, vols. 28–31.
Pat. App. Cas. or Pat. H. L. Sc.	Paton's Reports, English House of Lords, Appeals from Scotland; Craigie, Stewart, & Paton's Reports.
Patton & H.	Patton & Heath's Reports, Virginia Special Court of Appeals.
Peake or Peake N. P. .	Peake's Nisi Prius Cases, English Courts.
Peake Add. Cas. . .	Peake's Additional Cases, English Courts.
Peake Ev.	Peake on Evidence.
Pearce or Pearce Cr. Cas.	Pearce's Crown Cases, English Courts; Dearsly's Crown Cases Reserved; Denison's Crown Cases Reserved, vol. 2.
Peck (Ill.)	Peck's Reports, Illinois Supreme Court; Illinois Reports, vols. 11–38.
Peck (Tenn.)	Peck's Reports, Tennessee Supreme Court.
Peckw. El. Cas. . . .	Peckwell's Election Cases.
Peere Wms. or Peere Williams	Peere Williams' Reports, English Chancery.
Pen. or Penn. (N. J.) .	Pennington's Reports, New Jersey Supreme Court; New Jersey Law Reports, vols. 2, 3.
Penn.	Pennsylvania. Pennsylvania Reports, Supreme Court.
Penn. Law Jour. . .	Pennsylvania Law Journal Reports, Pennsylvania Courts.
Penn. St.	Pennsylvania State Reports, Pennsylvania Supreme Court.
Penr. & W.	Penrose & Watts' Reports, Pennsylvania Supreme Court; Pennsylvania Reports, vols. 2, 3.
Perk. or Perk. Prof. Bk.	Perkins' Profitable Book.
Perk. Conv.	Perkins on Conveyances.
Perry & D.	Perry & Davison's Reports, English Queen's Bench.
Perry & K.	Perry & Knapp's Election Cases.
Pet.	Peters' Reports, United States Supreme Court.

Pet. Adm.	Peters' Admiralty Reports, United States District Court.
Pet. C. C.	Peters' Circuit Court Reports, United States Circuit Court.
Petersd. Abr.	Petersdorf's Abridgment.
Ph.	Phillips' Reports, English Chancery.
Ph. El. Cas.	Phillipps' Election Cases.
Ph. St. Tr.	Phillipps' State Trials.
Phila.	Philadelphia Reports, Pennsylvania Courts.
Phill. Ev.	Phillipps on Evidence.
Phillim.	Phillimore's Reports, English Ecclesiastical Courts; Lee's Cases.
Phillim. Dom.	Phillimore on Domicil.
Phillim. Ecc. L.	Phillimore on Ecclesiastical Law.
Phillim. Ev.	Phillimore on Evidence.
Phillim. Int. L.	Phillimore on International Law.
Phillim. Rom. L.	Phillimore on Roman Law.
Phillipps El. Cas.	Phillipps' Election Cases.
Phillipps Ev.	Phillipps on Evidence.
Phillipps St. Tr.	Phillipps' State Trials.
Phillips	Phillips' Reports, English Chancery.
Phillips (N. C.) Eq.	Phillips' Equity Reports, North Carolina Supreme Court.
Phillips (N. C.) L.	Phillips' Law Reports, North Carolina Supreme Court.
Pick.	Pickering's Reports, Massachusetts Supreme Court; Massachusetts Reports, vols. 18–41.
Pierce Railr. L.	Pierce on Railroad Law.
Pig.	Pigott on Recoveries.
Pig. & R.	Pigott & Rodwell's Election Cases.
Pike	Pike's Reports, Arkansas Supreme Court; Arkansas Reports, vols. 1–5.
Pinn.	Pinney's Reports, Wisconsin Supreme Court.
Pitm.	Pitman on Snretyship.
Pittsb. Rep.	Pittsburgh Legal Journal Reports, Pennsylvania Courts.
Pl. or Pla.	Placita.
Pl. or Plowd.	Plowden's Commentaries or Reports, English Courts.
Pl. U.	Plowden on Usury.
Platt Cov.	Platt on Covenants.
Platt Leas.	Platt on Leases.
Pol.	Pollexfen's Reports, English Courts.
Poph.	Popham's Reports, English Courts.
Port. or Port. (Ala.)	Porter's Reports, Alabama Supreme Court.
Port. (Ind.)	Porter's Reports, Indiana Supreme Court; Indiana Reports, vols. 3–7.
Post (Mich.)	Post's Reports, Michigan Supreme Court; Michigan Reports, vols. 23–34.
Post. (Mo.)	Post's Reports, Missouri Supreme Court; Missouri Reports, vols. 42–63.
Postleth. Dict.	Postlethwaite's Dictionary of Trade.
Poth. Obl.	Pothier on Obligations.
Poth. Sale	Pothier on Contract of Sale.
Pow. Conv.	Powell on Conveyances.
Pow. Dev.	Powell on Devises.
Pow. Mort.	Powell on Mortgages.
Pow. Prec.	Powell's Precedents in Conveyancing.
Pow. R. & D.	Power, Rodwell, & Dew's Election Cases.
Poynt. M. & D.	Poynter on Marriage and Divorce.
Pr Ch.	Precedents in Chancery, English Chancery; Finch's Precedents.
Pr. Co.	Prerogative Court.
Pr. Dec.	Sneed's Printed Decisions, Kentucky Court of Appeals; Sneed's Decisions.
Pr. Falc.	President Falconer's Reports, Scotch Court of Session.
Pr. Reg. or Pr. Reg. C. P.	Practical Register in Common Pleas.
Pr. Reg. Ch.	Practical Register in Chancery.
Pr. St.	Private Statute.
Pres. Abs.	Preston on Abstracts.
Pres. Conv.	Preston on Conveyancing.
Pres. Est.	Preston on Estates.
Pres. Merg.	Preston on Merger.
Pres Shep. T.	Preston's Sheppard's Touchstone.
Price	Price's Reports, English Exchequer.
Prid. Prec.	Prideaux's Precedents in Conveyancing.
Prid. & C.	Prideaux & Cole's Reports, English Courts; New Sessions Cases, vol. 4.

Prob. & Mat. Cas.	Probate and Matrimonial Cases.
Puf.	Puffendorf's Law of Nations.
Pult. de Pace	Pulton de Pace Regis.
Purd. Dig.	Purdon's Digest, Pennsylvania Reports.
Pyke	Pyke's Reports, Lower Canada King's Bench.
Q.	Quorum.
Q. B.	Queen's Bench. Queen's Bench Reports. Adolphus & Ellis' Reports, New Series.
Q. C.	Queen's Counsel.
Q. S.	Quarter Sessions.
Q. t.	Qui tam.
Q. war.	Quo Warranto.
Quincy	Quincy's Reports, Massachusetts Supreme Court.
Quinti Quinto	Year Book 5 Hen. V.
R.	King Richard; thus 1 R. I. signifies the first year of the reign of King Richard I.
R. I.	Rhode Island. Rhode Island Reports, Supreme Court.
R. L.	Roman Law. Revised Laws.
R. M. Charlt.	R. M. Charlton's Reports, Georgia Superior Court.
R. S.	Revised Statutes.
R. S. L.	Reading on Statute Law.
R. t. F.	Reports tempore Finch, English Chancery; Cases tempore Finch.
R. t. Hardw.	Reports tempore Hardwicke, English King's Bench; Cases tempore Hardwicke.
R. t. Holt	Reports tempore Holt, English King's Bench; Holt's Reports.
R. & M.	Ryan & Moody's Nisi Prius Cases, English Courts.
R. & M. C. C.	Ryan & Moody's Crown Cases Reserved, English Courts.
R. & R. C. C.	Russell & Ryan's Crown Cases Reserved, English Courts.
Railw. Cas.	Railway Cases.
Railw. & Can. Cas.	Railway and Canal Cases.
Ram F.	Ram on Facts.
Ram Judg.	Ram on Legal Judgment.
Rand Perp.	Rand on Perpetuities.
Rand. (La.)	Randolph's Reports, Louisiana Supreme Court; Louisiana Reports, vols. 7–11.
Rand. (Va.)	Randolph's Reports, Virginia Court of Appeals.
Rast. Ent.	Rastell's Entries.
Rawle	Rawle's Reports, Pennsylvania Supreme Court.
Rawle Cov. Tit.	Rawle on Covenants for Title.
Rawle, P. & W.	Rawle, Penrose, & Watts' Reports, Pennsylvania Supreme Court; Pennsylvania State Reports, vol. 1.
Ray Med. Jur. Insan.	Ray on Medical Jurisprudence of Insanity.
Raym. Ent.	Raymond's Book of Entries.
Raym. Ld.	Lord Raymond's Reports, English King's Bench and Common Pleas.
Raym. T.	Raymond's Reports, English Courts.
Rayn.	Rayner's Tithe Cases.
Redf. (N. Y.) Surr.	Redfield's Reports, New York Surrogates Court.
Redf. Railw.	Redfield on Railways.
Reding.	Redington's Reports, Maine Supreme Court; Maine Reports, vols. 31–35.
Reeve Dom. Rel.	Reeve on Domestic Relations.
Reeves Hist. Eng. Law	Reeves' History of English Law.
Reeves Ship.	Reeves on Shipping.
Reg. Brev.	Registrum Brevium.
Reg. Cas.	Registration Cases.
Reg. Jud.	Registrum Judiciale.
Reg. Orig.	Registrum Originale.
Rep.	Reports. Coke's Reports.
Rep. Ca. Pr.	Reports of Cases of Practice, English Common Pleas; Cooke's Reports.
Rep. Ch.	Reports in Chancery, English Chancery.
Rep. Eq.	Reports in Equity; Gilbert's Cases in Equity.
Rep. Q. A.	Reports tempore Queen Anne; Modern Reports, vol. 11.
Rep. t. Finch.	Reports tempore Finch, English Chancery; Cases tempore Finch.
Rep. t. Hardw.	Reports tempore Hardwicke, English King's Bench; Cases tempore Hardwicke.

Rep. t. Holt	Reports tempore Holt, English King's Bench; Holt's Reports.
Reynolds	Reynolds' Reports, Mississippi High Court of Errors & Appeals; Mississippi Reports, vols. 40–42.
Rice or Rice (S. C.)	Rice's Law Reports, South Carolina Court of Appeals, and Court of Errors.
Rice Ch. or Rice (S. C.) Ch.	Rice's Chancery Reports, South Carolina Court of Appeals, and Court of Errors.
Rich. or Rich. (S. C.)	Richardson's Law Reports, South Carolina Court of Appeals.
Rich. Eq. or Rich. (S. C.) Eq.	Richardson's Equity Reports, South Carolina Court of Appeals.
Rich. Pr.	Richardson's Practice in King's Bench.
Rich. Pr. Com. Pl.	Richardson's Practice in Common Pleas.
Rich. & W.	Richardson & Woodbury's Reports, New Hampshire Supreme Court; New Hampshire Reports, vol. 2.
Ridgw. or Ridgw. Cas. t. Hardw.	Ridgeway's Reports, English Chancery and King's Bench.
Ridgw. Ap. or Ridgw. Parl. Cas.	Ridgeway's Appeals from Ireland, English House of Lords.
Ridgw. L. & S.	Ridgeway, Lapp, & Schoales' Reports, Irish King's Bench.
Ridgw. St. Tr.	Ridgeway's State Trials.
Riley or Riley (S. C.)	Riley's Law Reports, South Carolina Court of Appeals.
Riley Ch. or Riley (S. C.) Ch.	Riley's Chancery Reports, South Carolina Court of Appeals.
Rob. Chr. Adm.	C. Robinson's Admiralty Reports, English Admiralty.
Rob. (Cal.)	Robinson's Reports, California Supreme Court; California Reports, vol. 38.
Rob. Dig.	Robertson's Lower Canada Digest.
Rob. Ecc.	Robertson's Ecclesiastical Reports, English Ecclesiastical Courts.
Rob. Ent.	Robinson's Entries.
Rob. (La.)	Robinson's Reports, Louisiana Supreme Court; Louisiana Annual Reports, vols. 1–4.
Rob. (Va.)	Robinson's Reports, Virginia General Court.
Rob. W. Adm.	W. Robertson's Admiralty Reports, English Admiralty.
Robards	Robards' Reports, Missouri Supreme Court; Missouri Reports, vols. 12, 13.
Robards & J.	Robards & Jackson's Reports, Texas Supreme Court; Texas Reports, vols. 26, 27.
Robb Pat. Cas.	Robb's Patent Cases.
Robertson Ap.	Robertson's Reports, English House of Lords, Appeals from Scotland.
Robinson Ap.	Robinson's Reports, English House of Lords, Appeals from Scotland.
Robs. Bankr.	Robson on Bankruptcy.
Robt. or Robt. (N. Y.)	Robertson's Reports, New York City Superior Court.
Rog. Ecc. L.	Rogers on Ecclesiastical Law.
Rog. Rec.	Roger's Recorder, New York Courts; City Hall Recorder.
Rol. or Rolle	Rolle's Reports, English King's Bench.
Rol. Abr.	Rolle's Abridgment.
Rom. No. Cas.	Romilly's Notes of Cases, English Chancery.
Root	Root's Reports, Connecticut Supreme Court of Errors.
Roper H. & W.	Roper on Husband and Wife.
Rop. Leg.	Roper on Legacies.
Rosc. Cr. Ev.	Roscoe on Criminal Evidence.
Rosc. Ev. N. P.	Roscoe on Evidence at Nisi Prius.
Rosc Pl.	Roscoe on Pleading.
Rosc. R. Ac.	Roscoe on Real Actions.
Rose	Rose's Reports, English Bankruptcy.
Ross Conv.	Ross' Lectures on Conveyancing.
Ross Lead. Cas.	Ross' Leading Cases in Commercial Law.
Rowe	Rowe's Parliamentary and Military Cases.
Rub.	Rubric.
Ruffh. St.	Ruffhead's Statutes at Large.
Runnell	Runnell's Reports, Iowa Supreme Court; Iowa Reports, vols. 38, 39.
Running. Eject.	Runnington on Ejectment.
Running. Stat.	Runnington on Statutes.
Russ.	Russell's Reports, English Chancery.
Russ. Cr. & M.	Russell on Crimes and Misdemeanors.
Russ. Fact.	Russell on Factors.
Russ. & M.	Russell & Mylne's Reports, English Chancery.

Russ. & R.	Russell & Ryan's Crown Cases Reserved, English Courts.
Ruth. Inst.	Rutherforth's Institutes.
Ry. F. or Rym. Fœd.	Rymer's Fœdera.
Ry. & M.	Ryan & Moody's Nisi Prius Cases, English Courts.
Ry. & M. C. C.	Ryan & Moody's Crown Cases Reserved, English Courts.
S.	Section. Shaw & Dunlop's Reports, First Series, Scotch Court of Session.
S. B.	Upper Bench.
S. C.	Senatus-Consulte. Supreme Court. Same Case. South Carolina. South Carolina Reports, Court of Appeals and Court of Errors.
S. C. C.	Select Chancery Cases, English Chancery; Cases in Chancery.
S. Just.	Shaw's Justiciary Cases, Scotch Justiciary Court.
S. L. C. A.	Stuart's Lower Canada Appeal Cases.
S. P.	Same Point. Same Principle.
S. Teinds	Shaw's Teinds Cases, Scotch Courts.
S. V. A. R.	Stuart's Vice-Admiralty Reports, Lower Canada.
S. & B.	Smith & Batty's Reports, Irish King's Bench.
S. & D.	Shaw & Dunlop's Reports, First Series, Scotch Court of Session.
S. & L.	Schoales & Lefroy's Reports, Irish Chancery.
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S. & R.	Sergeant & Rawle's Reports, Pennsylvania Supreme Court.
S. & S.	Simons & Stuart's Reports, English Chancery.
S. & Sc.	Sausse & Scully's Reports, Irish Chancery.
S. & Sm.	Searle & Smith's Reports, Eoglish Probate and Divorce Cases.
S. & T.	Swabey & Tristram's Reports, English Probate and Divorce Cases.
Salk.	Salkeld's Reports, English Courts.
Sand. Us.	Sander's on Uses and Trusts.
Sandf.	Sandford's Reports, New York City Superior Court.
Sandf. Ch.	Sandford's Reports, New York Chancery.
Sau. & Sc.	Sausse & Scully's Reports, Irish Chancery.
Saund.	Saunders' Reports, English King's Bench.
Saund. Neg.	Saunders on Negligence.
Saund. Pl.	Saunders on Civil Pleading.
Saund. & C.	Saunders & Cole's Reports, English Bail Court.
Sav.	Savile's Reports, English Common Pleas.
Sawy.	Sawyer's Reports, United States Circuit Court.
Sax. or Saxt. Ch.	Saxton's Chancery Reports, New Jersey Chancery; New Jersey Equity Reports, vol. I.
Say.	Sayer's Reports, English King's Bench.
Sc.	Scilicet.
Sc. Jur.	Scottish Jurist, Court of Session.
Sc. L. R.	Scottish Law Reporter.
Sc. Sess. Cas.	Scotch Court of Session Cases.
Scac.	Scaccaria; the Exchequer.
Scam.	Scammon's Reports, Illinois Supreme Court.
Sch. & L.	Schoale & Lefroy's Reports, Irish Chancery.
Sco. or Scott	Scott's Reports, English Courts.
Sco. N. R.	Scott's New Reports, English Courts.
Scrib. Dower	Scribner on Dower.
Scriv. Copyhold	Scriven on Copyholds.
Sedgw. Dam.	Sedgwick on the Measure of Damages.
Sedgw. Stat. & Const. L.	Sedgwick on Statutory and Constitutional Law.
Sel. Cas. Ch. or Sel. Ch. Cas.	Select Chancery Cases, English Chancery; Cases in Chancery.
Sel. Cas. Ev.	Select Cases in Evidence.
Sel. Cas. N. F.	Select Cases, Newfoundland Courts.
Seld. or Seld. (N. Y.)	Selden's Reports, New York Court of Appeals; New York Reports, vols. 5–10.
Seld. Notes	Selden's Notes of Cases, New York Court of Appeals.
Selw. N. P.	Selwyn's Nisi Prius.
Semb.	*Semble;* it seems.
Serg. & R.	Sergeant & Rawle's Reports, Pennsylvania Supreme Conrt.
Sess. Cas.	Session Cases, English King's Bench.
Sess. Cas. Scotch	Session Cases, Scotch Court of Session.
Sett. Cas.	Settlement Cases.
Sh.	Shaw's Reports, First Series, Scotch Court of Session.

Sh. Ap.	Shaw's Appeal Cases, English House of Lords, Appeals from Scotland.
Sh. Dig.	Shaw's Digest of Decisions, Scotch Courts.
Sh. & Dunlop	Shaw & Dunlop's Reports, Scotch Court of Session; Scotch Session Cases, First Series.
Sh. & M'L.	Shaw & Maclean's Appeal Cases, English House of Lords.
Shand Pr.	Shand's Practice, Scotch Court of Session.
Shaw J.	Shaw's Justiciary Cases, Scotch Justiciary Court.
Shaw (Vt.)	Shaw's Reports, Vermont Supreme Court; Vermont Reports, vols. 10, 11, 30–35.
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Shelf. J. S. Comp.	Shelford on Joint Stock Companies.
Shelf. Lun.	Shelford on Lunacy.
Shelf. M. & D.	Shelford on Marriage and Divorce.
Shelf. Mort.	Shelford on Mortmain.
Shelf. Railw.	Shelford on Railways.
Shelf. T.	Shelford on Titles.
Shep. (Ala.)	Shepherd's Reports, Alabama Supreme Court; Alabama Reports, vols. 19–21, 25–41.
Shep. Touch.	Sheppard's Touchstone.
Shepl.	Shepley's Reports, Maine Supreme Court; Maine Reports, vols. 13–18, 21–30.
Shipp	Shipp's Reports, North Carolina Supreme Court; North Carolina Reports, vols. 66, 67.
Shirley	Shirley's Reports, New Hampshire Supreme Court; New Hampshire Reports, vols. 49–55.
Shortt Copy.	Shortt on Copyright.
Show.	Shower's Reports, English King's Bench.
Show. P. C.	Shower's Parliamentary Cases.
Sick.	Sickles' Reports, New York Court of Appeals; New York Reports, vols. 46–66.
Sid.	Siderfin's Reports, English King's Bench.
Sim.	Simons' Reports, English Chancery.
Sim. N. S.	Simons' Reports, New Series, English Chancery.
Sim. & S.	Simons & Stuart's Reports, English Chancery.
Skene Verb. Sig.	Skene de Verborum Significatione.
Skin.	Skinner's Reports, English King's Bench.
Slade	Slade's Reports, Vermont Supreme Court; Vermont Reports, vol. 15.
Sm. Ac.	Smith's Action at Law.
Sm Cont.	Smith on Contracts.
Sm. Eq. Man.	Smith's Manual of Equity.
Sm. Land. & T.	Smith on Landlord and Tenant.
Sm. Law of Prop.	Smith on Law of Real and Personal Property.
Sm. Lead. Cas.	Smith's Leading Cases.
Sm. Mast. & S.	Smith on Master and Servant.
Sm. Merc. Law.	Smith on Mercantile Law.
Sm. & Bat.	Smith & Batty's Reports, Irish King's Bench.
Sm. & G.	Smale & Giffard's Reports, English Chancery.
Sm. & M.	Smedes & Marshall's Reports, Mississippi Superior Court of Chancery.
Smith	Smith's Reports, English King's Bench.
Smith E. D. or E. D. Smith (N. Y.)	E. D. Smith's Reports, New York Common Pleas.
Smith (Ind.)	Smith's Reports, Indiana Supreme Court.
Smith (Me.)	Smith's Reports, Maine Supreme Court; Maine Reports, vols. 61–64.
Smith (N. Y.)	Smith's Reports, New York Court of Appeals; New York Reports, vols. 15–27.
Smith (Pa.)	Smith's Reports, Pennsylvania Supreme Court; Pennsylvania State Reports, vols. 51–80.
Smith (Wis.)	Smith's Reports, Wisconsin Supreme Court; Wisconsin Reports, vols. 1–11.
Smith & B. Railw. Cas.	Smith & Bates' Railway Cases, American Courts.
Smith & Bat.	Smith & Batty's Reports, Irish King's Bench.
Smythe	Smythe's Reports, Irish Common Pleas and Exchequer.
Sneed (Ky.) or Sneed Pr. Dec.	Sneed's Printed Decisions, Kentucky Court of Appeals.
Sneed (Tenn.)	Sneed's Reports, Tennessee Supreme Court.
South.	Southard's Reports, New Jersey Supreme Court; New Jersey Law Reports, vols. 4, 5.

Speara or Speara (S. C.)	Speara' Law Reports, South Carolina Court of Appeals and Court of Errors.
Speara Eq. or Speara (S. C.) Eq.	Speara' Equity Reports, South Carolina Court of Appeals.
Spel. or Spel. Gloss.	Spelman's Glossary.
Spencer	Spencer's Reports, New Jersey Supreme Court; New Jersey Law Reports, vol. 20.
Spinks	Spinks' Reports, English Ecclesiastical and Admiralty Reports.
Spooner	Spooner's Reports, Wisconsin Supreme Court; Wisconsin Reports, vols. 12–15.
Spott.	Spottiswoode's Reports, Scotch Court of Session.
Spott. St.	Spottiswoode's Styles.
Sprague	Sprague's Decisions, United States District Court.
Ss.	Scilicet.
St.	Statute. Statutes. Stair's Institutions of the Law of Scotland.
St. Ecc. Cas.	Stillingfleet's Ecclesiastical Cases.
St. Germain	St. Germain; Doctor and Student.
St. Tr.	State Trials.
Stair	Stair's Reports, Scotch Court of Session.
Stair Inst.	Stair's Institutions of the Law of Scotland.
Stair Pr.	Stair's Principles of the Law of Scotland.
Stanton	Stanton's Reports, Ohio Supreme Court; Ohio Reports, vols. 11–13.
Star Ch. Cas.	Star Chamber Cases.
Stark. Cr. L.	Starkie on Criminal Law.
Stark. Cr. Pl.	Starkie on Criminal Pleadings.
Stark. Ev.	Starkie on Evidence.
Stark. N. P.	Starkie's Nisi Prius Reports, English Courts.
Stark. Sland.	Starkie on Slander and Libel.
Stat.	Statute. Statutes.
Stat. at L.	Statutes at Large.
Stat. Glo.	Statute of Gloucester.
Stat. Marlb.	Statute of Marlbridge.
Stat. Mer.	Statute of Merton.
Stat. Westm.	Statute of Westminster.
Stat. Winch.	Statute of Winchester.
State Tr.	State Trials.
Stath. Abr.	Statham's Abridgment.
Staunf. P. C. & Pr.	Staunforde's Pleas of the Crown and Prerogative.
Steph. Com.	Stephen's Commentaries on English Law.
Steph. Cr. L.	Stephen on Criminal Law.
Steph. Pl.	Stephen on Pleading.
Stew. Adm. or Stew. (N. S.)	Stewart's Admiralty Reports, Nova Scotia Courts.
Stew. (Ala.)	Stewart's Reports, Alabama Supreme Court.
Stew. & P. or Stew. & P. (Ala.)	Stewart & Porter's Reports, Alabama Supreme Court.
Stiles	Stiles' Reports, Iowa Supreme Court; Iowa Reports, vols. 22–37.
Stillingfl. Ec.	Stillingfleet's Ecclesiastical Cases.
Stockett	Stockett's Reports, Maryland Court of Appeals; Maryland Reports, vols. 27–45.
Stockt.	Stockton's Reports, New Jersey Court of Chancery and Court of Errors and Appeals; New Jersey Equity Reports, vols. 9, 11.
Story	Story's Reports, United States Circuit Court.
Story Ag.	Story on Agency.
Story Bailm.	Story on Bailment.
Story Bills	Story on Bills of Exchange.
Story Confl. L.	Story on Conflict of Laws.
Story Const.	Story on the Constitution.
Story Eq. Jur.	Story on Equity Jurisprudence.
Story Eq. Pl.	Story on Equity Pleading.
Story Part.	Story on Partnership.
Story Prom. N.	Story on Promissory Notes.
Stra. or Strange	Strange's Reports, English Courts.
Stringf.	Stringfellow's Reports, Missouri Supreme Court; Missouri Reports, vols. 9–11.
Strobh.	Strobhart's Law Reports, South Carolina Court of Appeals and Court of Errors.
Strobh. Eq.	Strobhart's Equity Reports, South Carolina Court of Appeals and Court of Errors.

Stuart L. C.	Stuart's Reports, Lower Canada King's Bench.
Stuart, M. & P.	Stuart, Milne, & Peddie's Reports, Scotch Court of Session.
Style	Style's Reports, English King's Bench.
Sugd. Pow.	Sugden on Powers.
Sugd. Pr.	Sugden on Law of Property.
Sugd. Pr. St.	Sugden on Property Statutes.
Sugd. Vend. & P.	Sugden on Vendors and Purchasers.
Sumn.	Sumner's Reports, United States Circuit Court.
Swab. Adm.	Swabey's Reports, English Admiralty Courts.
Swab. & T.	Swabey & Tristram's Reports, English Probate and Divorce Courts.
Swan	Swan's Reports, Tennessee Supreme Court.
Swanst.	Swanston's Reports, English Chancery.
Sweeny	Sweeny's Reports, New York City Superior Court.
Sweet Pr. Conv.	Sweet's Precedents in Conveyancing.
Sweet Wills	Sweet on Wills.
Swinb. Spous.	Swinburne on Spousals.
Swinb. Wills	Swinburne on Wills.
Swint.	Swinton's Reports, Scotch Justiciary Court.
Syme	Syme's Reports, Scotch Justiciary Court.
T.	Trinity Term. *Tempore;* in the time of.
T. B. Mour.	T. B. Monroe's Reports, Kentucky Court of Appeals.
T. Jones	T. Jones' Reports, English King's Bench and Common Pleas.
T. L.	Termes de la Ley.
T. R.	Teste Rege. Term Reports, English King's Bench; Durnford & East's Reports.
T. R. E.	*Tempore Regis Edwardii;* in the time of King Edward.
T. Raym.	T. Raymond's Reports, English Courts.
T. T.	Trinity Term.
T. U. P. Charlt.	T. U. P. Charlton's Reports, Georgia Supreme Court.
T. & G.	Tyrwhitt & Granger's Reports, English Exchequer.
T. & M.	Temple & Mew's Reports, English Criminal Appeal Cases.
T. & R.	Turner & Russell's Reports, English Chancery.
Talbot	Cases tempore Talbot, English Chancery.
Taml.	Tamlyn's Reports, English Chancery.
Taney	Taney's Decisions, United States Circuit Court.
Tanner	Tanner's Reports, Indiana Supreme Court; Indiana Reports, vols. 8–14.
Tapp.	Tappan's Reports, Ohio Common Pleas.
Taunt.	Taunton's Reports, English Common Pleas.
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Tayl. Ev.	Taylor on Evidence.
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Tayl. (N. C.)	Taylor's Reports, North Carolina Courts.
Tayl. (U. C.)	Taylor's Reports, Upper Canada King's Bench.
Tayl. Pois.	Taylor on Poisons.
Temp. & M.	Temple & Mew's Reports, English Criminal Appeal Cases.
Tenn.	Tennessee. Tennessee Reports, Supreme Court.
Term	Term Reports, English King's Bench.
Term (N. C.)	Term Reports, North Carolina Supreme Court; Taylor's Reports.
Terrell & W.	Terrell & Walke's Reports, Texas Supreme Court; Texas Reports, vols. 38–44.
Tex.	Texas. Texas Reports, Supreme Court.
Th.	Thomson on Bills and Notes.
Th. Br.	Thesaurus Brevium.
Th. Dig.	Theloall's Digest.
Th. Ent.	Thompson's Entries.
Thach. Cr. Cas.	Thacher's Criminal Cases, Boston Municipal Court.
Thomp. (Cal.)	Thompson's Reports, California Supreme Court; California Reports, vols. 39, 40.
Thomp. & C.	Thompson & Cook's Reports, New York Supreme Court; New York Supreme Court Reports.
Thoms. (N. C.)	Thomson's Reports, Nova Scotia Supreme Court.
Tidd	Tidd on Practice in King's Bench.
Tiff.	Tiffany's Reports, New York Court of Appeals; New York Reports, vols. 28–39.
Tiff. & B. Trusts	Tiffany & Bullard on Trusts.

Tinw.	Tinwald's Reports, Scotch Court of Session.
Tobey	Tobey's Reports, Rhode Island Supreme Court; Rhode Island Reports, vols. 9, 10.
Toll. Ex.	Toller on Executors.
Toml. Dict.	Tomlin's Jacob's Law Dictionary.
Toml. Suppl. Brown	Tomlin's Supplement to Brown's Parliament Cases.
Toth.	Tothill's Reports, English Chancery.
Towns. St. Tr.	Townsend's Modern State Trials.
Tr. Eq.	Treatise of Equity.
Train & H. Prec.	Train & Heard's Precedents of Indictments.
Treadw.	Treadway's Reports, South Carolina Constitutional Court.
Trem.	Tremaine's Pleas of the Crown.
Trin. or Trin. T.	Trinity Term.
Tuck. (N. Y.) Surr.	Tucker's Reports, New York Surrogate's Court.
Tuck. Sel. Cas. (N. F.)	Tucker's Select Cases, Newfoundland Courts.
Tud. Cas. M. L.	Tudor's Leading Cases on Mercantile Law.
Tud. Cas. R. P.	Tudor's Leading Cases on Real Property.
Tud. Char. Trusts	Tudor on Charitable Trusts.
Turn. Ch. Pr.	Turner on Chancery Practice.
Turn. & R.	Turner & Russell's Reports, English Chancery.
Tuttle	Tuttle's Reports, California Supreme Court; California Reports, vols. 23–32, 41–51.
Twiss	Twiss on Law of Nations.
Tyler	Tyler's Reports, Vermont Supreme Court.
Tyng	Tyng's Reports, Massachusetts Supreme Court; Massachusetts Reports, vols. 2–17.
Tyrw.	Tyrwhitt's Reports, English Exchequer.
Tyrw. & G.	Tyrwhitt & Granger's Reports, English Exchequer.
U. B.	Upper Bench.
U. B. P.	Upper Bench Precedents.
U. C. C. P.	Upper Canada Common Pleas Reports.
U. C. Cham.	Upper Canada Chambers Reports.
U. C. Chan.	Upper Canada Chancery Reports.
U. C. E. & A.	Upper Canada Error and Appeal Reports.
U. C. L. J.	Upper Canada Law Journal.
U. C. o. s.	Upper Canada Queen's Bench and Practice Reports, Old Series.
U. C. Pr.	Upper Canada Practice Reports.
U. C. Q. B.	Upper Canada Queen's Bench Reports.
U. S. Dig.	United States Digest.
Ulp.	Ulpian's Fragments.
Upton Mar. W. & P.	Upton on Maritime Warfare and Prize.
Upton Tradem.	Upton on Trademarks.
V. or vs.	*Versus;* against.
V. C.	Vice-Chancellor.
V. & B.	Vesey & Beames' Reports, English Chancery.
V. & S.	Vernon & Scriven's Reports, Irish King's Bench and Irish House of Lords.
Va. Cas.	Virginia Cases, General Court.
Van Ness	Van Ness' Reports, United States District Court.
Van Santv. Eq. Pr.	Van Santvoord on Equity Practice.
Vattel	Vattel on Law of Nations.
Vaugh.	Vaughan's Reports, English Common Pleas.
Vaux	Vaux's Decisions, Philadelphia Recorder.
Veaz.	Veazey's Reports, Vermont Supreme Court; Vermont Reports, vols. 36–46.
Vent.	Ventris' Reports, English Courts.
Vern.	Vernon's Reports, English Chancery.
Vern. & S.	Vernon & Scriven's Reports, Irish King's Bench and Irish House of Lords.
Ves.	Vesey's Reports, English Chancery; Vesey Senior's Reports.
Ves. Jr.	Vesey Junior's Reports, English Chancery.
Ves. & B.	Vesey & Beames' Reports, English Chancery.
Vet. Entr.	Old Book of Entries.
Vet. N. B.	Old Natura Brevium.
Vid.	Vidian's Entries.
Vin. Abr.	Viner's Abridgment.
Vin. Supp.	Viner's Supplement.
Virg.	Virgin's Reports, Maine Supreme Court; Maine Reports, vols. 52–60.

Vr. or Vroom . . .	Vroom's Reports, New Jersey Supreme Court and Court of Errors and Appeals; New Jersey Law Reports, vols. 30–38.
Vt.	Vermont. Vermont Reports, Supreme Court.
W.	King William; thus Arabic 1 W. I. signifies the first year of the reign of King William I. Statute of Westminster.
W. Bl.	William Blackstone's Reports, English King's Bench and Common Pleas.
W. H. & G. . . .	Welsby, Hurlstone, & Gordon's Reports, English Exchequer; Exchequer Reports, vols. 1–9.
W. Jones	W. Jones' Reports, English King's Bench and Common Pleas.
W. Kel.	W. Kelynge's Reports, English King's Bench and Chancery.
W. N.	Weekly Notes, London.
W. R.	West's Reports, tempore Hardwicke, English Chancery. Weekly Reporter.
W. Va.	West Virginia. West Virginia Reports, Supreme Court.
W. W. & D. . . .	Willmore, Wollaston, & Davies' Reports, English Queen's Bench.
W. W. & H. . . .	Willmore, Wollaston, & Hodges' Reports, English Queen's Bench.
Wadd. Dig. . . .	Waddilove's Digest of Cases in English Ecclesiastical Courts.
Walf. Railw. . . .	Walford on Railways.
Walk. (Mich.) . .	Walker's Reports, Michigan Chancery.
Walk. (Miss.) . . .	Walker's Reports, Mississippi High Court of Errors and Appeals; Mississippi Reports, vol. 1.
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Wall. or Wall. (U. S.) .	Wallace's Reports, United States Supreme Court.
Wall. C. C. . . .	Wallace's Reports, United States Circuit Court.
Wall. Jr.	Wallace Junior's Reports, United States Circuit Court.
Wall. (Pa.) . . .	Wallace's Legal Intelligencer Reports, Pennsylvania Courts; Philadelphia Reports.
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Ward Leg.	Ward on Legacies.
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Warden & Sm. . . .	Warden & Smith's Reports, Ohio Supreme Court; Ohio State Reports, vol. 3.
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Warren L. Stud. . .	Warren's Law Studies.
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Wash. T.	Washington Territory Reports, Territorial Court.
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Washb.	Washburn's Reports, Vermont Supreme Court; Vermont Reports, vols. 16–23.
Washb. Easem. . . .	Washburn on Easements.
Washb. Real Prop. .	Washburn on Real Property.
Watk. Conv.	Watkins on Conveyancing.
Wats. Arb.	Watson on Arbitration.
Watts	Watts' Reports, Pennsylvania Supreme Court.
Watts & S.	Watts & Sergeant's Reports, Pennsylvania Supreme Court.
Webb.	Webb's Reports, Kansas Supreme Court; Kansas Reports, vols. 6–17.
Webb & D.	Webb & Duval's Reports, Texas Supreme Court; Texas Reports, vols. 1–3.
Welsby, H. & G. . .	Welsby, Hurlstone, & Gordon's Reports, English Exchequer; Exchequer Reports, vols. 1–9.
Welsh	Welsh's Registry Cases.
Wend.	Wendell's Reports, New York Supreme Court and Court of Errors.
Went. Off. Ex. . . .	Wentworth's Office of Executor.
Went. Pl.	Wentworth's Pleadings.
West or West t. H. .	West's Reports tempore Hardwicke, English Chancery.
West H. L.	West's Reports, English House of Lords.
West L. Jour. . . .	West's Law Journal.
West Va.	West Virginia. West Virginia Reports, Supreme Court.
Weston	Weston's Reports, Vermont Supreme Court; Vermont Reports, vols. 12–14.
Whart.	Wharton's Reports, Pennsylvania Supreme Court.
Whart. Cr. Law. . .	Wharton on American Criminal Law.
Whart. Lex.	Wharton's Law Lexicon.

Whart. Prec. Indict.	Wharton's Precedents of Indictments.
Whart. St. Tr.	Wharton's State Trials of the United States.
Whart. & S. Med. Jur.	Wharton & Stille on Medical Jurisprudence.
Wheat.	Wheaton's Reports, United States Supreme Court.
Wheat. Int. L.	Wheaton on International Law.
Wheeler Cr. Cas.	Wheeler's Criminal Cases, New York Courts.
Wheelock	Wheelock's Reports, Texas Supreme Court; Texas Reports, vols. 32–37.
Wh. & T. Lead. Cas. or White & T.	White & Tudor's Leading Cases in Equity.
Whitt.	Whittlesey's Reports, Missouri Supreme Court; Missouri Reports, vols. 32–41.
Wig. Disc.	Wigram on Discovery.
Wig. Wills	Wigram on Wills.
Wight El. Cas.	Wight's Election Cases.
Wightw.	Wightwick's Reports, English Exchequer.
Wilcox	Wilcox's Reports, Ohio Supreme Court; Ohio Reports, vol. 10.
Willes	Willes' Reports, English Courts.
Williams or Williams P.	Peere Williams' Reports, English Chancery.
Williams Ex.	Williams on Executors.
Williams Just.	Williams' Justice of the Peace.
Williams (Mass.)	Williams' Reports, Massachusetts Supreme Court; Massachusetts Reports, vol. 1.
Williams Pers. Prop.	Williams on Personal Property.
Williams Real Prop.	Williams on Real Property.
Williams S.	Williams' Notes to Saunders' Reports.
Williams (Vt.)	Williams' Reports, Vermont Supreme Court; Vermont Reports, vols. 27–29.
Willis Eq.	Willis on Equity Pleadings.
Willis Trus.	Willis on Trustees.
Willmore, W. & D.	Willmore, Wollaston, & Davison's Reports, English Queen's Bench.
Willmore, W. & H.	Willmore, Wollaston, & Hodges' Reports, English Queen's Bench.
Wills Cir. Ev.	Wills on Circumstantial Evidence.
Wilm. or Wilmot N. O.	Wilmot's Notes of Opinions and Judgments, English King's Bench.
Wilmot	Wilmot on Mortgages.
Wils.	Wilson's Reports, English King's Bench.
Wils. (Cal.)	Wilson's Reports, California Supreme Court; California Reports, vol. 1.
Wils. Ch.	Wilson's Reports, English Chancery.
Wils. Ex.	Wilson's Reports, English Exchequer Equity.
Wils. (Oreg.)	Wilson's Reports, Oregon Supreme Court; Oregon Reports, vols. 1–3.
Wils. & C.	Wilson & Courtenay's Reports, English House of Lords, Appeals from Scotland; Wilson & Shaw's Reports, vols. 6, 7.
Wils. & S.	Wilson & Shaw's Reports, English House of Lords, Appeals from Scotland.
Win. or Winch	Winch's Reports, English Courts.
Win. Ent.	Winch's Entries.
Wing. Max.	Wingate's Maxims.
Wins.	Winston's Reports, North Carolina Supreme Court.
Wis.	Wisconsin. Wisconsin Reports, Supreme Court.
Withrow	Withrow's Reports, Iowa Supreme Court; Iowa Reports, vols. 9–20.
Wm. Rob.	Wm. Robinson's New Admiralty Reports, English Admiralty.
Wms. or Wms. P.	Peere Williams' Reports, English Chancery.
Wms. Ex.	Williams on Executors.
Wms. Just.	Williams' Justice of the Peace.
Wms. Pers. Prop.	Williams on Personal Property.
Wms. Real Prop.	Williams on Real Property.
Wms. S.	Williams' Notes to Saunders' Reports.
Wolf. & B.	Wolferstan & Bristow's Election Cases.
Wolf. & D.	Wolferstan & Dew's Election Cases.
Wood	Wood's Reports, United States Circuit Court.
Wood Civ. L.	Wood's Institutes of the Civil Law.
Wood Com. L.	Wood's Institutes of the Common Law.
Wood Conv.	Wood on Conveyancing.
Wood H.	Hutton Wood's Decrees in Tithe Cases.

Wood Inst.	Wood's Institutes of English Law.
Woodb. & M.	Woodbury & Minot's Reports, United States Circuit Court.
Wooddes. Jur.	Wooddeson's Elements of Jurisprudence.
Wooddes. Lect.	Wooddeson's Lectures on Laws of England.
Woodf. Land. & T.	Woodfall on Landlord and Tenant.
Woolw.	Woolworth's Reports, United States Circuit Court.
Woolw. (Neb.)	Woolworth's Reports, Nebraska Supreme Court; Nebraska Reports, vol. 1.
Wordsw. J. S. Comp.	Wordsworth on Joint Stock Companies.
Wright Cr. Consp.	Wright on Criminal Conspiracies.
Wright (Ohio)	Wright's Reports, Ohio Supreme Court.
Wright (Pa.)	Wright's Reports, Pennsylvania Supreme Court; Pennsylvania State Reports, vols. 37–50.
Wright Ten.	Wright on Tenures.
Wyatt P. R.	Wyatt's Practical Register; Practical Register in Chancery.
Wythe	Wythe's Reports, Virginia Chancery.
Y. B.	Year Books.
Y. & C.	Younge & Collyer's Reports, English Exchequer Equity.
Y. & C. C. C.	Younge & Collyer's Chancery Cases, English Chancery.
Y. & J.	Younge & Jervis' Reports, English Exchequer.
Yates Sel. Cas.	Yates' Select Cases, New York Supreme Court and Court of Errors.
Yearb.	Yearbooks.
Yeates	Yeates' Reports, Pennsylvania Supreme Court.
Yelv.	Yelverton's Reports, English King's Bench.
Yerg.	Yerger's Reports, Tennessee Supreme Court.
Yool	Yool on Waste, Nuisance, and Trespass.
You.	Younge's Reports, English Exchequer Equity.
You. & Coll.	Younge & Collyer's Reports, Exchequer Equity.
You. & Coll. C. C.	Younge & Collyer's Chancery Cases, English Chancery.
You. & Jer.	Younge & Jervis' Reports, English Exchequer.
Zabr. or Zab. (N. J.)	Zabriskie's Reports, New Jersey Supreme Court, and Court of Errors and Appeals; New Jersey Law Reports, vols. 21–24.

LAW DICTIONARY.

A.

A, or **a**, as the first letter of the alphabet, is often used to distinguish a subdivision of a legal treatise or chapter of a digest, or a page of a book, from a following one, marked B or b.

A. AN. The definite article, a or an, does not invariably mean a single one.

Where directors are empowered, for a certain purpose, to issue *a* note, or accept *a* bill of exchange, to a certain amount, they are to be deemed authorized to give in lieu of the same *several* notes or bills, equal to the sum specified. Thompson *v.* Wesleyan Newspaper Association, 8 *Com. B.* 849; 19 *Law J.* N. S. 114.

A 1. Of the highest qualities. An expression which originated in a practice of underwriters of rating vessels in three classes, A, B, and C; and these again in ranks numbered.

A. AB. From. Used in phrases as:

A mensa et thoro; and **A vinculo matrimonii.** The two kinds of divorces,—one, "from bed and board," which merely authorizes a separate life of the husband and wife, without affecting the legitimacy of children, or authorizing either to contract a second marriage; the other, "from the bond of matrimony," which completely dissolves the marriage contract, leaving the parties free to marry again, unless, as in New York, the party for whose misconduct the divorce is granted is laid under a positive prohibition.

A posteriori; a priori; and a fortiori. Three classes of arguments. A train of reasoning which proceeds from the effect backwards to deduce the cause is called *a posteriori*, "from the later." The converse, an argument which, assuming the cause, demonstrates the result which must flow from it, is termed *a priori*, "from the earlier." Reasoning that because a specified, more surprising fact exists, therefore others which are less improbable may be believed, is *a fortiori* "from the stronger" reasoning.

A quo; a qua. From which. The judge or court from which a cause has been brought by error or appeal, or has otherwise been removed, is termed the judge or court *a quo*, *a quâ*.

A verbis legis non est recedendum. From the words of the law there is no receding. Expresses a familiar rule of statutory construction, viz., that the language of a statute is the primary guide in ascertaining the effect. If it is lucid, and expresses a single meaning, no extrinsic inquiry will be made for the purpose of varying it.

Ab agendo. From acting. A person incapacitated, by mental or physical weakness or any other cause, for business or transactions of any kind, is said to be *ab agendo*.

Ab assuetis non fit injuria. From matters of long standing no injury arises. An expression of the general principle that a person who neglects to insist upon his rights is deemed to have waived or abandoned them by long acquiescence in the existing state of things.

Ab inconvenienti. From inconvenience. This phrase designates arguments which seek to refute a proposition by pointing out disastrous consequences or untenable positions to which it necessarily leads. Thus it is said that, in interpreting the language of a constitution or statute, the courts have nothing to do with the argument *ab inconvenienti*, but can only ascertain and declare the written law.

Ab initio. From the beginning. The law sometimes imputes conse-

quences to an act from the time when it was performed, in view of a quality of such act which was not judicially ascertained till later. Thus an officer who seizes property under a process which he supposes, at the time, to be valid, but which is afterwards adjudged void, may be chargeable as a trespasser *ab initio*.

Ab intestato. From an intestate. Is generally used as the alternative or opposite of *ex testamento;* e.g., *vel ex testamento, vel ab intestato,* — either by will, or from an intestate.

ABACTION. A carrying away by violence.

ABACTOR. One who steals and drives away beasts by herds or droves; as distinguished from one who steals a single animal only.

ABANDON. To relinquish; surrender; disclaim; give up entirely.

Abandonee: one to whom something is abandoned. Abandoner: one who abandons. Abandun, or Abandum (*obs.*): a thing abandoned.

ABANDONMENT. The relinquishment, surrender, disclaimer, of one's rights.

1. An owner of property may, by acts evincing such an intent, divest himself of all right therein, by making an abandonment of it, without making a transfer to a particular person; and the title may remain in abeyance until some other person reduces the subject to possession. Thus it has been held that an owner of a wrecked vessel, although she lies in navigable waters, may abandon her, and thereafter disclaim all responsibility for injuries to another vessel which may collide with the wreck. So one who has made an invention, or produced a literary work, may, by abandonment of it to the public, divest himself of all right to protection under the patent or copyright laws.

2. In insurance, the word has the modified sense of the surrender of the insured property, not to any one who may find and take it, but to the insurers; the election of the insured to claim indemnity under his policy, and give up the remains of the subject of insurance to the underwriters.

3. A relation; a duty or an undertaking is sometimes spoken as of the subject of an abandonment; as the abandonment of a wife by her husband; of a child by its parent; the abandonment of a prosecution or defence by the party by whom it was at one time undertaken. But the surrender of a relation, involving as it does the disclaimer of *duties* more prominently than that of *rights*, is better styled DESERTION.

Where a husband voluntarily leaves his wife, intending to forsake her entirely, and never to return to her, it is an abandonment within the meaning of a statute providing that after abandonment by the husband the wife may carry on business as a *feme sole*. Moore *v.* Stevenson, 27 *Conn.* 14.

Failure by the husband to supply his wife with such necessaries and comforts as are within his reach, and compelling her by cruelty to quit him, are as much an abandonment as actual desertion on his part. Levering *v.* Levering, 16 *Md.* 213; Washburn *v.* Washburn, 9 *Cal.* 475.

ABATEMENT. 1. As respects debts and legacies. When the funds of a decedent estate are not enough to pay in full all the debts and legacies, the legacies are, under many systems of administration, reduced in proportion, and paid *pro rata*. This reduction is termed abatement.

2. Abatement of nuisance is the removal, destruction, of the cause of offence or annoyance. There may be an abatement of a nuisance under judicial proceedings resulting directly in its removal; or, in a proper case, by an act of individuals without other authority than that deduced from the illegality and mischief of the thing abated.

Neither an action for damages nor an injunction can abate a nuisance. An injunction may prevent, and a verdict for damages may punish, but neither of them will abate, a nuisance. Ruff *v.* Phillips, 50 *Ga.* 130.

3. In pleading, any matters of defence to a suit which only suspend the right to sue, or defeat the particular proceeding instituted, are termed defences in abatement, in distinction from those which tend to relieve the defendant wholly from the demand, and are termed pleas in bar. So if the right to prosecute an action at law, or suit in chancery, is suspended by death of plaintiff, transfer of his interest, or other like occurrence, the action or suit is said to be abated.

4. Abatement is used in many legal expressions in its ordinary English sense, and without any peculiar technical meaning; as in speaking of the abatement by a creditor of a portion of his demand; the abatement of duties upon importations; or of taxes.

ABATER, or ABATOR. One who makes actual removal of a nuisance, in virtue of the right to abate it. Also, one who, without right of entry in himself, takes possession of land between the death of the previous owner and before the heir or devisee has entered.

ABBREVIATIONS. Shortened conventional expressions, employed as substitutes for names, phrases, dates, and the like, for the saving of space, of time in transcribing, &c.

ABBROACHMENT. Buying merchandise while it is on the way to market, with intent to resell it. Also spelled Abbrochement; Abroachment.

See FORESTALLING.

ABDICATION. The surrender or relinquishment of sovereign power; the abandonment of the throne.

ABDUCTION. The wrongful, usually the violent, carrying away a human being.

The act of taking and carrying away a child, ward, wife, &c., by fraud, persuasion, or open violence. Carpenter *v.* People, 8 *Barb.* 603.

To constitute a violation of the statute of New York against abduction of women for the purpose of prostitution (2 Rev. Stat. 664, § 26), there must be some positive act to get the female away from the person legally having charge of her. A mere attempt to seduce is not enough. People *v.* Parshall, 6 *Park Cr.* 129.

A woman must be taken away, for the purpose of leading her to indiscriminate meretricious commerce with men, to make a prostitute of her. Such a statute does not apply to a case of a man's enticing such woman to leave her place of abode, for the sole purpose of illicit sexual intercourse with himself. Carpenter *v.* People, 8 *Barb.* 603. And so in Mass., Commonwealth *v.* Cook, 12 *Met.* 93; and in Iowa, State *v.* Ruhl, 8 *Iowa*, 447.

ABEARANCE. Behavior; conduct. A recognizance to be of good abearance means to be of good behavior.

ABET. To aid, promote, facilitate, the commission of an act. Usually spoken of offences.

Abettor: one who abets. Abetment: the act of abetting.

See ACCESSORY; AID; PRINCIPAL.

It is said that an abettor is one who is present at and aids in the commission of an offence; which distinguishes him from an accessory, who is one not present at the very act, but concerned in the crime before or after its commission. *Mozley & W.* But see U. S. *v.* Gooding, 12 *Wheat.* 460.

ABEYANCE. Suspense; the condition of being undetermined. While there is no person in existence in whom an estate (or a dignity or ecclesiastical preferment) can be deemed vested, the estate is said to be in abeyance; for the law considers it as still potentially existing, and ready to vest whenever a proper owner appears; and indeed never allows an estate to be in abeyance, if avoidable. Estates thus situated are also said, in the older books, to be *in nubibus*, in the clouds; or *in gremio legis*, in the bosom of the law.

Abeyance is said to be of two sorts, being either — 1, Abeyance of the fee-simple, or 2, Abeyance of the freehold. The first is where there is an actual estate of freehold *in esse*, but the right to the fee-simple is suspended, and is to revive upon the happening of some event; *e.g.* in the case of a lease to A for life, remainder to the right heirs of B who is alive, the fee-simple is in abeyance until B dies (Co. Litt. 342 *b*). The second species of abeyance, *i.e.* an abeyance of the freehold itself, occurs on the death of an incumbent, and until the appointment of his successor (Litt. § 647). *Brown.*

ABIDE. A statutory bond "to abide" the order of the court, construed as meaning to perform; to execute; to conform to. Hodge *v.* Hodgdon, 8 *Cush.* 294.

An engagement "to abide by the award," construed as meaning to await the award without revoking the submission, not necessarily to acquiesce in the award when made. Marshall *v.* Reed, 48 *N. H.* 36.

ABJURE. To retract, recant, disavow, one's position upon oath. Thus in the United States an alien applying to be naturalized is required to declare on oath that he does entirely renounce and abjure all allegiance to any foreign power. In England, an oath, by which a person holding office must bind himself not to acknowledge any right of the Pretender to the throne, has been styled the abjuration oath.

ABODE. The place where a person dwells.

See DOMICILE; DWELLING; HOME; INHABITANT; RESIDENCE.

Abordage. Collision between vessels.

ABORTION. The act of bringing

forth what is yet imperfect; and particularly the delivery or expulsion of the human fœtus prematurely, or before it is yet capable of sustaining life. Also, the thing prematurely brought forth, or product of an untimely process. Sometimes loosely used for the offence of procuring a premature delivery; but strictly the early delivering is the abortion; causing or procuring abortion is the full name of the offence.

See MISCARRIAGE.

Burrill confines the definition to a delivery procured after the period of quickening; but this is probably said because the rules of the common law and the earlier statutes were most stringently aimed at protecting the fœtus after quickening, and punished interferences with it after that point, more severely. Other authorities do not make the fact of quickening any part of the definition of the word; and although in some jurisdictions it may be an element in rendering the procuring an abortion punishable, in others the statutes have been enlarged to include before quickening as well as after.

The expulsion of the ovum or embryo, within the first six weeks after conception, is technically called miscarriage; between that time and the expiration of the sixth month, when the child may possibly live, it is termed premature labor. *Chitt. Med. Jur.* 410.

Our law does not recognize the distinction adopted by medical commentators on the subject, who consider miscarriages during the first six months as abortions, and those during the last three as premature labors; but applies the term abortion to the throwing off of the fœtus at any period of the pregnancy. *Wharton.*

ABOUT. When employed to qualify the statement of the length of a line, in a deed, "about" shows that exact precision is not intended; but if the place where the monument stood, by which the distance was controlled and determined, cannot be ascertained, the grantee must be limited to the number of rods or feet given. Cutts *v.* King, 5 *Me.* 482.

Where, in an entry, the natural object is called for as being "about" a certain distance from a fixed monument, and such object cannot be found, the call is rejected, and the distance mentioned is taken as the precise distance. Bodley *v.* Taylor, 5 *Cranch*, 191; Shipp *v.* Miller, 2 *Wheat.* 316.

In ascertaining a place upon a river, designated to be found by its distance from another place, the vague words about or nearly, and the like, are to be rejected, if there are no other words rendering it necessary to retain them; and the distance mentioned is to be taken positively. Johnson *v.* Pannel, 2 *Wheat.* 206.

A contract to pay "a claim of about $150," was held a contract to pay the whole debt, although it amounts to $200. Turner *v.* Whidden, 22 *Me.* 121.

ABRIDGE. To reduce or contract; usually spoken of written language.

Abridgment: the process of condensing the language of a work into smaller compass; also, the result itself of such condensing.

See COMPILE.

1. In copyright law, to abridge means to epitomize; to reduce; to contract. It implies preserving the substance, the essence, of a work, in language suited to such a purpose. In making *extracts* there is no condensation of the author's language, and hence no abridgment. To abridge requires the exercise of the mind; it is not *copying*. Between a compilation and an abridgment there is a clear distinction. A compilation consists of selected extracts from different authors; an abridgment is a condensation of the views of one author. Story *v.* Holcombe, 4 *McLean*, 306, 310.

2. In pleading, to abridge means the making a declaration or count shorter by subtracting or severing some of the substance therefrom; *e.g.* a man is said to abridge his plaint in assize, and a woman her demand in action of dower, where any land is put into the plaint or demand which is not in the tenure of the defendant; for if the defendant plead non-tenure, joint-tenancy, or the like, in abatement of the writ as to part of the lands, the plaintiff may leave out those lands, and pray that the tenant may answer to the rest. *Wharton; Brooke.*

Abridgment has a special use in law literature, as the name of a class of books in which the substance of the reports, or the rules of law deduced from them, are concisely and systematically stated; such as Fitzherbert's Abridgment; Brooke's Grand Abridgment; Statham's Abridgment; Bacon's Abridgment; Viner's Abridgment. In this sense there is perhaps no very clearly drawn distinction between the term and digest. The latter seems generally to indicate rather a reproduction of the rules of the cases by mere quotation or extract; while abridgment is usually used of works involving somewhat more originality of authorship.

ABSCOND. To depart clandestinely out of the jurisdiction of courts, or conceal one's self within it, for the purpose of avoiding process.

The laws of many of the states provide somewhat stringent remedies authorizing attachment of any property remaining within the jurisdiction belonging to debtors who abscond to avoid creditors, and allowing published or substituted service of process against them; and there has been similar legislation in England. These laws are known as the absconding debtor's acts; or the absent and absconding debtor's acts.

A debtor may "abscond," so as to subject himself to the operation of the attachment laws, without actually leaving the state. Field *v.* Adreon, 7 *Md.* 209.

The alleging in an affidavit for an attachment that the debtor absconds or secretes himself, constitutes only one ground of attachment. Cannon *v.* Logan, 5 *Port.* 77.

Abscond, alone, is not synonymous with remove. Re Proctor, 27 *Vt.* 118.

But an affidavit that the defendant is about to abscond himself and his property out of the state is equivalent to alleging that the defendant is about to remove himself and property out of the state. Ware *v.* Todd, 1 *Ala.* 199.

An intent to delay or defraud creditors is an element in absconding. Where a debtor went from the town of his usual residence, to another town in the state, and there worked openly at his trade as a journeyman, for above three months, without taking any measures to conceal himself, he was held not to be an absent or absconding debtor with respect to a creditor in the town which he left, though his friends and neighbors there did not know where he was, and his absence was a subject of conversation among them. Fitch *v.* Waite, 5 *Conn.* 117. S. P. in Illinois, House *v.* Hamilton, 43 *Ill.* 185.

ABSENCE. The condition of being away, or removed.

Absent: not present; away; removed.

Absence and non-residence are not convertible terms: a statute authorizing an attachment on proof of non-residence is not satisfied by an affidavit that the defendant "is not at this time within the state." Croxall *v.* Hutchings, 12 *N. J. L.* 84.

Absent debtor, in a statute authorizing proceedings against such, may include non-residents as well as residents. Cochran *v.* Fitch, 1 *Sandf. Ch.* 142.

Absenee, or absent, in the statutes of limitations of various states, which provide that the time of a debtor's absence, or the like, shall not be counted, are not confined in their application to persons who have once been inhabitants, but apply to those who have never before been in the state. So are the decisions of Mass., N. Y., Conn., Me., R. I., Vt., Ala., Miss., Mo., Pa., and Ohio; though there have been contrary decisions in N. J. and Tex. The verb absent, in the phrase to absent one's self, implies prior presence. But the noun and adjective, absence and absent, though originally they may have implied some prior presence, now mean, as ordinarily used, simply the state of being away, or not present; and refer only to the condition or situation of the person or thing mentioned, without implying any thing as to any prior condition or situation. Paine *v.* Drew, 44 *N. H.* 306.

Absent does not properly extend to deceased persons. A chancery attachment will not lie to charge the effects of a deceased foreign debtor in the hands of a resident defendant; for there is no longer any absent debtor within the meaning of the statute. Redfern *v.* Rummey, 1 *Cranch C. Ct.* 300.

Although a district judge may be present on the beneh during the trial of a cause, yet, if he is not there for the purpose of taking part in the trial and decision, he may be regarded as "absent." Bingham *v.* Cabot, 3 *Dall.* 19, 36.

Where a wife abandoned her husband, on account of his intemperate habits, cruel treatment, and absence from home, and during five successive years resided in an adjoining county, and it did not appear that she had knowledge of the death of such first husband, or that he was not generally well known to be living, it was held that these facts did not present a case of such a continuing absence of the husband for five successive years, within the provision of 2 N. Y. Rev. Stat. 139, § 6, as to render valid a second marriage, and authorize the issuing of letters to the woman as the widow of the second husband. There should be a *bona fide* absence of the absconding person from the state, and without being known to the other party to be living; or, at least, there should be such an absence from the county as would preclude the idea that he was living, after the most careful and diligent inquiry had been made. Wyles *v.* Gibbs, 5 *N. Y. Surr.* 382.

Absence from the state as a volunteer soldier or officer in the army of the United States constitutes absence on public business within the meaning of 2 Gav. & H. 161, § 216, which provides that "the time during which the defendant is a non-resident of the state, or absent on public business, shall not be computed in any of the periods of limitation." Gregg *v.* Matlock, 31 *Ind.* 373.

In Scotch law, absence is used as equivalent to default or want of appearance. A decree is said to be in absence where the defender does not appear. Every Scotchman within the kingdom is liable to be called in an action before the court of session, in which aetion decree may be given against the defender, although he do not appear. Even a foreigner, though not within the kingdom, provided he possess an estate in it, or goods which have been attached for the purpose of founding jurisdiction, may be exposed to a decree in absenee. *Wharton.*

ABSENTEE. One who dwells abroad; usually spoken of a proprietor who makes his residence somewhat permanently in another country than that where his estates are situated.

It means a person who has resided in the state, and has departed without leaving any one to represent him; also, a person who never was domiciliated in the state, but resides abroad. Emmerling *v.* Cucullu, 18 *La. Ann.* 695.

The absentees' parliament, so called, was held at Dublin, May 10, in the eighth year of Hen. VIII., and is mentioned in letters-patent, dated 29 Hen. VIII. 4 *Co. Inst.* 354.

ABSOLUTE. Complete; perfect; unconditional.

When occurring in a statute restricting suspension of absolute ownership (1 N. Y. Rev. Stat. 773, § 1), it is used as the opposite of "conditional," in the sense of "perfect," without any condition or incumbrance. The absolute ownership intended includes not only the property, but the right to an immediate and unconditional possession. Converse *v.* Kellogg, 7 *Barb.* 590.

Absolute is not used to distinguish a fee from a life-estate, but a qualified or conditional fee from a fee-simple. Greenawalt *v.* Greenawalt, 71 *Pa. St.* 483.

It is used in various significations: complete; not limited; not relative; unconditional; independent of any thing extraneous. In its signification of complete, not limited, it is used in the law to distinguish an estate in fee from an estate in remainder. In its signification of not relative, it describes the rights of man in a state of nature, as contradistinguished from those which pertain to him in his social relations. A clause in a will, bequeathing property to testator's daughters, and directing that it "shall vest absolutely" in them, does not import an exclusion of the marital rights of a daughter's husband, but rather characterizes a pure estate, unconnected with any peculiarities or qualifications,—a naked estate, freed from every qualification or restriction; for the most usual acceptation of absolute, when used in reference to estates, is not independent, but the opposite of partial or conditional. It implies not an exclusion of the husband's rights, but an exclusion of the idea that the estate given is partial or conditional. Otherwise of words directing that an estate shall vest "entirely," "only," or "exclusively" in the wife. Johnson *v.* Johnson, 32 *Ala.* 637.

ABSQUE. Without. Occurs in phrases taken from the Latin; such as:

Absque hoc. Without this. These are technical words of denial, used in pleading at common law by way of special traverse, to introduce the negative part of the plea, following the affirmative part or inducement. Hence a special traverse is often called a traverse with an *absque hoc*. *Steph. Pl.* 165, 186.

Absque impetitione vasti. Without impeachment of waste. Expresses a reservation frequently made to a tenant for life, that no man shall *impetere* or sue him for waste committed. This reservation only excuses from *permissive* waste, but is never extended to allow malicious waste to the very destruction of the estate itself.

Absque tali causa. Without such cause. A phrase formerly used in actions of trespass in the plaintiff's reply to a plea of the defendant, whereby the latter attempted to excuse the act complained of. Thus, if the defendant alleged that he committed the trespass by authority derived from another, the plaintiff might reply that he (the defendant) committed it *de injuria* (i.e. *de injuria suâ propriâ*, of his own wrong) and *absque tali causa*, without the cause in his plea alleged.

ABSTRACT OF TITLE. A memorandum or concise statement of the conveyances and incumbrances affecting the ownership of real property. In English conveyancing practice, such a memorandum is usually prepared by the solicitor of the vendor, and submitted to the purchaser's adviser, to enable him to decide on the validity of the conveyance tendered. In the United States, such a memorandum is usually prepared in the examination of titles involving much value; but the duty of preparing it is not very definitely imposed on the vendor.

Abstracts and indices of titles to land are subjects of literary property, so long as the compiler remains owner of the unpublished manuscript, and may be entered for copyright. The term abstract of title does not mean a mere condensed copy, but implies a work requiring learning, skill, and labor. Banker *v.* Caldwell, 3 *Minn.* 94.

Abstract, as applied to records, ordinarily means a mere brief, and not a copy of that from which it is taken. Dickinson *v.* Railroad Co., 7 *W. Va.* 390.

Abundans cautela non nocet. Extreme caution does no harm. This principle is generally applied to the construction of instruments in which superfluous words have been inserted more clearly to express the intention; as, in a deed, where the grantor adds words descriptive of the grantee or of the property conveyed, or of the condi-

tions of the conveyance, beyond what is absolutely necessary for the purpose. Such superfluous words can do no harm, if the instrument, when read without them, is still valid.

ABUSE, *v.* To treat, or use, or employ a thing improperly, or contrary to its nature, or to the rules governing its use. To make an extravagant or excessive use; as, to abuse one's authority.

Abuse, *n.* A use which is improper; also, a custom or practice which exists contrary to good morals or propriety; as, the abuses in the civil service.

Abuse of female child, is an expression equivalent to rape.

Abuse of distress is a wrongful using of a thing distrained, by the distrainer.

Abuse of process is a wrong employment of a regular judicial proceeding.

The phrase to abuse and misuse, used in an act of incorporation, was held to mean any positive act in violation of the charter, and in derogation of public right, wilfully done, or caused to be done, by those appointed to manage the general concerns of the corporation. Baltimore *v.* Pittsburg, &c. R. R. Co., 3 *Pittsb.* 20.

ABUT. To reach; to touch.

Abuttal: the end of a tract of land, or place where it touches the tract next to it. Strictly, or formerly, ends of a tract have been said to abut, sides, to adjoin. Abutments: the ends of a bridge, or parts which touch the land.

ACADEMY. Originally, an association formed for mutual improvement, and to advance science or art; also, a species of educational institution, of a grade between the common school and the college. In this sense, it is used in many acts of state legislatures chartering or providing for the incorporation of academies.

ACCEPT. To receive with approval or satisfaction; to receive with intent to retain.

1. The fact of acceptance, that is, assent, is important to be ascertained in determining the validity and obligation of various contracts. Thus, one to whom a contract is proposed, and who agrees to its terms, is said to accept the proposal; though, for this idea, assent is a more strictly accurate term.

2. As to corporations, persons to whom a charter is offered must accept it before a corporation is created. This acceptance may be shown by circumstances, as well as by any formal declaration.

Application for a charter and appearance before the legislative committee by one or more of the corporators acting by authority of the others, and acceptance by such corporators, is sufficient acceptance of the charter. State *v.* Dawson, 22 *Ind.* 272.

3. By a familiar rule of the contract of insurance, where the insured has the right to abandon to the insurer the remnants of the subject insured, and then to claim as for a total destruction or loss, acceptance is applied to the assent of the insurer to the abandonment, whether formally declared, or manifested by circumstances, such as acts of taking the thing abandoned into the possession of the insurer. Such acceptance operates as an acknowledgment of the sufficiency of the abandonment, and perfects the right of the assured to recover for a total loss, if the cause of the loss and material circumstances attending it have been truly made known.

4. In the law of negotiables, to accept a bill of exchange, a check, draft, or order, is to engage to pay it according to its terms. This engagement is usually made by writing the word "accepted" across the face of the bill. The terms acceptance and acceptor have a special signification in connection with these commercial instruments. Acceptance, within this use, is the act or engagement of a drawee, in accepting the bill; also, often the instrument itself, after it has been accepted. Acceptor is the name applied to a drawee, after he has accepted, and so has made himself liable as a promisor.

Acceptance of a bill may be either absolute or upon a condition. An absolute acceptance is either general or qualified, and is usually written across the face of the bill of exchange, thus: "Accepted, payable at Messrs. ——, Bankers, London;" if it is to be qualified, the words, "and not otherwise or elsewhere," are added, and then follows the signature of the person accepting. If the acceptance be qualified, non-presentation of the bill of exchange at the specified place, and in proper time, would exonerate the person who accepted it, and all the other parties; but the person who accepted it would not be exonerated if the acceptance were general. It may be conditional, as "It will not be accepted until the ship with the wheat arrives," or, "Cannot accept till stores are paid for;" these are undertakings to accept when the

ship with the wheat arrives, or the stores are paid for. *Wharton.*

The term accepted does not necessarily import a guaranty of payment by the person so indorsing a bill of account for goods furnished to a third party; *e. g.*, by a brigade quartermaster for clothing furnished to officers of the brigade. Hatch *v.* Antrim, 51 *Ill.* 106.

A payment cannot be construed as an acceptance, under any circumstances. The two things are essentially different. One is a promise to perform an act, the other an actual performance. A banker or an individual may be ready to make actual payment of a check or draft when presented, while unwilling to make a promise to pay at a future time. Many, on the other hand, are more ready to promise to pay than to meet the promise when required. The difference between the transactions is essential and inherent First Nat. Bank of Washington *v.* Whitman, 94 *U. S.* (4 *Otto*) 343.

Several somewhat distinct forms of acceptance are known in mercantile law. *Written* acceptance is the most formal and usual, but writing is not, except where prescribed by statute, indispensable; there may be an *oral* (also called *verbal*), or an *implied* acceptance. A promise in writing, to accept a bill of exchange yet to be drawn, may, by numerous authorities, operate as an acceptance of the bill when drawn; and it has been held in Central Sav. Bank *v.* Richards, 109 *Mass.* 414, that this rule embraces a promise communicated by telegraph. One who had telegraphed "You can draw for $2,500 at thirty days" was held liable as acceptor, in favor of a holder who discounted the bill on the faith of the despatch, although the consideration, on the expectation of which the promise was made, was never supplied. Acceptances are also distinguished as *absolute*, *conditional*, *qualified*, or *partial*. A conditional acceptance engages to pay the bill on occurrence of a designated event, as, "payable when in funds from" such and such a consignment. A qualified or partial acceptance introduces some limit or restriction on the amount, manner, or time, &c., of payment, as "payable in current funds;" "payable at the bank of" ——. There is also a kind known as acceptance *for honor*, or supra *protest*. This is where, after refusal by the drawee to accept, some person friendly to the drawer, accepts it, to save the latter's credit.

ACCEPTILATIO. A gratuitous discharge. The Latin name of a species of release, whereby, under the civil law, a debtor might be released from his obligation without actual payment.

ACCESS. Approach; or the opportunity of approaching. Usually employed, as a law term, with reference to sexual intercourse; sometimes as importing its occurrence; otherwise as importing opportunity of communication for that purpose, or such a residence of husband and wife with reference to each other that intercourse may be presumed.

ACCESSION. The acquisition of property of a concomitant nature, by virtue of the ownership of the principal to which it is accessory, or is attached as an incident; thus, if one man builds upon the ground of another, the right of the land-owner to the edifice is called title by accession.

Other uses of the word are that the commencement of a sovereign's reign is called his accession; and if a nation becomes party to a treaty or convention already in force between others, this is called its accession to the treaty.

Accessorium non ducit, sed sequitur, suum principale. The incident does not lead, but follows, its principal. Where one thing is merely incident or accessory to another, the accessory belongs to him who has the right to the principal subject; thus buildings pass by a conveyance of the land on which they are erected.

Accessorium sequitur naturam rei cui accedit. The incident follows the nature of the subject to which it is accessory. If one thing becomes so intimately connected with or dependent upon another as to be a mere incident or accessory to the other, it acquires the same nature or character as the subject or right to which it becomes accessory. Thus fixtures, although in their own nature personal property, if annexed to a freehold, become realty.

Accessorius sequitur naturam sui principalis. An accessory follows the nature of his principal. One who is accessory to a crime cannot be guilty of a higher degree of crime than his principal.

ACCESSORY. Accompanying. That which is connected as an incident, or subordinate, with some other thing, deemed its principal. The word is used both as adjective and noun; thus the pedestal pertaining to a statue may be said to pass by a sale of the statue as accessory to it, or, as an accessory. Subordinate contracts, the purpose of which is to make certain the performance of some antecedent engagement, are sometimes termed accessory contracts.

In crimes, one who, without being a direct actor in the perpetration of an offence, or present at its performance, is concerned in encouraging or promoting it, or in protecting the principal offender, is termed an accessory.

In this sense of the word it is often spelled accessary; and there is good authority, founded on usage, for this orthography; moreover, it is recommended by convenience, as distinguishing the application of the word to persons from its use as to things. Etymological reasons seem to favor the form accessory. See *Webster* and *Worcester* for the discussion of this question.

The distinction between principal and accessory is not recognized (unless by statutory regulation) in treason, nor in misdemeanors. In respect to ordinary felonies, it was, at common law, of much practical importance, in view of rules that the accessory could not be tried until his principal had been convicted; that he could not be convicted of a graver degree of crime than that established against the principal; and the like. But these rules have been relaxed by statute in several of the states.

An accessory is spoken of as an accessory *before the fact*, if he instigates, encourages, or aids in the offence, before it is actually committed; as an accessory *after the fact*, if, knowing that a felony has been committed, he receives, relieves, comforts, or assists the felon.

If a person does no more than procure, advise, or assist a felony, he is only an accessory; but if he is present, consenting, aiding, procuring, advising, or assisting, he is a principal, and must be indicted as such. Each person consenting to the commission of the offence, and doing any one act which is either an ingredient in the crime, or immediately connected with or leading to its commission, is a principal. United States *v.* Wilson, *Baldw.* 78, 102; United States *v.* Libby, 1 *Woodb. & M.* 221.

To constitute an accessory after the fact, the aid and assistance must be given after the felony is fully completed. Hence a party rendering assistance to another after a mortal blow has been struck, and before death has taken place, cannot be convicted as an accessory after the fact to the murder: his offence is that of accessory after the fact to the crime of an assault and battery with intent to kill, — the crime of murder having been incomplete until the death of the person assaulted took place. Harrel *v.* State, 39 *Miss.* 702.

In Scotch law, accessory action is applied to an action which is ancillary or subservient to another. Accessory obligation is applied to an engagement additional to one deemed primary or antecedent; such as an obligation to pay interest upon an indebtedness.

ACCIDENT. An unusual or unexpected event; the effect of an unknown cause, or an unusual effect of a known cause; that which happens without direct human agency, or without concurrence of the will of the person by whose bare act it has been caused.

The word does not exclude casualties resulting from some negligence on the part of the person injured. A large proportion of the events which are usually called accidents happen through some carelessness. The term properly means an event that takes place without expectation, which either proceeds from some unknown cause, or is an unusual, and therefore unexpected, effect of a known cause. An injury which happens from negligence of a degree which does not usually produce injury, is an unusual and unexpected result, and may be said to happen by accident. Schneider *v.* Provident Life Ins. Co., 24 *Wis.* 28.

To constitute an accident or casualty, or "inevitable accident," the occurrence must be such as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed. Brown *v.* Kendall, 6 *Cush.* 292.

A fire arising from negligence is not within the meaning of Stat. 6 Anne, ch. 31, § 67, as amended by Stat. 14 Geo. III. ch. 78, § 76, providing for exemption of liability for fires accidentally begun. Webb *v.* Rome, &c. R. R. Co., 49 *N. Y.* 420.

As used in a statute relieving a defendant who is prevented by accident from paying a debt against imprisonment for the debt, accident does not include ordinary misfortunes in business. Langdon *v.* Bowen, 46 *Vt.* 512.

As used in Ala. Rev. Code, §§ 2814–15, allowing rehearings, it does not include mere inattention of one's counsel. Exp. North, 49 *Ala.* 385.

Damage done to cotton thread by dampness of the hold of the vessel, not occasioned by bad stowage or any negligence of those employed in the conveyance of the goods, is an "accident of navigation," within the exception in a bill of lading. Clark *v.* Barnwell, 12 *How.* 272.

A bill of lading for cotton shipped by a steamboat carrier contained the following exception: "dangers of fire and navigation only excepted." Another bill contained the following exception: "unavoidable accidents of navigation and fire excepted." The cotton was burnt on board the boat. Held, that "dangers of fire," and "unavoidable accidents of fire," meant the same thing, and that the term fire meant any fire, and was not restricted to fire originating from the furnace of the boat. Swindler *v.* Hilliard, 2 *Rich.* (S. C.) 286.

An accident is an event from an unknown cause, or an unusual and unexpected event from a known cause; a chance or casualty. Thus, if a railroad bed, engine, and cars, are in good order, and the engineer and other attendants are skilful and careful, and yet a rail breaks, that is an unusual and unexpected event from a known cause, and an accident. But if the track is out of order, and the engine worn and unmanageable, and on account thereof there is the like result, that is not an unusual and unexpected event, but a usual and expected event from such a cause, — it is not accident, but it is negligence. Crutchfield *v.* Richmond, &c. R. R. Co., 76 *N. C.* 320.

The fact that a non-resident heir did not hear of testator's death in season to take a timely appeal from the probate of the will cannot be deemed an accident within an act enabling appeals. Burbeck *v.* Little, 50 *Vt.* 713.

ACCIDENTAL. An event may be called accidental, meaning that the cause of it is unknown; that it could not have been foreseen or predicted as the likely result of acts done or causes known to be in operation. With reference to the intervention of human intention in producing injurious events, the chief distinctions are that an event is called *accidental* (sometimes casual) when it occurred independent of human will or means of foresight, *negligent* when it might and ought to have been foreseen and prevented; and *wilful* (or, somewhat more strongly, *malicious*), when it was intentionally caused.

ACCOMMODATION. An arrangement or engagement made as a favor to another, not upon a consideration received; something done to oblige, usually spoken of a loan of money or commercial paper; also, a friendly agreement or composition of differences.

A proposal to sell at a price named, "terms accommodating," was held to mean that the purchase-money, or some part, might remain a while in the purchaser's hands, as if a loan for his convenience. Rice *v.* McLarren, 42 *Me.* 157.

Accommodation bill or note. Accommodation paper is a bill of exchange which one person accepts, or a note which he makes and delivers to another without a pecuniary consideration as between the parties, but to oblige or favor the latter, by enabling him to obtain a discount or an increased credit. Such paper, notwithstanding the want of a consideration moving to acceptor or maker, is enforced against him, in favor of a purchaser for value, and before maturity.

In a strict sense, the term accommodation paper imports a loan of the maker's credit, without instruction as to the manner of its use. Lenheim *v.* Wilmarding, 55 *Pa. St.* 73.

ACCOMPLICE. One of persons associated in the commission of a crime; any participator in an offence, whether a principal or an accessory. The principal use of the term is in discussions involving the rules regulating the admission of testimony of one *particeps criminis* against his fellows; in respect to which the grade of guilt of the witness is generally not important, and accomplice is an appropriate term, because it implies nothing as to grade. When the conviction and punishment of offenders is in question, and their relative shares in the criminal act are in discussion, principal and accessory are oftener employed. See ACCESSORY; PRINCIPAL.

Accomplice includes all persons who have been concerned in the commission of an offence, whether they are considered, in strict legal propriety, as principals in the first or second degree, or merely as accessories before or after the fact. Cross *v.* People, 47 *Ill.* 152.

ACCORD. An agreement between two persons, one of whom has a claim upon the other for damages for a wrong, or for payment of an indebtedness, that something different (usually less) shall be given and received in place of what might be legally enforced. The performance of such agreement, by paying or delivering the substituted sum or thing, constitutes "satisfaction," and discharges the original demand.

According to law. An averment that an affidavit was made according to law, was held to mean that it was made within the time required by law. McElhany *v.* Gilleland, 30 *Ala.* 183.

A will, directing that certain property should go according to law, was held to mean that the beneficiary named should take the estate in the same manner as the law would have given it to the testator's heirs. McIntyre *v.* Ramsey, 23 *Pa. St.* 317.

ACCOUNT. In the most general sense, a narrative of matters past; a statement of occurrences; more strictly, a statement of business dealings. As most often used in jurisprudence, it means a written statement of pecuniary transactions; an exhibit of charges and credits growing out of an adventure, or of mutual dealings, in form to facilitate the precise determination, by addition of columns, of the sum or balance due.

Account implies mutual dealings, and the existence of debt and credit. McWilliams *v.* Allan, 45 *Mo.* 573.

It implies that one is responsible to another, either on the score of contract or of some fiduciary relation of a public or private nature, created by law or otherwise; and cannot include a claim to have taxes on land refunded, on the ground that they were excessive through the wrongful and illegal conduct of the assessor. Stringham *v.* Winnebago County, 24 *Wis.* 594.

It means a list or catalogue of items, whether of debts or credits. Rensselaer Glass Factory *v.* Reid, 5 *Cow.* 587.

There is a broad distinction between an account and the mere balance of an account. A balance is but the conclusion or result of the debit and credit sides of an account. McWilliams *v.* Allan, 45 *Mo.* 573.

The word is sometimes used for the demand or right of action for the balance appearing due upon a statement of dealings; as where one speaks of an assignment of accounts.

A bequest of "all my accounts" was held not to include a savings-bank account. Gale *v.* Drake, 51 *N. H.* 78.

The word is often used in the sense of behalf, or charge; as in saying that an agent acts upon account of his principal; that a policy is issued on account of whom it may concern.

Long account. A claim to several items of damage for a wrong is not an account, within a statute authorizing a reference of an action involving a long account. Sharp *v.* Mayor, &c. of N. Y., 9 *Abb. Pr.* 436; Dewey *v.* Field, 13 *How. Pr.* 437; Ross *v.* Mayor, &c. of N. Y., 2 *Abb. Pr.* N. S. 266.

An action given by statute to recover from a city or county damages incurred by the plaintiff from a mob or riot, though involving a large number of items of damages, is not an action involving the examination of a long account. Ross *v.* Mayor, &c. of N. Y., 2 *Abb. Pr.* N. S. 266; 32 *How. Pr.* 164.

A bill of particulars is not an account, in the sense of the statute authorizing a reference. Dickinson *v.* Mitchell, 19 *Abb. Pr.* 286.

Mutual accounts. This phrase is used in provisions in many statutes of limitations, declaring that, when the suit is founded upon mutual accounts, the time for suing may be reckoned from the last item proved; or the like. Such provisions call for an account of each party involving original charges against the other.

The exception in the statute of limitations requires an account in writing. Theobald *v.* Stinson, 38 *Me.* 149.

Where the items of an account are all on one side, it is not a mutual, open, or current account, within the meaning of the statute of limitations. Fraylor *v.* Sonora, &c. Co., 17 *Cal.* 594.

An account where there are no credits except payments is not mutual, open, and current within the statute. Prenatt *v.* Runyon, 12 *Ind.* 174; Weatherwax *v.* Cosumnes, &c. Co., 17 *Cal.* 344; Adams *v.* Patterson, 35 *Id.* 122; Dyer *v.* Walker, 51 *Me.* 104; Peck *v.* N. Y. &c., S. S. Co., 5 *Bosw.* 226.

Open account, is one in respect to which nothing has occurred to bind either party by its statements; an account which is yet fully open to be disputed. But the phrase is also found in other senses. It sometimes designates an account of dealings which are still continuing; so that the account is open to further charges. It sometimes seems equivalent to mutual account; as meaning an account open to entries by either party.

Where there have been running or current dealings between the parties, and the account is kept open with the expectation of further dealings, the account is said to be open. Goodwin *v.* Harrison, 6 *Ala.* 438.

An open account is one in which some item of the contract is not settled by the parties, whether the account consists of one item or many; as where several loads of corn are sold at the same time and delivered, and there is no stipulation as to the price, the account is open. Sheppard *v.* Wilkins, 1 *Ala.* 62.

Account rendered, is one which, having been drawn up in form, is delivered by the creditor to the debtor as an exhibition of his demand, on a basis of a settlement between the two. It does not absolutely conclude the creditor; for,

until the debtor has accepted or acted upon it, there is no mutuality of obligation, and therefore no estoppel.

Account stated is an account which has been rendered by the creditor, and has been by the debtor assented to as correct, either expressly, or by implication of law from the failure to object.

Stated or liquidated accounts are those which have been examined and adjusted by the parties, and where a balance due from one of them has been ascertained and agreed on as correct. M'Lellan *v.* Crofton, 6 *Me.* 308.

Account stated involves an agreement, by both parties, that all the articles in an account are true. Stebbins *v.* Niles, 25 *Miss.* 267; Lockwood *v.* Thorne, 12 *Barb.* 487. See s. c. 11 *N. Y.* 170; 18 *N. Y.* 285.

An account merely rendered by one party against another is not an account stated between the parties. Spangler *v.* Springer, 22 *Pa. St.* 454.

To support a plea of a stated account, the evidence must show that the accounting was final; and that the accounts have been examined, and the balance admitted as the true balance between the parties. Bussey *v.* Gant, 10 *Humph.* 238.

To make an account stated, there must be a mutual agreement between the parties as to the allowance or disallowance of their respective claims; and to establish such an account, so as to preclude a party from impeaching it, save for fraud or mistake, there must be proof of assent to the account as rendered, either express or implied from failure to object within a reasonable time after presentation. Stenton *v.* Jerome, 54 *N. Y.* 480.

The admission need not be in writing. James *v.* Fellowes, 20 *La. Ann.* 116.

To constitute an account stated, it is not necessary that there should be mutual or cross demands. They may be all on one side, or consist of charges and the acknowledgment of payment. The simple rendering of the items of an account between the parties, and the striking of a balance, or agreeing upon the amount due, is sufficient; and upon such a state of facts an action on an account stated may be maintained. Where plaintiff went over the account in the defendant's presence, and found a certain sum due to the plaintiff, and the result was not objected to by the defendant, it was held that this was an account stated. Kock *v.* Bonitz, 4 *Daly*, 117.

Accountable. Liable to the demand of an account; under obligation to disclose one's acts or transactions to another.

A provision, making an officer accountable to another, may imply authority vested in the latter to deprive him of the office. McPhillips *v.* McPhillips, 9 *R. I.* 536.

Accountant. One whose vocation or function it is to keep or adjust accounts. Usually implies somewhat more of authority to pass upon the items or determine the balance than is involved in "book-keeper."

Accounting. Rendering or delivering a formal statement of one's dealings; usually employed in reference to a statement required by a creditor party as a basis of enforcing his claim for a balance due.

To enforce an accounting is an important branch of equitable jurisdiction, exercised upon what is called a bill for an account. By means of this description of suit, one who would be unable to sue at law, because unacquainted with the nature and amount of the dealings out of which his rights arise, may obtain a statement of them, and a decree for payment.

Action of account; also sometimes called account render. A writ or form of action allowed by the common law against a person who by reason of some fiduciary relation or office, such as that of collecting agent, guardian, or the like, was bound to render an account to another, but refused to do so. A leading peculiarity of the action was, that first (if the plaintiff established his right) a judgment was taken that defendant do account, then followed an accounting before auditors; and upon the result of this a second judgment was passed, for payment of the balance shown due.

Reeves says that in the old law the action of account, or "accompt," divided with debt the jurisdiction over contracts, but was gradually disused as assumpsit grew into fashion; the latter being preferred because it did not admit defendant to wager of law. 3 *Reeves Hist. by Finlason*, 408. This reason diminished as wager of law was disused. Accordingly in later years there was some revival of account in England. Throughout the United States in general it has not been a remedy in common use. In New York, it was allowed by a joint tenant or a tenant in common, by 1 *Rev. Stat.* 750, § 9. But Judge Bronson in McMurray *v.* Rawson, 3 *Hill* (*N. Y.*), 59, pronounced it "one of the most difficult, dilatory, and expensive actions that ever existed," said

that it had been only once brought in the state before, and predicted that the case then at bar would be the last. It seems abrogated wherever codes of reformed procedure have been enacted.

Action of book account. This action, also sometimes styled action of book debt, is allowed by statute in some of the states as a ready remedy for the collection of a balance due upon an account. It is not, like the common-law action of account, or a due-bill in equity for an accounting, a remedy for obtaining from a debtor a statement of his concealed dealings, upon which he has become indebted to the plaintiff; but is a remedy allowed to a creditor for the collection of the sum shown to be due, by his own accounts, upon his sales, &c., to the debtor. It is allowed, in general, only upon dealings and transactions such as are, by ordinary usage, proper matters of book account; such as goods sold; services; labor and materials. The action is aided by enactments allowing the creditor to produce his own accounts, attested by his oath to their correctness, and by them to establish his right to recover. This species of action has been largely used in Connecticut and Vermont, and exists in some other states.

ACCOUNTANT-GENERAL. An officer of the English court of chancery, appointed by act of parliament to receive all money lodged in court, and to place the same in the Bank of England for security. He has been superseded by the "paymaster-general." There has been a similar officer connected with the court of chancery in Ireland.

ACCREDIT. To acknowledge as an authorized ambassador or diplomatic agent. Strictly, the word means an acknowledgment by the government to which the minister is sent. When such government accepts his credentials, and recognizes him as the messenger of his nation, he is properly said to be accredited. But it is also used of the act of the nation sending a minister, in conferring authority and giving credentials. Webster recognizes this sense of the word; but in the only instance given it might bear the other meaning.

ACCRETION. The gradual increase of land, through the operation of natural causes; such as the action of rivers or of the sea. The deposit itself is usually called alluvion.

ACCROACH. To attempt to exercise power without authority; said especially of the attempt to exercise royal power. 4 *Black. Com.* 76; 2 *Reeves' Hist. Eng. Law*, 451; 2 *Id.* 186, 197.

ACCROCHE, signifies to encroach, and is mentioned in the statute 25 Ed. III. ch. 8, to that purpose. The French use it in the sense of delay; as *accrocher un procès*, to stay the proceedings in a suit.

ACCRUE. To come into existence, as a right or demand. Originally, it seems to have been used chiefly of an accessory demand, arising upon another as a principal; thus interest accrues to principal, or accruing costs are costs added to a judgment when execution is issued. But it is now used equally of independent original demands; as when a cause of action is said not to have accrued to the plaintiff within six years, and therefore to be outlawed.

Accrued is used in the Ohio wills act, § 79, as equivalent to vested, and implies that something has been imparted to or conferred upon a third person, over which he may have the immediate control by possession, or the present right to future possession, of which he cannot be deprived without his assent. Hartshorne *v.* Ross, 2 *Disney*, 15.

In some cases wages may properly be said to accrue on a customary monthly payday, rather than at the end of the performance of the work. Mundt *v.* Sheboygan, &c. R. R. Co., 31 *Wis.* 451.

Clause of accruer. This is an express clause, frequently occurring in the case of gifts by deed or will to persons as tenants in common, providing that upon the death of one or more of the beneficiaries his or their shares shall go to the survivors or survivor. It is a rule of law that there is "no survivorship upon survivorship;" *i.e.*, that the clause of accruer extends only to the original, not also to the accrued, shares, unless in terms it is expressly made to extend to the latter also, which it customarily is made to do. Pain *v.* Benson, 3 *Atk.* 80; *Brown.*

ACCUMULATE. To gather or collect in quantity. Accumulation: the act or process of gathering in quantity; or the sums or things which have been so gathered. When the interest of a fund, instead of being paid over to some person or persons, is itself invested as often as it accrues, so as to be reserved for the

benefit of some person or persons in the future, the income is said to be accumulated, and a direction for this purpose in a deed or will is called a direction for accumulation. Important restrictions have been imposed by statutes, and by the course of decisions of the courts, upon the power of the owner of a capital sum to direct by deed or will the accumulation of its income in hands of trustees.

ACCUMULATIVE. See CUMULATIVE.

Accumulative judgment. A judgment sentencing a person to imprisonment for a term to commence after a previous sentence shall have been satisfied.

By the common law such a judgment could only be given in cases of misdemeanors, and not upon convictions for felony, the party attainted of felony becoming thenceforth dead in law. Latterly, however, by Stat. 7 & 8 Geo. IV. ch. 28, § 10, the court was empowered to pass a second sentence, to commence after the expiration of the first, in a case of felony; and under the criminal statutes at present in force (24 & 25 Vict.) such accumulative punishments are in general use, not exceeding three in all. *Brown.*

Accusare nemo debet se. No one is bound to accuse himself. A maxim more frequently expressed in the form, *Nemo tenetur se ipsius accusare*, q. v. The principle embodied is fundamental in the criminal law.

Accusator post rationabile tempus non est audiendus, nisi se bene de omissione excusaverit. An accuser ought not to be heard after the expiration of a reasonable time, unless he can account satisfactorily for the delay.

ACCUSE. To make a charge against a person of the commission of a crime, or of gross misconduct; usually spoken of the formal preferring of a charge before an officer or tribunal competent to proceed towards the punishment of the offender. Accuser: the person by whom such charge is made. Accused: the person against whom it is made. Accusation: the charge itself; also, the act of preferring it.

Accused is the generic name for the defendant in a criminal case, and is more appropriate than either prisoner or defendant. Rex *v.* McNaughten, 1 *Car. & K.* 131.

Ac etiam. And also. Technical words used to introduce the clause required in former English common-law practice to be inserted in the writ, in cases where defendant was to be held to bail, for the purpose of apprising him of the true cause of action. This entire clause was commonly called the *ac etiam* clause.

The *ac etiam* clause was a form or fiction of law adopted first in the queen's bench, and afterwards in the common pleas, to give jurisdiction to these courts in actions for ordinary debts. The bill of Middlesex in the queen's bench being framed only for actions of trespass, and the statute, 13 Car. II. st. 2, ch. 2, having required that the true cause of action should be expressed in the writ or process, the court of queen's bench was in danger of losing its entire jurisdiction in matters of debt; to obviate that result, the *ac etiam* clause was invented. And some few years afterwards, North, C. J., directed that in the common pleas the like fiction should be added to the usual complaint of breaking the plaintiff's close. But since the uniformity of process act (2 Wm. IV. ch. 39) the necessity for this fiction has ceased. *Brown.*

ACKNOWLEDGE. To own, avow, or admit. Acknowledgment: an avowal or admission. 36 Nw 416

Thus, under most statutes of limitations, an acknowledgment of a debt, if clear, explicit, and unconditional (by several of the statutes it must be in writing), will remove the bar of the statute, and enable the creditor to sustain an action, notwithstanding the lapse of the statute time.

Acknowledge does not necessarily imply words. Bailey *v.* Boyd, 59 *Ind.* 292.

In conveyancing, acknowledgment is used either of the act whereby one formally avows or declares before an officer authorized to give an evidential certificate of the declaration, that an instrument executed by him is his act and deed; or of the certificate of the officer attesting such an avowal. The statutes of the states regulating transfers of real property very generally require that conveyances shall be thus acknowledged by the grantor, or that, as an equivalent, proof of genuine execution shall be made by oath of a subscribing witness, before the deed can be admitted to record; and, further, that where the grantor is a married woman, her acknowledgment shall be taken upon a private examination, separate and apart from her

husband, and shall include an assurance to the effect that she has signed the deed freely, and without fear or compulsion of her husband. The sufficiency of these certificates of acknowledgment must be tested by the requirements of the law — generally statute law — of the state within which the land conveyed lies.

Acknowledgment (and more frequently admission), is used of a person's conceding the truth of facts which render him civilly liable; for an admission of criminal acts, confession is more appropriate.

Acknowledgment money. A sum paid in some parts of England by the copyhold tenants, on the death of their landlords, as an acknowledgment of their new lords; in like manner as money is usually paid on the attornment of tenants. *Jacob.*

ACQUIESCE. To consent by silence, or without an express acknowledgment or declaration. Acquiescence: a consent inferred from silence, or from omission to object.

Such silent consent may, upon well-settled principles of equity jurisprudence, debar the party from obtaining special discretionary relief, which that court might otherwise grant him; and in cases where an innocent person has been led to act upon it to his injury, if it should be withdrawn, the person acquiescing is held bound at law, as well as in equity, on the principle of estoppel.

A vote passed by the corporate authorities of a college, that they acquiesced in a statute altering the charter, was held not to import their assent, such as would render the amendment obligatory, but to imply mere submission to the will of the legislature. Allen *v.* McKeen, 1 *Sumn.* 276.

ACQUIETANDIS PLEGIIS. The name of an obsolete English writ. It lay for a surety against the creditor who refused to acquit him after the debt was satisfied.

ACQUIT. To release or discharge one from an obligation or a liability.

Acquittal: the legal act of setting one free from a charge; most frequently used of a verdict of a jury (or finding of a magistrate authorized to try, instead of a jury, the question of guilt in fact), rendered upon trial of an indictment or criminal complaint, declaring the accused to be not guilty. But what is termed an "acquittal in law" may take place by mere operation of law; as where one charged as an accessory only is discharged by a verdict acquitting his principal.

Acquitted. Set free; judicially discharged from accusation; released from debt, &c. Includes both civil and criminal prosecutions. Dolloway *v.* Turrill, 26 *Wend.* 383, 399.

ACQUITTANCE. A writing, acknowledging that a person has paid a debt or become discharged from an obligation or engagement, usually a pecuniary one.

A discharge, in writing, of a sum of money, or debt due; as, where a man is bound to pay rent, reserved upon a lease, &c., and the party to whom due, on receipt thereof, gives a writing under his hand, witnessing that he is paid. *Jacob.*

Where A, having possession of a banker's receipt given upon a deposit of money, and conditioned that the money should be repaid on redelivery of the receipt, wrote the name of the depositor across the face of the receipt, and delivered it up to the banker, and thereby fraudulently obtained the money, it was held he might be convicted of having forged an acquittance. Reg. *v.* Atkinson, 2 *Moo. Cr. Cas.* 215.

ACROSS. May mean over, in either direction: it does not exclude the idea of passing over in the longest direction. A reservation in a deed of a right of way across the land is not necessarily to be confined to a right to cross the lot by its narrowest dimensions, but should be construed to give a right to cross at such points as will effectuate the actual intent of the parties. Brown *v.* Meady, 10 *Me.* 391.

ACT, *n.* In the most general sense, something done; the exercise of power, or an effect produced by power exerted.

In several uses "act" and "action" have the same meaning; but act is used technically to designate determinations of aggregate bodies. "The action of a legislature" is a more general phrase than "the act of" the legislature.

Act implies intention. Thus act and intention, as used in a policy of life insurance, restricting the liability of the company, in case the death of the insured be caused by "his own act or intention," mean the same thing. Chapman *v.* Republic Life Ins. Co., 6 *Biss.* 238.

In a special sense, act is used of a formal solemn writing, expressing that something has been done; as in the form of words used in acknowledgments, when a grantor declares that the

instrument is his act and deed. This use of the word is especially frequent in jurisdictions following the civil law, where many kinds of instruments are familiarly known as acts, and are classed as private acts or public acts, the latter being solemnized before some public officer, and having a higher effect and operation.

Act in pais. A thing done out of court (anciently, in the country); something not matter of record. See PAIS.

Act of attainder. A legislative act, attainting a person. See ATTAINDER.

Act of bankruptcy. The various bankrupt laws which afford a proceeding at the instance of creditors to compel the application of a debtor's property to their demands contain an enumeration or definition of acts of a debtor which expose him to these compulsory or involuntary proceedings; and these acts are known as acts of bankruptcy. In the existing bankrupt law of the United States these are to be found in the act of June 22, 1874, 18 *Stat. at L.* 178.

The enumeration, in substance, includes any person: Who departs from the state, &c., of which he is an inhabitant, with intent to defraud his creditors;

Who, being absent, remains absent, with such intent;

Who conceals himself, to avoid the service of legal process, &c.;

Who conceals or removes any of his property, to avoid its being attached, &c.;

Who makes any assignment, &c., of his estate, property, &c., with intent to delay, defraud, or hinder his creditors;

Who has been arrested and held in custody under process out of any court where he resides or has property, founded upon a demand provable against a bankrupt's estate, and for a sum exceeding one hundred dollars, such process remaining in force for a period of twenty days, or who has been actually imprisoned for more than twenty days in a civil action founded on contract for the sum of one hundred dollars or upward;

Who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, makes any payment, gift, or other transfer of money or other property, &c., or confesses judgment, or procures his property to be taken on legal process, with intent to give a preference to creditors, or to persons liable for him as indorsers, &c., or with the intent to defeat or delay the operation of the bankrupt laws;

Who, being a bank, banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment, or has stopped or suspended and not resumed payment within a period of forty days, of his commercial paper;

Or who, being a bank or banker, fails for forty days to pay any depositor upon demand of payment lawfully made.

The English bankruptcy act of 1869, § 6, enumerates the following as acts of bankruptcy:

A general conveyance or assignment by the debtor in trust for his creditors;

A fraudulent conveyance or transfer by the debtor of the whole or part of his property;

The debtor's having done any of the following things, with intent to defeat or delay his creditors, namely: departed out of England; remained out of England; being a trader, departed from his dwelling-house; begun to keep house; or suffered himself to be outlawed;

The debtor's having filed in court a declaration of his inability to pay;

The levying of an execution for not less than fifty pounds against the debtor, by seizure and sale of his goods;

The debtor's having neglected, if a trader, for seven days, and if not a trader, for twenty-one days, after service thereof, to pay or to secure or compound for the amount (not being an amount under fifty pounds) demanded on the debtor's summons of the petitioning creditor. *Brown.*

Act of congress; of the legislature; of parliament. Usually employed as meaning a law passed by either legislative body; or as equivalent to STATUTE, *q. v.* The statutes of the United States have, however, for many years been published in two classes, — the acts and the resolutions; importing that a resolution is included in the term statute, but not in the word act. In England, it was formerly, at least, considered that all the enactments of a parliament at one session formed one act; each distinct bill, as passed, becoming a chapter in the act. But this is not the general usage of the term in American legislation, in which the matter of each

bill, when passed and approved, becomes an act, and is published and known, ordinarily, as the act of the day on which executive approval is given; though all the acts of a session are often designated and numbered as chapters in the statute-book. Many acts become distinctively known by their subject-matter; as the act of supremacy, the toleration act, the act of uniformity, the bankrupt act, the patent act, the merchant shipping act. Acts of legislation are classified as public or private, general or local, and the like; as to which see STATUTES.

The words "act of the congress" are as strong and unequivocal as "statute of the congress." United States *v.* Smith, 2 *Mas.* 143, 151.

Act of God. A phrase used to designate a cause of injury or loss, or an interference with the fulfilment of a duty or engagement with which voluntary or intentional human agency has not been connected, and which could not have been prevented by exercise of human care or foresight, and for which, therefore, man ought not to be held responsible. See ACTUS DEI. In modern times, either because the phrase has seemed to savor of irreverence, or from a growing disinclination to impute events to directly exerted divine action, merely because their causes and laws are not known to man, other expressions have been substituted, such as *vis major; casus fortuitus;* and particularly inevitable accident. This latter term, said to have been proposed by Sir William Jones, is believed to be now in very general use as equivalent to act of God; though Bouvier (without, however, pointing it out) says that there is a distinction between the two. See INEVITABLE ACCIDENT.

The cases discussing the phrase are, most of them, cases in which common carriers have sought an exemption from liability on the ground that the loss was attributable to the act of God.

The phrase act of God means the operations of nature, unmixed with human agency or human negligence. To render the excuse valid that a loss or injury happened from the act of God, such loss or injury must be traceable immediately to the operations of nature, and must have resulted from inevitable necessity, which no human prudence could foresee or prevent. Coosa River Steamboat Co. *v.* Barclay, 30 *Ala.* 120.

It means something superhuman, or something in opposition to the act of man. Chicago, &c. R. R. Co. *v.* Sawyer, 69 *Ill.* 285; Merchants' Despatch Co. *v.* Smith, 76 *Ill.* 542.

It denotes natural accidents, such as lightning, earthquakes, and tempests; but its signification is more general, and embraces all other unavoidable or inevitable accidents. Walpole *v.* Bridges, 5 *Blackf.* 222.

It means some natural necessity, which cannot be occasioned by the intervention of man, but proceeds from physical causes alone, such as the violence of the winds or seas, lightning, or other natural accident. New Brunswick Steamboat, &c. Co. *v.* Tiers, 24 *N. J. L.* 697, 700; Merritt *v.* Earle, 29 *N. Y.* 115.

It excludes all human agency. Merritt *v.* Earle, 29 *N. Y.* 115.

It includes those losses and injuries which are occasioned exclusively by natural causes, such as could not be prevented by human care, skill, and foresight. All the cases agree in requiring the entire exclusion of human agency from the cause of the injury or loss. If the loss or injury happen in any way through the agency of man, it cannot be considered the act of God; nor even if the act or negligence of man contributes to bring or leave the goods of the carrier under the operation of natural causes that work their injury, is he excused. In short, to excuse the carrier, the act of God, or *vis divina*, must be the sole and immediate cause of the injury. If there be any co-operation of man, or any admixture of human means, the injury is not, in a legal sense, the act of God. Michaels *v.* N. Y. Central R. R. Co., 30 *N. Y.* 564.

Act of God includes: The grounding of a vessel on a concealed shoal or bank, if inevitable; that is, if not to be avoided by a competent share of skill and diligence. Morel *v.* Roe, *R. M. Charlt.* 19.

A sudden failure of the wind. Colt *v.* McMechen, 6 *Johns.* 160.

A freshet. New Haven & Northampton Co. *v.* Quintard, 6 *Abb. Pr.* N. S. 128; 37 *How. Pr.* 29.

It does not include: An accidental fire, although extending to conflagration of a city, and arising without any default of the carrier. Miller *v.* Steam Nav. Co., 10 *N. Y.* 431; Gould *v.* Chapin, 10 *Barb.* 612; Niblo *v.* Binsse, 44 *Barb.* 54; Merchants' Despatch Co. *v.* Smith, 76 *Ill.* 542.

A loss occasioned by a vessel's grounding in a storm, being misled by the absence of one of the usual lights, and the presence of a misguiding light; for no matter what degree of prudence may be exercised by the carrier and his servants, although the delusion by which it is baffled, or the force by which it is overcome, be inevitable, yet if it be the result of human means, the car-

rier is responsible. McArthur *v.* Sears, 21 *Wend.* 190.

Collision with a sunken wreck, visible above the surface, although the wreck was sunk in the channel only a day or two before the collision, and by a sudden squall. Merritt *v.* Earle, 29 *N. Y.* 115.

The shifting of a buoy by some supposed natural cause, which causes the loss of a vessel. Reaves *v.* Waterman, 2 *Spears*, 197.

The freezing of perishable articles by reason of an unusual intensity of cold, if the loss might have been prevented by the exercise of diligence and care. Wing *v.* N. Y. & Erie R. R. Co., 1 *Hilt.* 235.

Act of grace, is often used to designate a general act of parliament, originating with the crown, such as has often been passed at the commencement of a new reign, or at the close of a period of civil troubles, declaring pardon or amnesty to numerous offenders. In Scotch law, it designates a particular statute, passed in 1696, under which a creditor, enforcing his right to imprison his debtor, was compellable to provide for his subsistence.

Act of indemnity. A statute passed for the protection of those who have committed some illegal act, subjecting them to penalties. Such acts have been frequently passed in favor of officers who have acted in good faith in the discharge of their duties, but without some qualification required by law; or in a manner technically illegal; or in excess of the powers strictly vested in them; and who have thereby become liable to consequences from which, in judgment of the legislature, they ought to be relieved.

Act of law. The operation of legal rules upon given facts or occurrences; as when it is said that a son succeeds to his father's estate by the act (or, more appropriately, operation) of law.

Acts of sederunt. Ordinances of the court of session, in Scotland, enacted under the act of 1540, ch. 93, which authorized making such statutes as might be found necessary for ordering process and expediting justice. *Bell.*

Act of settlement. The Stat. 12 & 13 Wm. III. ch. 2, limiting the crown to the Princess Sophia of Hanover, and to the heirs of her body being Protestants, is usually termed, in books of English constitutional history and jurisprudence, the act of settlement.

Acta exteriora indicant interiora secreta. Outward acts indicate inward purposes. Acts are deemed to indicate the intention of the actor. Thus, in criminal cases, where the intent and the act must concur to constitute the crime, the intention can only be inferred from the acts of the accused, considered with other circumstances. In cases where a civil remedy is sought for injuries, and where malice must be proved, the acts and expressions of the defendant are the best and often the only evidence of his malicious intent. Malice may even be presumed from the mere act causing the injury, as in actions for damages for slander, where the making a slanderous statement, shown to be untrue, raises a presumption of malice. Similar rules of evidence as to fraudulent intent are within the same general principle. The most frequent application of the maxim, however, is to cases where a previous intention is judged of by subsequent acts; as where an officer or other person acting under an authority given him by law, and properly entering upon the exercise of his authority, subsequently is guilty of a trespass, he becomes a trespasser *ab initio;* the law judging by such subsequent trespass with what intent the original act was done. *Broom's Max.* 301.

ACTE. In French law, denotes a document, or formal, solemn writing, embodying a legal attestation that something has been done corresponding to one sense or use of the English word act. Thus, *actes de naissance* are the certificates of birth, and must contain the day, hour, and place of birth, together with the sex and intended christian name of the child, and the names of the parents and of the witnesses. *Actes de mariage* are the marriage certificates, and contain names, professions, ages, and places of birth and domicile of the two persons marrying, and of their parents; also the consent of these latter, and the mutual agreements of the intended husband and wife to take each other for better and worse, together with the usual attestations. *Actes de décès* are the certificates of death, which are required to be drawn up before any one may be buried. *Les actes de l'état civil* are public documents. *Brown.*

ACTIO. A civil-law term very nearly corresponding to, and evidently the original of "action" as employed under common-law systems. It may signify either a right such as is enforceable by

judicial proceedings, or a judicial proceeding for the enforcement of a right. That is, it means either a right of action, or an action in the sense of action at law, according to the context. The notion of a legal proceeding was the one attached to the term in its earliest use in Roman law, and it is in this sense that it is oftenest used in quotations from common-law books written in Latin, and in the names of civil-law proceedings and remedies. A very large number of different species of *actio*, taking the word in the sense of a general term for civil-law judicial proceedings, are enumerated. Names of the more important of these are given below; not as an exhaustive list, but as indicating the general method of the nomenclature and some similarities between the civil and the common-law classifications.

Actio ad exhibendum. Action for exhibiting. A civil-law action to compel defendant to produce or exhibit something which was necessary to enable plaintiff to prosecute some other action.

What the interdict was to immovables that the *actio ad exhibendum* was to movables. Its purport was simply to have the property in dispute produced in court; but as no one could succeed in that who could not show some interest in the property, the question of ownership was virtually raised and often practically decided in the preliminary action. Such was not its ostensible object, for in reality the *actio ad exhibendum* was only a personal action, not an action *in rem*; but it was a preliminary that often rendered any further steps unnecessary. *Hunt. Rom. L.* 189.

Actio æstimatoria. Actio quanti minoris. Two names of an action which lay in behalf of a buyer to reduce the contract price, not to cancel the sale; the *judex* had power, however, to cancel the sale. *Hunt. Rom. L.* 332.

Actio arbitraria. Action depending on the discretion of the judge. In this, unless the defendant would make amends to the plaintiff as dictated by the judge in his discretion, he was liable to be condemned. *Hunt. Rom. L.* 825.

Actio bonæ fidei. Action of good faith. The name of a class of actions in which the adjudication might be governed by natural equity and justice; much resembling in general nature the suits in equity of English law.

In proceedings *bonæ fidei* (equitable) free power is allowed to the *judex* to fix the value that ought to be given up to the plaintiff on the ground of what is fair and right, including the power to take an account of what it appears the plaintiff ought to furnish in turn on the same ground, and to condemn the defendant to pay the balance. — *Hunt. Rom. L.* 832.

Actio calumniæ. An action to restrain the defendant from prosecuting a groundless proceeding or trumped-up charge against the plaintiff. *Hunt. Rom. L.* 859.

Actio civilis. Actio directa. Two expressions which designated the actions which proceeded directly, *i. e.*, unswervingly, according to the written civil law, as distinguished from some which originated as a voluntary exercise of the power of magistrates to enforce justice. They corresponded somewhat to tho English common-law action, as contrasted with a suit in equity.

Actio commodati. Included several actions appropriate to enforce the obligations of a borrower or a lender. *Hunt. Rom. L.* 305.

Actio communi dividundo. An action to procure a judicial division of joint property. *Hunt. Rom. L.* 194. It was analogous in its object to proceedings for partition in modern law.

Actio damni injuria. A general phrase corresponding to the modern "action for damages." It embraced a great variety of actions for losses sustained from wrongful, including negligent, acts. *Hunt. Rom. L.* 97.

Actio de dolo. Actio de dolo malo. Actions arising out of fraud were designated by these expressions.

Actio de pecunia constituta may be brought against any one that has engaged to pay money, either for himself or another, without any stipulation coming in; if he has promised to be a stipulator he is liable under the *jus civile*. *Hunt. Rom. L.* 386.

Actio depositi. Included several actions appropriate to enforce the obligations of a depositary, or a depositor. *Hunt. Rom. L.* 308.

Actio directa. Actio contraria. These civil-law terms related to a distinction between the remedy for enforcing a main or principal obligation and the one allowed for enforcing a counter obligation. They embody much the

same idea as is indicated in Anglo-Saxon jurisprudence by the terms original and cross bill on action. See also ACTIO CIVILIS, *supra*.

Actio empti. An action employed in behalf of a buyer to compel a seller to perform his obligations or pay compensation; also to enforce any special agreements by him, embodied in a contract of sale. *Hunt. Rom. L.* 332.

Actio ex contractu. Action from contract. **Actio ex delicto.** Action from wrong. This division of actions, in civil law, corresponded, in general nature, to that which was maintained in common-law jurisprudence between actions of contract and of tort.

Actio ex stipulatu. Under the civil law, a promise unilateral, or unsupported by any counter-promise as a consideration, might be made legally binding when given in due form of question and answer. Such a promise was called a stipulation, and an action to enforce one was an action *ex stipulatu*. *Hunt. Rom. L.* 285.

Actio furti. This expression included a variety of civil remedies for theft. *Hunt. Civ. L.* 180.

Actio in personam. Action towards the person. **Actio in rem.** Action towards the thing. If the immediate method and effect of the suit was upon the defendant, the first phrase applied; if upon specific property, the second. The same distinction has been maintained in modern admiralty practice, and the distinction between personal and real actions in the common law is very analogous.

Actio injuriarum. Included a variety of actions for personal injuries, those inflicted upon the wife, slave, or other person, in whose security the plaintiff had an interest, as well as those upon the plaintiff directly.

Actio mandati. Included actions to enforce contracts of mandate, or obligations arising out of them. *Hunt. Rom. L.* 316.

Actio negotiorum gestorum. Included actions between principal and agent and other parties to an engagement, whereby one person undertook the transaction of business for another.

Actio quanti minoris. See ACTIO ÆSTIMATORIA, *supra*.

Actio redhibitoria. An action to cancel a sale in consequence of defects in the thing sold. It was prosecuted to compel complete restitution to the seller of the thing sold, with its produce and accessories, and to give the buyer back the price, with interest, as an equivalent for the restitution of the produce. *Hunt. Rom. L.* 332.

Actio stricti juris. Action of strict right. The name of a class of actions under the civil law, the decision of which was governed by the very terms of the defendant's contract or engagement, without power in the *judex* or tribunal charged with ascertaining the facts and making application of the law to them, to exercise any equitable discretion.

Actio tutelæ. Included various actions founded on the claims or obligations arising on the relation analogous to that of guardian and ward.

Actio venditi. An action employed in behalf of a seller, to compel a buyer to pay the price, or perform any special obligations embodied in a contract of sale. *Hunt. Rom. L.* 332.

Actio non accrevit infra sex annos. Right of action did not accrue within six years. This phrase is not, like the preceding ones, a name of a class of civil-law actions, but is the distinctive phrase of the plea by which, in Latin forms of common-law pleading, the defendant claimed the benefit of the statute of limitations. A similar plea, more particularly appropriate in assumpsit, was *non assumpsit infra sex annos;* he did not contract within six years.

Actio personalis moritur cum persona. A personal right of action dies with the person. Under this principle, actions for mere injuries to the person, the feelings, or the reputation, such as assault, libel, and slander, abate finally on death of the plaintiff before verdict; while rights of action founded on contract or on injuries to property survive, and may be prosecuted by his representatives. The principle was formerly much more broadly held than at the present day.

Actionem non habere. Actionem non ulterius habere. These phrases were formerly used in the commencement of common-law pleas. The one signified that the plaintiff ought not to have an action, because, &c., introducing the facts relied on as a defence; and was often called, briefly, the *actio non*. The other signified that plaintiff ought not to have an action further, and was called the *actio non ulterius*.

ACTION. The employment of this word in its vernacular sense of conduct; any thing done or performed; the exercise of physical or legal powers by an individual or body; is proper and not unusual in jurisprudence. Thus the expressions, "judicial action is often discretionary," "in the course he took, defendant was guilty of a criminal action," do not import a judicial proceeding of any kind, but signify, in the most general way, something done. But in a technical sense much more frequent and important, action is a broad, generic term for the great mass of ordinary judicial proceedings, governed by established law, and prosecuted for enforcement of rights or redress or punishment of wrongs.

A term which is used so often must insensibly acquire some variations of meaning. Thus action, in its broadest sense, includes all the various proceedings ordinarily allowed in courts of justice; more narrowly, and as opposed to prosecution, it includes the modes allowed to individuals for enforcement of civil rights or redress of private wrongs, excluding proceedings instituted by government for punishment of offences; or, as opposed to suit, it means an ordinary proceeding according to the course of courts of law, excluding resort to equity or to remedies of equitable cognizance. See SUIT.

Prior to the era of codes of reformed procedure, and while common-law and equitable remedies were everywhere distinct, there was ground to say that, by general usage, action meant the ordinary proceeding entertained in common-law courts for administering such redress or punishment as was within their powers. It might comprise the proceeding for punishment of public offences, as well as that for redress of private wrongs; but very usually the former was distinguished as indictment or prosecution, and action was employed as more appropriate for lawsuits of individuals.

The New York code of procedure, after dividing remedies into actions and special proceedings, defines (in § 2) action as "an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence." This definition has been re-enacted in many states, and has received general approval. It was a fundamental principle of the system thus introduced, to merge common-law and equitable modes in one uniform remedy; both kinds of rights are prosecuted by "action," as the technical term, and "suit" is relegated to the vernacular.

Action is the form of a suit given by law for the recovery of that which is one's due; the lawful demand of one's right. *Co. Litt.* 285, 285 *a*.

The means by which men litigate with each other. 3 *Black. Com.* 117.

The right of recovering in a court of justice what is due or owing to one's self. *Brown.*

The legal demand of a right, without regard to the form of the proceedings by which such right may be enforced. Bridgton *v.* Bennett, 23 *Me.* 420, 425.

The legal demand of one's right. Farrington *v.* Freeman, 2 *Edw.* 572; Bank of Commerce *v.* Rutland & Washington R. R. Co., 10 *How. Pr.* 1; Overseers of Clayton *v.* Beedle, 1 *Barb.* 11.

A legal demand of one's right, or the right of prosecuting to judgment for what is due to one's self; and thus understood it does not include a *mandamus*, the issuing of which is discretionary. People *v.* Sage, 3 *How. Pr.* 56.

Action may be defined as an abstract legal right in one person to prosecute another in a court of justice; and suit, as the actual prosecution of such right in a court of justice. Matter of Hunter, 6 *Ohio*, 499.

Thus, a statute providing that an action for the killing of the father shall survive, upon the death of the widow, to the children, means the right of action. David *v.* South-western R. R. Co., 41 *Ga.* 223.

In the New York revised statutes, action generally designates a suit at law; but the word suit may mean either a proceeding at law, or one in equity. Didier *v.* Davison, 10 *Paige Ch.* 515.

Civil action, in the Iowa code, is used in distinction from criminal action, and includes proceedings in equity. Kramer *v.* Rebman, 9 *Iowa*, 114.

Action, in a statute, sometimes includes suits in chancery. Coatsworth *v.* Barr, 11 *Mich.* 199.

Action, includes proceedings by foreign attachment. Allen *v.* Partlow, 3 *S. C.* 417.

It includes writ of error. Ulshafer *v.* Stewart, 71 *Pa. St.* 170.

A writ of error is not a suit or action within the provisions of a statute to sue *in forma pauperis*. Moore *v.* Cooley, 2 *Hill*, 412; S. P. McDonald *v.* Bank for Savings, 2 *How. Pr.* 35.

Neither *certiorari* nor *mandamus* are actions within a statute providing that, on the expiration of the term of office of an officer against whom an action is pending, the court shall substitute his successor. People *v.* Sage, 3 *How. Pr.* 56; People *v.* Oswego County Court, 2 *Thomp. & C.* 431.

A writ of error is not an action or suit, within a provision that no action or suit brought by persons in their official capacity shall abate by the determination of such capacity by death or otherwise, but their successors shall be substituted. Overseers of Poor *v.* Beedle, 1 *Barb.* 11.

In a statute providing for continuance of any action after death of a party, action has been held to include appeals from decrees of courts of probate. Stiles' Appeal, 41 *Conn.* 329.

In a proviso that an act permitting interested witnesses to testify, "shall not apply to actions by or against executors," &c., action has been held to include all civil proceedings. McBride's Appeal, 72 *Pa. St.* 480.

Petitions for the location of highways pending before county commissioners are not actions, within the meaning of a statute saving pending actions from the effect of certain statutes regulating appeals. Webster *v.* Commissioners of Androscoggin, 63 *Me.* 27.

A proceeding for assessment of damages for land taken for a highway is not an action. Valentine *v.* City of Boston, 20 *Pick.* 201.

Action, as defined in the New York code (see *supra*), includes: Any judicial proceeding which, if conducted to a termination, will result in a judgment; such as a proceeding in a justice's court, under a mechanic's lien law. People *v.* County Judge of Rensselaer, 13 *How. Pr.* 398.

All civil actions, not only such as were formerly actions at law, but also such as were formerly suits in equity. Corson *v.* Ball, 47 *Barb.* 452; Bank of Commerce *v.* Rutland, &c. R. R. Co., 10 *How. Pr.* 1.

A creditor's suit. Quick *v.* Keeler, 2 *Sandf.* 231.

A proceeding for partition. Backus *v.* Stilwell, 3 *How. Pr.* 318; 1 *Code R.* 70; Myers *v.* Rasback, 4 *How. Pr.* 83.

A proceeding in the nature of a writ of *quo warranto*. People *v.* Cook, 8 *N. Y.* 67.

Proceedings on the reference of a claim against an executor or administrator, under 2 Rev. Stat. 88, § 36. Lansing *v.* Cole, 3 *Code R.* 246.

It does not include: A proceeding to assess damages on the laying out of plank-roads. Ex parte Ransom, 3 *Code R.* 148.

Proceedings upon a submission of a controversy without action. Lang *v.* Ropke, 1 *Duer*, 701.

Proceedings against the heirs, executors, &c., of a deceased judgment debtor. Mills *v.* Thursby, 2 *Abb. Pr.* 432.

Actions are called common-law actions, or statutory actions, according as they were accorded by the common law, or have been created by statutes.

Actions are called civil, when they lie in behalf of persons to enforce their rights or obtain redress of wrongs in their relation to individuals; criminal, when they are instituted on behalf of the sovereign power, for the purpose of punishing offences against the public; and penal, when they are brought, either by the state or by an individual under permission of a statute, to enforce a penalty imposed by law for the commission of a prohibited act.

The English courts of judicature act, 36 & 37 Vict. ch. 66, § 100, prescribes that in the construction of that act "action shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by rule of court, and shall not include a criminal proceeding by the crown."

Actions are styled real, personal, and mixed, according as they seek to recover real property, or payment of money by way of damages, &c., or both.

Action real is that action whereby a man claims title to lands, tenements, or hereditaments, in fee or for life; and these actions are possessory, or auncestrel: possessory, of a man's own possession and seisin; or auncestrel, of the possession or seisin of his ancestor.

Action personal is such as one man brings against another, on any contract for money or goods, or on account of any offence or trespass; and it claims a debt, goods, chattels, &c., or damages for the same.

Action mixed is an action that lieth as well for the thing demanded as against the person that hath it, in which the thing is recovered, and likewise damages for the wrong sustained: it seeks both the thing whereof a man is deprived and a penalty for the unjust detention. *Jacob.*

By the real actions of the English law we understand specially the old feudal actions brought for the recovery of land, or any freehold interest therein.

Actions personal, as opposed to actions real, are such whereby a man claims a debt, or personal duty, or damages in lieu thereof; and likewise whereby a man claims a satisfaction or damages for some injury done to his person or property. *Mozley & W.*

Actions are called local, when they relate to or involve a subject-matter having, in the view of the law, an independent location, in which case the place of trial is governed by the location attributed to the subject; and transitory, when they are unconnected with such fixed subject-matter, and may be tried where the person of the defendant is reached.

Popular actions, in English usage, are those actions which are given upon the breach of a penal statute, and which any man that will may sue on account of the king and himself, as the statute allows and the case requires. Because the action is not given to one especially, but generally to any that will prosecute, it is called action popular ; and, from the words used in the process (*qui tam pro domino rege sequitur quam pro se ipso*, who sues as well for the king as for himself), it is called a *qui tam* action.

Actions are called, in common-law practice, *ex contractu*, when they are founded on a contract; *ex delicto*, when they arise out of a wrong.

The common-law action was commenced by a writ, which, under the practice in several of the states, embodied sufficient information of the case set up by plaintiff to serve the purpose of a declaration. Where this is not required, the plaintiff, in a common-law action, opens the pleadings by a declaration showing his cause of action. To this the defendant interposes a demurrer or a plea; and following the plea there might be, until recent statutory changes, a long series of replication, rejoinder, and the like, framed according to astute rules, prescribed by the science of special pleading, for bringing the parties to a distinct simple issue.

Under the codes, action is commenced by summons, which is scarcely a judicial process, but rather a notice from complainant to defendant to appear and defend. It proceeds by pleadings of a simple nature, limited to a complaint or petition and an answer, except where the answer alleges an affirmative claim or counter-cause of action, when a reply is appropriate. Issues are raised by an implied traverse of the answer or reply.

ACTIONABLE. That which may be the subject of an action. Thus words which are slanderous, and for the speaking of which an action may be maintained, are spoken of as actionable.

ACTOR. A plaintiff. Used as the opposite of *reus*, a defendant.

Also, used of the party who, for the time, has the initiative in the suit.

Actor sequitur forum rei. According as *rei* is intended as the genitive of *res*, a thing, or *reus*, a defendant, this phrase means: The plaintiff follows the forum of the property in suit, or the forum of the defendant's residence.

Actore non probante, reus absolvitur. The plaintiff not proving his case, the defendant is absolved. A principle more frequently expressed by the maxim, *Actori incumbit probatio*, q.v.

Actori incumbit probatio. Upon the plaintiff rests the burden of proof. If the plaintiff does not prove his case, or establish his claim, the defendant is not required to refute it, and the action fails. Thus, where the right of possession of property is in question, the defendant is not bound to show any title to the possession until the plaintiff has shown title sufficient to call in question the defendant's possession; and the plaintiff can recover only on the strength of his own case, not on the weakness of the defendant's. Where his claim is in equity, he is bound to prove it to be better, more just, more equitable, than the defendant's claim, whether the latter be in law or equity. Fisk *v.* Potter, 2 *Abb. Dec.* 138 ; 2 *Keyes*, 64. But the application of this principle is somewhat modified by the further maxim on the same subject, *Affirmanti, non neganti, incumbit probatio*, q. v.

ACTUAL. That which is real, which exists in fact, and in the time being ; in contradistinction to that which is merely conceived or is imputed by construction, or is theoretic, or is suggested as of future occurrence.

Something real, in opposition to constructive or speculative,—something "existing in act." State *v.* Wells, 31 *Conn.* 210, 213.

The word occurs in several legal phrases, of which the following are of leading importance:

Actual cost. The price which has been in fact paid for a thing purchased. Where a revenue law has imposed duties on goods according to their actual cost, this means the actual price paid in a *bona fide* purchase, and not the market value. Alfonso *v.* United States, 2 *Story*, 421; United States *v.* Sixteen Packages of Goods, 2 *Mas.* 48.

Actual damages. Money awarded to be paid by a wrong-doer to an injured person in compensation for his real loss or injury; in distinction, on the one band, from a merely nominal sum allowed as matter of course and upon legal theory, because his right has been violated; and, on the other, from a sum allowed to be imposed by way of punishment, or from motives of public policy, to prevent repetition of such wrongs. See DAMAGES.

Actual determination. Some statutes giving a right of appeal restrict it to a review of an actual determination of the court below; such as N. Y. Code of Pro. § 11.

A judgment by default, affirming a judgment appealed from, is not an "actual determination," within the meaning of such a statute, McMahon *v.* Rauhr, 47 *N. Y.* 67; nor is a judgment entered in a lower court, upon a *remittitur* from an appellate court, and in conformity therewith, Wilkins *v.* Earle, 46 *N. Y.* 358; 42 *How. Pr.* 255; nor is a judgment reversing a judgment below, and ordering a new trial, Frank *v.* Benner, 3 *Daly*, 422. But an appeal lies from a judgment entered after an order denying a new trial, although the judgment is not directed in the order; for such a judgment is, in effect, an "actual determination," the entry of judgment below having been suspended until the order was made. Caughey *v.* Smith, 47 *N. Y.* 244.

Actual notice is a notice really given,—a notice by means which bring the fact to the mind of the person concerned, and give him a knowledge of it; as distinguished from an imputation of knowledge on a theory of law, that, because the fact was publicly recorded, or means of knowing it existed, the person concerned is to be treated as if he had knowledge.

Notice is actual, when it is directly and personally given to the party to be notified; and constructive, when the party, by circumstances, is put upon inquiry and must be presumed to have had notice, or by judgment of law is held to have had notice. Jordan *v.* Pollock, 14 *Ga.* 145.

Actual occupation or possession. Actual occupant, as used in the provisions of the New York revised statutes governing ejectment, means no more than "tenant in possession." A soldier of the United States in charge, under superior officers, of land, as the property of the United States, is not such occupant. People *v.* Ambrecht, 11 *Abb. Pr.* 97, 101.

Neither actual occupation, residence, or cultivation are necessary to constitute actual possession, when the property is so situated as not to admit of any permanent, useful improvement, and the continual claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over any other. Ewing *v.* Burnet, 11 *Pet.* 41; 1 *McLean*, 266; and see Watkins *v.* Holman, 16 *Pet.* 25.

One who erects a saw-mill on land, and has mill employés residing thereon, although himself absent, and residing in another county, is in "actual possession" and "occupation" of the land within the meaning of Iowa Rev. 3, § 3318,—entitling such person to written notice of levy. Fleming *v.* Maddox, 30 Iowa, 239.

Actual possession, as used in the provisions of N. Y. Rev. Stat. 312, § 1, authorizing proceedings to compel the determination of claims to real property, means a possession in fact effected by actual entry upon the premises; an actual occupation. Churchill *v.* Onderdonk, 59 *N. Y.* 134.

It means an actual occupation or possession in fact, as contradistinguished from that constructive one which the legal title draws after it. The word actual is used in the statute in opposition to virtual or constructive, and calls for an open, visible occupancy. Cleveland *v.* Crawford, 14 *N. Y. Supreme Ct.* 616.

Actual payment. The statutes authorizing the formation of limited partnerships, and exempting a special partner from general liability, generally require proof to be made at the formation of the partnership that the capital has been actually paid. It has been held that a contribution to the capital, made in goods, is not a compliance with this re-

quirement. Haviland *v.* Chase, 39 *Barb.* 283. But a payment contributed in checks of third persons, upon bankers, which checks are afterwards paid, is an actual cash payment within such a statute. Hogg *v.* Orgill, 34 *Pa. St.* 344.

Actual total loss. A real destruction of property insured against losses at sea; a loss in fact, depriving the insured party of the original thing insured, as distinguished from such injury or change of condition as by the theory of insurance law entitles the insured to recover the insurance money, although the property may subsist in a condition admitting its being delivered to the insurers by abandonment.

Actual total loss is not quite equivalent to destruction: thus, a ship is totally lost when lost as a ship; a cargo is totally lost when lost as a cargo; and either ship or cargo is a total loss to the insured owner when he has lost all possession of, or power or control over them, although they may continue to exist in specie as before. But in the latter case there must be no rational hope, no practicable possibility, of recovering possession, and further prosecuting the voyage. Where a ship springs a leak and sinks in mid-ocean, though part of the cargo may float and is picked up by other vessels, there is an actual total loss. So goods which, while they exist in specie, are so damaged they cannot be reshipped, and could not arrive in specie at their final destination, the loss is an actual total loss. So, if a ship be burned to the water's edge, and still floats, incapable of repair; but if near the shore and in shoal water, the loss is not an actual total loss until it is ascertained that she cannot be weighed and recovered; nor is damage by fire an actual total loss, if the ship can be repaired. *Pars. Mar. Ins.*

Actual total loss is where a vessel ceases to exist in specie, becomes a "mere congeries of planks," incapable of being repaired; or where, by the peril insured against, it is placed beyond the control of the insured, and beyond his power of recovery. Globe Ins. Co. *v.* Sherlock, 25 *Ohio St.* 50.

ACTUARY. In English ecclesiastical law, the actuary is an officer similar to a clerk or scribe, charged with the duty of registering the canons and constitutions of the convocation.

In modern usage, the term generally signifies the computing officer of an insurance company, the person who calculates the risks and premiums for fire, life, and other insurances.

Actus curiæ neminem gravabit. An act of the court shall prejudice no one. The court will not suffer either party to an action to be prejudiced by the action or delay of the court itself. Thus, where the decision of a cause is delayed by the court without any laches of one of the litigants, and the other litigant dies before judgment, the court will order judgment to be entered *nunc pro tunc*, if necessary, to meet the justice of the case. Cumber *v.* Wane, 1 *Str.* 425; Moor *v.* Roberts, 3 *C. B.* N. S. 844; Miles *v.* Bough, 3 *Dowl. & L.* 105.

Actus Dei nemini facit injuriam. An act of God does injury to no one. In another form, *Actus Dei nemini est damnosus.* An act of God is hurtful to no one. Inevitable accidents, occurring without the intervention of man, are so treated by the law as to affect no one injuriously. Things which are inevitable by the act of God, which no industry can avoid nor policy prevent, should not be construed to the prejudice of any person, in whom there has been no laches. *Broom Max.* 230. Thus a common carrier is not held liable for loss, damage, or delay in the carriage of goods arising from the act of God; *e.g.*, from a tempest. The rule that, upon the death of a lessor who has only an estate for his life, before the day on which rent reserved is made payable, the rent shall be apportioned, is an illustration of the same principle. So with the rule that upon the death of a tenant for his own life his executors shall take the emblements, the estate being deemed to be determined by the act of God. Loss or damage, occurring without a wrongful or culpable act of any person, does not constitute *injuria*, within the meaning of these maxims, but is distinguished by the term *damnum absque injuria*, q. v.

Actus legis nemini facit injuriam. An act of the law does injury to no one. In another form, *Actus legis nemini est damnosus.* An act of the law is hurtful to no one. An act of the law is to be limited in its operation, so that it shall not work prejudice to the rights of any person. Illustrations of this principle are found in the application of rules relative to the effect upon rights of property, of marriage, divorce, merger of estates, &c. See Milbourn *v.* Ewart,

5 *Term*, 381; Cage *v.* Acton, 1 *Ld. Raym.* 515; Calland *v.* Troward, 2 *H. Bl.* 324; and 2 *Black. Com.* 123. The distinction referred to under the preceding maxim between *injuria* and *damnum absque injuria* (q. v.) is to be understood of the *actus legis* as well as of the *actus Dei.*

Actus me invito factus, non est meus factus. An act done without my assent is not my act. Where an act is performed unwillingly or involuntarily, under force, intimidation, or fear, it is not to be regarded as the act of the person performing it, and he is not bound by or responsible for such act. The case of a lighted squib thrown by one person and warded off by another, where the latter is not held responsible for the injury resulting, is a familiar illustration of an act done involuntarily. The execution of a deed under duress is an instance of an act done unwillingly, which is therefore void. The force or duress must, however, be illegal or improper to bring the case within the meaning of the maxim. Thus the execution of a deed, compelled by judicial decree, is valid, as the act of the grantor, although unwillingly performed. *Trayn. Max.* 21. A similar principle, applicable chiefly to criminal cases, is expressed by the maxim next following.

Actus non facit reum, nisi mens sit rea. An act does not make one guilty, unless the intention be guilty. A mere overt act, without criminal or wrongful intention, does not render the performer of it guilty of crime, nor even, under some circumstances, civilly liable for resulting injury. To constitute a crime, the intent and the act must both concur. Thus to take the property of another without his consent or against his will is criminal, if the criminal intent be present, prompting the act; but to take the property of another in mistake, in ignorance, or through mere heedlessness, is not criminal. In both cases the overt act is the same, but the intention is different. So a person offering counterfeit coin, in ignorance that it is counterfeit, commits no crime; while the same act, accompanied with knowledge that the coin offered is counterfeit, is criminal, because of the criminal intention to utter base coin. Yet a criminal intent is often presumed from overt acts only, in cases coming within the principle that every man is supposed to intend the necessary, or even the probable and natural, consequences of his own acts. Thus the malice aforethought requisite to constitute the crime of murder at common law is sufficiently proved by showing that the killing was intentional, and without justification or excusable cause, although no enmity or ill-will of the accused towards the deceased is shown. Rex *v.* Farrington, *Russ. & R.* 207; Rex *v.* Harvey, 2 *Barn. & C.* 264. So where an attack is made with a deadly weapon, or in a manner showing an utter disregard of consequences, and death ensues, the crime is murder; and, in general, where any act manifestly unlawful and dangerous is done deliberately, the mischievous intent will be presumed, unless the contrary be shown. 1 *East P. C.* 231. Moreover, when the law positively forbids a thing to be done, it becomes thereupon *ipso facto* illegal to do it wilfully, or in some cases even ignorantly, or, perhaps, even to effect an ulterior laudable object; and, from the mere infraction of the law, the intention to break the law must be inferred. *Broom Max.* 307, and cases cited.

The converse of this principle is of wide application, and, by analogy, illustrates the relation between the overt act and the intention in criminal cases. So long as an act rests in mere intention, it is not punishable; but when the act is done, the law judges not only of the act itself, but of the intent with which it was done; and if the act be coupled with an unlawful and malicious intent, though in itself the act would otherwise have been innocent, yet the intent being criminal, the act likewise becomes criminal and punishable. Rex *v.* Higgins, 2 *East*, 21; Rex *v.* Scofield, cited 2 *East P. C.* 1028; Dugdale *v.* Regina, 1 *Ellis & B.* 435.

So far as the maxim is applicable to civil remedies, the same principles govern its interpretation. Thus, in ordinary actions for slander or libel, if the defamatory matter was spoken or published on a proper occasion, malice in

fact must be proved; but if such speaking or publication was without just cause or excuse, malice will be inferred, without regard to the actual intention of the party.

AD. To, for, at, until. Occurring in many Latin phrases, such as:

Ad admittendum clericum. For admitting a clerk. The name of a writ which lay at common law in favor of one who had, by the proper legal proceeding (as by action of *quare impedit*), established his right of presentation to a benefice. It was directed to the bishop, requiring him to admit the patron's clerk to the benefice. The writ is practically obsolete.

Ad aliud (or sometimes *alium*) **examen.** To another tribunal.

Ad colligendum bona defuncti. For collecting the goods of the deceased. While a dispute is pending as to who shall be appointed executor or administrator, or probate of a will is delayed, the circumstances of the estate often require that the court of probate should appoint some person, temporarily, for collecting and preserving the assets. His commission, in old forms, was characterized by this Latin phrase.

According to the New York practice, when a case arises calling for the issuing of letters of collection, the selection of the collector rests wholly in the discretion of the surrogate. The collector, when appointed, takes an oath and gives a bond in manner prescribed by statute. His powers are strictly conservative, the purpose of the appointment being only to preserve the assets. He has no authority to pay debts; still less to pay legacies or make distribution; and his power of selling goods or disbursing moneys is limited to sales and payments necessary for collection or preservation of the estate, until the time arrives when he can turn it over to an authorized executor or administrator. *Dayt. Surr.* 251, 311, 583.

Ad communem legem. At the common law. The name of a species of writ of entry at common law, brought by a person entitled in reversion, to recover land which had been wrongfully alienated by the tenant for life. It could be brought only after the death of the tenant for life. Having been long obsolete, it was abolished in England by Stat. 3 & 4 Wm. IV. ch. 27, § 36. *Mozley & W.*

Ad damnum. To the loss. A common-law declaration, after alleging the acts forming the cause of action, closes with the clause or formula that they were to the damage of the plaintiff so many pounds (or dollars), namiug a sum, wherefor he brings suit. The Latin version of this clause, in the old forms, gave a name to it which is still retained; the clanse in the plaintiff's pleading, in which he alleges the amount of his loss, for which he claims recovery, is called the *ad damnum* clause, or the *ad damnum*.

Ad ea quæ frequentius accidunt jura adaptantur. Laws are adapted to cases which frequently occur. A statute, which, construed according to its plain words, is, in all cases of ordinary occurrence, in no degree inconsistent or unreasonable, should not be varied by construction in every case, merely because there is one possible but highly improbable case in which the law would operate with great severity and against our notions of justice. The utmost that can be contended is that the construction of the statnte should be varied in that particular case, so as to obviate the injustice. Miller *v.* Salomons, 7 *Exch.* 549; 8 *Id.* 778. If the words of the law do not extend to a case of rare occurrence, through inadvertence of the legislature or otherwise, the construction will not be strained to suit snch a case, it being deemed a *casus omissus*, which the courts will not supply. The general principle applies to the unwritten law as well as to statutes. Hawtayne *v.* Bourne, 7 *Mees. & W.* 599.

Ad exhæredationem. To the disherison; to the injury of the inheritance.

Ad fidem. (Holden) to allegiance.

Ad filum. To the thread. See AD MEDIUM FILUM.

Ad finem. To the end. Often abbreviated *ad fin.* It is chiefly used in references to books, as a direction to read from the place designated to the end of the chapter, section, &c.

Ad inquirendum. For inquiring. Characteristic words of a common-law writ directing inquiry to be made of

any thing relating to a cause depending. *Brown.*

Ad interim. In the mean time.

Ad litem. For the suit. Used to designate a guardian appointed to prosecute or defend a suit on behalf of a party incapacitated by infancy or otherwise; such guardian is termed a guardian *ad litem.*

Ad medium filum aquæ. To the middle thread of the stream. **Ad medium filum viæ.** To the middle thread of the way. It is a doctrine of conveyancing often applied, that a deed describing lands as bounding on a stream or on a highway, without any thing to identify the line more exactly, is understood to mean bounded by the centre line or middle thread of the stream or road; provided always that the grantor's own title extended so far.

Ad ostium ecclesiæ. At the door of the church. An ancient kind of dower was termed "dower *ad ostium ecclesiæ*," because the wife was endowed by the husband at the door of the church (when ceremonies of marriage were performed at the church door) of the whole of his lands, or such part of them as he might then specify, or even of his personal estate; but this has been disused and abolished by statute. 2 *Black. Com.* 133. A trace remains in the marriage ritual of the Church of England, in the words addressed by the man to the woman, "With all my worldly goods I thee endow."

Ad proximum antecedens fiat relatio, nisi impediatur sententia. Let a reference be to the nearest antecedent, unless the meaning hinders. A word of reference is to be understood as intended to refer to the antecedent nearest it, unless the evident meaning of the writer compels a different construction of the instrument under consideration. Where the context requires a deviation from the rule, the relative may be connected with nouns which go before the last antecedent. Staniland *v.* Hopkins, 9 *Mees. & W.* 192. In all cases "the last antecedent" is the last word which can be made an antecedent so as to have a meaning. And the intent will control the strict grammatical rule; as in case of an award that one should pay before such a feast ten pounds to another, and that *then* the other should make him a release, the word then should not then be referred to the time of the feast, but to the time of payment of the money. *Dyer*, 15 *b*, *arg.*

Ad quæstionem facti non respondent judices; ad quæstionem legis non respondent juratores. To a question of fact the judges do not answer; to a question of law the jurors do not answer. Or conversely, *Ad quæstionem juris respondent judices; ad quæstionem facti respondent juratores.* To a question of law the judges answer; to a question of fact the jurors answer. A question or issue of fact must be determined by the jury; a question or issue of law must be determined by the judge. This maxim expresses a leading principle of procedure, a peculiar and characteristic feature of the common-law system. One of many familiar instances of the application of the rule is the question of the validity of a deed, where the matters of fact, as the execution, delivery, and accompanying circumstances, are passed upon by the jury, and the judge determines, as matter of law, the legal sufficiency, and the construction and effect of the instrument. In an action for malicious prosecution, where the defendant gives evidence tending to show reasonable and probable cause for the prosecution, the jury must find the facts; but the judge must decide, as matter of law, whether the facts proved amount to reasonable and probable cause. But in all cases, the question whether there be any evidence is for the judge; whether sufficient evidence, for the jury. Another limitation of the rule is, that facts on which the admissibility of evidence depends are determined by the judge, not by the jury. Thus, if the competency of a witness, or of documentary evidence, turns on any disputed fact, the judge must decide it. And it is for the jury to determine the application of the law to the facts found by them, at least in all cases where their verdict is general, — that is, for the plaintiff or for the defendant, guilty or

not guilty, — such a verdict being manifestly compounded of the facts, and the law as applicable to them.

Ad quod damnum. The name of a writ commanding the sheriff to make inquiry "to what damage" a specified act, if done, will tend.

Ad quod damnum is a writ which ought to be sued before the king grants certain liberties, as a fair, market, or such like, which may be prejudicial to others, and thereby it should be required whether it will be a prejudice to grant them, and to whom it will be prejudicial, and what prejudice will come thereby. There is also another writ of *ad quoa damnum*, if any one will turn a common highway and lay out another way as beneficial. *Termes de la Ley.*

Ad quod non fuit respondendum. To which there was no answer.

Ad respondendum. For answering. Words peculiar to certain writs employed for bringing a person before the court to make answer in defence in a proceeding. Thus there is a *capias ad respondendum*, q. v.; also a *habeas corpus ad respondendum.*

Ad satisfaciendum. To satisfy. The distinctive words of the writ of *capias ad satisfaciendum*, q. v., and other writs by which the sheriff was required to take the defendant to satisfy the demand of the plaintiff.

Ad sectam. At the suit. Used in entitling causes or papers on the part of the defendant in a suit, in an abbreviated form; as "ads.," and sometimes "adsm." and "ats.;" *e. g.*, Richard Roe *ads.* John Doe, — Richard Roe at the suit of John Doe.

In many jurisdictions it has been the practice for the party who was the actor in each step or proceeding to entitle that paper, placing his own name first and his adversary's after. Thus the defendant's pleadings and notices of motion would be entitled, ——, defendant, *ads.* (for *ad sectam*) ——, plaintiff. If the paper thus entitled became the cause of a hearing and decision in court which was reported, the reporter naturally entitled his account with the same formula. Hence many cases in older reports are entitled Roe, *ads.* Doe, instead of Doe *v.* Roe. This method was abrogated, for New York, by the reformed code of procedure, which introduced the rule that the title of a cause should, from the outset and through all the proceedings, present the plaintiff's name first and the defendant's last. Whether the particular pleading or paper served emanates from the plaintiff or from the defendant, whether the cause is pending in the court of original jurisdiction or has been carried up by appeal, makes no difference; the same title is used throughout.

Ad terminum qui preterit. For a term which has passed. Words in the Latin form of the writ of entry employed at common law to recover, on behalf of a landlord, possession of premises, from a tenant holding over after the expiration of the term for which they were demised. *Wharton.*

Ad valorem. According to value. Duties upon imports have been imposed by two different systems, sometimes by requiring payment of a specific sum upon an article, by name, called specific duties; in other cases by requiring payment of a sum ascertained by a percentage on the value of the importation, called *ad valorem* duties.

The term *ad valorem*, as used in the revenue laws, does not always mean the actual value of the article. United States *v.* Clement, *Crabbe*, 499.

Additio probat minoritatem. An addition shows limitation. See ADDITION.

ADDITION. 1. Some designation conferred on a person besides his name, to identify him more precisely, has been called, especially in former conveyancing, his addition.

Addition is that which is given to a man besides his proper name and surname, that is to say, of what estate, degree, or mystery he is, and of what town, hamlet, or country. Additions of estate are these: yeoman, gentleman, esquire, and such like. Additions of degree are the names of dignity, as knight, earl, marquess, duke. Additions of mystery are: scrivener, painter, mason, carpenter. And there are additions of town, as, "of Dale." *Termes de la Ley.*

2. Addition, as used in its vernacular sense, in mechanic's lien laws, has received judicial construction.

Under a statute giving a mechanic's lien upon an "addition erected to a former building," the new structure must be a

lateral addition. It must occupy ground without the limits of the building to which it constitutes an addition; so that the lien shall be upon the building formed by the addition, and the land upon which it stands. An alteration in a former building, by adding to its height, or to its depth, or to the extent of its interior accommodations, is an alteration merely, and not an addition, within the act. An addition erected to a former building is the appropriate and accustomed phrase, when speaking of an additional building, erected alongside of, and not one under, or on top of, a former building. If one should say he had erected an addition to his house, he would not be understood as saying that he had put a cellar under it, or a story on top of it. Updike *v.* Skillman, 27 *N. J. L.* 131.

A piazza is an addition to a building, within the mechanic's lien law of New Jersey; folding doors are not. Whitenack *v.* Noe, 11 *N. J. Eq.* 413.

Additional. Embraces the idea of joining or uniting one thing to another, so as thereby to form one aggregate. Thus, "additional security" imports a security, which, united with or joined to the former one, is deemed to make it, as an aggregate, sufficient as a security from the beginning. Under a statute providing for giving additional security for a guardian, the new sureties are liable, with the old ones, for all defaults of the guardian since the first bond. State *v.* Hull, 53 *Miss.* 626.

ADEEM. To satisfy a legacy by some gift or substituted disposition, made by the testator, in advance. Ademption: an extinguishment of a bequest, by acts of the testator, indicating an intent to substitute another disposition for it.

Ademption is the act by which the testator pays to his legatee, in his lifetime, a general legacy which by his will he had proposed to give him at his death; also used to denote the act by which a specific legacy has become inoperative on account of the testator having parted with the subject. Langdon *v.* Astor, 16 *N. Y.* 9, 40.

Ademption, in strictness, is predicable only of specific, and satisfaction of general legacies. Beck *v.* McGillis, 9 *Barb.* 35, 56, Langdon *v.* Astor, 3 *Duer*, 477, 541.

An ademption of a legacy occurs where the thing specifically bequeathed is not in existence at the time of the testator's decease. Thus, if a horse be specifically bequeathed, and afterwards die during the testator's lifetime, or be disposed of by him, the legacy will be lost or adeemed, because there will be nothing on which the bequest can operate. Ford *v.* Ford, 23 *N. H.* 212.

Where one who has made his will, giving a legacy to a child or grandchild, afterwards gives a portion to or makes a provision for the child, though without expressing it to be in lieu of the legacy, it will be deemed an ademption if the circumstances indicate that intention, if it is not less than the legacy, if it is certain, and of the same general nature, &c. [*Story Eq.* § 1111.] Clendenning *v.* Clymer, 17 *Ind.* 155; Weston *v.* Johnson, 48 *Id.* 1.

If a testator bequeaths bank shares, and afterwards sells some of them, this sale is an ademption of the legacy *pro tanto.* White *v.* Winchester, 6 *Pick.* 48.

Same as to sale, by testator, in his life, of one of several slaves given by his will. Goddard *v.* Wagner, 2 *Strobh.* 1.

ADHERENCE. The name of a form of action by which, in Scotland, the mutual obligation of marriage may be enforced by either party. *Bell.* It corresponds to the English action for the restitution of conjugal rights.

ADJACENT. Lying close to, or bordering upon, something. People *v.* Schermerhorn, 19 *Barb.* 540, 556. Compare Peverelly *v.* People, 3 *Park. Cr.* 59, 69.

A statute authorizing the entry of a specified quantity of public land adjacent to a certain boundary does not restrict the entry to land adjoining the boundary; land in the neighborhood, or convenient or near to the place mentioned in the act, may be taken. Henderson *v.* Long, 1 *Cooke*, 128.

Adjacent, applied to lots of land, to discriminate them as to locality from other lots, in a statute which undertakes to devest rights of property, and is therefore to be strictly construed, must be held synonymous with contiguous; although in another and more general relation it might have a more extended meaning. Municipality No. 2, 7 *La. Ann.* 76.

ADJOIN. Adjoining, in a statute enacting that firing a building, not the subject of arson in the first degree, but adjoining to or within the curtilage of a dwelling-house, shall constitute the offence of arson in the second degree, means, in actual contact with. Peverelly *v.* People, 3 *Park. Cr.* 59.

The words, "adjoining to or occupied with a dwelling-house," in the Michigan statute defining burglary, have a legal signification, and must be construed in connection. They mean something more than adjacent or contiguous. They evidently refer to the common-law definition of burglary, and mean a breaking into out-houses within the same enclosure, adjoining to the dwelling, and occupied as part thereof. People *v.* McGra, 1 *Mich. N. P.* 27.

Adjoining, when applied to towns, includes towns which corner together, as well as those having the same boundary line. Holmes *v.* Carley, 32 *Barb.* 440.

A tract of land occupied as a homestead, situated eighty rods outside of the boundary of a city, was held not embraced in the provision that tracts of land laid off into

town lots, adjoining the boundaries of a city, should be deemed a part of the city. Truax *v.* Pool, 46 *Iowa*, 256.

ADJOURN. To postpone action of a convened body until another time specified, or indefinitely, usually called to adjourn *sine die*. Adjournment; a postponement or putting off of proceedings until another time or place.

The primary signification of adjourn is to put off to another day specified. But it has also the meaning of suspending business for a time; deferring; delaying. La Farge *v.* Van Wagenen, 14 *How. Pr.* 54, 58.

Adjourn and postpone, used in different clauses of a statute empowering justices of the peace to put off causes pending before them, have been held synonymous. Bispham *v.* Tucker, 2 *N. J. L.* 184 (254).

Adjournment, as used in S. C. Const., art. 3, § 22, relating to the governor's approval of acts, means an adjournment by the concurrent action of both houses of the general assembly. Corwin *v.* Comptroller-General, 6 *Rich.* (S. C.) 390.

Adjourned session; or, **adjourned term.** These expressions import a session or term which is but a continuation of a previous one; the same session or term prolonged. Thus, as the session or term preceding has not finally closed, the power of the court to correct an erroneous judgment continues. Van Dyke *v.* State, 22 *Ala. N. s.* 57.

Adjourned session, as the term is used in Maryland, is considered as the same session with that at which the adjournment was made. Mechanic's Bank of Alexandria *v.* Withers, 6 *Wheat.* 106, 109.

Adjourned summons. A summons taken out in the chambers of a judge, and afterwards taken into court to be argued by counsel. *Hunt, Eq.*

ADJUDGE. To determine, in the exercise of judicial power. Adjudged: decided judicially.

Adjudged is sometimes used as a synonyme of declare or deem, and without implying any judgment of a judicial tribunal; as, in N. J. Rev. Laws, 272, § 1, "all lotteries shall be, and are hereby adjudged to be, common and public nuisances." State *v.* Price, 11 *N. J. L.* 203, 218.

Adjudged and deemed are not materially different in meaning. Blanfus *v.* People, 67 *N. Y.* 107.

ADJUDICATE. To determine in the exercise of judicial power. Synonymous with adjudge in its strictest sense. Adjudication: a solemn or deliberate determination by the judicial power. In bankruptcy practice, the adjudication is the decision upon the question whether the debtor is a bankrupt, as distinguished from the determination of other questions arising in the proceedings.

Adjudication has several special uses in Scotch law; as to which see *Bell; Wharton.*

ADJUNCTION. One of the modes of industrial accession borrowed from the Roman law. It takes place where the property of one man is added to that of another; as, for example, where a man builds on the ground of another. In such a case it is held that the proprietor of the grounds is entitled to the building; but, as the presumption is that it was erected in *bonâ fide* belief that the ground was the property of the builder, he is entitled, in equity, to be indemnified to the extent, at least, of the benefit which he has conferred. *Bell.*

ADJUST. To bring to proper relations; to settle; to determine an amount due. Adjustment; a settlement or determination of the relative rights of parties, or of the sum due upon a demand. Used especially of the settlement of claims of insured parties after a loss, against insurers; the adjustment is the official determination what sum must be paid to satisfy the policy.

Adjustment, in the law of insurance, is the settling and ascertaining the exact amount of the indemnity to which, under the policy, the insured is entitled, after all proper allowances and deductions have been made; and fixing the proportions to be borne by the underwriters respectively. Before any adjustment is made, the underwriters require to be satisfied that a loss within the terms of the policy has occurred; and in the ordinary case the duty of making the requisite inquiries is devolved on the underwriter who has first subscribed the policy. In complicated cases of average loss the papers are usually submitted to a professional referee, to calculate and adjust the percentage rate of loss. After an adjustment has been once made and signed, it is not usual for the underwriters to require further proof, but at once to pay the loss. It is not, however, conclusive and binding on the underwriters; for where the extent of the loss is disputed, the adjustment operates merely as a transfer of the *onus probandi* from the insured to the underwriters. *Bell.*

ADMEASUREMENT. A determination by metes or boundaries of the extent of a right to lands.

A writ of admeasurement lay against persons who usurped more than their share in the two following cases: Admeasurement of dower, where the widow held from the heir more land, &c., as dower, than rightly belonged to her; and admeasurement of pasture, which lay between

those having common of pasture, where any one or more of them surcharged the common. (*Termes de la Ley.*) *Wharton.*

ADMINICLE. That which is brought in as aid or support to something else; something corroborative. Adminicular evidence is evidence brought in to explain or complete some evidence which in its nature is primary, but which, as adduced, needs explanation or corroboration.

Adminicle is a term used in the action of proving the tenor of a lost deed; and signifies any writing, draft, or scroll, tending to establish the existence or terms of the deed in question. *Bell.*

ADMINISTER. To serve in the conduct of affairs, in the application of things to their uses. Administration: the service rendered, or the charge or duty assumed.

1. In estates, an administrator or administratrix is a man or woman charged, by letters from a court of probate, with the duty of settling up the affairs of an estate, paying the debts, and discharging the legacies, or distributing the unbequeathed assets, in cases where no executor has been appointed.

Administra*tor* is uniformly distinguished from executor, being a personal representative named by the court of probate, in opposition to one designated by will. But administra*tion* is not confined in meaning to the settlement of an estate by an administrator; nor is execution in frequent use as meaning the performance of an executor's trust. Administration may mean the management of an estate by an executor, as well as that by an administrator.

A public administrator is an officer authorized by the statute law of several of the states to superintend the settlement of estates of persons dying without relatives entitled to administer.

Administer, in bonds given by administrators, that the principal shall well and truly administer, according to law, has been held to bind the sureties only for the just payment of debts, and not for the proper apportionment of the distributable surplus. Moore *v.* Waller, 1 *Marsh.* 488; Barbour *v.* Robertson, 1 *Litt.* 93.

Administration cum testamento annexo is granted when there is not any executor named in the will, or if an incapable person is named, or a person who refuses to act.

Administration de bonis non is granted when the first administrator dies before he has fully administered.

Administration durante minori ætate is where an infant is made executor, in which case administration with will annexed is granted to another, until the infant executor attain the age of seventeen years, when this administration ceases.

Administration durante absentia is granted when the next of kin is beyond sea, lest the goods perish or the debts be lost.

Administration pendente lite is granted where a suit is commenced in the probate court concerning the validity of a will, until the suit be determined, in order that there should be somebody to take care of the testator's estate.

Administrator-in-law. By the law of Scotland the father is what is called the administrator-in-law for his children. As such, he is *ipso jure* their tutor while they are pupils, and their curator during their minority. The father's power extends over whatever estate may descend to his children, unless where that estate has been placed by the donor or grantor under the charge of special trustees or managers. This power in the father ceases by the child's discontinuing to reside with him, unless he continues to live at the father's expense; and with regard to daughters, it ceases on their marriage, the husband being the legal curator of his wife. *Bell.*

2. In physiology, to administer means to cause a person to take into the human system.

To administer a drug or medicine is to direct and cause it to be taken. La Beau *v.* People, 33 *How. Pr.* 66; 34 *N. Y.* 223; 6 *Park. Cr.* 371.

To constitute the crime of administering poison, under the Florida statute, it is not sufficient to place poison in food intended for certain persons, if they use none of such food. Sumpter *v.* State, 11 *Fla.* 247.

What assistance to a suicide taking poison will constitute administering, see Blackburn *v.* State, 23 *Ohio St.* 146.

ADMIRAL. The title of an officer high in command in the navy.

ADMIRALTY. A court having jurisdiction of controversies arising out of navigation of public waters; also the system of jurisprudence particularly devoted to those controversies.

Throughout European commercial states, courts of admiralty have existed from earliest commercial times; having a jurisdiction generally co-extensive with navigable waters, and which embraced both questions of public right, including prize and causes of

a private character that grew out of maritime employment and commerce; and this, as nations grew more commercial, became in the end the most important branch of the jurisdiction. Throughout the continent, authority to determine maritime controversies was liberally accorded to these tribunals.

In England, in early times, less liberality was felt towards the exercise of admiralty powers. The early course of jurisprudence upon the subject was largely influenced by a sentiment of distrust and disapproval, which prevailed among the common-law courts and lawyers, and to a degree among the people at large, towards the courts of admiralty. They were courts of foreign origin, and were guided by the rules and forms, obnoxious through a long period to the English jurisprudents, of the civil law. They rejected trial by jury, and confided the determination of both fact and law to the judge. Hence there was a constant effort to limit the admiralty jurisdiction, and to maintain that of courts of common law against any possible encroachments from it; and this effort was particularly directed towards limiting the jurisdiction territorially. England's rivers admit of but little or no commerce above the ebb and flow of tides; hence the tidal line was naturally claimed, by the common lawyers, to be the extreme limit of the authority of courts of admiralty. And, while the flow of the tide might carry that jurisdiction up to high-water mark, along the shore and up the bed of large streams debouching in the ocean, it was rigorously insisted that at the ebb the maritime jurisdiction must recede with the waters, and the courts of law must enjoy their authority, in turn, while the soil was left bare. Moreover, as the *county* was in common-law jurisprudence the organization or division which underlaid the political and legal administration of affairs, it was insisted that admiralty should not break the legal integrity of a county. Tide or no tide, occurrences within the body of a county were withheld from its cognizance.

In recent years the jurisdiction of the English admiralty courts has been defined anew, and in a larger spirit, by the statutes 24 & 25 Vict. ch. 10, and 26 Vict. ch. 24; and other enactments have liberalized its practice. But the foregoing explanations are useful in introducing a brief sketch of the expansion which has been given in recent years to the term admiralty in the jurisprudence of the United States; an important topic to the American reader.

The national constitution, without defining what shall be understood by the word, declares that the judicial power of the general government shall extend to cases of admiralty and maritime jurisdiction. The early decisions of our courts assumed rather than decided that the admiralty jurisdiction here intended was only coextensive with admiralty jurisdiction in English jurisprudence; that the provision meant to grant only the limited jurisdiction which was signified by admiralty in the common law at the date of the constitution; and that the jurisdiction as vested in the national courts was subject to the well-known limitations attached to it in England, was confined to tidal waters, and was excluded from the body of a county. But the necessities incident to the development of our interior commerce, and of navigation upon the lakes and rivers of the United States above, or wholly independent of, tidal influences, have led the courts to reconsider this assumption, to discard the restrictions with which the common law guarded the maritime jurisdiction, and to give it the scope and extent which have been assigned to it among other nations; until at length *navigability*, and not tide, has been made the leading test in determining what waters are within the admiralty jurisdiction, as it is understood and established in America.

The earliest case of importance in the development of the new view of admiralty is that of Waring *v.* Clarke, 5 *How.* 441, decided by the United States supreme court in 1846. This was a case of a collision which occurred upon a river at a spot within the ebb and flow of the tide, but also within the body of a county; and it presented the question, whether, in this country, and under the constitutional grant of admiralty powers to the United States courts, places

within the body of a county were to be excluded. The court held that they are not: that county lines do not here, as in England, exclude admiralty jurisdiction. They decided that the grant of admiralty powers, in the constitution, to the courts of the United States was not intended to be confined to such cases as belonged to the admiralty jurisdiction in England, at the time of the adoption of that instrument. Such a limitation is inconsistent with the extent of admiralty jurisdiction exercised by the colonies, with a just interpretation of the constitution, and with its contemporary construction. Nor are the ancient English statutes declaring the jurisdiction in cases of collision not to extend to cases happening between ships within the ebb and flow of the tide, but *infra corpus comitatus*, in force here. The general admiralty law furnishes a surer foundation for ascertaining the locality of marine jurisdiction within the United States than the designation of it by the common-law courts of England.

Almost at the very date of this adjudication, congress, in the act of Feb. 26, 1845 (5 Stat. at L. 726), gave what was then considered as a new and extended assertion of the jurisdiction, but has since been seen to be wholly within its true boundaries, and to impose no real limitations upon the grant. The act declared that the district courts of the United States (they being the admiralty courts) "shall have, possess, and exercise the same jurisdiction in matters of contract and tort, arising in, upon, or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different states and territories upon the lakes and navigable waters connecting said lakes, as is now possessed and exercised by the said courts in cases of the like steamboats and other vessels employed in navigation and commerce upon the high seas or tide waters within the admiralty and maritime jurisdiction of the United States."

The case of The Belfast, 7 *Wall.* 624, presented the question whether the United States courts were bound to refrain from this jurisdiction, when the matter involved was a contract arising ont of commerce within a single state; and the supreme court decided, overruling previous decisions in favor of a more restricted rule, that the lien of the shipper of goods upon the vessel for nonperformance of an ordinary contract of affreightment is a maritime lien; and a proceeding *in rem* to enforce it is within the exclusive original cognizance of the district courts, notwithstanding the contract is for transportation between ports and places within the same state, and all the parties are citizens of the same state. It is enough that such contract is for transportation upon navigable waters, to which the general jurisdiction of the admiralty extends. This case explains the principal subjects of admiralty jurisdiction to be maritime contracts and maritime torts, including captures *jure belli*, and seizures on water for municipal and revenue forfeitures. Contracts, claims, or services purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty. Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty courts. Jurisdiction in the former cases depends upon the nature of the contract, but in the latter it depends entirely upon locality. Contracts to be performed on waters not navigable are not maritime any more than those made to be performed on land; nor are torts cognizable in the admiralty, unless committed on waters within the admiralty and maritime jurisdiction, as defined by law. The admiralty jurisdiction is not necessarily subject to the same limitations as are imposed upon the power of congress to regulate commerce, as conferred in the constitution. These are entirely distinct things, having no necessary connection with one another.

The case of Insurance Co. *v.* Dunham, 11 *Wall.* 1, in which the supreme court were called upon to consider, in the light of the recent expansion of the admiralty jurisdiction, whether a policy

of marine insurance was not a contract which ought to be deemed maritime, gave further elucidation to the meaning of the grant of admiralty jurisdiction, in respect to the nature of the causes of action embraced. The opinion explains that, by a series of decisions of the supreme court, it is established that the admiralty and maritime jurisdiction granted by the constitution is not limited by the restraining statutes or judicial prohibitions of England, but is to be interpreted with reference to analogous jurisdictions in other countries constituting the commercial world. As respects the *contracts* which are of admiralty cognizance, the English rule which limits the jurisdiction nearly to contracts made upon the sea, and to be executed thereon, does not prevail; but the criterion is the nature and subject-matter of the contract, and whether it has reference to maritime service or maritime transactions. If the subject-matter of the contract is maritime, the courts of admiralty may enforce it. And the court adjudged that a policy of insurance upon a ship or cargo against marine perils is of maritime subject-matter, and recovery for a loss may be enforced by libel *in personam* in the district court. That the jurisdiction embraces all *torts* committed upon navigable waters was earlier and with less hesitation established. (See The Commerce, 1 *Black*, 574.)

In brief, a long course of adjudications (see, upon the distinction between tidal and navigable waters, Steele *v.* Thacher, *Ware*, 91; The Chusan, 2 *Story*, 455; The Genesee Chief *v.* Fitzhugh, 12 *How.* 443; Fretz *v.* Bull, *Id.* 466; Jackson *v.* The Magnolia, 20 *Id.* 296; Nelson *v.* Leland, 22 *Id.* 48; Raymond *v.* The Ellen Stewart, 5 *McLean*, 269; McGinnis *v.* The Pontiac, 1 *Newb. Adm.* 130; 5 *McLean*, 359; Eads *v.* The H. D. Bacon, 1 *Newb. Adm.* 274; Scott *v.* The Young America, *Id.* 101; The Moses Taylor, 4 *Wall.* 411; The Hine *v.* Trevor, *Id.* 555; The Belfast, 7 *Id.* 624; The Eagle, 8 *Id.* 15; The Leonard, 3 *Ben.* 263; Cunningham *v.* Hall, 1 *Cliff.* 43; The General Cass, 5 *Am. L. T. Rep.* 12; The Backus, 1 *Newb. Adm.* 1; The Jenny Lind, *Id.* 443; and upon the objection that the subject-matter has arisen in internal commerce, Carpenter *v.* The Emma Johnson, 1 *Cliff.* 633; The Leonard, 3 *Ben.* 263; The Hardy, 1 *Dill.* 460; The Thomas Swan, 6 *Ben.* 42; The Mary Gratwick, 2 *Sawyer*, 342; Reppert *v.* Robinson, *Taney*, 492; The Sarah Jane, 1 *Low.* 203; Roberts *v.* Skolfield, 3 *Ware*, 184; The Wave, *Blatchf. & H. Adm.* 235; The John Gilpin, *Olc. Adm.* 77), have fully developed and established the principles that the term admiralty, as used in the constitution, is not necessarily to be construed as subject to all the restrictions imposed upon it in English jurisprudence at the time when the constitution was framed, but the grant confers admiralty powers as generally understood throughout the civilized world; that it is in no respect limited to the high seas, or dependent upon the ebb and flow of tides, or the bounds of counties, but extends over all waters of the United States which are actually navigable, whether found so by their original character, or made so by artificial improvement; and that thus construed it embraces not only all torts committed upon them, but also all contracts which are to be executed upon them, or relate to maritime services and transactions.

In England, it is considered that there are two courts, the *instance* court and the *prize* court. The same judge presides in both courts; in the former, he sits by virtue of a commission under the great seal, enumerating the objects of the jurisdiction, but specifying nothing relative to prize; in the latter, he sits by virtue of a commission, which issues in every war, under the great seal, to the lord high admiral, or commissioners for executing that office, requiring the court "to proceed upon all and all manner of captures, seizures, prizes, and reprisals of ships and goods, which are or shall be taken, and to hear and determine according to the course of the admiralty and the law of nations." In the United States, the double jurisdiction is recognized, and it is common to speak of proceedings "upon the instance side of the court," as distinguished from prize proceedings; but the whole jurisdiction, as respects original suits, is

vested in one tribunal, the district court of the United States. There is also an important criminal jurisdiction.

ADMIT. 1. To receive or take, as to admit evidence on the trial of a cause. Admissible: that which by the rules of evidence is entitled to be received. Admission: the act or fact of receiving.

2. To recognize a person's qualifications for a franchise; to make one a member of a privileged class or company, as to admit an attorney to the privilege of practising law, or an individual as member of a corporation. Admission: the act of receiving or of constituting membership.

3. To acknowledge or assent to an allegation; to confess or consent to the truth of something asserted. Usually spoken of an assertion against one's interest, but without importing any thing tortious or criminal in the thing asserted, an idea which is pretty strongly implied in confess; or any promise or surrender of a right, one or other of which is usually indicated by consent. Admission: the act of acknowledging something asserted; also the expression, written or oral, in which such acknowledgment is conveyed. Thus a party to a suit is said to be bound by admissions in his pleadings; and admissions made out of court are received in evidence against the party by whom they were made, or to impeach a witness.

Admission, in English ecclesiastical law, is applied to the declaration of the bishop, that he approves of the parson presented to serve the cure of any church. When a patron of a church has made presentation of a candidate, the bishop, upon examination, admits the latter, by saying *admitto te habilem.*

Admittance, in English real property law, denotes the form whereby a tenant is inducted by the lord of the manor into possession and enjoyment of a copyhold estate; corresponding with livery of seisin in the case of an estate of freehold.

ADMITTENDO IN SOCIUM. A writ for associating certain persons, as knights and other gentlemen of the county, to justices of assize on the circuits. (*Reg. Orig.* 206.) *Wharton.*

ADMONITION. A judicial reprimand to an accused person on being discharged from further prosecution. This was authorized by the civil law as a punishment for slight misdemeanors. *Mozley & W.*

Admonitio trina. A triple or threefold warning, given, in old times, to a prisoner standing mute, before he was subjected to the *peine forte et dure.* 4 *Bl. Com.* 325; 4 *Steph. Com.* 391.

ADOLESCENCE. The period between twelve in females and fourteen in males till twenty-one years of age. *Wharton.*

ADOPT. 1. To take; to make that one's own which originally was not so. Adoption: a voluntary acceptance of an act of another person, a child of other parents, &c., to be the same as if one had done the act, or begotten or given birth to the child.

Adoption of children was formally authorized and regulated by the civil law; and France, Germany, and Spain, following the civil law, have long made provisions on this subject; and such laws seem to have formerly existed in Louisiana, but were abrogated by art. 232 of the civil code. In England and throughout the common-law states of this country, adoption of children has, until very recently, or except when in rare instances it was authorized by some special or private law, been a purely voluntary or social act, depending for its continuance, and any benefits to grow from it, on the mutual will of the parties; though the objects of adoption have been partially attainable by resort to the laws of apprenticeship. In New York and in Massachusetts, adoptions are now authorized and regulated by statute.

The New York statute (the act of June 25, 1873, ch. 830) defines adoption as regulated by the act to be "the legal act whereby an adult person takes a minor into the relation of child, and thereby acquires the rights and incurs the responsibilities of parent in respect to such minor." It designates the persons who may adopt or be adopted, and what consent of third persons shall be required; and prescribes the mode in which the agreement of adoption shall be solemnized, before a county judge. And it provides that a child, when adopted, shall take the name of the person adopting, and the two thenceforth shall sustain toward each other the legal relation of parent and child, and have all the

rights and be subject to all the duties of that relation, excepting the right of inheritance, and except as respects the passing and limitations over of real and personal property under and by conveyances, wills, devises, and trusts; and that the natural parents of the child adopted are relieved from all parental duties toward and responsibility for the child.

An act of the legislature authorizing a man and wife named to adopt, without other words, a child mentioned, confers not merely the right to take the child into the family to reside (for which no legislation was needed), but the right to constitute the relation of parent and child, with all the consequences of that relationship. The child adopted under such an act becomes, for all legal purposes, the child of the person adopting it, and in particular, on the death of such person, will inherit as a child, in preference to a nephew. Vidal *v.* Commagère, 13 *La. Ann.* 516.

2. To select; to choose one from several objects.

To adopt a route for the transportation of the mail, means to take the steps necessary to cause the mail to be transported over that route. Rhodes *v.* United States, *Dev.* 47.

ADRIFT. Sea-weed between high and low water mark, which has not been deposited on the shore, and which during flood-tide is moved by each rising and receding wave, is adrift, within the meaning of Gen. Stats. ch. 83, § 20, although the bottom of the mass may touch the beach. Anthony *v.* Gifford, 2 *Allen*, 549.

Adscriptua glebæ. Attached to the land. Described a class of slaves who were by law attached to certain lands in such manner that neither slaves nor land could be sold separate. They must make a certain yearly payment to the owner of the soil, but were entitled to retain all beside that they could gain from the land for themselves.

ADULT. In our law, a person who has attained full age, or legal majority, has passed the twenty-first year.

ADULTERATION. The act or offence of corrupting articles of commerce, especially of food or drink, by the admixture of foreign substances.

The Stat. 23 & 24 Vict. ch. 84, § 1, (1860), seems to treat adulteration as mixing with an article of food or drink, "any ingredient or material injurious to the health of persons eating or drinking, such article." But the later Stat. 35 & 36 Vict. ch. 74, § 3, treats articles mixed with any other substance with intent fraudulently to increase the weight, as adulterated.

It is not clear that the addition of a wholesome article, as of pure water to milk, is adulterating. People *v.* Tauerback, 5 *Park. Cr.* 311.

The addition of water or any substance other than a sufficient quantity of ice to preserve milk while on transportation to market, is hereby declared an adulteration. *N. Y. Laws*, 1864, 1196, ch. 544, § 4.

ADULTERINE. Children begotten by an adulterous act of intercourse.

Adulterine guilds. Traders acting as a corporation without a charter, and paying a fine annually for permission to exercise their usurped privileges. *Smith's Wealth of Nations*, b. 1, ch. 10.

ADULTERY. The wrong (in some jurisdictions also a crime) of sexual intercourse by a married person with another than the spouse. Or, adultery consists in sexual intercourse between a married woman and a man other than her husband, the essence of the offence being the causing uncertainty as to issue.

As will be seen by a glance at the decisions mentioned below, there is a conflict in the use of the term in different jurisdictions, which can be only partially resolved; and to do this requires a careful discrimination between the proper meaning of the word and the operation of penal enactments directed to the wrong by its nature.

1. Sexual intercourse by a woman who is married, with a man other than her husband, is adultery upon her part, by all the authorities, and without question.

2. Sexual intercourse by a man who is married, with a woman who is not his wife, is adultery upon his part; that is, it is embraced within the term, as generally used and understood; although it may not be a punishable offence, nor even (as in England) recognized, standing alone, as a cause for which the wife of the wrong-doer may have a divorce.

3. Sexual intercourse between a married person and an unmarried gives rise to a perplexing question as to the character of the act of the unmarried participator. Is that act adultery by reason of the married status of the other party, or is it simple fornication in the single

person, while adultery in the married one? Upon this question the decisions are in conflict, turning, however, not only upon the mere meaning of the term, but often upon the provisions and definitions of some particular statute of the jurisdiction. In very general usage, the word is allowed to characterize an unlawful intercourse between two persons, either of whom is married to a third. And this use of the term, if established, would justify the distinction taken in the books between double adultery, where both parties are married to other persons, and single adultery, where one only is. For if the act of the man, for instance, being adultery in view of his own marriage, is also adultery in view of the woman's, it is strictly a double adultery; whereas, aside from this, there would be no more need of calling the offence double because two persons implicated in it were each guilty, than there is in the case of conspiracy, riot, or other offences requiring mutuality. But in the strictest view, and according to the closer and more technical use of the word, it characterizes the wrong of breaking one's own marriage vow by intercourse with a third person, and does not extend to the participation in another's breach of his or her marital obligations. But see *Whart. Cr. L.* § 2643.

4. If neither of the parties is subject to an existing marriage, the intercourse is not adultery.

Adultery is not limited to unlawful intercourse by a married woman, but includes unlawful intercourse by a married man, with either a married or single woman; and this is so of adultery, either as a punishable offence or as a cause of divorce. Before the adoption of the revised statutes, an unmarried man having sexual intercourse with a married woman would not be guilty of adultery. Commonwealth *v.* Call, 21 *Pick.* 509.

If the woman is unmarried, the offence does not amount to adultery. In the absence of a statute provision, the term does not cover intercourse with an unmarried woman, though the man is married. State *v.* Armstrong, 4 *Minor*, 335; State *v.* Lash, 1 *Harr.* 380.

Adultery is the illicit intercourse of two persons, one of whom at least is married. State *v.* Hinton, 6 *Ala.* 864; Hull *v.* Hull, 2 *Strobh. Eq.* 174.

Sexual intercourse with a married woman is adultery, and not simple fornication. Therefore, when defendant, on an indictment for fornication, proved a marriage between himself and the woman implicated, and the state offered to prove that the woman had, at the time of the alleged marriage, a husband living, held, that the evidence was incompetent, as it tended to prove the defendant guilty, not of the offence charged, but of a different one. State *v.* Pearce, 2 *Blackf.* 318.

An unmarried man, who has unlawful intercourse with a married woman, from which spurious issue may arise, is guilty of adultery. State *v.* Wallace, 9 *N. H.* 515.

Under Iowa Stat. 1860, § 4347, an unmarried person may be indicted and convicted of adultery, committed with the husband or wife of a third person. State *v.* Wilson, 22 *Iowa*, 364.

Adultery is the sin of incontinence between two married persons; or, if but one of the persons be married, it is nevertheless adultery; but in this last case it is called single adultery, to distinguish it from the other, which is double. *Jacob.*

Adultery is the sin of incontinence between persons one or both of whom are married. If both are married, it is double adultery, or adultery on the part of both. If but one of them is married, it is single adultery, and the married party alone is guilty of that offence. Criminal intercourse between a married woman and an unmarried man is not adultery on the part of the man, but the woman is guilty thereby of that offence. Hunter *v.* United States, 1 *Pinn.* 91.

A married man who has criminal intercourse with his own daughter, she being a single woman, is guilty of incestuous adultery, and she of incestuous fornication. Cook *v.* State, 11 *Ga.* 53.

Under the Pennsylvania act of 1705, an indictment for adultery cannot be supported against an unmarried man. Respublica *v.* Roberts, 2 *Dall.* 124.

Illicit intercourse by an unmarried man with a married woman is only fornication in him. Commonwealth *v.* Lafferty, 6 *Gratt.* 672.

Under the statute of Alabama, adultery and fornication are distinct offences; and under an indictment for adultery, containing but a single count, no conviction can be had, if the evidence shows that both the parties were unmarried. Smitherman *v.* State, 27 *Ala.* 23.

To support a conviction for adultery, it must be charged and proved that one of the parties is married to some other person than the *particeps criminis*. Tucker *v.* State, 35 *Tex.* 113; Territory *v.* Whitcomb, 1 *Mon. T.* 358. To nearly same effect, Miner *v.* People, 58 *Ill.* 59.

After a divorce for the husband's adultery, he does not, by marrying and cohabiting with a second wife, commit the crime of adultery. An indictment in such case, in Massachusetts, should be under Stat. 1784, ch. 40, § 2; and the second marriage, with the other facts constituting the of-

fence, should be set forth. Commonwealth *v.* Putnam, 1 *Pick.* 136.

If a man whose wife has been divorced from him marries again, and cohabits with the second woman, without having obtained a divorce from the first, he cannot be found guilty of adultery, either at common law or by the statutes of Maine. State *v.* Weatherby, 43 *Me.* 258.

ADVANCE, *v.* To furnish value before it becomes due, or in aid of an enterprise from which a return is expected.

Advance, *n.*, or Advances. Money or value thus supplied before time.

An advance of money on a contract, strictly speaking, is a payment made before an equivalent is received. Gibbons *v.* United States, *Dev.* 51.

As used in a will, with reference to money or property received from the testator by his children, the word advances includes loans as well as gifts, whether taken according to its meaning in law, or its meaning in common usage. Nolan *v.* Bolton, 25 *Ga.* 352.

Advances is not the appropriate term for money or property furnished by a father to his children, as a portion of his estate, and to be taken into account on the final partition or distribution thereof. In legal parlance, it has a different and far broader signification. It may characterize a loan or a gift, or money advanced, to be repaid conditionally. Chase *v.* Ewing, 51 *Barb.* 597.

Advances, as used in a will, may not include moneys paid for maintenance of testator's children. Vail *v.* Vail, 10 *Barb.* 69.

Advances may include rents of buildings. Ormsby *v.* State, 6 *Nev.* 283.

A mule is not an advance, within the sense of the South Carolina act, to secure advances made for agricultural purposes, and, therefore, a lien given under that act, to secure the payment of the price of a mule purchased, is void. McCullough *v.* Kibler, 5 *S. C.* 468.

ADVANCEMENT. Money or property supplied by a person to another who will be his heir or distributee, in anticipation of and to be deducted from the share of the recipient in the donor's estate; as distinguished from a loan, made to be repaid in any event, or a gift, which would benefit in addition to the inheritance or distributive share.

An advancement is a gift made during his lifetime, by a person who afterwards dies intestate, to his heir or distributee, of something by anticipation of what the donee would by law receive upon the death of the donor. Grattan *v.* Grattan, 18 *Ill.* 167; Osgood *v.* Breed, 17 *Mass.* 358; Christy's Appeal, 1 *Grant Cas.* 369; Cawthorn *v.* Coppedge, 1 *Swan*, 487; Miller's Appeal, 31 *Pa. St.* 337.

Advancement designates money or property furnished by a testator to his children, as a portion of his estate, and to be taken into account in the final partition or distribution thereof. Advances is not the appropriate term for money or property thus furnished. Chase *v.* Ewing, 51 *Barb.* 597, 612.

The true notion of an advancement is a giving by anticipation the whole or a part of what it is supposed a child will be entitled to, on the death of the parent or party making the advancement. Osgood *v.* Breed, 17 *Mass.* 358; Dilman *v.* Cox, 23 *Ind.* 440.

An advancement is a free and irrevocable gift by a parent in his lifetime to his child on account of such child's share of the estate after the decease of the parent dying intestate. Fellows *v.* Little, 46 *N. H.* 27.

To constitute an advancement, the property must have been received from the intestate himself. Callender *v.* M'Creary, 5 *Miss.* 356; Christy's Appeal, 1 *Grant Cas.* 369.

To constitute an advancement, the ancestor, in his lifetime, must divest himself of all interest in the property. Crosby *v.* Covington, 24 *Miss.* 619.

A debt due from an heir to the intestate is not to be regarded as an advancement. Osgood *v.* Breed, 17 *Mass.* 359; Proctor *v.* Newhall, *Id.* 93.

Money charged by a parent against a child, in the ordinary form of account-books, is not to be treated as an advancement. Ashley's Case, 4 *Pick.* 21.

Where money is lent or paid by a father to or for a son, at the request of the latter, and an account is stated by the father and interest charged, such loan or payment is not an advancement, but constitutes an indebtedness. Harris's Appeal, 2 *Grant Cas.* 304.

In the absence of any evidence of intention to the contrary, notes held by an intestate against his son are evidences of debt, and not of an advancement. Vaden *v.* Hance, 1 *Head*, 300.

Trifling gifts ought not to be charged as advancements. Mitchell *v.* Mitchell, 8 *Ala.* 414.

Advancements are understood to be gifts of money or personal property, for the preferment and settling of a child in life, and not such as are mere presents of small value, or such as are required for the maintenance and education of the child. Meadows *v.* Meadows, 11 *Ired. L.* 148.

A gift for the purpose of pleasure or amusement merely, as of a saddle-horse, or a buggy, is not considered an advancement; but the gift of a stallion, to be employed as a foal-getter and for profit, is an advancement. Ison *v.* Ison, 5 *Rich. Eq.* 15.

A gift to a grandchild is deemed to be a gift absolute, rather than an advancement. Shiver *v.* Brock, 2 *Jones Eq.* 137.

Advancement is a well-known term, both in conveyancing and in equity law. In marriage settlements, a power of advance-

ment is commonly given to the trustees, that is to say, a power is conferred upon them to raise some portion (not, as a rule, to exceed one half part) of the capital moneys to which each child of the marriage is either actually or contingently entitled under the settlement for his or her advancement in the world; for his or her apprenticeship in a profession or trade; or for his or her bringing out in society; or (if intended for the church) for his education at one of the universities.

In equity, the term has a similar meaning, but a somewhat different application. *Brown.*

ADVERSE. Opposed; that which resists a claim or proceeding.

Adverse claim. Where the sheriff, in levying an execution upon the goods of a debtor, finds that some third person claims the goods as his own, he may have an interpleader summons requiring the execution creditor and such third person to settle the right to the goods between them; so also, where the seller of goods attempts to stop them in transit, and the buyer insists upon having the goods delivered to him, the wharfinger or other person in custody of the goods may have an interpleader summons requiring the two parties to litigate between themselves their adverse claims. *Brown.*

Adverse party, Who is, see Cotes *v.* Carroll, 28 *How. Pr.* 436; Garnsey *v.* Knights, 1 *Thomp. & C.* 259.

Adverse possession, is a phrase in common use with respect to real property, to signify a possession avowedly contrary to some claim of title in another person. Its important consequences are three. By statutes declaratory of the law of champerty, or forbidding the sale of pretended titles, which exist in many of the states, an owner of land, however good his title may be, is precluded, while another person is in possession adverse to him, from making a conveyance; he cannot by deed vest his title in another, leaving him to sue for possession, but any action must be brought in his own name. Then, under statutes of limitations an adverse possession continued for a specified term of years constitutes a defence to an action for possession, though founded upon a title apparently good. Moreover, by the law of many of the states adverse possession, of proper character and length, operates to vest title in the possessor. To these may be added that actual possession of land is notice to put all persons disposed to deal in respect to it upon inquiry as to the rights of the possessor; no one can buy or hire lands in occupation, and deny that he knew the rights of the occupant.

The meaning of the phrase is said to be not quite the same when employed with reference to the rules forbidding sale of lands under adverse possession, as when employed with reference to the statute of limitations.

Adverse possession, such as will, under the statute of limitations, bar an entry, must possess these elements: it must commence under color of title; must be open and notorious; must be peaceable; and must continue unbroken throughout the term prescribed by the statute.

A possession of land may be adverse, so as under the statute of limitations to bar an action, without being adverse in such sense as to avoid a deed, under statutes against champerty, or selling pretended titles. Thus, although a tenant is in possession under such circumstances as will, after twenty years, bar a right of entry by the lessor, yet it does not follow that a conveyance within that time is void. Barret *v.* Coburn, 3 *Metc.* 510.

The adverse possession under claim of title which will avoid a deed as champertous under the New York statute must be under some specific title, which, if valid, would sustain the claim; a general assertion of ownership, without reference to a particular title, or a reliance upon a title which would not entitle the party to possession, is insufficient. The party in possession must hold adversely, "claiming under a title," and not "under claim of title." The distinction is substantial and material. Fish *v.* Fish, 39 *Barb.* 513.

One who claims under a deed from a judgment debtor has not such an adverse possession as will avoid a conveyance made by a purchaser under an execution on the judgment. Jackson *v.* Collins, 3 *Cow.* 89.

After a person in possession had confessed the title of an adverse claimant, in an action of ejectment, it was held that his possession ceased to be adverse in such sense as to invalidate a conveyance by the plaintiff in ejectment. Keneda *v.* Gardner, 4 *Hill,* 469.

Adverse possession is that kind of continued occupation and enjoyment of real estate which indicates an assertion of right on the part of the person maintaining it. Rivers *v.* Thompson, 43 *Ala.* 633.

The character of adverse possession is given, not by notice to persons interested, but by the nature of the acts done by the party. There must be a hostile intent, and that intent must be manifested by outward acts of an unequivocal kind. The open act of entry on the land, with the declared in-

tent to disseise, constitute a disseisin, without notice to the disseisee, or knowledge on his part of the entry and ouster. Lodge *v.* Patterson, 3 *Watts*, 74.

To constitute such an adverse possession as will bar a right of entry, it must be accompanied with what the law will consider, *prima facie*, a good title. Jackson *v.* Frost, 5 *Cow.* 346.

It is not necessary that an adverse possession, in order to be available within the statute of limitations, should commence under an effectual deed. If the entry be under color of title, the possession will be adverse, however groundless the supposed title may be. La Frombois *v.* Jackson, 8 *Cow.* 589.

To make a holding or possession of lands adverse, it need not be accompanied by a claim of title on the part of the possessor, with a denial of title in the legal proprietor. An adverse possession is a possession not under the legal proprietor, but entered into without his consent, either directly or indirectly given. It is a possession by which he is disseised and ousted of the lands so possessed. To make a disseisin, it is not necessary that the disseisor should claim title to the lands taken by him, or deny or disclaim the title of the legal proprietor. To determine whether or not the possession be adverse, it is only necessary to find out whether it can be considered as the constructive possession of the legal proprietor. If it be with his consent, express or implied, it is his possession, and not adverse. If it be without his consent, and against his will, it is adverse. Bryan *v.* Atwater, 5 *Day*, 181; French *v.* Pearce, 8 *Conn.* 439.

A possession, to be adverse, must be so open, notorious, and important as to give notice to parties that a claim of right is intended thereby; that the right of the true owner is invaded intentionally and with a purpose to assert a claim of title adversely to his. Carrol *v.* Gillion, 33 *Ga.* 539; Beatty *v.* Mason, 30 *Md.* 409.

Adverse possession for twenty years, by several successive persons, in order to bar an entry, must be continued by a regular chain of privity between them. Thus, where one entered, and then another entered upon him, claiming adversely, and, by a compromise with the first, retained possession of a part of the premises, held, that there was not a continuity of possession within the rule. Jackson *v.* Leonard, 9 *Cow.* 653.

Actual possession of part of a tract of land, with claim of title to the whole, under a written instrument, is sufficient to constitute adverse possession of the whole tract. Possession of land under a lease, the good faith of which is evidenced by the demand and receipt of rent, is good adverse possession, to the extent of the land cleared and cultivated by the lessee. Finlay *v.* Cook, 54 *Barb.* 9.

Mere continuance in a possession, which originated under a lease, after the reversioner is entitled to enter for a condition broken, and before the original term had expired by lapse of time, is not adverse to the right of the reversioner to re-enter. Gwynn *v.* Jones, 2 *Gill & J.* 173.

Though adverse possession and ouster or disseisin are sometimes synonymous, they are not always so. A disseisin may commence by force or fraud; an adverse possession may commence by force, but not by fraud, as, for instance, under a deed obtained by fraud or by forgery. Livingston *v.* Peru Iron Co., 9 *Wend.* 511.

Adverse verdict. The verdict of a county commissioners' jury is adverse to the petitioner seeking a review of a verdict for land damages, if such verdict does not exceed the damages allowed to him by the selectmen. Hamblin *v.* Barnstable County, 16 *Gray*, 256.

Adverse witness. A witness whose mind discloses a bias hostile to the party examining him; not a witness whose evidence, being honestly given, is adverse to the case of the examinant. *Brown.*

ADVICE. Counsel given, or an opinion expressed as to wisdom of future conduct; also, information or notice given of something that has occurred. Advices (*plu.*) is used generally of information of past occurrences, not of counsel.

ADVISE. To give counsel, or recommend a plan or course; also, to give notice.

ADVOCATE. Is used in English and American law to indicate, in a general and untechnical way, a professional person charged with the oral conduct of a cause or interest; such as is more technically known as a barrister or counsellor. Under the civil law, and in Scotland, the term seems used as nearly corresponding to these two.

Advocate is a person learned in the law, who assists his client with advice and pleads for him in open court. The barristers in the ecclesiastical courts are so termed; as are also the barristers in Scotland. *Holthouse.*

The patron of a cause who assists his client with advice and pleads for him. A barrister practising before the supreme court. *Bell.*

In the Roman law, and also in those English courts which have largely moulded themselves upon that law, the persons who undertake and have the liberty to plead the causes of others are called advocates. Their duties are analogous to those of barristers, and since the recent acts, which have thrown open to all practitioners the practice in all the various courts, the term advocate is used interchangeably with, although less frequently than, that of barrister.

In ecclesiastical law, those persons whom

we now call patrons of churches, and who reserved to themselves and their heirs a liberty to present to the living on any avoidance, were also called *advocati ecclesiæ*, *i.e.*, defenders of the church. *Brown.*

Lord advocate, is the principal public prosecutor in Scotland. He is assisted by a solicitor-general and four junior counsel, termed advocates depute. He is understood to have the power of appearing as prosecutor in any court in Scotland, where any person can be tried for an offence, or to appear in any action where the crown is interested; but it is not usual for him to act in the inferior courts, which have their respective public prosecutors, called procurators-fiscal, acting under his instructions. He does not, in prosecuting for offences, require the intervention of a grand jury, except in prosecutions for treason, which are conducted according to the English method. The lord advocate is virtually secretary of state for Scotland. *Wharton.*

Faculty of advocates, is the name of the bar of Scotland in Edinburgh. Only a small proportion, however, of these profess to be practising lawyers, and it has become a habit for country gentlemen to acquire the title of advocate, in preference to taking a degree at the Scottish universities. The dean of faculty and the two crown lawyers, the lord advocate and solicitor-general, are the only persons who take precedence at the Scottish bar, independent of seniority. The lord advocate and the solicitor-general are the only members of the faculty who wear silk gowns and sit within the bar. *Wharton.*

ADVOCATION, in Scotch law, is a process by which an action may be carried from an inferior to a superior court before final judgment in the former. *Wharton.*

ADVOWSON. The right of presentation to a church or benefice; and he who has the right to present is called the patron, or *patronus*, sometimes also *advocatus*, and sometimes *defensor*. Advowsons are of two kinds: appendant, and in gross. An advowson appendant, means an advowson which is, and which from the first has been and ever since continued to be, appended or annexed to a manor, so that, if the manor were granted to any one, the advowson would go with it as incident to the estate. An advowson in gross signifies an advowson that belongs to a person, but is not annexed to a manor; so that an advowson appendant may be made an advowson in gross by severing it by deed of grant from the manor to which it was appendant.

Advowsons are also either presentative, collative, or donative: presentative, when the patron has the right of presentation to the bishop or ordinary, and also to require of him to institute his clerk, if he finds him qualified; collative, when the bishop and patron happen to be one and the same person, so that the bishop, not being able to present to himself, performs by one act (termed collation) all that is usually done by the separate acts of presentation and institution; and donative, when the king or a subject founds a church or chapel, and does, by a single donation in writing, place the clerk in possession, without presentation, institution, or induction.

Again, advowsons are either advowsons of rectories or advowsons of vicarages. *Brown.*

ADVOWTRY. An old form of the word ADULTERY, *q. v.*

Ædificare in tuo proprio solo non licet quod alteri noceat. To build upon your own land what may injure another is not lawful. A proprietor of land has no right to erect an edifice on his own ground, interfering with the due enjoyment of adjoining premises, as by overhanging them, or by throwing water from the roof and eaves upon them, or by obstructing ancient lights and windows. *Broom Max.* 369.

Ædificatum solo, solo cedit. What is built upon the land goes with the land. Every thing built upon land belongs to the proprietor or purchaser of the land. This principle is within the general maxim, *Accessorium non ducit, sed sequitur, suum principale*, q. v. But there are many qualifications and exceptions to this rule. Thus, as between landlord and tenant, where the tenant has erected on the demised premises a building to protect machinery necessary to the carrying on of his business, the machinery and the building are both regarded as accessory to his trade rather than to the land, and do not pass to the landlord. Where one builds upon ground in the belief that it is his own, while in reality it belongs to another, the building so erected belongs to the real proprietor of the land; but the builder is entitled to receive from him its value. *Trayn. Max.* 269.

Æquitas sequitur legem. Equity follows the law. In the application of the principles of equity, the courts follow the rules of the law in all cases within the common-law rules. It is only where the law is ineffectual that equity gives redress, following, however, the rules of law. Thus, courts of equity cannot establish a rule of property different from that which the law has established. Keech *v.* Hall, 1 *Dougl.* 21. And where rival equities are equal in point of merit, the law prevails. Boone *v.* Chiles, 10 *Pet.* 177, 210.

Æstimatio capitis. Valuation of life. The value of a human life. The Saxon laws fixed a certain price or valuation of the life of every man, according to rank, &c. In later times, the amount recoverable as damages for causing the death of any person is sometimes termed the *æstimatio capitis*.

Ætate probanda. An obsolete English writ. It was directed to the sheriff of a county, commanding him to summon twelve men, as well knights as other honest and lawful men, to be before certain commissioners previously appointed to inquire whether or not the king's tenant, holding in chief by chivalry, was of full age to receive his lands into his own hands. The commission by which the above commissioners were appointed was thence called "the commission *pro ætate probanda*." *Brown.*

AFFIANT. One who makes an affidavit. Deponent is quite usually employed in this sense; but, strictly, affiant is the author or subscriber of an affidavit; deponent, of a deposition.

AFFIDAVIT. An oath in writing; and to make affidavit of a thing, is to testify it upon oath. An affidavit, generally speaking, is an oath in writing, sworn before some person who had authority to administer such oath. *Jacob;* Kapp *v.* Dudo, 1 *Mich. N. P.* 189.

Any form of legal oath which may be taken; not, of necessity, to be in writing. Baker *v.* Williams, 12 *Barb.* 527.

That an answer, read to oppose a motion, is not an affidavit, see Blatchford *v.* N. Y. & New Haven R. R. Co., 7 *Abb. Pr.* 322.

The description in Bacon's Abridgment (tit. *Affidavits*) of an affidavit will hardly stand any critical examination as a definition. It is there called an oath in writing administered. How that can be, when the form is presented orally, is not very clear. Soule *v.* Chase, 1 *Abb. Pr.* N. S. 48.

Upon the distinction between affidavit and deposition, see Stimpson *v.* Brooks, 3 *Blatchf.* 456.

Distinction between affidavit and oath, see Burns *v.* Doyle, 28 *Wis.* 460.

An affidavit is simply a declaration, on oath, in writing, sworn to before some person who has authority to administer oaths. Its validity does not depend on the fact whether it is entitled in any cause or in any particular way. Without any caption whatever, it is nevertheless an affidavit. Harris *v.* Lester, 80 *Ill.* 307.

There can be no such thing as an unwritten affidavit. Windley *v.* Bradway, 77 *N. C.* 333.

AFFILIATION. Establishment of paternity; judicial determination that a man is the father of a bastard child. Also called FILIATION, *q. v.*

AFFINITAS; AFFINITY. A relationship resulting from marriage, either between the husband and the blood relations of the wife, or between the wife and the blood relations of the husband. It is a relationship in theory of law only, not a real or physiological kindred.

Affinity is distinguished into three kinds: Direct, or that subsisting between the husband and his wife's relations by blood, or between the wife and the husband's relations by blood. Secondary, or that which subsists between the husband and his wife's relations by marriage. Collateral, or that which subsists between the husband and the relations of his wife's relations. *Wharton.*

The relation contracted by marriage between a husband and his wife's kindred, and between a wife and her husband's kindred, in contradistinction from consanguinity, or relation by blood. Carman *v.* Newell, 1 *Den.* 25; Higbie *v.* Leonard, *Id.* 186; Paddock *v.* Wells, 2 *Barb. Ch.* 331.

By a marriage, one party thereto takes by affinity the same relation to the kindred of the other that the latter holds by consanguinity. There is no rule by which the relation by affinity is lost upon a dissolution of the marriage, more than a relation by blood is determined by the death of those from whom it is derived. As the dissolution of a marriage once lawful, whether by death or divorce, has no effect on the issue, so it should not be allowed to annul a relation by affinity which the marriage produced. Spear *v.* Robinson, 29 *Me.* 531.

Affinity is the tie which arises from marriage betwixt the husband and the blood relatives of the wife, and between the wife and the blood relatives of the husband. If the husband or wife die, the affinity ceases, unless they have issue which survives and is living. There is also affinity between the husband and one who is connected by marriage with a blood relative of the wife. But there is no affinity between the blood relatives of the husband and those of the wife. Paddock *v.* Wells, 2 *Barb. Ch.* 331.

Relationship by affinity may exist between the husband and one who is connected by marriage with a blood relative of the wife. *Ib.*

Where the deceased husband of defendant, a widow, was a first cousin of the vice-chancellor, and defendant had a son by that husband, who was still living, it was held that there was a relationship by affinity between defendant and the vice-chancellor. The death of the husband would have severed the tie of affinity had not the living issue of the marriage, commingling the blood of both parties, continued to preserve the affinity. *Ib.*

Where C's father married the widow of the defendant's brother, and subsequently died, it was held that there was no kindred

or subsisting affinity between defendant and C, which could operate as a principal cause of challenge to C as a juror. Cain *v.* Ingham, 7 *Cow.* 478.

Where the widow of the justice's brother who became the wife of the plaintiff's brother was dead, and there was no evidence that there was any issue of the marriage, it was held that the justice was not disqualified by reason of affinity. Carman *v.* Newell, 1 *Den.* 25.

Two men who marry sisters are related by affinity. Foot *v.* Morgan, 1 *Hill*, 654.

AFFIRM. Generally, to assert or declare. 1. More technically, to make solemn declaration under judicial sanction, which, without involving in form an appeal to Almighty God or an invocation of supernatural punishment for falsity, expresses the willingness of the speaker to submit to the temporal punishment of perjury if he testifies untruly. Persons who entertain conscientious scruples against the form of a judicial oath are allowed, when summoned as witnesses, &c., to use the form, "I solemnly and truly declare and affirm," or words to like effect, but without importing any relaxation of the punishment of perjury if they give false testimony. Affirmation: a solemn assertion or declaration thus given. Affirmant: one who affirms instead of taking oath.

2. To ratify or confirm one's past act, or the act of one's agent. To express this idea, ratify or confirm is more often used.

3. To reassert or confirm a judgment, decree, or order, brought before an appellate court for review. Affirmance: the decision or deliberate determination of an appellate court, that a proceeding brought before it for review is correct and lawful, and must be carried into operation.

A dismissal of an appeal, for want of prosecution, is not an affirmance of the judgment appealed from. Drummond *v.* Husson, 14 *N. Y.* 60.

Affirmanti, non neganti, incumbit probatio. Upon the party affirming, not on the party denying, rests the burden of proof. The burden of proof rests upon the party having the affirmative of the issue. Negatives are presumed, and need not be proved; but the party alleging a fact which is disputed is bound to prove it. In general, the proof of the claim or cause of action alleged by a plaintiff rests with him, *actori incumbit probatio*, q. v.; but if the defence goes beyond a denial of the facts constituting the alleged cause of action, and alleges facts tending to establish an affirmative defence, the burden of proving those facts is with the defendant.

AFFIRMATIVE. The party who, upon the allegations of pleadings joiuing issue, is under the obligation of making proof, in the first instance, of matters alleged, is said to hold the affirmative, or, in other words, to sustain the burden of proof.

AFFORCE. To add force to; to increase the strength of.

In the earliest employment of jury trial, if the twelve did not agree, others were called in, until out of the increased number, twelve were found who did agree. This, as it was a true increase of the jury, was naturally and properly called afforcing the assize or panel. Later, the term seems applied to coercive measures brought to bear upon the twelve, as if to compel were the idea.

AFFRAY. A mutual fight in a public place. The definitions given do not agree. "Affray," says Jacob, "formerly meant no more than affright; as where persons appeared with armor or weapons, not usually worn, to the terror of others; but now it signifies a skirmish or fighting between two or more, and there must be a stroke given or offered, or a weapon drawn." Doubtless, actual violence or battery is involved in the term as now used. Mere words will not constitute an affray. O'Neill *v.* State, 16 *Ala.* 65; Hawkins *v.* State, 13 *Ga.* 322. And a person is not guilty of an affray who offers no resistance to an attack made upon him, although the attack is induced by insulting language used by him to the assailant. O'Neill *v.* State, 16 *Ala.* 65. But abusive and insulting language, together with acts tending to violence, such as drawing knives and attempting to use them in a public street, may amount to an affray. Hawkins *v.* State, 13 *Ga.* 322. And if one person, by such abusive language towards another as is calculated and intended to bring on a fight, induces the other to strike him, he is guilty of an

affray, though he may be unable to return the blow, State *v.* Perry, 5 *Jones L.* 9; or if a person is willing to fight, and merely prefers to go out of the corporate limits, and does not strike the first blow, but by his language provokes the other to strike him, he is guilty of an affray, State *v.* Sumner, 5 *Strobh.* 53.

The fight must be in a public place, Sampson *v.* State, 5 *Yerg.* 356; State *v.* Sumner, 5 *Strobh.* 53; for it is a distinguishing element of affray that it tends to create public alarm; that it disturbs the public in their enjoyment of highways, parks, and other places of common resort. As to what is a public place, see PUBLIC.

It was held in Duncan *v.* Commonwealth, 6 *Dana*, 295, and in Klum *v.* State, 1 *Blackf.* 377, that the fighting must be by mutual consent, by agreement; and in Cash *v.* State, *Overt.* 198, that it need not be. We judge the true rule to be that the fight must be mutual: there must be violence on both sides, as an attack by one person on another, without retaliation, is assault and battery only, though in a public place.

Burrill says "that affray differs from a riot in not being premeditated; for if any persons meet together upon any lawful or innocent occasion, and happen on a sudden to engage in fighting, they are not guilty of a riot, but an affray only." But this cannot be reconciled with the cases holding a previous agreement to fight to be necessary; nor is it clear that a riot must needs be premeditated. The distinction between the terms, as they are ordinarily employed, seems to be that an affray usually involves two parties or sides only, and the violence is the ultimate object; that is, to injure the adverse contestant, as an act of malice or revenge, is the end and aim of the fight; whereas a riot is usually the resort of numbers of persons to violence as a means of accomplishing some unlawful purpose beyond; as to rescue a prisoner, to suppress an unpopular performance, to drive away persons of an obnoxious race or creed. The distinction, whatever it may be, is of importance, in view of the rules that for affray, only persons participating or abetting are punishable, while for riot, by-standers not engaged in suppressing it may be. See RIOT; also MOB.

AFFREIGHTMENT. A contract for the use or service of a merchant vessel.

AFORESAID. Previously mentioned; already described or identified.

In drafting written instruments it is usual to state, once for all, at the place where a person or subject-matter is first spoken of, the name and addition, or the particulars of description enabling the reader to identify the individual intended; and afterwards, wherever the same individual is again involved, to use only a brief, salient name, and refer to the previous description by the word "aforesaid."

AFORETHOUGHT. Previously in mind; designed or intended.

To constitute murder at the common law, the killing must be done with malice aforethought; that is, with a preconceived intent to kill, as distinguished from an accidental or involuntary killing, or killing in heat of passion, without conscious formation of a complete design to kill. Malice aforethought was the technical term for describing the intent which distinguished murder before the enactment of statutes introducing degrees of murder depending on the length of time during which the purpose to kill has been entertained, or the evidence of its completeness and persistency. The course of decision under these statutes seems to be that aforethought imports an intention only, and does not imply that prolonged deliberation or complete premeditation which distinguishes murder in the first degree, hence is not sufficient in an indictment for the first degree, but, when used without other and stronger terms, amounts to a charge of murder in the second degree only.

After. Under a statute which provides that, after the expiration of a given number of days from one act, another may be done, the day of the first act must be excluded, and the second act cannot be done till the day after the expiration of the given number of days, counting the day after the first act as the first day. Commercial Bank *v.* Ives, 2 *Hill*, 355; Butts *v.* Edwards, 2 *Den.* 164.

Where a statute requires an act to be done after thirty days, it cannot be done

till the thirty-first day. Judd *v.* Fulton, 10 *Barb.* 117.

After, in a statute prescribing computation of time, is a word of exclusion. Page *v.* Weymouth, 47 *Me.* 238.

The words "after my debts and funeral charges are paid, I devise and bequeath as follows," &c., charge the real estate of testator with payment of his debts. The word after implies, as strongly as any word can do, that the payment of debts is a condition precedent to the absoluteness of any entire devise in the will. Fenwick *v.* Chapman, 9 *Pet.* 461.

AFTERMATH. The grass which grows after the first or principal crop of hay of the season has been made; also the right to take such last crop of grass for hay or pasturage.

Against the form of the statute. A technical phrase or clause employed in indictments for statutory offences. An indictment for an offence not known to and punishable by the common law, but created by statute, should conclude with the averment that the act was done *against the form of the statute*, or *statutes*. The equivalent Latin phrase is *contra formam statuti*, q. v.

AGE. 1. Progress of life. The length of time during which a person has lived or a thing has existed. A man's age is measured by the number of years and days from his birth to his death, or to the earlier time spoken of, whatever that may be.

2. Age is used to signify the time in a person's life at which he attains full personal rights and capacities; *i.e.*, twenty-one years. One who has completed his twenty-first year is popularly said to be of age.

3. In a similar sense to the last, age is used of the time of life at which some particular power or capacity is understood to become vested; as in the phrases, age of consent, age of puberty.

Age prayer or prier. A plea or mode of interposing the objection to a suit that the defendant was an infant and desired to have the suit stayed till he became of age. It was employed in ancient English practice, but is no longer in use.

AGENT. One who acts for or in the place of another in virtue of an existing authority or power from him. Agency: the relation between one who authorizes another to act in his stead, and the one who so acts.

Agent must be distinguished from servant, which is one who acts by authority and for the benefit of another, but without standing in his place; also, from representative, which may signify (as in the case of an executor) one who was designated to act by the choice of the person whom he represents, but whose present continuing authority is derived from the law; also, from trustee, who acts in behalf of one person, in virtue of an authority derived from another.

Agents are general or special: a general agent is one whom a principal employs to transact all his business of a designated kind; a special agent is one constituted for a single transaction. The importance of the distinction is that a general agent, having a wide scope both of duty and authority, represents his principal in all matters within the ordinary limits of the principal's business, and this may be in one or more places; the latter is one whose authority is definitely limited, and whose duty is specified. If a general agent, acting within the limits of his employment, violates instructions received from the principal, the principal alone will be liable to third persons; but if a special agent violates instructions, the principal will not be liable.

Agent, is a general term, which may be used to include clerks and servants, but is by no means restricted to such. People *v.* Allen, 5 *Den.* 76.

The terms attorney, and agent, import, *ex vi termini*, a delegation of power from another, which may be exercised in the name of the principal. Under a statute authorizing commissioners, "or any agent or attorney appointed by them," to make a certificate, a certificate made by an agent in the names of the commissioners is good. Colgin *v.* State Bank, 11 *Ala.* 222.

An astronomer who assists contracting engineers in their survey, and is paid with their money, but who was not appointed by them, and cannot be discharged by them, and who is not responsible to them, is not their agent. Jones *v.* United States, 1 *Ct. of Cl.* 383.

Neither agent nor servant, in a statute defining embezzlement by an agent or servant, will include a mechanic who receives materials of another to be manufactured at his own shop, and afterwards converts them to his own use. Commonwealth *v.* Young, 9 *Gray*, 5.

That the phrase "officers, agents, or servants," in a statute punishing embezzlement does not necessarily include clerks, see Budd *v.* State, 3 *Humph.* 483.

Whether agent may include both general and special agents, see Hartford, &c. Ins. Co. *v.* Matthews, 102 *Mass.* 221; Wilson *v.* Genesee Mut. Ins. Co., 14 *N. Y.* 418.

Agent and patient. When the same person is the doer of a thing and the party to whom it is done, he is said to be agent and patient. Thus, where a widow endows herself of the best part of her husband's possessions, or where one being indebted to another, afterwards the debtor makes the creditor his executor, and the creditor retains out of the testator's assets as much as will satisfy the debt, the acting party is both agent and patient. *Wharton.*

AGGRAVATION. Something connected with a crime or wrong, additional to its essential elements and enhancing its guilt or injurious consequences.

Facts alleged in the plaintiff's complaint in an action for a wrong, or introduced in evidence on the trial, not because they are essential elements of the wrong complained of, but because they entitle him to increased damages, are said to be introduced in aggravation of damages; as where, in an action for breach of promise of marriage, evidence that defendant, by means of the promise, seduced the plaintiff, is offered.

AGGRIEVED. Damnified; injured; exposed to loss of property or rights.

Many of the statutes declaring a right to appeal or bring error give it to the party aggrieved by the judgment. In this connection the word means some party to the proceeding sought to be reviewed, whose substantial rights of person or property are prejudiced by the decision below, assuming it erroneous.

Aggrieved, in a statute providing for a review of the admeasurement of dower, cannot be applied to a person not a party to the judgment. Lowery *v.* Lowery, 64 *N. C.* 110.

Aggrieved applies only to one whose pecuniary interest is affected by the decree, or whose right of property may be established or divested thereby. Swackhamer *v.* Kline, 25 *N. J. Eq.* 503; Raleigh *v.* Rogers, *Id.* 506.

Would the party have had the thing in controversy, if the erroneous judgment had not been given? is the best test as to who is the party aggrieved. Adams *v.* Woods, 8 Cal. 306.

The party aggrieved is the party against whom an appealable order or judgment has been entered. Ely *v.* Frisbie, 17 *Cal.* 250.

A person aggrieved by the order of a probate court, within the meaning of a statute providing for appeals from such order, is one who has a present and existing interest injuriously affected by the order. Labar *v.* Nichols, 23 *Mich.* 310.

A party to a decree of foreclosure and sale, who has parted with his interest subsequent to the commencement of the suit, but prior to the entry of the decree, cannot, in that right, maintain an appeal from the decree, under the act giving the right to a party aggrieved; though if his wife, who is also a party to the suit, retains an inchoate right of dower in the subject of the suit, he may unite with her in such an appeal. Kiefer *v.* Winkens, 3 *Daly*, 191, 39 *How. Pr.* 176.

A person who has, since an administrator's sale of lands for payment of debts, acquired an interest in the lands is aggrieved by an order of the probate court vacating the proceedings of sale, and may appeal from such order. Betts *v.* Shotton, 27 *Wis.* 667.

A party is aggrieved by a decree of a judge of probate, only when it operates on his property or affects his interests directly. Deering *v.* Adams, 34 *Me.* 41; Veazie Bank *v.* Young, 53 *Me.* 555.

A mere garnishee of a debtor to the estate of a deceased person has no such interest in the appointment of an administrator upon such estate, as to enable him to appeal from the decree of the judge of probate making such appointment. Veazie Bank *v.* Young, 53 *Me.* 555.

A trustee, being the representative of the creditors, is aggrieved by and may appeal from a decision in insolvency proceedings adverse to the interests of all the creditors; and also where he has an interest as trustee, in reference to his allowance or expenses, or when he is himself a creditor. Salmon *v.* Pierson, 8 *Md.* 297.

One is not aggrieved by an order appointing him administrator, so that he can appeal therefrom, if he can avoid the effect of the order by declining the appointment. Succession of Decoux, 5 *La. Ann.* 140.

If a verdict and judgment in a petition for freedom are in favor of the defendant, he cannot sustain an appeal, though he has taken an exception, because he is not aggrieved by the result of the trial below. Ringgold *v.* Barley, 5 *Md.* 186.

A prisoner is not legally aggrieved by an order that he be discharged and go without day; he therefore cannot appeal therefrom. Commonwealth *v.* Graves, 112 *Mass.* 282.

AGIO. A commercial term used to express the difference in value between banknotes, or other paper currency, and the coin of the country. *M'Culloch's Comm. Dict.*

AGIST. Anciently, to take in and feed the cattle of strangers in the king's forest, and to gather up the money due for the same; which was done by officers appointed for the purpose, called agisters, or gist-takers.

AGISTMENT. A species of bailment; being a contract whereby a landowner receives the animals of another to be fed and cared for upon his premises. Agister: the bailee in agistment.

Agistment also signifies the profit of feeding another's cattle in one's ground or field. There is also agistment of seabanks, where lands are charged with a tribute to keep out the sea; and *terræ agistatæ* are lands whose owners must keep up the seabanks. *Holthouse.*

AGNATES; AGNATI. Relatives whose relationship can be traced exclusively through males.

The *agnati* were those relatives of a person not *sui hæredes*, and who connected themselves with him by a male relationship. They ranked next after the *sui hæredes* and next before the *cognati.*

AGNOMEN. The Romans recognized four names of persons,—the *agnomen* being a name derived from some achievement, personal peculiarity, or circumstance particularly associated with the individual.

AGRARIAN. Relating to land. Agrarian laws, in common parlance, are laws tending to an equal distribution of landed estates; laws for subdividing large properties and increasing the number of landholders.

AGREE. 1. In the most general sense, to unite in mental action; to exchange assents; to concur in opinion or purpose. Agreed is applied to persons who are thus united in purpose or opinion. In this sense, while the term does not imply any exchange of promises, it does import a conference or exchange of views; persons are not said to agree because they think alike merely, but because they consciously concur in each other's thought. Thus we say that the jury agreed upon a verdict; that five judges agreed and two dissented: meaning that they decided alike, upon conference. But the electors who have voted for the successful candidate, though they have chosen alike, are not properly said to agree, if the vote of each was his separate act; to say that they agreed upon the man elected would seem to import some caucus or previous conference by which their votes were determined.

2. When the context or connection shows that the word is used with reference to any mutual dealings or arrangements for determining the future action of the parties, agree means, properly, to exchange promises; to unite in an engagement that something shall be done or omitted: and agreement means a meeting or concurrence of minds upon a course to be taken; a concord established by reciprocal promises or by compensating a promise. Also, secondarily, agreement designates the language, oral or written, embodying mutual promises. In this use of the words they are nearly equivalent to the verb and noun contract: the differences being that contract unquestionably involves the ideas of a subject-matter of value and an exchange of promises or considerations in compensation for each other; which implications are less distinct in agree. Whether agree imports a consideration is disputed: the true view seems to be that it properly imports more than promise, followed by assent; implies reciprocal promises, though not necessarily promises which would form a legal consideration; yet as there is no distinct term for the relation established by the bare acceptance of a promise, agreement is sometimes loosely used for that. Or we may say that offer and promise, on the one hand, and assent on the other, are unilateral, importing action of a single mind; agree means an exchange of promises, which may or may not involve value or compensation; while contract implies mutual engagements involving value or founded upon consideration. To say that a congressman *contracted* to vote for a subsidy would clearly impute bribery; that he promised his vote in exchange for something of value promised to him. To say that he *agreed* to vote for it would not negative bribery, but, on the other hand, would not imply it; the words would be perfectly satisfied if there was a conference of representatives and an exchange of assurances that they would vote for the bill, in the honest exercise of duty. To say that he promised his vote would import only that he declared an intention of voting for the bill, to some one interested in its passage.

A verdict in a criminal case, stating

that the jury "agree" instead of "find," is sufficient. Benedict *v.* State, 14 *Wis.* 423.

Agree, in an instrument signed by one party only, but delivered to and accepted and acted upon by another, imports reciprocity; implies a counter-promise by the other to perform what appears by the terms of the instrument to be the condition on which the signer's promise is founded. Baldwin *v.* Humphrey, 44 *N. Y.* 609.

The words, I agree to sell, &c., in a contract for the sale of land, import a concluded agreement, and not a mere offer to sell. Ives *v.* Hazard, 4 *R. I.* 14.

That agreement may import a mutual act of two parties, but is frequently used as declaring the engagement of one only; a man may agree to pay money, or to perform some other act; and the word is then used synonymously with promise or engage, see Packard *v.* Richardson, 17 *Mass.* 122.

Agreement, in its popular and usual signification, means no more than concord; the union of two minds or a concurrence of views or intention. The cause or occasion which produces it is a distinct thing. The concord or union of minds may be lawful or unlawful; with consideration or without; creating an obligation or without: still it is an agreement. Any thing done or omitted by the compact of two or more minds is universally called an agreement. Whether a consideration exists is a distinct idea, and enters not into the popular meaning of the term. Agreement is synonymous with mutual assent. A statute (of frauds) requiring a memorandum of an agreement ought not to be construed, in the absence of something beyond the employment of that word, as requiring the consideration to be stated. Sage *v.* Wilcox, 6 *Conn.* 81.

Agree no more implies a consideration than the word promise. Newcomb *v.* Clark, 1 *Den.* 226.

Agreement is more comprehensive than promise; signifies a mutual contract, on consideration, between two or more parties. A statute (of frauds) which requires the agreement to be in writing includes the consideration. Wain *v.* Walters, 5 *East*, 10.

But a statute which requires the promise to be in writing is satisfied without a statement of the consideration. Rigby *v.* Norwood, 34 *Ala.* 129.

Agreement is not synonymous with promise or undertaking, but, in its more proper and correct sense, signifies a mutual contract, on consideration, between two or more parties, and implies a consideration. Andrews *v.* Pontue, 24 *Wend.* 285.

Agreement, as used in a statute declaring void parol agreements not to be completed in one year, signifies a mutual contract, on consideration, between two or more persons; and, *ex vi termini*, includes the several parties, and their respective stipulations, — every thing, indeed, which is to be done on both sides. Broadwell *v.* Getman, 2 *Den.* 87.

Agreement is constantly used as the synonyme of contract. There seems, however, to be a shade of difference between the terms, agreement being applicable to less formal acts or instruments. *Burrill.*

Agreement is seldom applied to specialties; contract is generally confined to simple contracts; and promise refers to the engagement of a party without reference to the reasons or considerations for it, or the duties of other parties. *Parsons, Contr.* 6.

A statute limiting an action upon "a specialty, or any agreement, contract, or promise in writing," does not embrace a judgment. Kimball *v.* Whitney, 15 *Ind.* 280.

It is agreed, contained in an agreement signed by two persons, implies a mutual agreement binding upon both; thus, where "it is agreed" that A shall furnish articles at a certain price to B, there is an implied agreement that B will accept them and pay the price. Barton *v.* McLean, 5 *Hill*, 256.

AGRICULTURE, does not apply to the cultivation of a one-acre garden of ordinary vegetables by a man whose chief avocations are those of a butcher and day-laborer; this is "horticulture." Simons *v.* Lovell, 7 *Heisk.* 510.

It does not include labor in a grist-mill. Bachelder *v.* Bickford, 62 *Me.* 526.

AID, *v.* To assist; help; promote. Differs from encourage and advise, in importing some active co-operation; and from abet, in not importing (when used alone) any criminality in the act aided. Aid, *n.*: a person (sometimes a thing) who promotes, helps, or assists in something done.

Aider by verdict. Defects or omissions in a declaration or indictment are said to be aided by verdict, upon the principle that an appellate court will presume, in support of the verdict, that facts, without evidence of which the verdict could not have been found, were duly proved, although the averment of them is obscure, indistinct, or might have been held insufficient upon a demurrer.

When it may be reasonably presumed — that is, presumed consistently with the general tenor of the pleadings — that the defect was supplied or taken into consideration by the jury previously to giving their verdict, in such cases the error, defect, or omission cannot be made a ground of objection, and is thence said to be cured by the verdict. *Brown.*

Where there is any defect, imperfection, or omission in any pleadings, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively

or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict. Serj. *Williams*, in note to Stennel *v.* Hogg, 1 *Saund.* ed. 1845, 228, note.

Aiding and abetting; Aiders and abettors. Phrases designating the guilt of persons who assist; help, or promote the commission of a crime, of which another person is the principal perpetrator. Compare ACCESSORY; ABET.

Aid prayer. A proceeding by which a person, sued in respect of land in which he had but a limited interest, besought the aid of a lord or reversioner, or other person having a further or more permanent interest in the land, to defend the same. **Aid of the king** might also be sought by a person sued in respect of land held of the king. *Termes de la Ley.*

Aids, in old English law, were originally mere benevolences granted by a tenant to his lord, in times of distress, but at length the lords treated them as a matter of right, and not of discretion. They were principally three: To ransom the lord's person, if taken prisoner; to make the lord's eldest son and heir-apparent a knight; to give a suitable portion to the lord's eldest daughter on her marriage.

Also extraordinary grants to the crown by the house of commons, and which were the origin of the modern system of taxation. *Wharton.*

ALCALDE (sometimes spelled Alcadé and Alcaid), a juridical officer, known in Spain and in those parts of America which were settled under Spanish authority and adopted Spanish institutions. His functions somewhat resembled those of mayor in small municipalities on the continent, or justice of the peace in England and most of the United States; yet *juaces de paz* or justices of the peace, seem to have been known as a distinct class of officers, and there were *alcaldes ordinarios* besides the grade of *alcalde mayor*. See Strother *v.* Lucas, 12 *Pet.* 442, note *a;* United States *v.* Castillero, 2 *Black.* 194. The importance of the title to American lawyers has lain in this, that in tracing back the early history of titles to lands in territory acquired from Spain, one often came upon deeds and muniments of title authenticated by or before an alcalde; and sometimes a careful examination of his official powers at the period of his act became necessary. These titles have now very generally become established by authoritative decisions of the federal judiciary, rendering any renewal of such examinations of diminished importance.

An alcalde had no jurisdiction under the mining laws (of Spain governing California), and could not make title to a mine. Under the Spanish laws, most of the important functions of the local government of California were performed by the governor and the departmental assembly; but the law also made provision for prefects and subprefects; for *ayuntamientos* or municipal councils; and for the appointment of *alcaldes* and *juaces de paz* or justices of the peace. Judicial functions were exercised by the alcaldes; but it does not appear that their authority extended to the adjudication of a mining title. United States *v.* Castillero, 2 *Black.* 17, 194.

ALDERMAN. An officer of dignity in a municipal corporation. The powers and duties of aldermen vary under differing local laws; but in modern usage the legislative power granted to a city is vested in the aldermen as a board, or is shared by them as one of two boards composing the legislative body; while the aldermen individually exercise some functions, more or less extensive in different municipalities, as magistrates and administrative officers.

Alderman has been long used to designate an officer having judicial, as well as civil or legislative power. Purdy *v.* People, 4 *Hill*, 384, 387, 409.

ALEATORY. Contracts, the obligations and performance of which depend upon an uncertain event, such as insurance, engagements to pay annuities, and the like, are termed, in the civil law, aleatory.

In aleatory contracts, of whose essence it is that there should be risk on one side or on both, all risks appertaining to the contract, and not excepted, are assumed by the parties. Moore *v.* Johnston, 8 *La. Ann.* 488.

ALIAS. 1. Otherwise; also (in abbreviation of *alias dictus*), otherwise called.

2. At another time; on another occasion; before.

An *alias* execution is another and different execution actually issued at a different time, and does not include an execution altered by change of date. Roberts *v.* Church, 17 *Conn.* 142.

Alias has become incorporated into the English language, as equivalent to "otherwise called;" and the use of it alone, without the addition of *dictus*, in an indictment

does not create uncertainty. Kennedy *v.* People, 39 *N. Y.* 245.

Alias dictus. Otherwise called. Used to denote a second or further name of a person known by two or more different names; commonly abbreviated to *alias*. Thus the full form of the common expression John Doe, *alias* Goodright, is John Doe, *alias dictus* (otherwise called) Goodright.

ALIBI. Elsewhere; in another place. This term is used to designate that mode of defence to a criminal prosecution where the accused, to prove that he cannot have committed the crime with which he is charged, offers evidence that he was in another place at the time when, as alleged, the act was done.

When established beyond question this is a very convincing and satisfactory defence. It is, however, proverbially open to suspicion, because it offers opportunity and temptation for the employment of false witnesses; and because it may often mislead, through a mistake of honest witnesses as to the precise day and hour of the facts to which they swear. Exactness as to time of ordinary events is not generally observed by persons noticing the event, but perhaps not aware of the importance which it is to assume in some future judicial inquiry. Hence witnesses may easily be mistaken as to time. Yet, when an *alibi* is set up, if either the witnesses for the prosecution are in any error in recollecting the time of the offence, or those for the defence make any mistake as to the day or hour when they saw the prisoner elsewhere, both may intend to testify truthfully, yet the defence, though apparently good, may be unfounded.

ALIEN, *n.* Generally, one born abroad, or who does not, either by nativity or voluntary adoption, owe allegiance to the government within whose territory he dwells. Alienage, alienism: the status or legal condition of an alien. By our law, those persons who were born out of the jurisdiction of the United States, and who have not been naturalized, are aliens; except that children of ambassadors and foreign ministers, and in some cases wives of naturalized men, though born abroad, are citizens; and that alienage has been imputed to children born in this country before its separation from England, but of parents who withdrew, with such children, on the treaty of peace; and that conversely citizenship has been accorded to persons born within territory while it was under dominion of a foreign power which has since become or been annexed to the United States, without requiring from them any distinct individual act of naturalization. See ANTENATUS.

An alien is one born without the allegiance of the commonwealth. Ainslie *v.* Martin, 9 *Mass.* 456. See also Lynch *v.* Clarke, 1 *Sandf. Ch.* 583, 668; Ex parte Dawson, 3 *Bradf.* 130, 136. 20 Ny 320.

Alien, as used in 2 N. Y. Rev. Stat. 69, § 31, excluding certain aliens from being executors, means one born out of the jurisdiction of the United States, and who has not been naturalized. McGregor *v.* McGregor, 3 *Abb. App. Dec.* 92; 33 *How. Pr.* 456.

With respect to the change of allegiance caused by the revolution, one born in and a subject of Great Britain before the revolution, and who always resided there, and never was in the United States, is an alien, and therefore cannot take lands in the United States by descent from a citizen of the United States. Dawson *v.* Godfrey, 4 *Cranch*, 321; s. p. Fairfax *v.* Hunter, 7 *Id.* 603; Blight *v.* Rochester, 7 *Wheat.* 535; Contee *v.* Godfrey, 1 *Cranch C. Ct.* 479.

Any subject of Great Britain who has emigrated to this country since the declaration of independence is an alien. Jackson *v.* Wright, 4 *Johns.* 75.

With respect to the acquisition of Texas, one who removed from Texas to Mexico during the revolution, and before the declaration of Texan independence, and remained in Mexico, is an alien, and cannot inherit in Texas. McKinney *v.* Saviego, 18 *How.* 235.

Where a person born in Texas, when it was a part of the republic of Mexico, the place of birth being also the domicile of her father and mother until their deaths, was removed to Mexico at the age of four years, before the declaration of Texan independence, and there remained, it was held that she was an alien, and could sue in the courts of the United States. Jones *v.* McMasters, 20 *How.* 8.

Alien enemy. One who owes allegiance to a government at war with ours; usually spoken of a person dwelling within our territory or seeking some action from our government or courts.

Alien friend. A subject of a nation which is at peace with us.

Alien and sedition laws. Acts of congress of July 6 and July 14, 1798. See *Whart. St. Trials*, 22.

ALIEN, *v.*; **ALIENATE**. To part with; put away; transfer. Alienation: a putting away or divesting one's self of something.

When used of property, these words embrace all the voluntary acts or modes by which an owner devests his title or diverts the property from the ownership and course of descent which the law would otherwise impute.

Alienation is as much as to say: to make a thing another man's; to alter or put the possession of lands or other things from one man to another. *Termes de la Ley.*

To alienate means voluntarily to part with ownership. The right to alienate was a right which the owner of real estate had to divert it from the heir. Alienation differs from descent, in this, that it is effected by the voluntary act of the owner of the property, while descent is the legal consequence of the decease of the owner. A transfer by conveyance or devise is an alienation; but property which is not transferred or devised is not alienated. By the death of the assured, the insured property is not alienated. Burbank *v.* Rockingham Mut. Fire Ins. Co., 24 *N. H.* 550.

Alienation imports a transfer of the entire title; a transfer short of the conveyance of the title, is not an alienation. Masters *v.* Madison County Mut. Ins. Co., 11 *Barb.* 624.

A deed to a naked trustee, in trust for grantor's wife and children, is not an alienation of a homestead, requiring the wife's signature; for the trust expressed in such deed being a passive one, the grantee takes no title, but the estate vests immediately in the *cestuis que trust*, each taking the title to an undivided share. Riehl *v.* Bingenheimer, 28 *Wis.* 84.

A mortgage of property insured is not of itself an alienation, within a provision of the charter or policy, avoiding the contract if the property shall be alienated during the risk; according to the weight of authority. Pollard *v.* Somerset Mut. Fire Ins. Co., 42 *Me.* 221; Smith *v.* Monmouth, &c. Ins. Co., 50 *Id.* 96; Rice *v.* Tower, 1 *Gray*, 426; Rollins *v.* Columbian Ins. Co., 25 *N. H.* 200; Folsom *v.* Belknap County Mut. Fire Ins. Co., 30 *Id.* 231; Shepherd *v.* Union, &c. Ins. Co., 38 *Id.* 232; Conover *v.* Mutual Ins. Co., 3 *Den.* 254, 1 *N. Y.* 290; Allen *v.* Hudson River, &c. Ins. Co., 19 *Barb.* 442. Compare, to the contrary, Edmands *v.* Mutual, &c. Ins. Co., 1 *Allen*, 311; Edes *v.* Hamilton, &c. Ins. Co., 3 *Id.* 362; Phillips *v.* Behn, 19 *Ga.* 298. A mortgage followed by a transfer of the right of redemption, Tomlinson *v.* Monmouth, &c. Ins. Co., 47 *Me.* 232, or by a sale in foreclosure, Mount Vernon, &c. Co. *v.* Summit, &c. Ins. Co., 10 *Ohio St.* 347, is an alienation.

A statutory prohibition upon alienations of real property by married women should be held to include mortgaging. Vinnedge *v.* Shaffer, 35 *Ind.* 341.

Alienation, in a clause in a policy restricting alienation of the subject insured, extends to alienations in law; to any transfer which vests the property, and the charge and control of it, in another person, even though the change is only temporary. Lane *v.* Maine Mut. Fire Ins. Co., 12 *Me.* 44.

ALIENI JURIS. Under another's authority.

1. In the Roman law. A person subject to the paternal authority vested by the law in the *pater-familias*, termed *patria potestas* (q. v.); as distinguished from those not subject to such authority, known as *sui juris*.

2. In modern law. A person subject to the authority or power of another, as an infant is subject to the authority of his parent or guardian, or a wife to the control of her husband, is said to be *alieni juris;* and such persons are thus distinguished from those capable to act in their own right, who are said to be *sui juris*, q. v.

This phrase should not be confounded with mental alienation, or be supposed to embrace persons who are incapacitated to act in their own affairs by weakness of mind. If a lunatic is termed *alieni juris*, it is in virtue of his having been placed in the care of a committee or guardian, and not from the alienation of mind merely.

ALIMENT, *n.* Originally food; hence, also, necessaries of life, generally, or even money allowed for procuring them. Aliment, *v.*, is sometimes used in the sense of to supply necessaries.

ALIMONY. A provision for support which a husband may be adjudged to make to his wife, when she seeks a judicial separation or divorce. It is temporary, otherwise called alimony *pendente lite*, when it is ordered, at the institution of a suit, to prosecute or defend the suit, and to buy necessaries meantime; it is called permanent, when it is made, upon granting a divorce, for the wife's future maintenance.

Alimony is an allowance out of a husband's estate, made for the support of a wife while living apart from her husband. Chase *v.* Chase, 55 *Me.* 21; Odom *v.* Odom, 36 *Ga.* 286.

Alimony, as used in the constitution and statute of New Hampshire, means that provision or allowance which is made to a wife

on a divorce from the bonds of matrimony, and does not embrace other allowances. Parsons *v.* Parsons, 9 *N. H.* 309; Sheafe *v.* Sheafe, 24 *Id.* 564.

Alimony includes all allowances, whether annual or in gross, made to a wife upon a decree of divorce. Burrows *v.* Purple, 107 *Mass.* 428.

The phrase "alimony and maintenance," as used in Nix. Dig. 247, § 9, regarding divorces, does not comprise, in its legitimate signification, an allowance of a portion of the husband's estate in fee. Calame *v.* Calame, 25 *N. J. Eq.* 548.

Aliter. Otherwise. Used in the reports to introduce a converse proposition or an exception to a general principle previously stated.

Aliud est celare, aliud tacere. It is one thing to conceal, another to be silent. Silence is not concealment. A familiar application of this principle is in the negotiation of a contract of sale, in which either party may innocently keep silence as to matters open to both to exercise their judgment upon. *Broom Max.* 782. The seller is not legally bound to proclaim the defects of the subject offered for sale; he may remain silent and allow the buyer to inspect the article and satisfy himself, before concluding the transaction, whether it is defective or not. Silence, under such circumstances, does not amount to concealment of any defects, nor is there any warranty implied against defects. Keates *v.* Earl of Cadogan, 10 *Com. B.* 591. To such transactions the maxim *caveat emptor* (q. v.) is applied. But the non-disclosure of facts which ought to be disclosed is such concealment as will vitiate a contract or obligation entered into or obtained by such means.

Aliud est possidere, aliud esse in possessione. It is one thing to possess, another to be in possession. Although no distinction is made in the common usage, between the terms "to possess" and "to be in possession," their use in legal phraseology involves an important distinction. To possess, implies right of property; to be in possession, may mean mere custody. Thus, the proprietor of demised premises possesses the land of which his tenant is in possession; the lender possesses the article loaned, of which the borrower is in possession; the owner of a lost or stolen article still possesses it when it is in the possession of a finder, or of an honest purchaser for value. *Trayn. Max.* 37.

Aliunde. From another source. This term designates evidence derived from extrinsic sources. Thus where a party seeks to contradict, explain, or vary the terms of an instrument in writing by proof of facts extrinsic to the instrument, such proof is termed evidence *aliunde.* An instance is when evidence *aliunde* (from without the will) is received to explain an ambiguity in a will.

ALL. Is frequently and carelessly used in all writings, lay as well as legal; and the generality of the phrase is frequently to be restrained in a statute, not only by the context, but by the general form and scheme of the act, as demonstrative of the intention of the legislature. Phillips *v.* Saunders, 15 *Ga.* 518.

In statutes, as in common parlance, all is a general rather than a universal term, and is to be understood in one sense or the other, according to the demands of sound reason. Kieffer *v.* Ehler, 18 *Pa. St.* 388; Stone *v.* Elliott, 11 *Ohio St.* 252.

All is not always to be construed literally; as, in a statute declaring a lien, in favor of "all laborers who shall perform" certain work. Dano *v.* M. O. & R. R., R. R. Co., 27 *Ark.* 564.

All estate; all interest; all property. A devise of "all my real estate," without words of limitation or inheritance, passes a fee-simple. Godfrey *v.* Humphrey, 18 *Pick.* 537; Morrison *v.* Semple, 6 *Binn.* 94; Carr *v.* Jeannerett, 2 *McCord*, 66.

By a devise of "all my other estate, real and personal, not otherwise disposed of," a fee passes. Countess of Bridgewater *v.* Duke of Bolton, 6 *Mod.* 106.

The words, "all my estate, both real and personal," "to be at her absolute disposal," are sufficient to vest a fee. Jackson *v.* Babcock, 12 *Johns.* 389.

A deed of "all the estate, both real and personal," to which the grantor is "entitled in law or equity, in possession, remainder, or reversion," passes all the grantor's estate. Mundy *v.* Vawter, 3 *Gratt.* 518.

In a will, the words all my estate will pass every thing a man has; but if the word all is coupled with the word personal, or with words of local description, then the gift will pass only personalty, or the specific estate particularly described. Hogan *v.* Jackson, 6 *Coup.* 299.

The words in a will, "I give, devise, and bequeath all my estate and effects," if not restricted by the context, pass all the real estate, including after-acquired real estate, of which the testator dies seised. Stokes *v.* Salomons, 4 *Eng. L. & Eq.* 133.

The assignment of "all the interest" of a member of a special partnership to buy lands does not pass any collateral benefit

which he derived as agent of the partnership, such as his expenses and costs in securing the land bought, to the partnership. Stewart *v.* Stebbins, 30 *Miss.* 66.

A devise of "all my property," certain described portions excepted, is a general devise, and so is a devise of "all the rest of my books" (certain specified books having been previously devised). Mayo *v.* Bland, 4 *Md. Ch.* 484.

A devise of "all my property of any nature or kind whatsoever, which deed, papers, and movables will show," will not pass land which belonged to the testator's wife. Mitchell *v.* Mitchell, 1 *Ired. L.* 257.

Under a bequest of "all my property of every description," money, *choses in action*, and every thing of which the testator has a right to dispose, passes to the legatee. Hurdle *v.* Outlaw, 2 *Jones Eq.* 75.

A conveyance of "all the property I possess," held, to mean all that the party owned, as well in remainder as in immediate occupation. Brantly *v.* Kee, 5 *Jones Eq.* 332.

All I possess; or am worth. "I give and bequeath all that I possess in-doors and out-doors," is sufficient to pass real estate. Tolar *v.* Tolar, 3 *Hawks*, 74.

A gift in a will of "all I am possessed of," will pass all the interest in personal estate which the testator may have, not at the time of making the will, but at the time of his death, if not inconsistent with other parts of the will. Wilde *v.* Holtzmeyer, 5 *Ves. Jr.* 811.

A testamentary gift of "all I am worth" includes the real as well as the personal estate of the testator. Huxstep *v.* Brooman, 1 *Brown Ch.* 437.

All faults. In the absence of fraud, a sale of goods with "all faults" covers all such faults and defects as are not inconsistent with the identity of the goods as the goods described. Whitney *v.* Boardman, 118 *Mass.* 242.

All legal costs, in a suit, clearly includes charges for travel and attendance, and other items that inure to the benefit of the attorney, as well as clerk's, officer's, and witnesses' fees. James *v.* Bligh, 11 *Allen*, 4.

All matters in dispute, occurring in a submission, includes costs; and the court has no power, in the absence of any stipulation therefor, to amend the award in that regard. Hoover *v.* Neighbors, 64 *N. C.* 429.

All personal effects. A deed of trust, specifying certain personal property, and concluding with a grant of "all personal effects of every name, nature, and description," embraces only things *ejusdem generis* with those already mentioned which might not have been supposed to pass under the words used. Bellamy *v.* Bellamy, 6 *Fla.* 62.

All sorts. The phrase "all sorts of wool" includes only animal wool, where used in a statute which in another clause mentions wool and cotton-wool as distinct commodities. Pearce *v.* Cowie, 1 *Holt N. P.* 69.

ALL-FOURS. Two cases or decisions are said to "run upon all-fours" — a metaphor taken from the running of mated quadrupeds — when they are alike in all the circumstances which can at all affect the proper determination of them.

ALLAY. See ALLOY.

Allegans contraria non est audiendua. He who alleges things contradictory of each other is not to be heard. Contradictory allegations in pleading are not permitted. Thus, one maintaining that a deed is valid, which confers upon him some right, cannot at the same time allege its invalidity, in order to escape an obligation imposed upon him by the same deed. So a person cannot claim to act under an agreement, and at the same time repudiate it. Crossley *v.* Dixon, 10 *H. of L. Cas.* 293, 310. But the maxim does not forbid fair alternative pleading; as where, in an action for damages, the defendant denies that the plaintiff has sustained any injury whatever, he may also allege that, even if the plaintiff has sustained injury, the damage was occasioned by the plaintiff's own act or negligence. Such allegations are not considered contradictory of each other.

The principle by which an assertion of a right or matter of fact, whether by record, deed, or by mere act or omission, may operate to prohibit a subsequent contradictory assertion, forming part of the doctrine of estoppel, is within the meaning of this maxim. *Broom Max.* 169.

The rule is also applied to a witness making contradictory statements relative to the same transactions, in determining the degree of credibility to which he may be entitled. *Broom Max.* 174.

Allegans suam turpitudinem non est audiendua. He who alleges his own infamy is not to be heard. No one is permitted to allege discreditable conduct of his own, in order to escape the fulfilment of some obligation which otherwise is binding upon him. This maxim is to be understood in a very limited sense. As a general rule, a person who alleges or confesses something to his own discredit is heard, and

his statement is accepted, on the ground that one does not readily acknowledge what is discreditable to himself. But this reason does not apply to a person seeking to take advantage of his own fraud, or other wrongful or disgraceful act, and such cases are within the meaning of the maxim. But even within these limits there are exceptions. An action upon an express promise for the payment of money may be defended by setting up that the consideration of the promise was the payment of a gambling debt, or the price of illicit intercourse. Although such defences involve allegations of conduct discreditable to the person making them, they are nevertheless heard, and, if proved, may be sustained as sufficient defences.

The maxim is also applied in determining the degree of credibility to which a witness is entitled who testifies to his own participation in the offence sought to be proved by him; as an accomplice in crime, or a paramour in adultery. So an arbitrator is not allowed, as a witness, to impeach his own award and his own integrity by contradicting his report as to matters of fact therein stated, and avowing that he acted with bad faith and duplicity. Underhill *v.* Van Cordtlandt, 2 *Johns. Ch.* 339, 350. On like grounds, as well as from considerations of public policy, a juror is not received as a witness to impeach his verdict by alleging his own misconduct.

Allegata et probata. Allegations and proofs. A phrase frequently used in expressing the rule that the evidence must correspond to the allegations of the pleadings in a cause. A party is not allowed to state one case in his pleadings, and make out a different case by proof: the *allegata* and *probata* must agree; the latter must support the former. Boone *v.* Chiles, 10 *Pet.* 177, 209. If there be proofs to facts not put in contestation by the pleadings, or allegations of facts not established by proofs, in each case they must be rejected. The Sarah Ann, 2 *Sumn.* 206.

ALLEGATION. That which is asserted or declared. It is most frequently used of the formal averments in the pleadings in a suit, setting forth what the party is prepared to prove, characterizing not the entire pleading, but the separate statements contained in it, considered distinctly. In English ecclesiastical practice, however, the word seems to designate the pleading as a whole: the three pleadings are known as the allegations; and the defendant's plea is distinguished as the defensive, or sometimes the responsive allegation, and the complainant's reply as the rejoining allegation.

Allegation of faculties. A statement of pecuniary means; particularly the statement of a husband's means, required in ecclesiastical practice, from a wife, as a basis of an application for alimony.

ALLEGIANCE. The obligation of a citizen or subject to render obedience and support to his government or sovereign, in return for the protection which he receives.

This obligation was, upon the older ideas, inalienable and perpetual: it could not be divested by any act of the subject; but this view has been, in modern times, and in deference to necessities arising out of the extensive emigration and colonization of the past two centuries, relaxed, so far, at least, that both English and American laws recognize the liberty of a subject to exchange one allegiance for another, by naturalization. See the English naturalization act of 1870, *Stat.* 33 *Vict.* ch. 14; act of congress of July 27, 1868, 15 *Stat. at L.* 223, *Rev. Stat.* 1999.

The older learning on allegiance will be found in Calvin's Case, 7 *Rep.* 1, and in the notes to that case in *Broom's Const. Law.* It is there said that allegiance is of four kinds, namely, natural allegiance, that which arises by nature and birth; acquired allegiance, that arising through some circumstance or act other than birth, *e. g.*, by denization or naturalization; local allegiance, that arising from residence simply within the country, for however short a time; and legal allegiance, that arising from the oath of allegiance.

Allegiance is the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign, in return for the protection he receives. It may be an absolute and permanent obligation, or it may be

qualified and temporary. Carlisle *v.* United States, 16 *Wall.* 147.

ALLOCATIO. ALLOCATION. An allowance; particularly, one made upon account in the English exchequer.

Allocatione facienda. A writ for allowing to an accountant such sums of money as he hath lawfully expended in his office; directed to the lord treasurer and barons of the exchequer upon application made. (*Reg. Orig.* 206.) *Jacob.*

ALLOCATUR. It is allowed. This Latin word was formerly affixed to or indorsed upon a writ or order, with the judge's signature or initials, to denote that he approved and authorized the instrument. "Allowed," in modern practice, takes its place; or the name or initials of the judge may show an allowance.

After an attorney's bill has been examined or taxed by one of the masters, and the items which he disallows have been deducted, the remaining sum certified by the master to be the proper amount to be allowed, is termed the *allocatur*. *Brown.*

ALLODIAL. Free; owned without obligation of fealty or vassalage; not feudal. Allodium; an estate held independent of feudal obligations; owned by a man in his own right, without owing service to a superior.

Allodial is where an inheritance is held without any acknowledgment to any lord or superior, and therefore is of another nature from that which is feudal. Allodial lands are free lands which a man enjoys without paying any fine, rent, or service to any other. *Jacob.*

Allodial land is land not held of any lord or superior, in which, therefore, the tenant has an absolute property and not an estate merely. The lands of the Saxons were allod, but under the oath taken at Salisbury in 1087, all the lands in England became feudal, *i. e.*, held of some superior lord, and for an estate only. *Brown.*

Allodial is used in contradistinction from feudal; in which sense all movable property is allodial. In a more limited sense the term is applied: 1. To the property belonging to the crown; 2. To the superiorities reserved by the sovereign; 3. To churches, churchyards, manses, and glebes, the right of which does not flow from the crown. *Bell.*

The terms alod and allodial did not have any necessary reference to the mode in which the ownership of land had been conferred; each simply implied that the lands were held in absolute ownership, and not in dependence upon any other body or person in whom the proprietary rights were supposed to reside, or to whom the possessor of the land was bound to render service. *Digby, Hist. of Law of Real P.* 5.

Calling lands allodial meant that they were held in absolute ownership, without recognizing any superior to whom any duty was due on account thereof. Such lands were alienable at the will of the owner, and were liable for his debts; and descended, on his death (if undevised), to his heirs. Allodial lands, or, as they were called in Saxon, *boc lands*, might be granted upon such terms and conditions as the owner saw fit, by a greater or less estate, present or future. 1 *Washb. Real P.* 16.

Allodial, as used in Wis. Const. art. 1, § 14, means free; not subject to the burdens and restrictions on alienation connected with feudal tenures. The section does not prohibit the legislature from regulating conveyances, or dower, or other rights growing out of the domestic relations. Barker *v.* Dayton, 28 *Wis.* 367.

ALLONGE. When the back of a bill of exchange becomes absolutely filled with indorsements, so that no room remains for more, the law-merchant allows additional indorsements to be made upon a slip of paper, to be annexed to the bill. This slip is called an allonge.

There is no authority against such a mode of indorsement, and no principle is violated by holding it to be a legal transfer. Folger *v.* Chase, 18 *Pick.* 63.

ALLOT. To set apart specific property, a share of a fund, &c., to a distinct party. Allottee: a person to whom something has been allotted. Allotment: the act of setting apart property to one, as his share. Thus, if more shares in a corporation are subscribed than by the charter may be issued, an allotment becomes necessary, apportioning the allowable number among the subscribers. See ALLOW.

Allotment note. A writing by a seaman, whereby he makes an assignment of part of his wages in favor of his wife, father or mother, grandfather or grandmother, brother or sister. Every allotment note must be in a form sanctioned by the board of trade. The allottee, that is, the person in whose favor it is made, may recover the amount in the county court. (*Stat.* 17 & 18 *Vict.* ch. 104, §§ 168, 169.) *Mozley & W.*

Allotment system. Designates the practice of dividing land in small portions for cultivation by agricultural laborers and other cottagers at their leisure, and after they have performed their ordinary day's work. *Wharton.*

ALLOW. To permit, consent to, or approve; as to allow an appeal or a

marriage; to allow an account. Also, to give a fit portion out of a larger property or fund; as to allow a wife alimony. Allowance: the act of permitting or giving; also, a share or portion given.

Allow usually means to substitute something by way of compensation for another thing, while allot is a proper term for a direction to set apart a portion of specific property. A statute regulating dower, which directs that the widow shall be "allowed" so much, should be construed as authorizing a payment of the value of her share in money. Glenn *v.* Glenn, 41 *Ala.* 571, 586.

The words, in a written instrument, I allow to give, were held equivalent to I intend to give. Harmon *v.* James, 7 *Ind.* 263.

Allowance, as used in the Ala. Rev. Code, § 2361, directing the chancellor to decree the wife an allowance out of the estate of her husband, imports an absolute right, as a provision for her support. Smith *v.* Smith, 45 *Ala.* 264.

A judgment of forfeiture of pay and allowances imposed on a soldier for desertion includes any bounty money due him. United States *v.* Landers, 92 *U. S.* 77.

ALLOY. Some inferior metal lawfully mingled with gold or silver in coining; also in manufactures of the precious metals. It is allowed, within limits strictly prescribed, as respects coinage, by law, to render the coin harder, and less depreciable by wear. Also spelled ALLAY.

ALLUVION. A latent, gradual, imperceptible increase. The term is chiefly used to signify a gradual increase of the shore of a running stream, produced by deposits from the waters.

Accretions which are successively formed, and imperceptibly, to a soil situated on the shore of a river are alluvion, and belong to the owner of the soil on the edge of the water. Pulley *v.* Municipality No. 2, 18 *La.* 278.

Alluvion is the addition made to land by the washing of the sea, a navigable river, or other stream, whenever the increase is so gradual that it cannot be perceived in any one moment of time. Lovingston *v.* St. Clair County, 64 *Ill.* 56; Livingston *v.* Heerman, 9 *Mart.* (*La.*) 656.

Alluvion, within the rule that soil formed by alluvion belongs to the adjoining landowner, is an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. The test as to what is gradual and imperceptible, in the sense of the rule, is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. Whether it is the effect of natural or artificial causes makes no difference as to the ownership. County of St. Clair *v.* Lovingston, 23 *Wall.* 46; Municipality No. 2 *v.* Orleans Cotton Press, 18 *La.* 122.

ALONG. The decisions are somewhat conflicting whether "along," in giving the boundaries in a description of land, is to be taken strictly as importing by the side of, exterior to, contiguous, and as excluding any ownership to the centre of the thing designated, or whether it may be read as consistent with such ownership. The true view seems to be that it designates some monument or visible substantial thing having length, as giving the direction or course of the boundary line; but is indeterminate as to whether the centre or exterior line is the limit of ownership: that is to be ascertained by the context or by the rules of law applicable to the property involved. Thus, along a small stream, means to the thread of the stream; along a navigable river, means bounded by the bank; along a town road, means to the centre; along a street, spoken of streets in a city such as New York, where the fee of the street is presumably in the corporation, means by the edge or side. The cases cannot, however, all be reconciled to this definition; the following selections indicate the differing views which have prevailed:

Along means by, on, or over, according to the context. In a deed bounding lands, as extending along the shore, it can only mean on. Church *v.* Meeker, 34 *Conn.* 421.

Where one sovereign state makes a cession of land to another, bounding the grant by a river, and describing the line not only as commencing on the bank, but also as running up the river and along the bank thereof, the latter words, "along the bank," exclude the intendment that would otherwise prevail, that the line should run along the thread of the stream. The limit, on and along the bank of the river, must be where the bank and the water meet in its bed within the natural channel or passage of the river. The words "along the bank" are the controlling call in interpreting such a cession; and they exclude the idea that the line is to be traced at the edge of the water, as that may be at one or another time, or at low water, or the lowest low water. The water is not a call in the description of the boundary, though the river is; but "river" does not mean water alone, but banks, shores, water, and the bed of the river. The bank is the fast land which confines the

water of the river in its channel or bed in its whole width; that is to be the line. Both bank and beds are to be ascertained by inspection, and the line lies where the action of the water has permanently marked itself upon the bank, rejecting altogether the attempt to trace the line by either ordinary low water or extreme low water. Howard *v.* Ingersoll, 13 *How.* 381, 416.

The fact that a monument from which a line is to run along a stream stands on the bank does not require that the line shall run on the bank. It fixes the terminus, leaving the law to say whether the line along the stream shall follow the bank or the middle, according to whether the tide ebbs and flows or not. Thus a deed describing the boundary as running to a stake standing on or near the bank of a river, above tide, "thence running along the river as it winds and turns," to another stake, conveys the land to the thread of the stream. Luce *v.* Carley, 24 *Wend.* 451.

Although, in general, a grant described by a boundary "running to" a stream, highway, party-wall, ditch, &c., and thence along the same, means to and along the middle of the same, a boundary running "to the river, and thence along the shore of the river," restricts the grant to the margin. It is competent for the grantor to restrict his conveyance so as not to pass the bed of the stream; and this phraseology imports such a restriction. Child *v.* Starr, 4 *Hill*, 369.

A boundary line described as running to a post on the north bank of a creek, "thence down the same and along the several meanders thereof to the place of beginning," which was also on the north bank, includes the bed of the stream to the centre. Seneca Indians *v.* Knight, 23 *N. Y.* 498.

A boundary along an inland, unnavigable lake, and the outlet thereof, carries the land under water to the centre; or at least under the shallow water in front of the bank, and the right to fill in the same. Ledyard *v.* Ten Eyck, 36 *Barb.* 102.

A deed of a city lot, being part of a parcel of land mapped into lots and streets by the grantor, which conveys the lot, describing it as bounded by a line commencing on the side of the street, and running along the street, conveys the land to the centre of the street. A street, whether in the city or country, given as a boundary, is to be considered as a line, not as a space. Hammond *v.* McLachlan, 1 *Sandf.* 323; Herring *v.* Fisher, *Id.* 344.

Where the stone foundation wall of a brick building projected several inches beyond the face of the brick wall, it was held that a deed of the premises, bounding them by a line described as running "to the corner thereof, thence easterly along the south side of the brick wall," with a reservation of an easement in the wall for the support of an adjoining building, gave the grantee to the face of the brick wall, not to that of the foundation. Cornes *v.* Minot, 42 *Barb.* 60.

Along its route, in a statute giving a railroad company an insurable interest against fire communicated by its locomotives to property along its route, means by the side of, alongside, along the line of, lengthwise of, or near to the chartered limits of the roadway as surveyed and located, and not within, upon, over, or across the route. Grand Trunk R. R. Co. *v.* Richardson, 91 *U. S.* 454.

ALTER. To modify; to change in form or details without destroying identity. Alteration: a modification or change. Alter is distinguishable from amend, which implies improvement, alteration for the better: while alter imports modification merely, irrespective of whether the thing is improved or depreciated. It is distinguishable from change, which may mean to exchange or substitute; to put a distinct thing in place of a former one: while alter represents the identity of the subject as preserved.

A statutory power to alter a wharf imports a power to extend or diminish it, City of Hannibal *v.* Winchell, 54 *Mo.* 172; and a like authority to alter streets or roads involves power to change the grade of the street, Waddell *v.* Mayor, &c. of N. Y., 8 *Barb.* 95; Fish *v.* Mayor, &c. of Rochester, 6 *Paige*, 268; or to discontinue a part of the road which is disused by the alteration, Ponder *v.* Shannon, 54 *Ga.* 187; but not to appropriate the land covered by a street to purposes inconsistent with its use as a street, Lachland *v.* North Missouri R. R. Co., 31 *Mo.* 180.

Alteration of written instruments gives rise to numerous and important questions of construction and evidence; the general rule being that an alteration of the tenor of a written instrument in any material particular, made by one party without the assent of the other, nullifies the instrument, so far at least as claims of the party making the alteration are concerned. Deeds, simple contracts, negotiable instruments, and wills are, however, subject to different rules in respect to alteration. But it is to be understood that by alteration is meant something done to an instrument by which its tenor or effect is changed. If what is written upon a document does not assume to change its operation, or modify its meaning, and cannot mislead any one as to the effect of the

original, the word alteration is not appropriate.

The word alteration, when applied to a contract, imports something by which its meaning is changed. Adding a mere memorandum, or erasing one, if no change in the effect of the contract is involved, does not constitute a material alteration. Oliver *v.* Hawley, 5 *Neb.* 439; Palmer *v.* Sargent, *Id.* 233.

Memoranda upon a plan, that certain persons have desired to purchase one of the lots, and to whom and when it was sold, but not varying the courses and distances of the lines of the lots, nor the relative situations of the lots to each other, are not an alteration of the plan; for they do not import any change in the effect of the plan. Morrill *v.* Otis, 12 *N. H.* 466.

Affixing a lightning-rod to a house is not altering it, within a mechanic's lien law allowing a lien for alterations. Drew *v.* Mason, 81 *Ill.* 498.

The effect of alterations in a deed (Pigot's Case, 11 *Coke*, 266), bill of exchange (Master *v.* Muller, 4 *Durnf. & E.* 320), or promissory note (Warrington *v.* Early, 12 *Ellis & B.* 763), is: (1) if it is material, then whether it is made by a party, or by a stranger, it vitiates the instrument; but (2) if it is immaterial, then if it is made by a party, it vitiates; but (3) if it is made by a stranger, it has no such effect. *Brown.*

ALTERNATIVE. A privilege or opportunity of choosing one of two things or courses. Also, either of two objects offered to one's choice.

Alternative obligations are obligations in which the obligor is bound to do one of two things, and which may be satisfied by performance of either. The general rule is, that where an instrument or engagement requires a person to do one act *or* another, without words importing a preference of either, such person has the right to elect which he will do.

Alternative writ. A writ which commands the party sued to perform a specified act, or to show cause to the court why he should not do it. The practice under the writ of *mandamus* is, to issue first a writ commanding the respondent to do the act desired, or show cause, &c. This is called an alternative *mandamus*. If respondent does not act as desired, and shows cause unsuccessfully, then a peremptory *mandamus*, that is, an unqualified command, is issued.

Alterum non lædere. Not to injure another. One of the three fundamental maxims, laid down by Justinian as first principles, upon which all rules of law are based. The others are *honeste vivere* and *suum cuique tribuere*, q. v.

AMALGAMATION. The legislative union or merger of two corporate bodies in one new one is most frequently termed, in the United States, consolidation, *q. v.*; in England, amalgamation. The term imports a union of corporate identities. One company, by associating and connecting itself with another, does not thereby become equitably amalgamated with it.

Two companies cannot amalgamate with each other, unless such a transaction is authorized by the constitutions of both companies, or unless all the shareholders in both consent to the amalgamation. And where there is a power to amalgamate, that power must be strictly pursued. Speaking generally, corporations cannot amalgamate. *Brown.*

AMALPHITAN CODE. A collection of sea-laws, compiled about the end of the eleventh century, by the people of Amalphi. It consists of the laws of maritime subjects, which were or had been in force in countries bordering on the Mediterranean; and was for a long time received as authority in those countries. *Azuni; Wharton.*

AMBASSADOR. A person sent by the sovereign power of one nation, to arrange or negotiate affairs of state with the sovereign of another nation; not, however, as a mere agent, but as a representative. Ambassadors are either ordinary, being such as are employed to reside continuously where they are sent, or extraordinary, *i. e.* sent upon some especial or unusual occasion or errand.

Ambassador is the commissioner who represents one country in the seat of government of another. He is a public minister, which, usually, a consul is not. *Brown.*

Ambassador is a person sent by one sovereign to another, with authority, by letters of credence, to treat on affairs of state. (5 *Inst.* 153.) *Jacob.*

By the laws of nations, none under the quality of a sovereign prince can send any ambassador; a king that is deprived of his kingdom and royalty hath lost his right of legation. No subject, though ever so great, can send or receive an ambassador; and if a viceroy does it, he will be guilty of high treason. The electors and princes of Germany have the privilege of sending and reception of ambassadors; but it is limited only to matters touching their own territories, and not of the state of the empire. It is said there can be no ambassador without

letters of credence from his sovereign to another that hath sovereign authority; and if a person be sent from a king or absolute potentate, though in his letters of credence he is termed an agent, yet he is an ambassador, he being for the public. (4 *Coke Inst.* 153.) *Jacob.*

The United States have always been represented by ministers plenipotentiary, never having sent a person of the rank of an ambassador in the diplomatic sense. 1 *Kent Com.* 39, n.

The expression, "ambassadors and other public ministers," which occurs three times in the constitution, must be understood as comprehending all officers having diplomatic functions, whatever their title or designation. Hence, the president has power by the constitution to appoint diplomatic agents of the United States of any rank, at any place, and at any time, in his discretion, subject always to the constitutional conditions of relation to the senate. 7 *Op. Att.-Gen.* 186.

Ambigua responsio contra proferentem est accipienda. An ambiguous answer is to be construed against him who offers it. Where different constructions of an answer or plea present themselves, the construction unfavorable to the party offering the answer or plea is to be adopted. This is a limited statement of a rule of construction applicable to all pleadings, generally expressed by the maxim, *Ambiguum placitum interpretari debet contra proferentem*, q. v.

Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur. A latent ambiguity may be supplied by evidence; for whatever ambiguity arises from an extrinsic fact, may be removed by evidence in regard to such fact.

Extrinsic evidence is received to explain an ambiguity not apparent on the face of the instrument to be construed, on the ground that where the ambiguity itself is produced by extraneous circumstances, its explanation must of necessity be sought through the same medium. A patent ambiguity, arising upon the language of the instrument itself, although it may be removed by construction, cannot be explained by averment or evidence of extrinsic facts. But with respect to a latent ambiguity, as it is raised only by extrinsic evidence, it may be removed in the same manner. Thus, in the construction of wills, in all cases in which a difficulty arises in applying the words of a devise to the thing which is the subject-matter of the devise, or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted and removed by the production of further evidence upon the same subject, calculated to explain what was the estate or subject-matter really intended to be devised, or who was the person really intended to take under the will; and this appears to be the extent of the maxim. The characteristic of these cases is, that the words of the will do describe the object or subject intended, and the extrinsic evidence has not the effect of varying the instrument in any way whatever: it only enables the court to reject one of the subjects or objects to which the description in the will applies, and to determine which of them the devisor understood to be signified by the description which he used in the will. *Broom Max.* 615. Thus, where a devise was to B for life, and remainder to her three daughters, M, E, and A, in fee, as tenants in common, and it appeared that at the date of the will B had two legitimate daughters, named M and A, living, and one illegitimate daughter, named E, the claim of the last mentioned to the land devised was defeated by extrinsic evidence admitted to show that B had formerly had a legitimate daughter named E, who had died before the date of the will, and that neither her death, nor the birth of the illegitimate daughter E, were known to the testator. Doe d. Thomas *v.* Benyon, 12 *Ad. & E.* 431.

The rule is by no means confined to wills, but is to be understood as extending to deeds and negotiable instruments; the inquiry into extrinsic facts being always restricted, however, to ascertaining the intention of the parties, and not permitted with any view of varying the contract.

The meaning of the rule is also somewhat enlarged by the consideration that parol evidence must be admitted to some extent to determine the application of every written instrument, as to who or what is meant by names or other descriptive matter contained in it. Such evi-

dence is always necessary to show that the party sued upon a contract is the person who made the contract, and is bound by it; to identify the subject of a specific devise or bequest; to determine whether a particular chattel is parcel of the thing demised; and in similar cases, where the instrument appears on the face of it to be perfectly intelligible and free from ambiguity; but extrinsic evidence must nevertheless be received, for the purpose of showing what the instrument refers to. *Broom Max.* 617.

AMBIGUITY. An uncertainty as to the sense of language, arising from its admitting of more than one meaning. Ambiguous: that which may be understood in either of more senses than one. Ambiguities are termed patent when they are apparent upon the language in question alone; and latent, when the language is of itself lucid and suggests one meaning only, but a necessity for a choice of meanings is raised by some extrinsic evidence on matter of fact outside the instrument. See AMBIGUITAS.

Several of the definitions given treat ambiguity, duplicity, indistinctness, obscurity, and uncertainty as equivalent words; and the case of a blank left for a name, in a written instrument, has been mentioned as an instance of an ambiguity. But we think a distinction should be observed: that ambiguity or duplicity are predicable only of language as to which it is needful to make a choice of meanings; while indistinctness, obscurity, and uncertainty include these, and also cases of language devoid of sense, or which does not present any meaning with clearness or precision. The case of a blank left for a name should be deemed an uncertainty, but not an ambiguity.

Ambiguum placitum interpretari debet contra proferentem. An ambiguous pleading ought to be interpreted against the party offering it. Where different constructions of a pleading present themselves, the construction unfavorable to the pleader should be preferred. It is a maxim in the construction of pleadings that every thing shall be taken most strongly against the pleader. Howard *v.* Gosset, 10 *Q. B.* 383. The grounds of this maxim are that every man is presumed to make the best of his own case, and it is incumbent upon him to make his meaning clear. But these reasons do not allow that a party should contend that he has himself ill pleaded; hence it is a general rule that every pleading, if it be fairly susceptible of such a construction, must, as against the party pleading, be taken to have been pleaded agreeably to the rules of pleading. Goldham *v.* Edwards, 18 *Com. B.* 399. And the maxim is not to be understood as applying to the pleading of matters peculiarly within the knowledge of the opposite party.

When the objection to the ambiguity has been waived by pleading over, or the ambiguity has been cured by verdict, the reverse of the maxim applies, and the construction of the ambiguous expression which is most favorable to the party using it must be adopted. *Broom Max.* 601.

Ambulatoria est voluntas defuncti usque ad vitæ supremum exitum. The will of a decedent is ambulatory even to the last moment of his life. A testamentary disposition of property is not fixed, but remains ambulatory, revocable, and subject to change at the pleasure of the testator, until his death. Hence no testament is of any effect until the death of the testator.

AMBULATORY. That which may be moved; changeable; not yet settled past alteration. Thus the dispositions of a will are ambulatory during the testator's lifetime.

AMEND. To alter with effect of improving; to modify for the better. Amendment: the act of improving; also a writing made or proposed as an improvement of some principal writing.

Amendments of constitutions have been frequently made, under general provisions, which most of the constitutions contain, authorizing the preparation and adoption of amendments. The number of amendments which have been made to the constitution of the United States now reaches fifteen. Eleven were made coevally with the adoption of the constitution, for the purpose of better securing its original provisions from misconstruction or abuse. The twelfth was adopted, at a later day, to change

the mode of the presidential election. Three more were adopted, within a few years after the civil war, for the purpose of rendering permanent certain results of the war, — the abolition of slavery and the advancement of the rights of the colored race.

In legislation, while a bill is upon its passage, individual legislators have liberty of proposing changes which they think will improve its provisions; and this is termed offering amendments.

In practice, amendment is used of the correction of an omission or error which is discovered to have been committed in the pleadings or proceedings in a cause. Modern laws governing practice have given to the parties to a cause, and to the courts, extensive privileges or discretionary authority of amending omissions, errors and defects of form, mistakes, and the like, in matters of procedure.

No court has authority, under the name of an amendment, to allow an appeal after the period limited by the statute has expired. Enos *v.* Thomas, 5 *How. Pr.* 361; People *v.* Eldridge, 7 *Id.* 108; Fry *v.* Bennett, 7 *Abb. Pr.* 352. But see Crittenden *v.* Adams, 5 *How. Pr.* 310.

To serve a mere copy of an original pleading, with no change except leaving off a verification, or a demurrer which was appended to the original, is not amending the pleading. Howard *v.* Michigan Southern R. R. Co., 5 *How. Pr.* 206; George *v.* McClooy, 6 *Id.* 200.

AMERCEMENT, or **AMERCIAMENT.** A punishment by the purse; a penalty assessed by the peers or equals of the party amerced for an offence done, for which he places himself at the mercy of the lord. The word amercement has long been especially used of a mulct or penalty, imposed by a court upon its own officers, for neglect of duty; or failure to pay over moneys collected. In particular, the remedy against a sheriff for failing to levy an execution or make return of proceeds of sale, is, in several of the states, known as amercement. In others, the same result is reached by process of attachment.

Amerciament signifies the pecuniary punishment of an offender against the king or other lord in his court that is found to be in *misericordia; i.e.,* to have offended, and to stand at the mercy of the king or lord. The author of *Termes de la Ley* saith that amerciament is properly a penalty assessed by the peers or equals of the party amerced for the offence done; for which he putteth himself at the mercy of the lord. (*Termes de la Ley,* 40.) And by the statute of Magna Charta, ch. 14, a freeman is not to be amerced for a small fault, but proportionable to the offence, and that by his peers. (9 Hen. III. ch. 4.) Amerciaments are a more merciful penalty than a fine; for which, if they are too grievous, a release may be sued by an ancient writ founded on Magna Charta, called *moderata misericordia.* (See *New Nat. Brev.* 167; *F. N. B.* 76.) The difference between amerciaments and fines is this: fines are said to be punishments certain, and grow expressly from some statute; but amerciaments are such as are arbitrarily imposed. (*Kitch.* 78.) Also fines are imposed and assessed by the court; amerciaments by the country; and no court can impose a fine, but a court of record: other courts can only amerce. (8 *Coke,* 39, 41.) *Jacob.*

AMI; AMY. A friend; as *alien ami,* an alien belonging to a nation at peace with us; *prochein ami,* a next friend suing or defending for an infant, married woman, &c.

AMICABLE. Friendly. An action entered and prosecuted by consent of parties, because both wish to obtain the judgment of the court upon some question of common interest, is called an amicable action. Special statutory regulations exist in several of the states, authorizing and favoring such actions. In other states, the same thing is done under the name of submitting a cause upon an agreed statement, or submitting a controversy without action.

Amicable compounders, under the Louisiana code, are not the same as arbitrators. Arbitrators are to determine agreeably to the law. Amicable compounders are authorized to abate something of the strictness of the law in favor of natural equity. Bird *v.* Laycock, 7 *La. Ann.* 171.

Amicable lawsuit does not convey the idea of an arbitration. Arbitration means a reference or submission of a matter in dispute to the decision of one or more persons as arbitrators, whilst the latter, an amicable lawsuit, is one instituted in a court of justice seriously, but in a friendly spirit, in order that some matter in controversy may, by a judicial decree, be settled definitely, as cheaply, and with as little delay as possible. Thompson *v.* Moulton, 20 *La. Ann.* 535.

Amicus curiæ. A friend of the court. A term applied to a by-stander, who, without having any interest in the cause, of his own knowledge makes a suggestion on a point of law or of fact,

for the information of the presiding judge.

When a judge is doubtful or mistaken in matter of law, a bystander may inform the court thereof as *amicus curiæ*. Counsel in court frequently act in this capacity when they happen to be in possession of a case which the judge has not seen, or does not at the moment remember. *Holthouse.*

In a case in 2 Show. 297, a counsellor urged that he might, as *amicus curiæ*, inform the court of an error in proceedings, to prevent giving false judgment; but this was denied, because the party was not present at the time. *Jacob.*

Amittere legem terræ. To lose the law of the land. To forfeit the protection afforded and the benefits conferred by the law of the land.

Amittere liberam legem. To lose frank-law. A term having the same meaning as *amittere legem terræ*, q. v. He who *amittit liberam legem*, or *amittit legem terræ*, lost the protection extended by the law to a freeman, and became subject to the same law as thralls or serfs attached to the land.

AMORTISE. To alien lands in mortmain; to reduce the property of lands or tenements in mortmain. Amortisation: or amortisement, the conveyance of lands in mortmain. Also spelled Admortise, &c.

AMNESTY. An act of the sovereign power, granting oblivion of a past offence. It differs from pardon in being more general; it extinguishes the offence as to all participators; while pardon exonerates an individual from a punishment which he has incurred. Amnesty is rather a political decision that acts which might, by their motive and effect, be treated as crimes, shall not, for reasons of state policy, be so considered. Pardon is rather the clemency which the executive is authorized to exercise towards one convicted or guilty of what is unquestionably a crime.

Amnesty is generally declared in favor of some large class of persons concerned in an insurrection or like general and public offence which government does not think best to pursue with punishment.

Amnesty properly belongs to international law, and is applied to rebellions which by their magnitude are brought within the rules of international law; but it has no technical meaning in the common law, and is merely the synonyme of oblivion, which in the English law is the synonyme of pardon. Knote *v.* United States, 10 *Ct. of Cl.* 397.

AMOTION. Removal; a carrying away. The word is particularly used of the removal of a corporate officer from office; as distinguished from depriving a member of his privilege of membership, which is called, in reference to public corporations, disfranchisement; in respect to private ones, expulsion.

Amotion is the depriving of office an officer of a corporation. The power of amotion is incident to every corporation at common law; for it is necessary to the good order and government of corporate bodies. The causes for which a corporator may be amoved, and which, alone, will justify amotion, are: 1. Offences against his oath or declaration, the duty of his office, and the common profit and general interests of the corporation. 2. Offences against the public, of a nature to render the officer infamous; as perjury, forgery, &c. 3 Offences of a mixed nature, or such as are not only indictable as offences against the public, but are also contrary to his duty as a corporator. *Grant, Corp.* 241.

AMOUNT. Jurisdiction, when made dependent upon amount, does not depend upon the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but upon the amount in dispute between them. Thus, upon appeal from a decree dissolving an injunction restraining the sale of property upon execution, the jurisdiction depends upon the amount claimed in the execution, and not upon the value of the property upon which the execution has been levied. Ross *v.* Prentiss, 3 *How.* 771.

When the appellate jurisdiction of the court of last resort is dependent on value, that court will, in determining the question of jurisdiction, look to the amount claimed by the plaintiff in the court below, and not to the amount of the judgment from which the appeal is taken. McKee *v.* Ellis, 2 *La. Ann.* 163; State *v.* Wiltz, 11 *Id.* 439.

Where a plaintiff appeals, the amount in dispute is that claimed in the complaint, not that pleaded in offset by the defendants, or found for them by the jury. Gillespie *v.* Benson, 18 *Cal.* 409; Skillman *v.* Lachman, 23 *Id.* 198.

Where only a portion of a judgment is actually contested, in a suit to enjoin proceedings upon it, the jurisdiction of an appeal is determined by the portion in dispute, not by the entire amount of the judgment. Gayarre *v.* Hays, 21 *La. Ann.* 307.

The amount to be considered in determining the question of jurisdiction of an appeal from a judgment awarding alimony at a certain monthly rate, is the amount due

and collectible under the judgment, not the sum awarded for each month. State *v.* Judge of Second District Court, 21 *La. Ann.* 65.

In a proceeding to obtain possession of the room, keys, and papers of a public office, the amount in controversy by which the jurisdiction of an appeal is to be tested is not the value of such office, but that of the accessories which may be reached directly by the proceeding. State *v.* Lagarde, 21 *La. Ann.* 18; State *v.* Judge of the Second District, 22 *Id.* 49.

No computation of interest will be made to give jurisdiction, unless interest be specially claimed in the pleadings. Udall *v.* The Ohio, 17 *How.* 17.

A decree for a specific sum, with interest from the date of the master's report, is reviewable upon appeal, if the sum and interest to the date of the decree reach the jurisdictional amount, although the specified sum alone may be less. The Patapsco, 12 *Wall.* 451.

In estimating the amount in dispute for the purpose of determining the question of jurisdiction, interest on the claim, which has accrued before suit brought, should be included in estimating the amount in dispute. Malson *v.* Vaughn, 23 *Cal.* 61; Skillman *v.* Lachman, *Id.* 198; Orth *v.* Clutz, 18 *B. Mon.* 225.

When a note is payable with interest, the principal and interest together constitute the amount of the note, within the meaning of a statute making the right to appeal dependent on the amount in controversy. Smith *v.* Smith, 15 *Vt.* 620.

If the interest which is due at the time of commencing suit, together with the principal, does not amount to the statute limit of appellate jurisdiction, the fact that the interest afterwards accruing is enough to make up the deficiency will not enable the appellate court to take cognizance of the cause. Wolf *v.* Witherell, 22 *La. Ann.* 25.

The amount in controversy which determines the jurisdiction of a justice's court is the principal sum sued for, exclusive of costs. Bradley *v.* Kent, 22 *Cal.* 169.

The costs in an action constitute no part of the amount in controversy, and are not included in the computation of the sum required to give jurisdiction on appeal. Maxfield *v.* Johnson, 30 *Cal.* 545; Moore *v.* Boner, 7 *Bush*, 26.

AMPLIATION. Originally, an enlargement or extension; but used in the civil law to signify a postponement of the decision of a cause for further consideration or reargument, like the English expressions, *ulterius concilium* or *curia advisare vult.*

Also, an official copy of a notarial act, something like our exemplification.

AMY. See AMI.

ANCESTOR. Generally, one who precedes another in line of descent is his ancestor; but, in law, the word is almost always used to mean a former owner of an estate which has descended. Ownership of property and death are implied. One's father or grandfather are not properly termed his ancestors while they live; nor is there much occasion for the term after death, except in reference to the descent of their property. See ASCENDANT.

Ancestor is a person from whom an estate immediately comes in right of blood. Brower *v.* Hunt, 18 *Ohio St.* 311.

When used in relation to succession of real estate, ancestor embraces both lineals and collaterals. McCarthy *v.* Marsh, 5 *N. Y.* 263; Banks *v.* Walker, 3 *Barb. Ch.* 438. See also Den *v.* De Hart, 3 *N. J.* 363, (481).

It embraces collaterals as well as lineals, through whom an inheritance is derived. Wheeler *v.* Clutterbuck, 52 *N. Y.* 67.

It applies to a progenitor, and not to a parent's collateral kindred. Pratt *v.* Attwood, 108 *Mass.* 40.

Ancestor, as used in 2 N. Y. Rev. Stat. 38, § 22, includes every predecessor in estate; every person from whom property might be inherited. Armstrong *v.* Moran, 1 *Bradf.* 314, 318.

As used in the Connecticut statute with reference to the distribution of ancestral estates, it signifies the one from whom the estate immediately, and not the one from whom the estate remotely, descended. Buckingham *v.* Jacques, 37 *Conn.* 402.

As used in the Ohio act of 1831, regulating descents, &c., it means any one from whom the estate was inheritable. The ancestor from whom the estate must, in law, be understood "to have come to the intestate," is he from whom it was immediately inherited. Prickett *v.* Parker, 3 *Ohio St.* 394.

ANCHORAGE. Is sometimes used in the sense of a charge or duty exacted of ships for the privilege of riding at anchor in a haven. *Cowel; Wharton.*

ANCIENT. Old; that which has existed from an indefinitely early period, or long enough to acquire some rights or privileges accorded in view of long continuance.

Ancient demesne, or domain. A species of tenure of lands, in England, whereby all manors belonging to the crown in the days of Edward the Confessor and William the Conqueror were held. The numbers and names of the manors belonging to the crown, as of all others belonging to common persons, William the Conqueror caused to be set down in a book called Domesday; and those which appear by that book to have belonged to the crown,

and are there denominated *terræ regis*, are called ancient demesne. Lands in ancient demesne are of a mixed nature, *i.e.*, they partake of the properties both of copyhold and of freehold; they differ from ordinary copyholds in certain privileges, and from freehold by one peculiar feature of villenage, viz., that they cannot be conveyed by the usual common-law conveyance, but pass by surrender to the lord or his steward in the manner of copyholds, with the exception that in the surrender the words "to hold at the will of the lord" are not used, but simply the words "to hold according to the custom of the manor."

There are three kinds of tenants in ancient demesne: those whose lands are held freely by grant of the king; those who do not hold at the will of the lord, but yet hold of a manor which is ancient demesne, and whose estates pass by surrender, or deed, and admittance, and who are styled customary freeholders; those who hold of a manor which is ancient demesne, by copy of court-roll, at the will of the lord, and are styled copyholders of base tenure. (*Cowel; Scriven Copyholds*, 425; 1 *Cruise Dig.* 44.) *Brown.*

Tenants in ancient demesne used to enjoy certain privileges, *e.g.*, that of being impleaded in the courts of their own manors only, and of being exempted from serving on the juries of the county; but those privileges have mostly ceased, and provision is made by Stat. 4 & 5 Vict. ch. 35, and the acts amending the same, for the general enfranchisement of ancient demesne lands. *Ib.*

Ancient houses. In England, it seems to be understood that after a house has stood for twenty years, it acquires a prescriptive right to support from the adjoining soil; and the adjoining land-owner cannot make excavations, even in his own land, to the prejudice of such support. Upon this subject the law is not uniform throughout the United States; but the general rule is believed to be that each land-owner has a natural implied right to the support of his soil in its natural state, from the adjoining lands, but not for buildings standing upon it: whether they are of ancient or recent erection makes no difference.

Ancient lights, or windows. In England, openings in a house for air and light which have been used unobstructed for upwards of twenty years acquire a prescriptive right, and may not afterwards be obstructed, even by buildings erected by an adjoining land-owner upon his own land. Windows thus privileged are technically termed ancient lights. The doctrine of ancient lights has been adopted in a few of the United States; in others, it has been distinctly repudiated; in others again, it is an open question. But the general current of American jurisprudence is against it, as being a rule of the common law which was not suited to the condition of our colonial ancestors, and which, therefore, cannot be deemed to have been brought hither by them.

Ancient wall. A wall built to be used, and in fact used, as a party-wall, for more than twenty years, by the express permission and continuous acquiescence of the owners of the land on which it stands, is ancient. Eno *v.* Del Vecchio, 4 *Duer*, 53, 63.

Ancient witness. The expression, ancient witness, employed in the provision of the judiciary act of congress of Sept. 24, 1789, authorizing the taking the deposition of a witness who was "ancient or infirm," is believed to be a corruption or misprint of *enceinte*. The intention, probably, was to allow a deposition when the witness was a pregnant woman, or person otherwise physically unable to attend and testify in person. As to the expression, aged witness, see AGE.

Ancient writings. Inasmuch as great lapse of time must necessarily embarrass or destroy means of making technical proof of the genuineness of a written instrument, it has been found necessary to allow very old deeds, wills, &c., to be read in evidence without formal proof of execution, and upon a presumption of their being genuine, where they are produced from the proper custody, and are corroborated by circumstances of possession naturally accordant with their purport. The term of thirty years is the one assigned as sufficient to give rise to this privilege; and muniments of title to property, purporting to be thirty years old and upwards, are known as ancient instruments, and are received in evidence, wherever the common-law rule prevails unchanged, without requiring preliminary proof, as in case of writings recent in date. But this doctrine is by no means carried so far as to allow any

paper, of whatever character, to be so received. It applies only where the nature of the instrument and the attendant circumstances are such as to raise a presumption that it is genuine; as where one who holds land produces a deed conveying it to an ancestor, and proves a possession corresponding to the title the deed purports to convey, and a custody of the deed such as would naturally occur, if it were genuine. The doctrine of ancient instruments has lost much of its practical importance under the operation of the statutes now so extensively in force, providing for the recording of the more important written instruments affecting title, and the proof of their contents by a copy of the record.

Ancients. Gentlemen in the English inns of court who have attained a certain standing by reason of length of membership, have been termed, in the parlance of those institutions, ancients.

ANCILLARY. Assistant; auxiliary; that which aids or promotes a proceeding regarded as the principal. Thus a grant of administration obtained in some state where particular assets are situated, for the purpose of collecting them into the general administration which is proceeding in the state of the decedent's domicile, is an ancillary administration. A bill in equity filed to prevent a payee of notes from transferring them to a *bona fide* purchaser for value, until the determination of defences alleged against him could be reached at law, is an ancillary suit.

ANGLICE. In English. In old English pleadings established Latin words were used, so far as practicable, to express the cause of action, to describe the subject-matter in controversy, and for other purposes; or a periphrasis was resorted to, if one could be used with sufficient certainty. But there were many things for which no names were to be found in classical Latin, hence it was usual, where no Latin words existed appropriate to express a thing, and no description in Latin could be given with the requisite certainty, to form a word with a Latin termination, sometimes taking or modifying an existing Latin word, and sometimes coining a new word, and this term was followed by *Anglicé* and the English equivalent.

ANIMAL. This term is less extensive, as used in jurisprudence, than in natural science. It does not include mankind, and, until recent years, has been used, with a limitation which cannot be very precisely defined, to creatures which are of use or value to man, or in the preservation of which he has an interest.

Earlier occasions for the use of the word were in reference to the protection of property in animals; and while this was the object, useless and noxious creatures were, naturally, left out of view. For the purpose of dealing with any infraction of the right of an owner or possessor of an animal, the law had only occasion to consider such as man desired to hold, and these were viewed as domesticated or tame animals, wild animals, and creatures which, whether wild or tame, were of so base a nature as not to be subjects of permanent property, though they might be held in a possession which the law would protect. Discussions, in the cases, as to what is included by "animals" in the law of property and larceny, in duty laws and statutes punishing malicious mischief, and the like, are to be read with reference to the term being limited by a notion of property.

But another idea has arisen in recent years, under the adoption of statutes for the prevention of cruelty to animals. The enforcement of such laws was at first questioned, upon the ground that "animals" in law did not include the baser and the undomesticated creatures. Thus, in a New York police-court case, soon after the passage of the law for the protection of animals, a prosecution for the inhuman manner of confining a turtle on exhibition at a restaurant, was contested by the argument that reptiles were not included in "animals" in the legal sense. Such views have not prevailed. Steady progress has been toward the recognition of all sentient life as deserving of legal protection against cruel malice, irrespective of any property aspect. Upon the whole, there

is good ground to say that, while the use of the word in any particular context or statute may be limited by the general meaning and purpose, yet the term "animal" in jurisprudence may include all living creatures not human.

An act of 1861 exempted from duty "animals of all kinds; birds, singing and other, the land and water fowls;" and a later act of 1866 levied a duty of twenty per cent "on all horses, mules, cattle, sheep, hogs, and other live animals." Held, that birds were not included in the terms "other live animals." The second statute must be read by the light of the first. Rieche *v.* Smythe, 13 *Wall.* 162.

The word animal, as used in the statute for the punishment of cruelty, shall be taken to mean any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal. *Stat.* 12 & 13 *Vict.* ch. 93, § 29.

Fowls and poultry are within the phrase any other domestic animal, as used in the above statute; and torturing a cock may be punished under the act. Budge *v.* Parsons, 3 *Best & S.* 382; 7 *Law T.* N. S. 624; 9 *Jur.* N. S. 796; Bates *v.* McCormick, 9 *Law T. R.* N. S. 175; 12 *Irish Com. L. R.* 577.

In this and every law of this state relating to animals, the words "animal" or "dumb animal" shall be held to include every living creature. *N. Y. Laws*, 1874, ch. 12, § 8.

ANIMUS. Mind, intention, purpose, or will. Occurs in many technical phrases, (usually in the ablative case, *animo*). The following are the most frequent examples:

Animus et factus. Intention and act. This phrase is used to designate acts which have effect only when induced or accompanied by positive intention. Thus, a change of domicile is in general effected only by an actual change of residence, accompanied by the intention of remaining and acquiring a domicile in the new place of residence. Where the action and intention concur, the thing is said to be done *animo et facto*, — by intention and act.

Animus hominis est anima scripti. The purpose of the man is the soul of the writing. The intention of the party who executed an instrument gives life to the instrument. As respects most instruments, the law looks to this intention as the chief guide in determining the construction and effect of what is written.

Animo cancellandi. With intention of cancelling. A phrase used of acts of destruction or mutilation of instruments in writing, done not by mere accident, but with the intent to annul the instrument.

Animo defamandi. With intention of defaming. The phrase expresses the malicious intent which is essential in every case of verbal injury, to render it the subject of an action for libel or slander.

Animo donandi. With intention of giving. This phrase is used to express the consent to give, which is an essential element of a gift, on the part of the giver, as is the consent to receive on the part of the receiver. The *animus donandi* is rarely presumed, and only when the act can bear no other construction. The *animus recipiendi* is usually presumed when the subject of the gift is beneficial to the donee.

Animo furandi. With intention of stealing. This phrase expresses the felonious intent which is essential to make the taking the property of another theft or larceny. The mere taking does not constitute the crime; the property must have been taken with intent to steal it.

Animo manendi. With intention of remaining. A phrase used in the discussion of questions of domicile, to express the intention to remain and establish a permanent residence, which intention is essential to the acquiring of a new domicile in the place to which the residence has been removed. It is used in opposition to *animo revertendi*, which expresses the contrary intention of returning to the former residence. The residence is described either as *animo revertendi*, with intention of returning; or as *animo manendi* (sometimes in the form *animo remanendi*), with intention of remaining.

Animo recipiendi. With intention of receiving. Expresses the consent to receive a gift, on the part of the donee, which is essential to a gift.

Animo revertendi. With intention of returning. 1. This phrase is used, in the discussion of questions of domicile, to express the intention to return

to a former residence, notwithstanding a temporary removal, as distinguished from the *animum manendi* (q. v.), — the intention of remaining at such new place of residence; or notwithstanding absence for a temporary purpose, however prolonged, as in case of a sailor who follows his occupation *animo revertendi*, — with the intention of returning to his place of domicile.

2. The phrase is also used of animals astray. Property in domesticated animals is not lost by its wandering from the owner's premises, if there is reason to suppose it had the intent to return.

Animo revocandi. With intention of revoking. This phrase is used of such acts as the erasure or tearing-off of the signature to a will, or the destruction of the instrument, when done with the design to revoke it.

Animo testandi. With intention of making a will.

ANNEX. To put one thing in permanent connection with another. Annexation: a connection of something with another deemed of higher permanence or importance.

It generally implies that the thing annexed is accessory, and the other is principal. It seems never to be used of persons.

Territory newly incorporated into the national domain, as a permanent acquisition, is said to be annexed; as in the case of the annexation of Texas; and, somewhat similarly, annexation is used, in Scotch law, of the acquisition of lands by the crown, or by a kirk. Fixtures are spoken of as being annexed to the freehold. Attaching some subordinate or corroborative document to a pleading, &c., is termed annexing it.

Ponderous exhibits, such as hotel registers, are annexed to a deposition and certificate, if they are sealed up by the magistrate and transmitted to the clerk in the same wrapper therewith. Shaw *v.* McGregory, 105 *Mass.* 96.

The placing of a loose paper within the folds of a writ is not an annexation within Me. Rev. Stat. ch. 114, § 33, authorizing a specification of the plaintiff's claim to be annexed to it. Saco *v.* Hopkinton, 29 *Me.* 268.

ANNUALLY, as applied to the payment of interest, means not the payment of interest at the end of one year only, but at the end of each and every year, during a period of time either fixed or contingent. Sparhawk *v.* Wills, 6 *Gray*, 163.

Under a statute requiring the certificate to be filed annually, "in the month of," &c., the directors are not liable for debts incurred after the expiration of the corresponding month in a subsequent year. Bond *v.* Clark, 6 *Allen*, 361.

ANNUITY. A yearly payment of a certain sum of money, granted to another in fee or for life, or for a term of years and charged upon the person of the payer; for when it is charged upon real estate it is most commonly called a rent charge. Annuities are most commonly created to continue for the lifetime of the payee; but there seems no reason for deeming this a part of the definition.

Upon the meaning of annuity, as compared with assessment and some other words in a bequest, see Stephens *v.* Milnor, 24 *N. J. Eq.* 358; as compared with income, see *Exp.* McComb, 4 *Bradf.* 151; as compared with legacy, see *Ib.*, also, Matter of Williams, 12 *N. Y. Leg. Obs.* 179; as compared with rent-charge, see Wagstaff *v.* Lowerre, 23 *Barb.* 209, 216.

ANNUS. A year. Occurs in several technical phrases; such as the following:

Annus deliberandi. The year allowed by the Scottish law for the heir to deliberate whether he will enter upon his ancestor's lands, and represent him. Entry has very serious effect, and, therefore, this time is given for consideration; it commences at the ancestor's death, unless in the case of a posthumous heir, and then from his birth. *Wharton.*

Annus et dies. A year and a day. This phrase designates a period of time limited by the common law for the performance of many acts, and for the duration of many forfeitures, warranties, &c.; and is designated in English by the expression "year and day." See YEAR.

Annus luctus. The year of mourning. This expression designates the period after the death of her husband during which a widow was required, by Roman law, to remain unmarried. Although the law ordained that she should not marry *infra annum luctûs*, a calendar year seems not to have been always required; as, in the reign of Augustus, the period was but ten months. *Vide Ov. Fast.* i. 27. The law was retained dur-

ing the Saxon and Danish rule in England, and descended to modern times, as a custom of more or less binding obligation, in connection with the wearing of mourning dress during the like period.

Annus utilis. A year that may be used; a serviceable year. 1. This expression is used, in the singular form, to denote a year made up of available or serviceable days; a year of days in which some right can be exercised.

2. In the plural form, — *anni utiles*, — the expression signifies the years during which a right may be exercised. Thus, in the construction of statutes of limitation or prescription, although the number of years which has elapsed is sufficient to bar the action or right claimed, yet if, during a part of the time, the person who would otherwise be barred is an infant, or under some other disability within exceptions contained in the statute relied on, those years are not reckoned against him, not being, as to him, *anni utiles*, or years during which his right could be claimed or exercised.

Anno Domini. In the year of the Lord. This phrase is commonly prefixed to the number denoting the year of the Christian era; thereby distinguishing that computation of time which is adopted by all Christian nations, viz., reckoning from the birth of Jesus Christ, from other modes of computing time. The initial letters, A.D., of the phrase are frequently employed, followed by either words or figures, for the number of the year; and this mode of designating dates is generally deemed sufficiently certain, even in indictments. Figures alone, without any thing to denote the era from which the computation was to be reckoned, have been held insufficient in a criminal complaint. Commonwealth *v.* McLoon, 5 *Gray*, 91.

Anni nubiles. Marriageable years. Used to designate the marriageable age of women; as in the phrase *infra annos nubiles*, q. v.

ANOTHER. A statute punishing larceny of the "personal goods of another," may sustain a conviction for larceny of goods belonging to the United States. United States *v.* Maxon, 5 *Blatchf.* 360.

ANSWER. A statement made in response to a charge or a question; also, in pleading, the formal written statement made by a defendant in a suit in equity or admiralty, or in a civil action under the reformed codes of procedure, setting forth the grounds of his defence; corresponding to what, in actions under the common-law practice, is called the plea. 53 N.J. 497; 42 N.J. 71.

Ante litem motam. Before suit moved. A phrase used to distinguish transactions or proceedings taken or occurring before some particular controversy began, or before suit was brought, from other transactions or proceedings occurring or taken after that time, which are described as *post litem motam*.

ANTEJURAMENTUM. By ancient English laws, an accuser was required, upon instituting a prosecution, to take an oath that he would prosecute; and, in want of this oath, the accused might be discharged. The accused, likewise, on the day of trial, must make oath of innocence; if he refused he was deemed guilty. Such a preliminary oath was called *antejuramentum;* also, *præjuramentum*, and *juramentum calumniæ*. *Jacob; Mozley & W.*

ANTENATUS. Born before. Particularly born before a particular period or event; *e.g.*, subjects of Scotland born before the union of the crowns of England and Scotland; British subjects born in the United States before the separation of the colonies from the mother country. Calvin's Case, 7 *Coke*, 1; 2 *Kent Com.* 40, 56, 58. See ALIEN.

The rule as to the point of time at which the American *antenati* ceased to be British subjects differs in England and in the United States, as established by the courts of justice in the respective countries. The English rule is to take the date of the treaty of peace in 1783. The American rule is to take the date of the declaration of independence. The British doctrine is that the American *antenati*, by remaining in America after the peace, lost their character of British subjects; and the American doctrine is, that those withdrawing from this country, and adhering to the British government, lost, or perhaps, more properly speaking, never acquired, the character of American citizens. Inglis *v.*

Sailors' Snug Harbor, 3 *Pet.* 99; and see Blight *v.* Rochester, 7 *Wheat.* 544.

ANTENUPTIAL. Before marriage. The grave disabilities imposed by former English law upon married women, and the rights accorded over their property, if not settled to their use, to their husbands, rendered it often of much importance that, before the marriage ceremony, formal written engagements should be made, in which the intended wife should be represented by trustees, protecting her property to her own use, and to her children, and often securing other interests. These are called antenuptial settlements. In many of the states liberal laws enlarging the power of married women to hold property have diminished their importance.

ANTICHRESIS. A contrary use. This term was employed in the civil law to designate a peculiar kind of mortgage, whereby the mortgagee, by special agreement, had the use of the property mortgaged, instead of interest or other like compensation; he taking the right to use the thing pledged to him, or to reap the fruits or receive the profits, according to the nature of the thing and the terms of the agreement. It differed from a *vadium vivum* (q. v.) in that the profits were in no case applicable, as they might be in the latter, to extinguish the principal debt.

Antichresis is a contract whereby a debtor abandons to his creditor the profits of goods which he has hypothecated to him to hold in place of interest upon the money which he has borrowed. *Colluire & B.*

In the Roman law, *pactum antichreseos* was an agreement by which the creditor in a voluntary pledge had the use and profits of the thing pledged, in lieu of interest on the debt; and there might be the further stipulation that any surplus should go to the extinction of the debt. The contract bore some analogy to the Scotch wadset. *Bell.*

By the law of Louisiana, there are two kinds of pledges, — the pawn and the antichresis. A pawn relates to movables, and the antichresis to immovables. The antichresis must be reduced to writing; and the creditor thereby acquires the right to the fruits, &c., of the immovables, deducting yearly their proceeds from the interest, in the first place, and afterwards from the principal of his debt. He is bound to pay taxes on the property, and to keep it in repair, unless the contrary is agreed. The creditor does not become the proprietor of the property, by failure to pay at the agreed time; and any clause to that effect is void. He can only sue the debtor, and obtain sentence for sale of the property The possession of the property is, however, by the contract, transferred to the creditor. Livingston *v.* Story, 11 *Pet.* 351.

Actual possession, as in all contracts of pledge, is of the essence of an antichresis in Louisiana. Garcia *v.* Garcia, 7 *La. Ann.* 526.

APEX JURIS. A subtlety of law. This phrase expresses an extreme point or subtlety of law; a rule or doctrine of law carried to an extreme either of severity or refinement; a needlessly strict adherence to the letter of the law. The term is frequently used in the plural form, *apices juris.*

Apices juris non sunt jura. Subtleties of law are not rights. The courts disallow curious and nice exceptions tending to the overthrow or delay of justice. But this maxim is not to be understood as prohibiting the allowance of all technical objections. Even in questions of pleading or practice, the established rules of procedure are not within the meaning of the rule. *Broom Max.* 188.

APOSTASY. Was formerly esteemed a punishable offence; and consisted in a total renunciation of a religious belief once professed; while heresy was denying only some particular doctrine. It is said to be still punishable, in England, under Stat. 9 & 10 Will. III., ch. 32 (see *Brown*); but is probably not so anywhere in the United States.

APOSTATA CAPIENDO. An obsolete English writ which issued against an apostate, or one who had violated the rules of his religious order. It was addressed to the sheriff, and commanded him to deliver the defendant into the custody of the abbot or prior. *Reg. Orig.* 71, 267; *Jacob; Wharton.*

APOSTLES. In admiralty practice, the papers forming the record upon an appeal, transmitted from the inferior to the appellate court, for the purpose of showing what proceedings were had below, are sometimes called the apostles. The term is derived from the civil law, where it appears to have a more fixed and frequent use than with us.

APOTHECARY. Any person who keeps a shop or building where medicines are compounded or prepared according to

prescriptions of physicians, or where medicines are sold. Act of congress of July 13, 1866, § 9; 14 *Stat. at L.* 119.

APPARATUS. The terms apparatus and implements do not include animals. A statute which provides that the apparatus or implements used in unlawful gaming may be seized and destroyed, does not authorize killing fighting cocks. Coolidge *v.* Choate, 11 *Metc.* (*Mass.*) 79.

APPAREL. A statute which exempts from execution "the necessary wearing apparel" of a debtor, extends to cloth and trimmings which one has put into the hands of a tailor, to be made into clothes necessary for him. Richardson *v.* Buswell, 10 *Metc.* (*Mass.*) 506.

A travelling trunk, mahogany cabinet-box, and breast-pin are not exempted under provisions exempting wearing apparel. Towns *v.* Pratt, 33 *N. H.* 345.

Neither are rings and jewelry. Frazier *v.* Barnum, 19 *N. J. Eq.* 316.

APPARENT. That which appears, or has been made manifest. In respect to facts involved in an appeal or writ of error, that which is stated in the record.

Apparent danger, as used with reference to the doctrine of self-defence in homicide, means such overt actual demonstration, by conduct and acts, of a design to take life or do some great personal injury, as would make the killing apparently necessary to self-preservation. Evans *v.* State, 44 *Miss.* 762.

Apparent defects, in a thing sold, are those which can be discovered by simple inspection. *La. Code*, art. 2497.

Apparent good order. Prefixing the word apparent, in the usual acknowledgment in a bill of lading that goods in packages have been received in good order, making the clause read, "shipped in apparent good order," does not change the legal effect of the bill. The receipt of the goods, and giving a bill of lading therefor, is *prima facie* evidence that they were in good order, without an explicit statement to that effect. But the carrier's implied admission is limited to the apparent condition of the package, and, if a loss occurs, he is not precluded from showing that it proceeded from some latent cause or secret defect. The Oriflamme, 1 *Sawyer*, 176.

APPEAL. 1. When used with reference to proceedings in courts of justice, appeal signifies one principal mode of obtaining a review of a judicial decision. It is a proceeding of civil-law origin; and was introduced therefrom into the procedure of courts of equity and admiralty; and has again been adopted from these into the codes of reformed procedure adopted by so many of the states; also, into bankruptcy procedure; while the modes of review in use by the common-law courts have been chiefly writs of error, and, secondarily, some discretionary writs, as *certiorari*. The distinguishing incidents of an appeal are, that the party aggrieved by the judgment below applies to the court of superior jurisdiction to rehear his cause; his appeal being allowed (if a formal allowance is required by the law of the forum), he cites the other party to appear and answer, and takes steps in the court below to have the necessary papers or record of proceedings there transmitted to the appellate court. It is the original theory, that an appeal, when perfected, annuls the judgment below; but, to prevent injustice, provisions of positive law are very common, requiring an appellant to give security for the payment or performance of the final judgment, or, in default of such security, the respondent may proceed upon the judgment, — at the peril, of course, of its being reversed. Upon the appeal, the cause is, strictly or by the original form of the proceeding, heard anew; is tried and decided upon proofs newly introduced, and in the same manner as if it had not been adjudicated. But this feature of the proceeding has been extensively modified by local statutes, and by judicial introduction of intendments and presumptions in favor of sustaining the proceedings below; so that, as actually practised in many jurisdictions, appeal is little more than a review of the proceedings and judgment of the lower court, requiring the appellant to show error either in the determination of the law or the facts, in order to obtain relief. In the states which have adopted the name appeal for the review allowed of judgments governed by codes of procedure, the proceeding is subject to so much statute regulation, and is so far assimilated in its effect to writ of error, that it seems no longer possible to give a descriptive definition which shall be correct for the various states, and shall distinguish the two modes of review.

The distinction between an appeal and a writ of error is that an appeal is a process of civil-law origin, and removes a cause entirely; subjecting the fact, as well as the law, to a review and revisal: but a writ of error is of common-law origin, and

it removes nothing for re-examination but the law. Wiscart *v.* Dauchy, 3 *Dall.* 321; United States *v.* Goodwin, 7 *Cranch*, 108.

Appeal is sometimes used to denote the nature of appellate jurisdiction, as distinguished from original jurisdiction, without any particular regard to the mode by which a cause is transmitted to a superior jurisdiction. United States *v.* Wonson, 1 *Gall.* 5, 12. Compare United States *v.* Goodwin, 7 *Cranch*, 108.

Appeal signifies simply the removal of a cause from an inferior to a superior jurisdiction, and is not limited to a review of questions of law. People *v.* Justices of Marine Court, 2 *Abb. Pr.* 126; 11 *How. Pr.* 400.

2. In legislative practice, a member who is dissatisfied with a ruling of the presiding officer may appeal to the vote of the body at large. Such an appeal is taken by rising and requesting it, orally, in the same general way as a motion is made, and is, immediately, or after such debate as the rules allow, put to vote; the question usually being, Shall the decision of the chair be sustained? — or to that effect. If a majority vote in the negative, the ruling is reversed.

3. In old English law, appeal also signifies, when spoken in reference to a prosecution for crime, an accusation by one subject against another, for a heinous crime; but demanding punishment for the injury sustained by himself, rather than for the offence committed against the public. Originally, appeals lay for treason; but these have been considered abolished by the statutes 5 Edw. III. ch. 9, 25 Edw. III. ch. 24, 1 Hen. IV. ch. 14; see, however, Com. Dig. tit. Appeal, A. 1. Other criminal appeals were abolished by 59 Geo. III. ch. 45. The principal kinds, while they existed, were the following: Appeal of arson; appeal of death; appeal of mayhem; appeal of rape; and appeal of robbery. Of these appeals, all were capital, except that of mayhem. The latest instance of an appeal was the celebrated case of Ashford *v.* Thornton, 1 *Barn. & Ald.* 405 (one of rape followed by murder); and, probably in consequence of that case, the abovementioned statute was passed, forbidding such appeals for the future.

It is considered that these appeals, being in the nature of a private process for the punishment of a public crime, probably originated in the time when a private pecuniary satisfaction, or *weregild*, was payable to the party injured, or his relations, to expiate even the gravest offences; but when these offences, by degrees, grew no longer redeemable or compoundable by the payment of a *weregild*, the private process was still continued, in order to insure the infliction of punishment upon the offender, though the party injured was allowed no pecuniary compensation.

APPEAR. To come into court as a party to a suit; to make known, formally, that one will proceed in a cause. Appearance, the act or step in a cause by which a party comes into court, or makes known that he will proceed.

The words may be used of either plaintiff or defendant, but are most commonly predicated of defendant. They originated in the times when the parties to a suit were expected actually to confront each other, personally or by attorney, before the court, previous to pleading or proceeding with the cause. This was so necessary, anciently, that stringent steps were requisite to compel a defendant to appear, if he would not voluntarily do so, before the plaintiff could proceed. The corporal appearance of defendant is still generally required upon a criminal trial; but in the modern practice of civil actions the appearing is constructive or figurative: all that is done, even when full formality is observed, is to serve a notice, or enter a memorandum on the record, setting forth that an attorney named appears for the defendant. And, without this, the practice is to treat almost any step or proceeding taken which implies that defendant submits to the jurisdiction, or has had notice and does not object, as equivalent to an appearance, and operative to waive any defects or irregularities in the service of process. For after defendant has appeared, generally, these become of no importance. Instances of the application of this principle are cases where a defendant has been held concluded, as if he had formally appeared, by applying for and obtaining an order from the court giving him time to answer, and serving that order, with a notice signed by an attorney as "attorney for the defend-

ant," Ayres *v.* Western R. R. Corp., 32 *How. Pr.* 351, 48 *Barb.* 132; by putting in an answer, Hayes *v.* Shattuck, 21 *Cal.* 51; by interposing a demurrer, Kegg *v.* Welden, 10 *Ind.* 550; Knight *v.* Low, 15 *Id.* 374; Evans *v.* Iles, 7 *Ohio St.* 233; by moving to dissolve an attachment, Whiting *v.* Budd, 5 *Mo.* 443; by filing an affidavit controverting the ground upon which an attachment issued, and praying for a discharge thereof, Duncan *v.* Wickliffe, 4 *Metc.* (*Ky.*) 118; by moving for a continuance and change of venue, Shaffer *v.* Trimble, 2 *Greene*, 464; by moving to set aside an interlocutory order, Tallman *v.* McCarty, 11 *Wis.* 401; by moving to mitigate damages, and for a new trial, and taking a bill of exceptions to the decision thereon, Wilson *v.* Fowler, 3 *Ark.* 463; by attending and taking part in the trial, Scott *v.* Niles, 40 *Vt.* 573; by taking an appeal, Fee *v.* Big Sand Iron Co., 13 *Ohio*, 563; Weaver *v.* Stone, 2 *Grant Cas.* 422: but, to constitute an appearance within this principle, there should be some formal entry, plea, or motion, evincing an intent to appear; and it should be ascertainable by the record, Scott *v.* Hull, 14 *Ind.* 136. Thus it has been held that appearance should not be implied from indorsing an admission of service on a summons, National Bank *v.* Rogers, 12 *Minn.* 529; from giving notice of retainer, Wandelaer *v.* Coomer, 6 *Johns.* 328; Vanderpoel *v.* Wright, 1 *Cow.* 209; Mann *v.* Carley, 4 *Id.* 148 (though modern practice is probably less strict); from giving bail, after an arrest under bail process, Lanneau *v.* Ervin, 12 *Rich.* 31; from giving a bond by third parties, to dissolve an attachment, Clark *v.* Bryan, 16 *Md.* 171; from giving an attachment bond, in a suit *in rem*, in order to get possession of a seized vessel, and taking depositions, Coplinger *v.* Steamboat, 14 *Ind.* 480; from making a motion to quash, Ferguson *v.* Ross, 5 *Ark.* 517; Gooch *v.* Jeter, *Id.* 383; from giving notice of a motion to dissolve an attachment, where there had been no personal service, Glidden *v.* Packard, 28 *Cal.* 649; from taking a deposition, or attending on the taking one by the plaintiff, Scott *v.* Hull, 14 *Ind.* 136; from filing an answer, by attorney, protesting against the jurisdiction of the court, Sullivan *v.* Frazee, 4 *Robt.* 616; from moving to set aside a judgment, where there had been no personal service of process, Lutes *v.* Perkins, 6 *Mo.* 57; from giving notice of appeal, under a statute providing that "a defendant shall be deemed to appear in an action when he answers, demurs, or gives the plaintiff a written notice of appearance," Steinbach *v.* Leese, 27 *Cal.* 295; from signing an appeal bond in a suit on a note, by one of two joint-makers, who has not been served with process, Hendrich *v.* Kellogg, 3 *Iowa*, 215; from taking an appeal from a judgment rendered by default, Rose *v.* Ford, 2 *Ark.* 26; and when an attorney entered his name for the defendant, and afterwards erased his name and wrote the word mistake, it was held that this was not an appearance which would cure the want of service of process, Foreman *v.* Lay, 6 *Ala.* 784. There have been many similar cases; the general principle being that an act or step taken in the cause will operate as an appearance, if it fairly implies that defendant submits to be sued, or has received notice of the suit and does not at once object to the manner of the notice.

The foregoing explanations relate to appearance when the word is used without qualification, or to what is called a general appearance. Appearances are known as *general*, *special*, or *conditional*, according as they are unqualified, or are made for some specific purpose, as to make a certain motion, or are coupled with conditions. They are known as *voluntary*, *compulsory*, or *optional*, according as they are entered freely, or are compelled by some adverse step of plaintiff, or are made by a person who is under no obligation to appear, but applies to do so, in order to save certain rights. They are *in person* or by *attorney* or by *next friend*, in various cases, according as the party defends himself, or employs an attorney, or, being under disability, is required to be represented.

In common parlance, appearing for a defendant is sometimes regarded as nearly synonymous with answering; but this is a loose use of the word. Larabee *v.* Larabee, 33 *Me.* 100.

APPELLANT. The party who takes an appeal.

APPELLATE. Pertaining to the judicial review of adjudications. Appellate is used in a broader sense than appeal: thus appellate jurisdiction is the power to take cognizance of and review proceedings had in an inferior court, irrespective of the manner in which they are brought up, whether by appeal, or by writ of error, or even by *certiorari*.

Appellate does not include such power of review as is exercised by the secretary of the interior, or the commissioner of the land office, over the action of inferior land officers. This is supervisory power, rather than appellate. Hestres *v.* Brennan, 50 *Cal.* 211.

APPELLEE. The party against whom an appeal is taken; also called the respondent.

APPENDAGE. A statutory provision relative to appendages of a railroad does not include the rolling-stock. An appendage is something added as an accessory to, or the subordinate part of, another thing. Engines and cars are no more appendages of a railroad than are wagons and carriages appendages of a highway. While they are essential to the enjoyment of the road, they do not constitute any part of it. State *v.* Somerville, &c. R. R. Co., 28 *N. J. L.* 21, 26.

APPENDANT. A thing of inheritance belonging to another inheritance which is more worthy: as an advowson, common, &c., which may be appendant to a manor, common of fishing to a freehold, a seat in a church to a house, &c. It differs from appurtenance, in that appendant must be by prescription, *i.e.* a personal usage for a considerable time; while an appurtenance may be created at this day, for if a grant be made to a man and his heirs, of common in such a moor for his beasts levant or couchant upon his manor, the commons are appurtenant to the manor. (*Co. Litt.* 121 *b.*) *Wharton.*

An appendant is that which, beyond memory, has belonged to another thing more worthy, and which agrees with that to which it is related, in its nature and quality; and an appurtenant is that the commencement of which may be known. Appendances and appurtenances will pass by the words "with the appurtenances thereunto belonging," or by other tantamount expressions. Leonard *v.* White, 7 *Mass.* 6. See also Jackson *v.* Striker, 1 *Johns. Cas.* 284, 291.

APPLY. 1. To ask or request; but generally in the sense of a somewhat formal request to some superior. Thus, one is said to apply to the court for an order; to the governor for a pardon; to a corporation for insurance. Application: a request, usually a formal request in writing, in some matter involving exercise of authority or discretion. In insurance, the written application for the policy forms the basis of the contract, is usually referred to in the policy as forming a part of it, and the truthfulness of its statements may become of great importance in determining the validity of the insurance.

2. To devote or appropriate to a particular use, purpose, demand, or subject-matter: as to apply money to the payment of debts; to apply the words of a contract or statute to the things designated. Applicable: that which may be devoted to some particular use, or employed to further some purpose. Applied: that which has been devoted or employed to its use or purpose. Application: the act of devoting or appropriating; also, sometimes the use or purpose to which a thing or fund has been devoted.

Application of payments is determination to which of several demands a general payment made by a debtor to his creditor shall be applied.

Applicable. A general law should always be construed as within a constitutional provision prohibiting local laws when a general law can be made applicable,—where the entire people of the state have an interest in the subject, as statutes of frauds and limitations; but where only a portion of the people are affected, as in locating a county seat, the applicability will depend on the facts of each particular case. Evans *v.* Job, 8 *Nev.* 322.

Applied. An agreement contemplating the issue of shares of stock to be applied to payment of interest due, was held to mean not that the stock was to be applied, but that it should be sold and the proceeds applied. Manice *v.* Hudson River R. R. Co., 3 *Duer*, 426.

APPOINT. 1. To select or designate a person to hold an office or discharge a trust. Appointment: the act of designating a person to hold an office or trust. Appointee is applied to the person so designated, until he has accepted and qualified.

Appointment, in this sense, usually implies an individual power, as distinguished from a designation by votes of many persons, for which election is the better term; also, a complete power to vest the office, and in this differs from

nomination, which is an advisory designation only, and subject to election or confirmation.

To authorize commissioners to be elected by a certain board of officials is not an infringement of a constitutional provision that they shall be either "elected by the people or appointed as the legislature may direct;" for, although the word elected is used in the statute, the mode prescribed for selecting the commissioners is, in legal effect, an appointment, and comes within the meaning of that word as used in the constitution. Sturgis *v.* Spofford, 45 *N. Y.* 446.

Legislation which prolongs the term of an incumbent of an office is not an appointment. People *v.* Batchelor, 22 *N. Y.* 128.

When a person has been nominated to an office by the president, confirmed by the senate, and his commission is signed and sealed, his appointment is complete; and, on complying with the conditions established by law, his title to enter on the possession of his office is also complete, and the transmission of his commission to such officer is not essential to his investiture of the office. United States *v.* Le Baron, 19 *How.* 73; United States *v.* Stewart, *Id.* 79.

An appointment within the meaning of the constitution of Kentucky is completed when the commission is made out, signed by the governor, and transmitted to the appointee. Justices *v.* Clark, 1 *T. B. Mon.* 82.

2. Appoint is also used, quite technically, in reference to property. Where a donor of lands, by deed or will, has by that instrument clothed some person, often the individual named to enjoy the earliest estate created, with power to designate one to enjoy it afterwards, this is a power of appointment; the exercise of it is appointment; and the term is also sometimes applied to the instrument by which the power is exercised. The person receiving the estate is the appointee. The person authorized to select him is sometimes, though rarely, called the appointor; he must be distinguished from the donor of the power.

Appointment may signify an appropriation of money to a specific purpose. Harris *v.* Clark, 3 *N. Y.* 93, 119.

APPORTIONMENT. In its general sense, is the division of a fund, or property, or other subject-matter, in shares proportioned to different demands, or appropriate to satisfy rival claims.

Apportionment of annuities is called for when the annuitant dies during the year; and such part of the annual sum as corresponds with the part of the year already expired is claimed by his representatives as properly belonging to his estate. Apportionment of a right of common is a division of the right to share it between several persons, among whom the land to which, as an entirety, it first belonged, has been divided. Apportionment of rent may arise in several cases; where the leasehold estate has been divided, and the obligation to pay rent must be shared accordingly; where there has been a partition of the estate in reversion, subject to the lease, and several persons are entitled to receive portions of the rent; where the premises are rendered untenantable during a term, and the rent payable is to be reduced proportionably. These various forms of apportionment are more minutely known in England than in this country, and have there been subject to numerous statutory regulations.

Apportionment, under contracts, consists in the allowance upon a partial performance, of a proportionate part of what the party would have received as a recompense for entire performance. Where the contract is to do an entire thing for a certain specified compensation, there is no right of apportionment.

Apportionment of representatives takes place under the constitution of the United States (and there is a similar apportionment of members of the legislature, under the state constitutions), upon each decennial census; after which, the number of representatives which each state may send is newly determined, proportionately to the population.

Apportionment of corporate shares is necessary where more shares are subscribed than the charter allows to be issued: hence, the number allowed must be divided among the subscribers in proportion to their offers.

A direction to apportion stock among the subscribers does not require that every subscriber should receive some of the stock. Clarke *v.* Brooklyn Bank, 1 *Edw.* 361, 368; Haight *v.* Day, 1 *Johns. Ch.* 18.

APPRAISE. To value; fix the worth of; estimate at a price; usually

spoken of an estimate made with some measure of authority. Appraiser: one clothed with authority to determine the value of property. Appraisal or appraisement: a valuation or price fixed upon property by the estimate of an authorized person; also the act of making such estimate.

Appraisals are made under legal sanctions in several affairs. In the administration of estates, it is usual to require the assets to be inventoried, and an appraisal made of their value; with the amount of which the executor or administrator stands charged, until he accounts for its disposal. In collection of duties, where the value of dutiable goods is in question, it is determined by appraisers. See MERCHANT APPRAISERS. Leases containing covenants of renewal for long terms often provide that the rent upon a renewal shall be a percentage upon the value of the land at that time, to be determined by appraisers.

Appraisers, in a lease providing for appraisement of the property, a fixed percentage whereof is to be the rent, imports disinterested persons. Pool *v.* Hennessy, 39 *Iowa,* 192.

APPRENTICE. A person, usually a minor, under legal engagement to serve an artisan or tradesman, in consideration of being taught his art or trade. Apprenticeship, the contract or relation between the apprentice and his master.

The distinguishing incidents of the relation are usually, that it is constituted by an instrument under seal, called the indenture; to which the consent of the parent of the apprentice, if any, and the approval of some authorized magistrate, is necessary, as well as the assent of the immediate parties; that the engagement binds the master to teach his art or trade to the youth, as well as to maintain him, hence the indenture is not assignable, except by permission of statute; and requires the latter to learn and serve faithfully; that the engagement is mutual for a term deemed sufficient (the years from fourteen to twenty-one being commonly taken), to allow the apprentice time for learning the master's trade, and the master a fair opportunity of gaining, by the skilled service of the apprentice during the later portion of the term, compensation for the instruction and maintenance given; and that the master, during the term, stands in most respects *in loco parentis* towards the apprentice, and is clothed with much of a father's authority and responsibility. Careful statutory provisions have been usual for securing the faithful performance of the master's engagements, and for enforcing obedience and fidelity on the part of the apprentice: but these differ in various jurisdictions, and the system itself is not maintained as distinctly and strictly as in former times. Apprenticeship had its origin in days when the various trades were encompassed with restrictions as to the persons who might enter them. Modern customs, which have so greatly relaxed the rules governing the exercise of the arts and trades, have correspondingly modified the strict characteristics of apprenticeship.

Apprenticeships were altogether unknown to the ancients. The reciprocal duties of master and apprentice make a considerable article in every modern code. The Roman law is perfectly silent with regard to them. I know no Greek or Latin word (I might venture, I believe, to assert that there is none) which expresses the idea we now annex to the word apprentice, — a servant bound to work at a particular trade, for the benefit of a master, during a term of years, upon condition that the master shall teach him that trade." *Smith, Wealth of Nations,* b. 1, ch. 10.

The term apprenticeship does not necessarily imply a formal binding out for a term of years. At common law, such binding out was not obligatory; though acts of parliament prescribed it. In America, the common-law doctrine prevails; as a general rule any man may use what trade he pleases. The Fla. pilot law, requiring "a regular apprenticeship of two years," does not necessarily mean that there must be a formal binding of the learner to a master. The accepted definition of "apprentice" is, that service in the trade, or a following of the occupation, is enough; a binding out is not necessary. State *v.* Jones, 16 *Fla.* 306.

Apprentice is derived from *apprendre,* to learn, and signifies "a young person bound by indentures to a tradesman or an artificer, who, upon certain covenants, is to teach him his mystery or trade. Apprentices are, however, not strictly confined to tradesmen or artificers: husbandmen may take apprentices; but in doing so they must covenant to teach them the art and mystery of husbandry." It is essential to every legal indenture of appren-

ticeship that the master or mistress must engage or covenant to teach the apprentice some trade, art, or mystery: this is the element which distinguishes apprenticeship from menial service. To constitute an apprenticeship, something is to be learned: there can be no apprenticeship without this characteristic mark. Hopewell *v.* Amwell, 3 *N. J. L.* 422 (320).

APPROPRIATE. To determine the use of; to reserve or destine a fund or property for a distinct use, or for the payment of a particular demand.

As used with reference to funds, appropriate is very nearly synonymous with one of the senses of apply, *q. v.*; and the two are often used interchangeably. There is, however, a distinction: appropriate is rather to decide that a certain fund, for instance, shall be in the future expended for a certain purpose; apply is to make the expenditure in fact. Money in the treasury is appropriated to the payment of specific claims, by an enactment which reserves it for these, though it yet remains in the treasury unexpended; it is applied to them when actual payment is made. In more general uses of the two words, applied and appropriated, they can hardly be discriminated.

Appropriation is, originally, the act of appropriating. In common parlance, the money in the public treasury which has been appropriated to some public use is called the appropriation.

A specific appropriation is an act of the legislature by which a named sum of money has been set apart in the treasury, and devoted to the payment of a particular demand. Stratton *v.* Green, 45 *Cal.* 149.

There may be an appropriation of public moneys to the payment of a claim, without the employment of the word appropriate in the statute. State *v.* Bordelon, 6 *La. Ann.* 68.

To constitute an equitable assignment of a particular fund in payment of a debt, there must be some appropriation of the fund, either by giving an order upon it, or by transferring it in such a manner that the holder would be authorized to pay it to the creditor directly, without the further intervention of the debtor. This is the distinction between a mere contract to pay out of certain funds, and an appropriation which courts of equity will uphold as an equitable assignment. Hoyt *v.* Story, 3 *Barb.* 262.

Appropriate, as used in the Declaration of Rights, art. 10, — relating to the acquisition of property by right of eminent domain, — includes every mode by which property may be applied to the use of the public, and extends to every species of valuable right and interest, such as real and personal property, easements, franchises, and incorporeal hereditaments. Boston & Lowell R. R. Corp. *v.* Salem & Lowell R. R. Co., 2 *Gray*, 1, 35.

Under a policy of insurance upon a building, containing a stipulation that, if the premises are "appropriated or used" for carrying on the trade of a carpenter, &c., the policy shall be void, the mere setting up of the machinery, &c., for the manufacture of boxes is not such an appropriation of a part of the premises to carpenter's work as avoids the policy. United States, &c. Ins Co. *v.* Kimberly, 34 *Md.* 227.

Appropriation, as used in the act of congress of July 4, 1864, restricting the jurisdiction of the court of claims from claims for the destruction or appropriation of property by the army or navy in the suppression of the rebellion, &c., includes all taking or using of property by the army or navy, during the war, not authorized by a valid contract with the government. Filor *v.* United States, 9 *Wall.* 45.

The term excludes the idea of purchase, and relates to those acts of military power which exist and belong within the state of war, and which are generally confined to an enemy's country. Waters' Case, 4 *Ct. of Cl.* 389.

Taking steamers into the temporary employment of the government, under a pressing military necessity, was held, under the circumstances, not an appropriation by the army so as to exclude the owner's claim for hire from the jurisdiction of the court of claims. United States *v.* Russell, 13 *Wall.* 623.

Appropriation, in English ecclesiastical law, signifies the annexing of a benefice to the proper and perpetual use of some religious house, bishopric, college, or spiritual person, to enjoy for ever; in the same way as impropriation is the annexing a benefice to the use of a lay person or corporation, that which is an appropriation in the hands of religious persons being usually called an impropriation in the hands of the laity. (*Com. Dig.* tit. Advowson, D. E.) This contrivance seems to have sprung from the policy of monastic orders. At the first establishment of parochial clergy, the tithes of the parish were distributed in four parts, — one for the bishop, one to maintain the fabric of the church, a third for the poor, and the fourth for the incumbent. The sees of the bishops becoming amply endowed, their shares sunk into the others; and the monasteries, inferring that a small part was enough for the officiating priests, appropriated as many benefices as they could by any means obtain to their own use; undertaking to keep the church in repair, and to have it constantly served. But in order to complete such appropriation effectually, the king's license and consent of the bishop must first be obtained; the consent of the patron is also necessarily implied. *Jacob.*

Appropriation of payments. This phrase is sometimes used to mean the application of a general payment to the discharge of a particular debt among several which are due from the payer to the payee. Application of payments is a more appropriate designation.

APPROVE; APPROVER; APPROVEMENT. Approvement has several meanings. 1. It signifies much the same as improvement; thus, approvement of common means the enclosing a part of a common by the lord of the manor, for the purpose of cultivating the same, leaving sufficient for the commoners.

2. It is said to signify the profits of a farm. (*Cowel.*)

3. It signifies the act of an approver, who, when indicted of treason or felony, and arraigned for the same, confesses the fact before plea pleaded, and accuses others, his accomplices, of the same crime, in order to obtain his own pardon. (3 *Cruise*, 89; *Cowel;* 2 *Durn. & E.* 391.) *Brown.*

Approver, in the old criminal law, signified a person who, when indicted of treason or felony, and arraigned for the same, did confess the fact before plea pleaded, and appeal or accuse others, his accomplices, of the same crime, in order to obtain his pardon. This could only be done in capital offences. If the accused, or, as he was called, the appellee, were found guilty, he suffered the judgment of the law, and the approver had his pardon *ex debito justitiæ;* but, if the jury acquitted the appellee, the approver received judgment to be hanged, upon his own confession of the indictment. The modern practice, however, is for the justices of the peace, in cases where it appears probable that the evidence will otherwise be insufficient to obtain a conviction, to hold out a hope to some one of the accomplices, that if he will fairly disclose the whole truth as a witness on the trial, or, as it is termed, become queen's evidence, and bring the other offenders to justice, he shall himself escape punishment. The reception of the evidence is in the discretion of the court: and, should it prove to be unsatisfactory, the approver is liable to be tried for the offence, and may be convicted on his own confession. (4 *Steph. Com.* 394.) *Mozley & W.*

In old statutes, bailiffs of lords in their franchises are called their approvers; and approvers in the marches of Wales were such as had license *de vendre et acheter* beasts, &c. But, by the statute 2 Edw. III. ch. 12, approvers are such as are sent into counties to increase the farms of hundreds, &c., held by sheriffs. Such persons as have the letting of the king's demesnes in small manors are called approvers of the king. Stat. 51 Hen. III. st. 5. And in the stat. 1 Edw. III. st. 1, ch. 8, sheriffs are called the king's approvers. *Jacob.*

APPURTENANCE. Something connected as an incident with another thing deemed a principal, and necessary to its enjoyment, so that the two are usually dealt with as one subject-matter. Appurtenant: annexed or pertaining to some more important thing. Appurtenant and appurtenances are substantially the same in meaning as accessory and accessories; but they are more technically used in relation to property, and are the more appropriate words for a conveyance. The reports contain many decisions upon the question what property shall be deemed to pass by a conveyance of a described subject-matter with its appurtenances.

Appurtenant denotes annexed or belonging to; but in law it denotes an annexation which is of convenience merely and not of necessity, and which may have had its origin at any time, in both which respects it is distinguished from appendant. In conveyances of lands and houses, it is usual to add to the parcels, or else to the *habendum*, or to both, the phrase, "with the appurtenances," and, to make surer, to add "or reputed as appurtenant or belonging thereto." The term is commonly confined in law to the purely incorporeal hereditaments that are commonly annexed to lands or to houses, and may include as well common as any other right. (Lister *v.* Pickford, 34 *Beav.* 576.) *Brown.*

The appurtenance and the thing to which it is appurtenant must agree in nature and quality: thus a seat in church may be appurtenant to a house, but not to land. Where a mill was sold with the appurtenances, a kiln, occupied with the mill for many years, did not pass, it not appearing but that the kiln was a lime-kiln, having no relation to the mill; though, had it been shown to be a malt-kiln, it might pass. 3 *Salk.* 40.

Appurtenances, in a will or deed, comprehends only things in their nature incident to the tract conveyed: it never includes other land. Helme *v.* Guy, 2 *Murph.* 341; Otis *v.* Smith, 9 *Pick.* 293.

A deed conveying land, together with the appurtenances, cannot include an adjacent strip of land. Land cannot be an appurtenance to land. New York Central R. R. Co. *v.* Buffalo Railway Co., 49 *Barb.* 501.

Strictly speaking, in a legal sense, land can never be appurtenant to land. A thing, to be appurtenant to another, must be of a different and congruous nature; such as an easement or servitude, or some collateral incident belonging to and for the benefit of the land. In a case, therefore, where the words of a grant pass land, with its appurtenances, the law will, in the absence of any controlling words, deem the word appurtenances to be used in its technical sense. Even if there is nothing in *rerum*

natura upon which the word can operate, that does not entitle the court to desert the legal sense. It is not necessary to show that there are things granted to which the word applies. The word is often thrown in by conveyancers without any actual knowledge of the premises, to avail, as far as it may avail, by way of cautionary enlargement of the principal grant, if there be any thing on which it may operate. If there be in fact no appurtenances, then the word, like other expletives in a deed, is merely nugatory. United States *v.* Harris, 1 *Sumn.* 21.

In wills, land may pass under the term appurtenances, to give effect to the intent. Otis *v.* Smith, 9 *Pick.* 293.

The fee of an adjoining road does not pass by a deed, as an appurtenance of the land professedly granted, described in the deed by precise and definite boundaries. Jackson *v.* Hathaway, 15 *Johns.* 447.

By a deed of land adjoining a street, "with the appurtenances," the fee of the street does not pass to the grantee. Harris *v.* Elliott, 10 *Pet.* 25.

By appurtenances, in a deed of 5,000 acres of Pennsylvania lands, dated 1704, it was held that the usual city lots and liberty lands passed. Hill *v.* West, 4 *Yeates*, 142.

A conveyance of land, "with all the buildings, ways, privileges, and appurtenances, to the same belonging," is appropriate language to convey an easement or appurtenance already existing and belonging to the land, but not to create a new one. Kenyon *v.* Nichols, 1 *R. I.* 411.

Buildings are in no just sense appurtenances to land; if annexed to the freehold, they are a parcel of the land, and pass as such by a conveyance of the land. United States *v.* Harris, 1 *Sumn.* 21, 38.

Appurtenances in a partition of an estate whereon are certain mine-hills, includes the right to take ore. Grubb *v.* Grubb, 74 *Pa. St.* 25.

One entire railroad will not pass by the word appurtenance to another railroad, any more than one tract of land would pass as appurtenant to another. Philadelphia *v.* Philadelphia, &c. R. R. Co., 58 *Pa. St.* 253.

A grant of a messuage, with the appurtenances, passes only what is parcel of the house, — the buildings, curtilage, and gardens. Bettisworth's Case, 2 *Coke*, 31 *a*.

Although by a devise of a house with the appurtenances, only the garden and orchard will pass with the house, a devise of a house with the lands appertaining will pass the land usually occupied therewith. Blackborn *v.* Edgley, 1 *P. Wms.* 600.

Although land cannot be appurtenant to a messuage in the proper meaning of an appurtenance, a grant of a messuage with the lands appertaining thereto must be taken in the sense of the messuage and the lands usually occupied with or lying to it. Hill *v.* Grange, 1 *Plowd.* 164.

Although, according to the strict technical signification of the word, land cannot be appurtenant to a house, yet, where a house is conveyed with its appurtenances, the word must refer to land, if it is to have any meaning, and as the grantor must have used it to indicate land. At least the garden, curtilage, and close adjoining the house, will pass as parcel of the house. Ammidown *v.* Ball, 8 *Allen*, 293.

Under a mechanic's lien law, allowing liens upon land or lots for "buildings or appurtenances to buildings" thereon erected, a vault under the sidewalk adjacent to the lot is not an appurtenance, and cannot be made subject to a lien. Parmelee *v.* Hambleton, 19 *Ill.* 615.

Appurtenances may include a yard and sidewalk of a building. McDermott *v.* Palmer, 8 *N. Y.* 383, 387.

Appurtenant, as used in Gen. Stat. ch.178, §§ 6, 46, relating to escapes from "yards," &c., adjoining or "appurtenant" to houses of correction, embraces any yard entirely devoted to the purposes of the institution, though not immediately connected with it. Commonwealth *v.* Curley, 101 *Mass.* 24.

A policy insuring all articles making up the stock of a pork house, and all within and appurtenant to the building, covers every thing in the building properly belonging to a pork house, without regard to the particular ownership of each and every article contained in or appurtenant to the building. Ætna Ins. Co. *v.* Jackson, 16 *B. Mon.* 242. See, to the same effect, Crosby *v.* Franklin Ins. Co., 5 *Gray*, 504; Haley *v.* Dorchester, &c. Ins. Co , 12 *Id.* 545; Bryant *v.* Poughkeepsie, &c. Ins. Co., 17 *N. Y.* 200, 21 *Barb.* 154; Pindar *v.* King's County Ins. Co., 36 *N. Y.* 648; Bigler *v.* New York Central Ins. Co., 20 *Barb.* 635.

By the grant of a grist-mill, with the appurtenances, the soil of a way immemorially used for the purpose of access to the mill does not pass; but it may be treated as a grant of the easement for the accommodation of the mill. Leonard *v.* White, 7 *Mass.* 6.

A devise of a grist-mill, with the appurtenances, will pass every thing necessary for the full and free enjoyment of the grist-mill, and requisite for the support of the establishment, such as a dam, water, the race leading to the mill, a proper portion of ground before the mill for the unloading and loading of horses, wagons, &c., as used by the testator. Blaine *v.* Chambers, 1 *Serg. & R.* 169.

Under appurtenances, in a deed, a water-power appurtenant to a mill passes; the grantor need not insert the word privilege, though contained in the contract between the vendor and vendee. Pickering *v.* Stapler, 5 *Serg. & R.* 109.

What is necessary for the enjoyment of a mill stream passes as appurtenant, but what is convenient merely does not; therefore, one who hires a tan-yard and bark-mill cannot throw the contents into the stream, nor put his waste bark on the les-

sor's adjoining land. Howell *v.* M'Coy, 3 *Rawle*, 256.

Appurtenances of a riparian lot includes an addition formed by an extension of the port-warden's line outward. Williams *v.* Baker, 41 *Md.* 523.

Flats may pass as appurtenant to a wharf, notwithstanding the maxim that land cannot pass as appurtenant to land. Doane *v.* Broad Street Assoc., 6 *Mass.* 332.

A written agreement for the sale or a conveyance of a "bridge, with the privileges and appurtenances," will pass the land upon which it stands, and that which is necessary to its beneficial use and enjoyment. Sparks *v.* Hess, 15 *Cal.* 186.

Appurtenances, as used in rule 8 of the supreme court rules in admiralty, — enumerating a ship's tackle, sails, apparel, furniture, boats, or other appurtenances, — includes other articles than those previously specified, furnished to the vessel by her owners, for the uses of the voyage, although not required in navigation; such as, in a vessel intended for the pearl fishery, a diving-bell and air-pump. The Witch Queen, 3 *Sawyer*, 201.

Appurtenance, used in the return of levy by a sheriff, is too general and indefinite to comprehend in its meaning any personal property as the subject of levy; it therefore passes nothing. Monroe *v.* Thomas, 5 *Cal.* 470.

Apud acta. Among the acts; among the recorded proceedings. In the civil law, this phrase is applied to appeals taken orally, in the presence of the judge, at the time of judgment or sentence. Hence any proceedings taken *viva voce*, in the presence of the court and all the parties, may be termed *apud acta;* the use of the term being somewhat analogous to the modern phrase "in open court."

Aqua cedit solo. Water passes with the land. A grant of land conveys the water which covers the land.

Aqua currit, et debet currere, ut currere solebat. Water runs, and ought to run, as it has used to run. A running stream should be allowed to flow in its natural channel, without alteration or diversion. The maxim applies, of course, only to watercourses, and is not to be understood as prohibiting a diversion or reasonable detention of the water of a stream by a riparian proprietor, if the water is returned to its accustomed channel before it passes the land of the next proprietor below, not diminished in quantity nor polluted or defiled in any way.

A watercourse begins *ex jure naturæ*, and, having taken a certain course naturally, it cannot be lawfully diverted. Shurry *v.* Pigott, 3 *Bulstr.* 339.

The right to the use of a stream is incident or appurtenant to the land through which it passes. The stream cannot be lawfully diverted, unless it is returned again to its accustomed channel, before it passes the land of a proprietor below. Running water is not susceptible of an appropriation which will justify the diversion or unreasonable detention of it. Blanchard *v.* Baker, 8 *Me.* 253.

ARBITER. Originally a kind of judge, in the Roman law, distinguished by being clothed with a certain discretionary power or authority to decide by principles of natural justice in preference to strict law. In modern language, a person chosen by parties to determine a controversy between them; being nearly the same as an ARBITRATOR, *q. v.* Cowel says, in substance, that an arbiter is a person bound to decide according to the rules of law and equity, as distinguished from an arbitrator, who may proceed wholly at his own discretion, so that it be according to the judgment of a sound man; while Russell considers that this distinction between arbiters and arbitrators is not observed in modern law. *Russ. Arb.* 112. The true distinction between the terms appears to be this: Arbitrator is a technical name of a person selected with reference to an established system for friendly determination of controversies, which, though not judicial, is yet regulated by law; so that the powers and duties of the arbitrator, when once he is chosen, are prescribed by law, and his doings may be judicially revised if he has exceeded his authority. Arbiter is an untechnical designation of a person to whom a controversy is referred, irrespective of any law to govern the decision; and is the proper word to signify a referee of a question outside of or above municipal law. A question of honor, or of courtesy; a wager; and therefore not subject-matter for legal adjudication, may be referred for decision, wholly independent of any statutory system authorizing and enforcing arbitration; and the referee, not being technically an arbitrator, is well designated by the term arbiter. But the terms are nearly synonymous.

ARBITRATION, or **ARBITRAMENT.** A non-judicial mode of determining controversies, in which the parties submit their demands to individuals chosen by themselves, who hear and decide it by authority derived from the consent, but under guidance of law. Arbitration, in its most general sense, includes the entire proceeding, — the submission, hearing, and decision; in a narrower sense, it denotes the proceedings of submission and hearing only, the decision being distinctly spoken of as the award. Arbitrators are the persons chosen by the parties to a controversy, to determine it.

The distinguishing incidents of an arbitration are, that the parties agree to submit their controversy to the decision of persons chosen by themselves, instead of resorting to an action in a court of justice, which agreement is termed the submission; that their arbitrators, usually chosen one by each party (with leave, in case of disagreement, to choose a third, called umpire), are limited in powers, with respect to what questions they may assume to decide, by the submission, but are empowered and governed in respect to their course in hearing and deciding, by the law; not, indeed, that they must decide the merits according to the rule of law that would determine them in a court of justice, but that they are subject to the law of arbitrations, and not irresponsible; and that, for whatever the law recognizes as a breach of arbitrator's duty, — unfair conduct in the hearing, assuming to decide a question not submitted, failing to decide the whole of an entire question, or wilfully making an unjust and partial decision, — their award may be set aside. But the law of arbitrations is subject to distinct statutory regulations, which vary in the different jurisdictions.

Arbor dum crescit; lignum dum crescere nescit. A tree while it grows; wood when it ceases to grow. That which is a tree while it is growing is deemed merely wood as soon as it ceases to grow. This maxim states a distinction between real and personal property in regard to trees and wood, which is well established. Thus a charge of stealing wood is held actionable *per se*, as importing an accusation of felony; a tree after it is cut down and becomes wood being the subject of larceny, while the cutting down and carrying away growing trees is but trespass. Lo *v.* Saunders, *Cro. Jac.* 166; Dexter *v.* Taber, 12 *Johns.* 239.

ARCHAIONOMIA. The name of an ancient collection of Saxon laws. It was first published during the reign of Queen Elizabeth, in the Saxon language, with a Latin version by Mr. Lambard; and was republished, with additions, by Wilkins, in his work entitled *Leges Anglo-Saxonicæ.*

ARCHBISHOP. The head or chief of the clergy in a whole province. He has the inspection of the bishops of that province, as well as of the inferior clergy, and may deprive them on notorious cause. The archbishop has his own diocese, wherein he exercises episcopal, as in his province he exercises archiepiscopal, jurisdiction. To him or to his court, all appeals are made from inferior jurisdictions within his province; and, as an appeal lies or lay from the bishops in person to him in person, so it also lies from the consistory courts of each diocese to his archiepiscopal court. (1 *Burns Ecc. Law;* 2 *Roll. Abr.*) *Brown.*

ARCHDEACON. A dignitary of the church who has ecclesiastical jurisdiction immediately subordinate to that of the bishop, either throughout the whole of his diocese or in some particular part of it. He is nominally appointed by the bishop himself, and has a kind of episcopal authority originally derived from the bishop, but now independent and distinct. It was formerly his office to grant letters of administration; but that duty is now discharged by the district probate courts. He visits the clergy, and has his separate court for the punishment of offenders by spiritual censures, and for hearing all other causes of ecclesiastical cognizance. (*Com. Dig. Ecclesiastical Persons; Burns Ecc. Law;* 1 *Lev.* 192.) *Brown.*

ARCHES COURT. See COURT OF ARCHES.

ARCHIVES. 1. Originally, an apartment, office, or special repository, within a library or other public institution for the custody of books and writings, wherein state papers, muniments of title, ancient records, charters, and evidences belonging to the government or pertaining to a community, city, or family, &c., are kept.

2. In its secondary meaning (and in this it is now most frequently met), the

word signifies the writings themselves thus preserved; thus we say the archives of a college, of a monastery, &c.

Arcta et salva custodia. Close and safe custody. A direction for the keeping of a prisoner.

ARGENTUM. Silver. Thus *argentum album*, literally white silver, stood for unstamped, uncoined silver, or bullion; also for silver coin worn smooth. *Argentum Dei*, literally God's silver, stood for earnest money paid on closing a bargain.

ARGUENDO. In arguing; in the course of argument. A term of frequent occurrence in the reports, used to denote an expression of opinion by the court or by counsel in reasoning or stating the grounds of a decision, but not as a matter authoritatively decided; and which is not therefore entitled to weight as a precedent. The abbreviated form, *arg.*, is often used.

Argumentum a simili valet in lege. An argument from a like case is of weight in law. The maxim is rather a rule of logic than a principle of jurisprudence.

Argumentum ab auctoritate est fortissimum in lege. An argument from authority is very strong in the law. This maxim expresses the rule of decision under which the courts follow established precedents, — more briefly expressed by the phrase, *stare decisis*, q. v.; or otherwise, *non quieta movere*, q. v.

Argumentum ab impossibili valet in lege. An argument from an impossibility is of weight in law. An argument against a particular application or interpretation of a statute or instrument, on the ground that such application or interpretation involves an impossibility or absurdity, is entitled to consideration. This maxim is a principle of logic, rather than a mere legal rule of construction; the *argumentum ab impossibili* being analogous to a *reductio ad absurdum*.

Argumentum ab inconvenienti plurimum valet in lege. An argument from inconvenience is of great weight in law. Arguments drawn from inconvenience are entitled to great weight in doubtful cases. The operation of the maxim is restricted to such cases. Thus, if a deed contain equivocal expressions, and great inconvenience must follow from one construction, the inference is that such construction is not according to the true intention of the grantor. But where there is no equivocal expression in the instrument, and the words have but one plain meaning, an *argumentum ab inconvenienti* proves only want of foresight in the grantor, which is not a ground for the adoption of a different construction by the courts.

So, in the interpretation of the law, if there be any doubt as to its meaning, the courts will consider what may be the good or bad effects of their decision. But, if the law is clear, inconveniences afford no argument of weight with the courts; the legislature alone can remedy them. So, where a statute is imperative, reasoning *ab inconvenienti* cannot prevail. Where any great inconvenience would result from a particular construction, the courts will be warranted in looking for another interpretation, but will not strain the language of the act. *Broom. Max.* 185.

Argumentum a divisione est fortissimum in lege. An argument from division is of the greatest force in law. An argument drawn from the consideration of the subject in separate parts, and the application to the whole subject of the principle found to control all the parts, is entitled to great weight.

ARISTOCRACY. A form of government which is lodged in a council composed of select members or nobles, without a monarch, and exclusively of the people; also, a privileged class of the persons or political party in the state. (*Paley's Polit. Phi; Brougham's Polit. Phi.*) *Wharton.*

ARMA. Arms. 1. Weapons, whether offensive or defensive; implements of attack, or protection against attack.

2. Arms or cognizances of families; coat armor.

Arma in armatos sumere jura sinunt. The laws permit the taking arms against the armed. It is lawful for one unlawfully attacked, to repel force by force. Where a person attempts by violence to dispossess another of a thing lawfully in the possession of the latter, the possessor may use force to maintain his possession. But after he has been deprived of the possession, he cannot resort to violence to recover it.

ARMIGER. One who bears arms; the attendant of a knight, who waited upon him in time of war, and bore his armor or shield; an esquire.

ARMORIAL BEARINGS. Devices depicted on a ground representing a shield, and indicating the noble or gentle descent of the wearer. They are of English origin and use, and derived from the times when the shield of the knight or warrior customarily bore inscriptions showing his birth and family connections.

ARMS. 1. Weapons; commonly used to signify aggressive weapons, or instruments of attack.

The constitution of the United States, amend. art. 2, declares that, "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." This provision has given rise to some question as to what descriptions of weapons are included.

The constitutional right to keep and bear arms does not extend to carrying bowie knives, fire-arms, &c., concealed upon the person; or prohibit legislative regulations of the manner in which arms may be carried. State *v.* Reid, 1 *Ala.* 612.

The constitutional provision means such weapons as are used for the purposes of war, and does not include weapons not used in civilized warfare; small pistols, for example. Fife *v.* State, 31 *Ark.* 455.

It does not extend to carrying unusual and dangerous weapons in such a manner as will naturally terrify peaceable people among whom the bearer goes. State *v.* Huntley, 3 *Ired. L.* 418.

It does not mean the right to bear weapons ordinarily or commonly, for individual defence; but has reference to the right to bear arms for the defence of the community against invasion or oppression. The citizen has, at all times, the right to keep arms of modern warfare, if done without danger to others, and for purposes of training and efficiency in their use. The use of such arms may be restricted as to manner, time, or place, — due regard being had to the right to keep and bear, for the constitutional purpose, — but cannot be prohibited. The right to keep or bear other arms not protected by the constitution may be absolutely prohibited. Andrews *v.* State, 3 *Heisk.* 165.

The constitutional provision does not forbid an act of a state legislature, providing that a homicide, which would otherwise be manslaughter, shall, if committed with a bowie knife or dagger, be deemed murder, and punished as such. It secures the right to carry a bowie-knife for lawful defence; but as that weapon is peculiarly destructive, the legislature has the power to affix an increased penalty to any unlawful homicide committed by means of it, provided, always, that the law is so framed as to operate as a caution to the unlawful employment of the weapon, and not as an absolute prohibition on its use. Cockrum *v.* State, 24 *Tex.* 394.

A statute regulating the carrying of pistols, dirks, and certain other deadly weapons, is not repugnant to the constitutional right to keep and bear arms. The "arms" referred to in the second amendment to the United States constitution are the arms of a militiaman or soldier, and they do not comprise dirks, bowie knives, &c. English *v.* State, 35 *Tex.* 493.

Armour or arms include any thing that a man wears for his defence, or takes into his hands for that purpose, or uses in his wrath to cast at another, or to strike him with. The terms do not, in law, signify simply a sword, shield, helmet, or such like; but extend also to stones and other missiles used for purposes of defence or warfare. (*Crompt. Just.* 65; *Cowel.*) *Holthouse.*

2. Arms, or coat of arms, signifies *insignia*, *i. e.*, ensigns of honor, such as were formerly assumed by soldiers of fortune, and painted on their shields to distinguish them; or nearly the same as ARMORIAL BEARINGS, *q. v.*

Mackenzie defines arms to be "marks of hereditary honor, given or authorized by some supreme power, to gratify the bearer, or distinguish families. Historically, armorial bearings seem to have been, originally, the distinctive marks, badges, or devices whereby warriors, clad in armour, were recognized. *Bell.*

The original of "arms" was to distinguish commanders in war; for, the ancient defensive armour being a coat of mail which covered the person, the individual could not be distinguished, and therefore a certain badge was painted on the shield, which was called arms. *Jacob.*

For description of the arms of the United States, see resolution of congress of June, 20, 1782.

What is meant by the arms of a state, see Kirksey *v.* State, 7 *Port.* 529.

Arm of the sea. An arm of the sea is considered as extending as far into the interior of a country as the water of fresh rivers is propelled backwards by the ingress of the tide. *Ang. Tidew.* 73.

Long Island Sound is an arm of the sea, within the common-law acceptation of the term, being navigable tide-water; and is more specifically an arm of the sea than mere rivers, bays, or inlets, because, in addition to its tide-water and navigable character, it is without the territorial limits of any county. The Martha Anne, *Olc.* 18.

Armed vessel. To constitute an enemy vessel an armed vessel within an act giving a bounty for the destruction of armed vessels, she need not have any par-

ticular or specific armament. A vessel which belonged to the British navy, and was used for hostile purposes, and was armed with muskets, pikes, &c., was held an armed vessel within such an act. Parlin *v.* United States, 1 *Ct. of Cl.* 174. Compare Murray *v.* The Charming Betsey, 2 *Cranch*, 84.

ARMY. The organized military forces of a nation; the soldiers under employ of a government, for land service, considered collectively.

Army, in its most general sense, might be taken to include all the organized and armed power of the nation; its fighting forces, whether operating on sea or land, or both. But, as generally used in the acts of Congress, it does not include the naval forces or the marine corps. Re Bailey, 2 *Sawyer*, 200.

ARPEN; ARPENT. A measure for land, nearly corresponding to the English acre. The word, in Latin forms, occurs in ancient English law and books; particularly Domesday Book. It is said to have been in use in France, but without uniformity as to the amount designated by it, in the different provinces. It is employed in Louisiana conveyancing; but in some instances appears used as if it were originally a linear measure. See 6 *Pet.* 763; 4 *Hall's Am. Law J.* 518; 12 *How.* 435.

It is an acre or furlong of ground; and, according to the old French account in Domesday Book, one hundred perches make an arpent. The most ordinary acre, called *l'arpent de France*, is one hundred perches square; but some account it but half an acre. *Jacob.*

Formerly a portion of land, in France, ordinarily containing one hundred square rods, or perches, each of 18 feet, or 900 square toises, equal to 4,088 square yards, or nearly five-sixths of an English acre. This is the arpent of Paris. The woodland arpent contains 6,108 square yards, or about 1 acre, 1 rood, 1 perch, English (Davies and Peck). *Webster.*

A portion of land in France; usually 100 square rods or perches, each of 18 feet. The arpent is about one-seventh less than the English acre. *Fleming & T.*

ARPENTATOR, a measurer or surveyor of land. *Cowel; Jacob.*

ARRAIGN. To bring one accused of crime before the court, to stand trial upon the merits of the charge. Arraignment: the act or proceeding of calling a prisoner into court, to stand his trial upon an indictment. For the etymology, see *Burrill.*

The arraignment of a prisoner consists of three parts: Calling him to the bar, and, by holding up his hand or otherwise, making it appear that he is the party indicted; but holding up the hand is a mere ceremony, and is frequently dispensed with, it only being necessary for the prisoner to admit that he is the person indicted. Reading the indictment to him, distinctly, in English, that he may fully understand the charge. Demanding whether he is guilty or not guilty, and entering his plea; and then demanding how he will be tried, the common answer to which is, "By God and my country." *Wharton.*

Arraignment does not include the plea. The arraignment is the act of the court; the plea is the act of the accused. Whitehead *v.* Commonwealth, 19 *Gratt.* 640; Jackson *v.* Commonwealth, *Id.* 656.

A record which shows that a prisoner, after having been furnished with a copy of the indictment, appeared in court, offered to waive arraignment, and tendered a plea of not guilty, which was entered, shows all the requisites of a valid arraignment. It shows that the prisoner was identified; that he was fully informed of the contents of the indictment; and that he understood he was asked by implication whether he was guilty or not guilty, and answered in the negative. Goodin *v.* State, 16 *Ohio St.* 344.

ARRAS. In Spanish law, signifies a donation which a husband makes to his wife, on account of the marriage, either corresponding to or reciprocating the dowry which she brings to him, or gratuitously; which latter is called *sponsalitia largitas.*

ARRAY, *v.* To rank or set in order. Array, *n.*: a body of persons set in order, and mentioned collectively; usually applied to the persons summoned to form a jury. To challenge the array, as applied to juries, means to raise an objection which applies to the entire panel, such as that the sheriff who summoned them was partial or disqualified; as distinguished from an objection to individual jurymen, which is a challenge to the polls, *i.e.* heads.

ARREARS. Money which remains unpaid after it has become due; arrearages. It is generally used of a portion or balance which remains due, when some part has been paid.

ARREST, *v.* To take a person into legal custody. Arrest, *n.*: the act of taking a person into custody of the law.

An arrest is the taking, seizing, or detaining the person of another, touching or putting hands upon him in the execution of

process, or any act indicating an intention to arrest. United States *v.* Benner, *Baldw.* 234, 239.

By arrest is to be understood to take the party into custody. To commit is the separate and distinct act of carrying the party to prison, after having taken him into custody by force of the execution. French *v.* Bancroft, 1 *Metc.* (*Mass.*) 502.

No manual touching of the body or actual force is necessary to constitute an arrest. It is sufficient if the party be within the power of the officer, and submit to the arrest. Gold *v.* Bissell, 1 *Wend.* 210; Huntington *v.* Blaisdell, 2 *N. H.* 318; Huntington *v.* Schultz, *Harp.* 453; United States *v.* Benner, 1 *Baldw.* 239; Field *v.* Ireland, 21 *Ala.* 240; Emery *v.* Chesley, 18 *N. H.* 198; Jones *v.* Jones, 13 *Ired. L.* 448.

An arrest is a restraint of the person; a taking the party into actual custody. Hart *v.* Flyn, 8 *Dana*, 190; Lawson *v.* Buzines, 3 *Harr.* 416.

The arrest of an offender, and the retaking him on fresh pursuit after an escape, constitute but one effective arrest. Cooper *v.* Adams, 2 *Blackf.* 294.

Where an officer notified a party that he came to arrest him under a warrant, and the party submitted, and the officer accompanied him home, remained there all night, and took him before a magistrate the next day, it was held that this was an arrest, although the party was not actually deprived of liberty, nor personally guarded by the officer. Courtoy *v.* Dozier, 20 *Ga.* 369.

The delivery to the sheriff of a *ca. sa.* against a prisoner in his custody, who had been admitted to the limits, is not, *ipso facto et eo instanti*, an arrest, so as to place the defendant in custody on the execution, and render the sheriff liable for an escape. Tracy *v.* Whipple, 8 *Johns.* 379.

Arrest of judgment. A species of motion, familiarly known in courts proceeding according to the common law, for reviewing proceedings upon which the successful party claims a judgment, and, if error is found, forbidding entry of judgment.

ARRESTMENT. In Scotch law:

1. A process for seizing and detaining a criminal's person; like our arrest.

2. A process for securing movables in the hands of the possessor, until the property in them can be determined.

3. A process allowed to creditors for securing movables of a debtor in the possession of a third person, or debts due from a third person to the debtor, and holding them to make satisfaction of the creditor's demand; analogous to attachment or garnishment in many of the United States. In this proceeding, the creditor is termed the arrester, and the third person is called the arrestee; analogous to garnishee.

ARRIVE. The words arrive and enter are not always synonymous; there certainly may be an arrival without an actual entry, or attempt to enter. United States *v.* An Open Boat and Lading, 5 *Mas.* 120, 132. See also The Patriot, 1 *Brock.* 407, 411.

A vessel has not arrived till she drops her anchor, or is moored. Gray *v.* Gardner, 17 *Mass.* 188.

A vessel insured until her arrival at a certain port is protected by the policy until she reaches the spot in that port where it is intended to discharge her cargo, and which is the usual place of discharge. But if she is destined to one or more places for the delivery of cargo, and delivery or discharge of a portion of her cargo is necessary, not by reason of her having reached any destined place of delivery, but as a necessary and usual nautical measure to enable her to reach such usual and destined place of delivery, she cannot properly be considered as having arrived at the usual and customary place of discharge, when she is at anchor for the purpose only of using such means as will better enable her to reach it. If she cannot get to the destined and usual place of discharge in the port, because she is too deep, and must be lightened to get there, and, to aid in prosecuting the voyage, cargo is thrown overboard or put into lighters, such discharge does not make that the place of arrival: it is only a stopping-place in the voyage. Simpson *v.* Pacific Mut. Ins. Co., 1 *Holmes*, 136.

Arrival, when occurring in the acts of congress relating to revenue and navigation, should be construed according to its common acceptation, except where the context shows a clear intention to use it in a more limited sense. Parsons *v.* Hunter, 2 *Sumn.* 419, 423. And see Levy *v.* McCartee, 6 *Pet.* 102.

A mere touching at port for advices, or to ascertain the state of the market, or being driven in by an adverse wind, and sailing again so soon as it changes, is not an arrival, within those acts; they contemplate an arrival for purposes of business requiring an entry and clearance, and a stay at port so long as to require some of the acts connected with the business. Harrison *v.* Vose, 9 *How.* 372, 378. See also United States *v.* Shackford, 5 *Mas.* 445, 447; Parsons *v.* Hunter, 2 *Sumn.* 419; 9 *Op. Att.-Gen.* 256; 6 *Id.* 163.

Passing through the waters of a river which constitutes the boundary between the United States and a foreign nation, for the purpose of proceeding to a port within such foreign territory, is not an arrival in the limits of the United States. The Apollon, 9 *Wheat.* 362.

When an American vessel enters a foreign port for the purposes of trade, to deliver or take in the whole or part of her

cargo, or when she remains for so long a time that by the laws of the country she is compelled to enter at the custom-house, she must be deemed to have arrived at such port. 9 *Op. Att.-Gen.* 256.

ARROGATION. A civil-law term for the adoption of a person who was already of full age.

Arsæ et pensatæ. Burnt and weighed. A term formerly applied to money tested or assayed by fire and by weighing. It occurs in the plural form, qualifyiug the word *libræ*, pounds; and marks the distinction between money so tested and ordinary coin, termed *argentum album*, q. v.

ARSON. Properly, the malicious burning of another's house. 2 *Bish. Cr. L.* § 8. This was distinguished, early in the development of the common law, as an aggravated offence, owing to the peril to human life which it involved, and was deemed a felony. To constitute the crime at the common law, the building involved must be a habitation or dwelling; for the protection of human life was the chief ground of specially distinguishing the offence. Yet it must be the property of another person, at least in some sense, or for occupation; for the burning of a building which was unqualifiedly one's own was deemed to partake of an exercise of the right of property too much to admit of its being pronounced felony. There must be a burning, — some actual destruction of the woodwork of the building by fire; though it might be very slight, and extinguished before extensive damage, or actual peril to inmates. And there must be an evil intent, — that general malice, at least, which is a necessary element in crime; though not necessarily an intent to produce death of the inmates; nor need death be the result.

The general definition of the word, above indicated, has been modified in many of the states, by statutes which aim to state with precision what shall be punishable as arson within the jurisdiction. Several of these include buildings somewhat removed from the character of dwellings, and other kinds of property which were not the subject of arson at common law. And some of them divide the offence into degrees, being guided, in so doing, largely by the idea of punishing with the greater severity those burnings which involve the greater danger to life. Upon the other hand, in other jurisdictions, statutes have been passed imposing punishment for wilful and malicious burning of many descriptions of property not the subject of arson at common law, without extending that name to include them. Hence the same criminal act of burning — the burning one's own house, to the danger of the interests of other persons; the burning a vessel, a shop, storehouse, or barn — may be punishable in several states, and perhaps may be subject to the same punishment, yet be recognized as arson in some only, while in others it is not within the term.

Thus, by 2 N. Y. Rev. Stat. 657, arson is defined, for that state, and distinguished in four degrees. Arson in the first degree consists in wilfully burning in the night-time a dwelling-house in which there shall be, at the time, some human being.

Arson in the second degree comprises wilfully burning an inhabited dwelling-house in the daytime, which, if done in the night, would be arson in the first degree; also, wilfully burning in the night-time any shop, warehouse, or other building not the subject of arson in the first degree, but adjoining to or within the curtilage of any inhabited dwelling-house, so that such house shall be endangered.

Arson in the third degree includes wilfully burning in the daytime any shop, warehouse, or other building, which, if committed in the night-time, would be arson in the second degree: also, burning in the night-time the house of another not the subject of arson in the first or second degree; any house of public worship, or any schoolhouse; any public building, &c., or any building in which shall be deposited the papers of any public officer; or any barn or grist-mill, or manufactory, or fulling-mill, or ship or vessel: also, wilfully burning insured property, with intent to prejudice the insurer: also, wilfully burning in the night-time any store or warehouse not adjoining to or within the curtilage of any inhabited dwelling-

house, so that such house shall not be endangered by such firing.

Arson in the fourth degree includes wilfully burning in the daytime any dwelling-house or building, ship or vessel, which, if committed in the night-time, would be arson in the third degree: also, wilfully burning in the day or night time any saw-mill, any carding-machine, or building containing the same, or any building which, completed, might be the subject of arson in either degree, while in the process of erection or construction; or any stack of grain of any kind, or any stack of hay, or any wood, boards, timber, or other lumber piled or yarded for sale, not being the property of the person charged; any toll-bridge, or any other public bridge: also, burning in the day or night any standing crop of grain, or any nursery or orchard belonging to another, or the woods in any town, or grass or herbage growing on any marshes or other lands not belonging to the person charged.

These definitions, it will be seen, bring within the term arson, in some one of its degrees, almost every act of burning property which can require criminal punishment. Elsewhere, the same result, in substance, has been reached, without enlarging the meaning of arson, by imposing a punishment upon the offence of wilfully and maliciously burning property of the kind specified, whatever the things desired to bring within the scope of the penalty may be.

ARSURA. Burning. The name of the ancient trial or assay of coin by fire. Thus, *tot libras ad arsuram*, — so many pounds according to the test by fire, — signified pounds of tested and approved money. *Cowel.*

ART. The patent laws allow the issuance of a patent to the inventor or discoverer of any new and useful art, &c., and this has given rise to some discussion upon the meaning of the word art in this connection. Mr. Curtis explains that the word is included in the statute, in order to embrace within the patent laws those inventions where the particular machinery or apparatus, or the particular substances employed, would not constitute the discovery, so much as a newly invented mode or process of applying them, in respect to the order or position or relations in which they are used. The term embraces those inventions where the particular apparatus or materials employed may not be the essence of the discovery, but that essence consists in using apparatus or materials in new processes, methods, or relations, so as to constitute a new mode of attaining an old result; or a mode of attaining a new result in a particular department of industry, which result may not itself be any new machine, manufacture, or composition of matter; or, finally, an entirely new process of making or doing something which has not been done before by any process. *Curt. Pat.* § 9.

A process, *eo nomine*, is not the subject of a patent under our laws, but it is included under the general term "useful arts;" and an art may require one or more processes or machines in order to produce a certain result or manner. Corning *v.* Burden, 15 *How.* 252, 268.

ART AND PART. A phrase used in Scotch law; also, says Jacob, "in the north of England," signifying that a person shared in the planning and in the execution of a crime: was both an accessory before the fact, and an aider and abettor. Art implies advice or counsel towards the perpetration of the offence; part signifies the actual share taken in its execution. But the phrase does not necessarily import both descriptions of guilt; for it is said that one may become art and part, either by giving a warrant or mandate to commit the crime, or by giving counsel or advice to the criminal how to conduct himself in it, or by his assistance in the execution of it. *Ersk. Inst.; Bell.*

ARTICLE. 1. Originally, a distinct part or portion; one of several things presented as connected or forming a whole; one of a set; either of the constituents or members articulated in one corpus. Particularly, in legal phraseology, one of many connected propositions or paragraphs forming a complete document. Hence the expression relative to pleading, to articulately propound; *i.e.*, to set forth in formal, distinct propositions.

Article is a word of separation, to indi-

vidualize and distinguish some particular thing from the general thing or whole, of which it forms a part; as an article in an agreement, an article of faith, an article of a newspaper, or an article of merchandise. The original or radical Greek word means to join or to fit to, as a part; and only very recently has it been applied to denote material or corporeal things, such as goods or physical property, and then only in the sense of something that is separate and individual in itself; as in the expressions, "salt is a necessary article," or "a hammer is a useful article." Wetzell *v.* Dinsmore, 4 *Daly*, 195.

Whether article, in a printed notice, given by a carrier on taking charge of travellers' baggage, that he will not be liable for more than a sum named upon each article forwarded, means each separate package, trunk, valise, bag, &c., or each distinct thing, piece of clothing, ornament, book, &c., contained in a package, trunk, &c., see Wetzell *v.* Dinsmore, 4 *Daly*, 195; Hopkins *v.* Westcott, 6 *Blatchf.* 64.

Three cases of pills, each case containing one gross, were delivered to a carrier for transportation, under a receipt limiting recovery for loss of any article forwarded to $50. The three were each separately addressed to the consignee, and were done up in one package, which was again addressed. *Held*, that the "article" to which the valuation applied was the whole package, in its entirety. Wetzell *v.* Dinsmore, 54 *N. Y.* 496.

For the meaning of articles, in acts imposing taxes, see Wells *v.* Shook, 8 *Blatchf.* 254.

2. From the employment of article, as a name of the separate paragraphs of a document, has arisen a usage of applying articles (*plu.*) to several kinds of documents, consisting of distinct propositions connected; such as a libel or complaint in the ecclesiastical courts.

Articles of agreement. Throughout the United States, the term articles of agreement means much the same as agreement in writing; being any document which sets forth distinctly the several engagements and considerations which form parts of either of the more complex contracts arising in affairs. In England, it seems to be applied somewhat more precisely to a preliminary memorandum, drawn up and signed, of the clauses, stipulations, and conditions to be embodied in a deed which the parties have agreed to make, and which is to be drawn up and executed in future, when it will supersede the articles. Such articles are usually entered into for the purchase and sale of lands, for the taking and granting of leases, and for making mortgages and settlements on marriage.

Articles of association, in the law of corporations, signifies an instrument common in joint-stock associations and corporations formed under general acts, which creates the corporate union between the members, and prescribes the corporate objects and form of organization. This instrument is distinguished from charter, in that the latter emanates from the sovereign power; and from by-laws, in that they are the acts of a corporation already in existence.

Articles of the clergy. Ancient English statutes, containing certain articles relating to the church and clergy, and causes ecclesiastical.

Articles of confederation. The name given to the instrument embodying the compact for government, made between the thirteen original states of the Union, before the adoption of the constitution. It was adopted and took effect March 1, 1781, and continued in force until superseded by the constitution, on the first Wednesday of March, 1789.

Articles of faith, or of religion. A system of propositions of religious truth, commonly called the Thirty-nine Articles, drawn up by the convocation in 1562, and confirmed by James I. Former English laws required a subscription to these articles from candidates for office or ecclesiastical preferment, or for various positions of trust, or academical appointments and degrees, very generally; but the requirement has, by modern legislation, been relaxed.

Articles of impeachment. The formal statement of the charges against a public officer, put forward as the basis of proceedings to remove him, is called the articles of impeachment.

These articles are prepared and adopted in the more popular branch of the legislative body, the commons in England, or house of representatives, assembly, &c., in America; and submitted to and tried by the other, the lords or senate.

Articles of the navy. A system of rules prescribed by act of parliament for the government of the English navy; also, in the United States, there are articles for the government of the navy,

comprised in chapter 10 of U. S. Rev. Stat. tit. xv.

Articles of partnership. This phrase is in very frequent use to designate the formal agreement whereby a partnership is formed, and the rights and duties of the members of the firm are prescribed. The instrument embodies all necessary stipulations governing the commencement and duration of the partnership, the nature of the business, and place of carrying it on, the firm name, the capital to be contributed, and other obligations assumed by the members, their respective shares in profits or losses, the mode of conducting the business, and the duties of each partner therein, the mode of winding up the firm and dividing assets at the close, and all other matters likely to be drawn in question.

Articles of the peace. A species of complaint allowed to be exhibited by one who fears that another is about to commit an unlawful injury to complainant's person or property, the object being to compel the accused to give security that he will refrain from the act threatened, or from any breach of the peace. Such security the court or magistrate, upon due oath to the facts making out a proper case, may require.

Articles of war. The name of a system of rules, established by authority of law, for the government of the army and navy, in many matters of detail. These rules are known by this name, both in England and in the United States. The articles of war of the United States are contained in chapter 5 of U. S. Rev. Stat. tit. xiv.

ARTICULATE ADJUDICATION. A term used in Scotch law to describe a form of judgment used where there are more debts than one due to the adjudging creditor. In such cases, it is usual to accumulate each debt by itself, so that in case of an error in ascertaining or calculating one of the debts, the error may not reach any other debt.

ARTIFICIAL PERSON. A company to which the law has given existence as a distinct legal entity; a corporation. Persons are spoken of as natural, or individuals existing by nature; and artificial, those which are created by law.

Articled clerk. The English term for a clerk under articles of agreement analogous to an apprenticeship, by which he is bound to serve in the office of a solicitor in consideration of being instructed in the profession.

No one solicitor may have more than two articled clerks at any one time but a firm may have two to each partner. *Brown.*

ARTS. The expressions useful arts and fine arts have a technical use in the patent and copyright laws. Webster defines art in this use as signifying: a system of rules serving to facilitate the performance of certain actions; and says that arts are divided into the useful, otherwise called the mechanic or industrial arts, or trades, being those in which the hands and body are more concerned than the mind, such as manufactures; and the fine arts, otherwise called the liberal, or polite arts, being those in which the mind or imagination is chiefly concerned, as poetry, music, and painting. Worcester defines arts as: the application of knowledge or skill to effect a desired purpose; practical skill as directed by theory or science.

Fine arts. Under U. S. Rev. Stat. § 4952, copyright may be secured for models and designs intended to be perfected as works of the fine arts. This term, as construed in the office of the librarian of congress is limited to painting and sculpture. Protection for designs, prints and labels for manufactured articles, devices for advertisements, medals, ornaments, regalia, utensils, emblems, earthenware, &c., is to be sought at the patent office.

Lost arts. Centuries ago discoveries were made in certain arts, the fruits of which have come down to us, but the means by which the work was accomplished are now unknown; the knowledge has been lost for ages. Yet it will hardly be doubted that if any one now discovered an art thus lost he would be entitled to a patent. Gaylor *v.* Wilder, 10 *How.* 477.

Useful arts. See ART.

ASCENDANT. Has two senses; in a broader, it includes persons related or connected in the ascending line, by consanguinity or affinity; in a more restricted sense, it includes only those related by consanguinity. Bernard *v.* Vignaud, 10 *Mart.* (*La.*) 482, 561.

ASPORTATION. A removal or carrying away of chattels. This, the carrying away, is an essential part of

the crime, though the slightest distance of removal is sufficient.

ASSAULT. Any wilful and unlawful attempt or offer, with force, to do a corporal injury to another.

In explanation of the definition, it is to be observed: 1. That the attempt or offer must be wilful. An accidental or unintended demonstration of violence is not an assault. Some of the decisions, indeed, take the position, unqualifiedly, that to constitute assault the threatening acts must be animated by a purpose to hurt; and, if this purpose is disproved, there is no assault. But other cases seem to warrant a broader definition, and to sustain the view that acts wilfully committed, which evince a purpose to do a personal injury, and which would do an injury if completed, or if not intercepted, may constitute an assault, notwithstanding the perpetrator did not intend to pursue them to the point of actual injury. Where an unequivocal purpose of violence is accompanied by an act which, if not stopped or diverted, will be followed by personal injury, it is an assault. State *v.* Malcolm, 8 *Iowa*, 413. And unless the latter view can be conceded to some extent, the cases holding that the aiming a fire-arm which the accused knew, but the complainant did not know, was not loaded, is an assault, cannot be sustained. Of the three following definitions, it will be seen that the first makes an actual intent to hurt, in the breast of the assailant, an essential element; while the other two are satisfied by acts which evince such intent, coupled with ability.

An assault is an offer or an attempt to do a corporal injury to another; as by striking at him with the hand, or with a stick, or by shaking the fist at him, or presenting a gun or other weapon within such distance as that a hurt might be given, or drawing a sword and brandishing it in a menacing manner: provided the act is done with intent to do some corporal hurt. United States *v.* Hand, 2 *Wash. C. Ct.* 435.

An assault is an attempt, with force or violence, to do a corporal injury to another, and may consist of any act tending to such corporal injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using actual violence against the person. Hays *v.* People, 1 *Hill*, 351.

An assault is an attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness, with such circumstances as denote, at the time, an intention to do it, coupled with a present ability to carry such intention into effect. Tarver *v.* State, 43 *Ala.* 354.

2. We include the word unlawful in the definition, believing it to be a proper element; that is, an offer or use of force, in the exercise of one's rights, or the performance of one's duty, is not properly an assault. It may, indeed, be urged that the act is an assault, but is justified by the right or duty; and the distinction is, of course, purely verbal. But the proper use of the term seems to be to confine it to unlawful conduct. Bouvier gives unlawful as a part of the meaning; so does Finch (*Law*, 202); and it was held in United States *v.* Lunt, *Sprague*, 311; 8 *Mo. L. Rep.* N. S. 622, that, in an indictment for an assault with a dangerous weapon, the word assault carries with it an allegation of illegality. But many of the definitions given omit unlawfully; the three quoted above, and those by Blackstone and Hawkins, quoted below, for example; also the following:

Assault is an attempt or offer, with force and violence, to do a corporal hurt to another; as by striking at him with or without a weapon. But no words whatsoever, be they ever so provoking, can amount to an assault. *Jacob; Wharton.*

3. Assault, as popularly used, includes violence; but, as a law term, it is limited to the attempt or offer to use, and does not include actual use of violence. The word occurs, perhaps, most frequently in the phrase assault and battery, in construing which the two nouns are to be carefully discriminated. Assault covers only the offer, the threat in action; the actual use of force is embraced by battery. In all the ordinary cases of criminal violence, the two are combined, in fact, hence they have from the earliest times been combined in the name; and assault and battery is in common use as designating what is to all ordinary intents a single offence. There may be, however, a punishable assault, without any battery being involved; as where the intention is abandoned, or the attempt is frustrated, before actual use of violence; and in trespass for assault and battery, a defendant may be found guilty of the assault and not guilty of the bat-

tery. It seems safe to say that there can be no battery without a preliminary assault. The practical utility of using the double name is doubtful. Offences, generally, include an offer or attempt, as well as an actual commission; and why the two elements should be so carefully discriminated in the name, in the case of battery, and not in other cases, is not obvious. It would seem that assault might be reserved for the offence of offering or attempting violence not followed by an actual use of it; and that battery alone was a sufficient name for the unlawful use of violence, the preliminary attempt being treated as merged in the commission, as in other offences. But the employment of the phrase assault and battery is very general; while assault is, in popular language, often employed as including battery. The authorities, however, sustain the distinction between the two.

An assault is an offer to strike, beat, or commit an act of violence on the person of another, without actually doing it, or touching his person. A battery is the touching or commission of any actual violence on the person of another, in a rude and angry manner. Johnson *v.* Tompkins, 1 *Baldw.* 571, 600; State *v.* Shields, 1 *West. L. J.* 118.

An attempt or offer to beat another, without touching him: as if one lifts up his cane or his fist in a threatening manner at another, or strikes at him, but misses him; this is an assault, *insultus;* and though no actual suffering is proved, yet the party injured may have redress by action for damages as a compensation for the injury. It is thus distinguished in law from a battery, which is the unlawful beating of another, and includes the least touching of another's person wilfully or in anger. Practically, however, the word assault is used to include the battery. 3 *Black. Com.* 120.

An assault is an attempt or offer to do a corporal hurt to another, as by striking him, or presenting a gun at him at carrying distance, or pointing a pitchfork at him which might reach him, or holding up one's fist at him, or doing any such like act in an angry, threatening manner; and a battery is any injury whatsoever to the person of a man done in an angry, revengeful, rude, or insolent manner. An assault and battery is the combination of both offences. 1 *Hawk. P. C.* ch. 62, § 1.

Under a statute which punishes assault and battery with intent to kill, an indictment cannot be sustained for a mere assault with intent, &c.; there must be a battery also. United States *v.* Turley, 4 *Cranch C. Ct.* 334.

4. Some demonstration of force capable of injuring the person is essential: mere threats do not constitute assault, if unaccompanied by any offer or attempt to strike. Smith *v.* State, 39 *Miss.* 524; State *v.* Mooney, *Phill. L.* 434; and see the definition by Jacob, quoted above. But the violence involved and injury portended may be the very slightest.

Any injury whatsoever, be it never so small, being actually done to the person of a man, in an angry or revengeful, or rude or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him, are batteries in the eye of the law. (1 *Hawk. P. C.* 263, 264.) *Jacob.*

The mere taking hold of the coat, or laying the hand gently on the person of another, if done in anger, or in a rude and insolent manner, or with a view to hostility, amounts not only to an assault, but to a battery. Even striking at a person, though no blow be inflicted, or raising the arm to strike, or holding up one's fist at him, if done in anger or in a menacing manner, is an assault. United States *v.* Ortega, 4 *Wash. C. Ct.* 534.

5. An act done with the consent of the person affected is not an assault. This is implied in the term corporal injury. What is done to a consenting person is not an injury in the legal sense, *volenti non fit injuria.* Thus, though a child of tender years cannot legally consent to sexual intercourse, yet she may consent to an attempt to commit it; and an attempt made with her consent is not an assault. Reg. *v.* Cockburn, 3 *Cox Cr. Cas.* 543; Reg. *v.* Read, *Id.* 266, 2 *Car. & K.* 957, 2 *Den. Cr. Cas.* 377; Rex *v.* Mehegan, 7 *Cox Cr. Cas.* 145. But there must be actual consent in these cases; mere omission to resist, or consent obtained by fraud, is not enough to deprive the act of the character of an assault. Reg. *v.* Case, 4 *Cox Cr. Cas.* 220, 1 *Den. Cr. Cas.* 580.

The following are representative cases upon the leading elements of the definition:

Stopping a person, and preventing him, by means of threats, from passing along the public highway, is an illegal imprisonment, and an assault. Bloomer *v.* State, 3 *Sneed,* 66.

It is an assault to double the fist and run it at another, saying, "If you do that again, I will knock you down." United States *v.* Myers, 1 *Cranch C. Ct.* 310; S. P. State *v.* Hampton, 63 *N. C.* 13.

To ride a horse so near one as to endanger his person, and create a belief in his

mind that it is the intention of the rider to ride over him, constitutes an assault. State *v.* Sims, 3 *Strobh. L.* 137.

There may be an assault without specific intent to injure the sufferer in particular; as by recklessly shooting into a crowd, and wounding some one not intended to be injured. State *v.* Myers, 19 *Iowa*, 517.

An intent to commit violence, accompanied by acts which, if not interrupted, will be followed by personal injury, is sufficient to constitute an assault, although the assailant may not be at any time within striking distance. People *v.* Yslas, 27 *Cal.* 630.

An offer to strike, by one person rushing upon another, will be an assault, although the assailant is not near enough to reach his adversary, if the distance is such as to induce a man of ordinary firmness to believe that he will instantly receive a blow unless he strikes in self-defence. State *v.* Davis, 1 *Ired. L.* 125.

To point or flourish a deadly weapon at another in a threatening manner is an assault, if the person doing so is sufficiently near to the person threatened to admit of doing personal injury with a weapon of the nature employed; but is not one if he is so distant that he could not have done any harm with the weapon, had he tried. State *v.* Yancey, 74 *N. C.* 244; McKay *v.* State, 44 *Tex.* 43.

To approach a person in possession of chattels, brandishing a knife, and threatening and intending to do him bodily harm, unless he yields possession of the chattels, is an assault. Barnes *v.* Martin, 15 *Wis.* 240.

Where one, being within striking distance, raises a weapon for the purpose of striking another, and at the same time declares that, if the other person will perform a certain act, he will not strike him, and the latter does perform the required act, in consequence of which no blow is given, this is an assault. State *v.* Morgan, 3 *Ired. L.* 186.

Where the accused raised a club over the head of a woman, within striking distance, and threatened to strike her if she opened her mouth, this was held an assault; for it showed an intent to strike, on her violating a condition which defendant had no right to impose. United States *v.* Richardson, 5 *Cranch C. Ct.* 348.

Any thing attached to the person partakes of its inviolability. A blow on the skirt of one's coat, when upon his person, is an assault and battery. So of striking one's cane, while in his hand. Respublica *v.* De Longchamps, 1 *Dall.* 114; s. p. State *v.* Davis, 1 *Hill*, (*S. C.*) *L.* 46.

That to attack and strike with a club, with violence, the horse before a carriage in which a person is riding, is an assault on the person, see De Marentille *v.* Oliver, 2 *N. J. L.* 380.

Where the defendant raised his whip, and shook it at the plaintiff, though within striking distance, and made use of the words, "Were you not an old man, I would knock you down," this was held not an assault. State *v.* Crow, 1 *Ired. L.* 375; s. p. Commonwealth *v.* Eyre, 1 *Serg. & R.* 347.

That it is not an assault to point a cane at one in the street, merely in derision and as an insult, but without an intent to strike, see Goodwin's Case, 6 *City H. Rec.* 9.

Snatching a bank-bill from the owner's hand, and thereby touching his hand, but with no intention of injuring or touching his person, is not an assault with force and violence, under Rev. Stat. ch. 125, § 16. Commonwealth *v.* Ordway, 12 *Cush.* 270.

Cocking and raising a gun, and threatening to shoot a person, is an assault in law, although there is no actual attempt to shoot or injure the person; provided, under all the circumstances, the act indicates an intention to shoot. United States *v.* Kiernan, 3 *Cranch C. Ct.* 435; s. p. Keefe *v.* State, 19 *Ark.* 190; Richels *v.* State, 1 *Sneed*, 606.

Taking a gun into one's hands in the execution of an intention of shooting, or doing some act, besides so taking the gun, to carry such intention into execution, is an assault. The offence is complete if there has been an act done, indicating an intention coupled with ability. Higginbotham *v.* State, 23 *Tex.* 574; State *v.* Epperson, 27 *Mo.* 255; State *v.* Myerfield, *Phill. L.* 108; s. p. State *v.* Church, 63 *N. C.* 15.

In general, it is an assault to present a pistol which purports to be loaded at another person, so near as would endanger his life if it were fired, although the pistol is not in fact loaded. State *v.* Smith, 2 *Humph.* 457; Rex *v.* Parfait, *Leach*, 23, *East P. C.* 416; Rex *v.* Thomas, *Leach*, 372, *East P. C.* 417.

Pointing a gun or pistol at a person who does not know but that it is loaded, or has no reason to believe that it is not, is an assault. State *v.* Shepard, 10 *Iowa*, 126; s. p. Beach *v.* Hancock, 27 *N. H.* 223; State *v.* Cherry, 11 *Ired. L.* 475.

Presenting a pistol loaded and cocked, although with the finger on the trigger, and in an angry manner, is only a common assault. Morgan *v.* State, 33 *Ala.* 413.

One who recklessly aims and fires a pistol at another, and hits him, may be convicted of a criminal assault and battery, although he did not actually know it was loaded. Commonwealth *v.* McLaughlin, 5 *Allen*, 507.

Drawing a pistol, or pointing it somewhat in the direction of another person, has been held not an assault, where it was not aimed at him, and attendant circumstances indicated there was no present intention to fire. Lawson *v.* State, 30 *Ala.* 14; Woodruff *v.* Woodruff, 22 *Ga.* 237.

Where the defendant presented a gun, within shooting distance, against the prosecutor, who was then armed with a knife, and about to attack the defendant, but there was no attempt to use the gun, nor any intention to use it unless first assailed with the knife, this was held not an assault. State *v.* Blackwell, 9 *Ala.* 79.

If a person holding a cocked pistol by

his side say to his antagonist, without any attempt to use the pistol, "I am now ready for you," his conduct does not amount to an assault. Warren *v.* State, 33 *Tex.* 517.

Where an ambassador exhibited a painting in the window of his house, which gave offence to the crowd outside, and defendant, among the crowd, fired a pistol at the painting at the very time when the ambassador and his servants were in the window to remove it, but did not intend to hurt any of them, and in fact, did not, it was held that, there being no attempt to injure any person, there could be no conviction for an assault. United States *v.* Hand, 2 *Wash. C. Ct.* 435.

To constitute an assault with a gun or pistol, it is necessary that the weapon should be presented at the party assaulted, within the distance at which it may do execution. Shaw *v.* State, 18 *Ala.* 547; Tarver *v.* State, 43 *Ala.* 354.

An assault implies force upon one side, and repulsion, or, at least, want of assent, upon the other, and must be committed against the will of the other party; for an assault upon a consenting party would be a legal absurdity. Duncan *v.* Commonwealth, 6 *Dana*, 295; Smith *v.* State, 12 *Ohio St.* 466.

Where a medical man to whom a girl fourteen years of age was sent for professional advice had connection with her, under the pretence that he was thereby treating her medically for her complaint, she making no resistance, solely from the *bona fide* belief that such was the case, it was held that he was properly convicted of an assault. Reg. *v.* Case, 1 *Den. Cr. Cas.* 580, 4 *Cox Cr. Cas.* 220, *Templ. & M. Cr. Cas.* 218. .

So, if a medical practitioner unnecessarily strips a female patient naked, under the pretence that he cannot otherwise judge of her illness, it is an assault, if he assisted to take off her clothes. Rex *v.* Rosinski, 1 *Moody*, 19, 1 *Lewin*, 11.

Where one seized an axe, holding it behind him, and saying, "If you interfere, I'll cut you down," it was held that this was not an unlawful attempt coupled with a present ability to injure. Cutter *v.* State, 59 *Ind.* 300.

One deliberately cocking and pointing a loaded pistol at a person, within shooting distance, is guilty of an assault. State *v.* Taylor, 20 *Kan.* 643.

To point an unloaded pistol at another, within shooting distance, accompanied by an order to kneel down, which is obeyed through fear, is not a criminal assault within Pasch. Dig. 2144. McKay *v.* State, 44 *Tex.* 43.

Putting cantharides into coffee, whereby a person who drank the coffee was made ill, was held an assault, the intent being for wanton sport. Regina *v.* Button, 8 *Carr. & P.* 660.

Putting cantharides into rum, whereby a person who drank it was made ill, was held not an assault, the intent not stated. Regina *v.* Hanson, 2 *Carr. & K.* 913.

Putting Spanish flies into ale, whereby the persons who drank it were made ill, was held not an assault, but *dictum* that if death had ensued it would have been manslaughter, the intent being wanton sport. Queen *v.* Walkden, 1 *Cox Cr. Cas.* 282.

Compelling a servant to take a dose of opium, with intent to disable her from resisting a robbery of her master's house, seems to have been held not a common assault, in Reg. *v.* Dilworth, 2 *Moo. & R.* 531.

Administering cantharides to a woman with intent to excite her passions and dispose her to sexual intercourse, whereby, however, she was killed, was held not murder, in Bechtelheimer *v.* State, 54 *Ind.* 128.

ASSAY. In modern usage this word generally signifies the peculiar modes of trying the purity of the precious metals.

Assayer. Any person or corporation whose business it is to separate gold and silver from other metals, or mineral substances, or to ascertain the quantity of gold or silver in any alloy or combination with other metals. Act of congress of July 13, 1866, § 9, 14 *Stat. at L.* 121.

Assayer of the king. An officer of the mint, appointed by Stat. 2 Hen. VI. ch. 12, to be present at the taking in of the bullion, as a party indifferent between the master of the mint and the merchant, to set the true value of the bullion according to the law. (*Termes de la Ley.*) *Mozley & W.*

Assay office. The apartment, establishment, or building and organization of skilled persons, where the processes of assaying gold and silver, required by government, incidental to maintaining the coinage, are conducted.

ASSENT. Approval; consent; express disclaimer of all objections; willingness declared.

Assent is sometimes a word of contract, as when used in the constitution of the United States when it received the sanction of the people and thus became a compact between the parties to it and the federal government. Canal Co. *v.* R. R. Co., 4 *Gill & J.* 1.

Assent, as used in Miss. Const. art. 12, § 14, relative to elections, means agreeing to or consenting to, and this can be shown only by affirmative action, — by actually voting. Hawkins *v.* Carroll Co., 50 *Miss.* 735.

By signing as guarantor, the wife's promissory note, expressed on its face to be secured by a mortgage, a husband "assents in writing," within Mass. Gen. Stat. ch. 106, § 3. Cormerais *v.* Wesselhoeft, 114 *Mass.* 540.

ASSESS. To determine, by rules of law, a sum of money to be paid; to rate the proportional contribution due from another person to a fund; to fix the amount payable by a person, or each of several persons, in satisfaction of an

established demand. Assessment: the act or proceeding of determining a sum to be paid; also, the demand or right in action to receive the sum, or the money due, after the amount has been ascertained, and before it has been paid. Assessors: officers charged with the duty of making assessments.

Thus, in the affairs of ordinary business corporations, assessment is the act of the corporate authorities in splitting the demand against a subscriber, upon his engagement to pay for stock, into several instalments, and collecting them successively; and these instalments, which are generally known in the English cases as calls, are, in American usage, termed assessments. In the law of municipal corporations, assessment usually signifies determining the sum which owners of property affected by a local improvement must pay, or shall receive, in view of the benefit or injury which it causes to their lands. Assessment of damages is the determination of the sum which a defendant or a corporation proposing to take lands for a public use must pay in satisfaction of the demand proved or the value taken. Assessment of taxes is the apportionment of the entire sum to be raised by a tax, among the different tax-payers, establishing the share due from each.

Assessment is the adjustment of the shares of a contribution by several towards a common beneficial object, according to the benefit received. The term is used to distinguish some kinds of local taxation, whereby a peculiar benefit arises to the parties, from general taxation. Taxes are impositions for purposes of general revenue; assessments are special and local impositions upon property in the immediate vicinity of an improvement for the public welfare, which are necessary to pay for the improvement, and laid with reference to the special benefit which such property derives from the expenditure. Palmer *v.* Stumph, 29 *Ind.* 329.

Assessment, as used in juxtaposition with taxation in a state constitution, includes all the steps necessary to be taken in the legitimate exercise of the power to tax. Hurford *v.* City of Omaha, 4 *Neb.* 336.

Assessments means the ordinary charges that a municipal corporation imposes from year to year. Boers *v.* Barrett, 2 *Cin.* 67.

As distinguished from other kinds of taxation, assessments are those special and local impositions upon property in the immediate vicinity of municipal improvements which are necessary to pay for the improvement, and are laid with reference to the special benefit which the property is supposed to have derived therefrom. Hale *v.* Kenosha, 29 *Wis.* 599.

An assessment is a special and local imposition upon property in the immediate vicinity of a street improvement, imposed in order to pay for the improvement, and with reference to the special benefit which the property derives from the expenditure. Hill *v.* Higdon, 5 *Ohio St.* 243.

Assessments and taxes are not synonymous. Thus, a charter of a benevolent institution, which declares its property "not subject to taxes or assessments," exempts the same from assessments for benefits as well as from taxes for general revenue for public use. State *v.* Mayor, &c. of Newark, 36 *N. J. L.* 478.

Assessment and tax are not synonymous. An assessment is doubtless a tax; but the term implies something more: it implies a tax of a particular kind, predicated upon the principle of equivalents, or benefits, which are peculiar to the persons or property charged therewith, and which are said to be assessed or appraised, according to the measure or proportion of such equivalents; whereas, a simple tax is imposed for the purpose of supporting the government generally, without reference to any special advantage which may be supposed to accrue to the persons taxed. Taxes must be levied, without discrimination, equally upon all the subjects of property; whilst assessments are only levied upon lands, or some other specific property, the subject of the supposed benefits; to repay which the assessment is levied. Rideneour *v.* Saffin, 1 *Handy*, 464.

The meaning of the words tax and assessment is the same, whether applied to the opening or to the paving of a street. In either case they are regarded as synonymous. Mayor, &c. of Baltimore *v.* Green Mount Cemetery, 7 *Md.* 517.

When used of business corporations, assessment means a rating by the board of directors, by instalments, of which notice is to be given. Spangler *v.* Indiana, &c. R. R. Co., 21 *Ill.* 276.

Assessor. A person learned in some particular science or industry, who sits beside the judge or other officer of a court, to assist him with his advice in the trial of a case requiring special knowledge. *Brown.*

This term is frequently applied to persons who assist a judge or magistrate with their special knowledge of the subject which he has to decide; thus we speak of legal assessors, nautical assessors, &c. *Mozley & W.*

ASSETS. Originally, enough property for the payment of debts of a decedent; when an executor or administrator received enough property with the estate to defray the debts, he was said

to have assets (*assez*, sufficient), which rendered him liable for their payment. In modern usage, the term is equivalent to property available for the payment of debts, in whole or in part, of a person, estate, or corporation; but presents the idea not of property pure and simple, or available for enjoyment, but property in trust or custody for the payment of demands. See *Burrill*, for the etymology and change of meaning of the word.

Assets is equivalent in its common acceptation to the word property. Where, by an agreement of dissolution of a copartnership, all the assets of the firm, except the machinery, were assigned to one of the parties, it was held that all the property of the firm, except the machinery, passed thereby. Lowber *v.* Le Roy, 2 *Sandf.* 202.

In an accurate and legal sense, all the personal property of the deceased, which is of a salable nature, and may be converted into ready money, is deemed assets. But the word is not confined to such property; for all other property of the deceased which is chargeable with his debts or legacies, and is applicable to that purpose, is, in a large sense, assets. 1 *Story Eq. Jur.* § 531.

Assets are *real* or *personal:* where a man hath lands in fee-simple, and dies seised thereof, the lands which come to his heirs are assets real; and where he dies possessed of any personal estate, the goods which come to the executors are assets personal.

Assets are also divided into assets per descent and assets *inter maines*. Assets by descent is where a person is bound in an obligation, and dies seised of lands which descend to the heir, the land shall be assets, and the heir shall be charged as far as the land to him descended shall extend. Assets *inter maines* (in the hands) is when a man indebted makes executors, and leaves them sufficient to pay his debts and legacies; or where some commodity or profit ariseth to executors in right of the testator. (*Termes de la Ley*, 56, 77.) *Jacob.*

Assets of a deceased person are divided into *real assets*, consisting of what is called real estate, and *personal assets*, consisting of what is called personal estate, which are administered according to different rules.

Assets of a deceased person are also divided into *legal* and *equitable* assets. Legal assets are such as a creditor of the deceased may make available in an action at law for the payment of his debt. They include all personal assets, being such as devolve upon the executor *virtute officii;* and such real assets as the testator has not charged with, or made subject to, the payment of his debts. Equitable assets are such as can be made available to a creditor in a court of equity only. They include such real assets as the testator has left expressly for the payment of his debts. *Mozley & W.*

ASSIGN. 1. To transfer to another. It is the appropriate word for a transfer of personal property, and particularly for a transfer of rights in action; or where a transfer of mixed property is made for some qualified purpose, as for benefit of creditors; and corresponds to grant or convey, more usually used as to lands, and give or sell, of chattels. Assignable: that which the law allows the owner to transfer to another. Assignment: the act of transferring title to property; also the written instrument by which property, particularly rights in action or mixed property, is transferred. Assignor: one who assigns. Assignee: one to whom something is assigned. This word is especially used of one to whom, under an insolvent or bankrupt law, the whole estate of a debtor is transferred to be administered among his creditors. 34 Md. 447.

Assigns (*plu.*), though in original meaning equivalent to assignees, is differently employed: it is a technical word in a conveyance, to signify the persons to whom the grantee may potentially convey in future; thus, in general terms, if a conveyance is made to A, it vests the property in him only, and the estate terminates with his life; if to A and his heirs, the estate descends, but A has no power of alienation; if to A, his heirs and assigns, A may convey or devise at pleasure, and, in default of his deed or will, the estate descends. Thus the latter phrase is the technical one to pass the entire fee.

Assign is tantamount to grant, and when used in a deed is effectual to pass a freehold. Hutchins *v.* Parleton, 19 *N. H.* 487.

A promise to pay a creditor out of the fruits of a depending action, and a promise to assign the action to him, are very different things. In the one case, credit is given to the party making the promise; in the other, a specific security is looked to. Gill *v.* Clagett, 4 *Md. Ch.* 153.

Assignable. In New York, before the code of procedure, assignable had two significations: that a particular thing was the subject of assignment; and that it was assignable so as to vest in the assignee a right of action. Thacker *v.* Henderson, 63 *Barb.* 271.

Assigned. The allegation in a complaint to recover proceeds of a note col-

lected by defendant upon behalf of plaintiff, that the plaintiff "duly assigned" the note to the defendant for the purpose of collection, imports that he delivered it to defendant, actually or constructively, and that it was accepted by defendant. The word assigned implies all matters essential to make an operative transfer. Hoag *v.* Mendenhall, 19 *Minn.* 335.

The word assigned, in the Iowa code, although used alone, means assigned by writing. Mere delivery of an account is not such an assignment as will authorize the assignee to sue in his own name, under the code; but written evidence of the assignment is necessary. Andrews *v.* Brown, 1 *Iowa*, 154; Williams *v.* Soutter, 7 *Id.* 435.

A clause in a policy of insurance, that the interest of the insured therein shall not be assigned without consent, does not apply to a transfer of his interest by a partner to his copartner. Wilson *v.* Genesee Mutual Fire Ins. Co., 16 *Barb.* 511; Hoffman *v.* Ætna, &c. Ins. Co., 1 *Robt.* 501.

Assignee. There are three classes of persons in whom a patentee of an invention can vest an interest of some kind in the patent; they are an assignee, a grantee of an exclusive sectional right, and a licensee. An assignee is one who has transferred to him, in writing, the whole interest of the original patent, or an undivided part of such whole interest in every portion of the United States; and no one, unless he has such an interest transferred to him, is an assignee. Potter *v.* Holland, 4 *Blatch.* 206, 1 *Fish.* 327.

Executors and administrators are not assignees, within the meaning of that term, in a statute requiring that notice of a sale in foreclosure shall state the names of the mortgagor and mortgagee and of the assignee. Bridenbecker *v.* Prescott, 3 *Hun*, 419.

Although the word assignee frequently designates and includes executors and administrators, the assignee of an assignee *in perpetuum*, the heir of an assignee, the assignee of an heir, the assignee of an assignee's executor, and a devisee, yet in a statute where the words personal representative are also used in the same connection, the term assignee cannot have such enlarged sense. Page *v.* Johnston, 23 *Wis.* 295.

Assigns or assignees are those who are assigned, deputed, or appointed by the act of the party, or the operation of law, to do any act, or enjoy any benefit, on their own accounts and risks; an assignee being one that possesses a thing in his own right, but a deputy, he that acts in the right of another. (*Perkins.*) Assignee by deed is when a lessee of a term, &c. sells and assigns the same to another, that other is his assignee by deed; assignee in law is he whom the law so makes, without any appointment of the person; as an executor is assignee in law to the testator. (*Dyer*, 6.) But if there be assignee in deed, assignee in law is not allowed. He is called assignee who hath the whole estate of the assignor. *Jacob.*

Assignment signifies a conveyance of the interest a man has in an estate, or chose in action; and includes transfers of negotiable paper, by indorsement, delivery, &c. Bump *v.* Van Orsdale, 11 *Barb.* 634. But see Potter *v.* Bushnell, 10 *How. Pr.* 94; Hicks *v.* Wirth, 4 *E. D. Smith*, 78, 10 *How. Pr.* 555.

Assignment does not include testamentary transfers. The idea of an assignment is essentially that of a transfer by one existing party to another existing party, of some species of property or valuable interest (1 *Toml. Law Dic.* "Assigns"), except in the case of an executor. Hight *v.* Sackett, 34 *N. Y.* 447.

The word assignment has a technical meaning, and must be construed accordingly. An absolute transfer or sale by an insolvent debtor in payment of a pre-existing debt is not an assignment within the meaning of Iowa Code, § 977. Cowles *v.* Ricketts, 1 *Iowa*, 582.

The term assignment, when used with reference to bonds and notes, implies more than indorsement: it means indorsement by one party, with intent to transfer, and an acceptance of such transfer by the other party. Bank of Marietta *v.* Pindall, 2 *Rand.* 465.

Assigns, in a devise, &c., to A, his heirs and assigns, implies the right to sell, give away, or dispose in any other manner of the estate given to him. It empowers the devisee to sell or give, to deed, will, or transfer, the property as he may think proper. McRee *v.* Means, 34 *Ala.* 349.

The phrase, the survivor or his assigns, necessarily imports the power of transfer by the survivor, and, when unrestricted by any other terms employed in an instrument, it confers the power of assigning by deed *inter vivos*, or by will. Peck *v.* Ingraham, 28 *Miss.* 246.

Assigns is not requisite, in the limitation of a fee, to give the estate the quality of alienability. Grant *v.* Carpenter, 8 *R. I.* 36.

That the word assigns does not indicate a fee, see Chrystie *v.* Phyfe, 19 *N. Y.* 344.

Assigns, as used in policies of fire insurance, does not apply to an absolute purchaser of the property, becoming such without the consent of the underwriters, nor to one acquiring merely a lien or other interest by way of mortgage. Holbrook *v.* American Ins. Co., 1 *Curt. C. Ct.* 193; 1 *Am. Law Reg.* 18.

2. Section 11 of the judiciary act of congress of 1789 forbade any district or circuit court to take jurisdiction of any chose in action in favor of an assignee, unless the suit might have been prosecuted in such court if no assignment had been made. Some decisions are found upon what is meant by assignee and

assignment in this section, which are equally instructive under the provision as modified by act of March 3, 1875, § 1.

An indorsee is not regarded as claiming through an assignment: the indorsement is a new contract entered into by the indorser and indorsee; and the indorsee, if a citizen of a different state from the indorser, may sue him in the circuit court, whether the maker could be sued there or not. Young *v.* Byran, 6 *Wheat.* 146; Mollan *v.* Torrance, 9 *Id.* 537; Evans *v.* Gee, 11 *Pet.* 80; Brown *v.* Noyes, 2 *Woodb. & M.* 75, 82; Dennison *v.* Larned, 6 *McLean*, 496; Campbell *v.* Jordan, *Hempst.* 534.

The holder of a promissory note assigned to him by delivery only, and not by indorsement in writing, who sues in the character of bearer of the note, is not an assignee within the meaning of section 11 of the judiciary act of 1789. Smith *v.* Clapp, 15 *Pet.* 125.

So, also, the restrictive provision does not apply to a note made payable "to bearer;" or to a fictitious payee; or to the maker's own order, with his indorsement. In a note drawn payable to an individual "or bearer," the promise to pay the bearer is as strong as that to pay the payee named. It is, therefore, unnecessary for a holder to prove any assignment or transfer from the payee. And his right to sue in the federal courts does not depend on that of the payee. Bradford *v.* Jenks, 2 *McLean*, 130.

3. The laws which have in recent years been passed, in many of the states, permitting within limits the examination of parties to civil suits, as witnesses, have restricted the privilege where the testimony of one party concerned in a conversation or transaction might be used not against the other participant, but against his assignee, personally unacquainted with what was said or done, and unable to stand on equal terms with his adversary in testifying. The general intention has been that the surviving party to a transaction in issue shall not have the unfair advantage of giving his version of the matter, when the other and adverse party cannot. Hence have arisen provisions that an assignor shall not be admitted as a witness against an assignee, &c., unless the other party to the right in action is living and his testimony can be procured (*N. Y. Code of Pro.* § 399, as amd. 1851); that a party or person for whose immediate benefit an action is prosecuted or defended shall not be examined, when the opposite party is an assignee, &c., and that when an assignor is examined as a witness on behalf of his assignee, &c., the adverse party shall be received as a witness; and that an assignor shall not be received as a witness, in favor of his assignee, and against a defendant who is assignee, &c., unless the other party to the transaction is living, and his testimony can be procured. (*N. Y. Code of Pro.* § 399, as amd. 1857.) Such enactments have given rise to several decisions as to what is an assignor or an assignee within their meaning.

The holder of a promissory note drawn payable to bearer, who transfers it by delivery, is merely an assignor within the meaning of section 399 of the New York code, above mentioned. Bump *v.* Van Orsdale, 11 *Barb.* 634; Clement *v.* Adams, 12 *How. Pr.* 163.

One who transfers a note which is not negotiable is an assignor. Jagoe *v.* Alleyn, 16 *Barb.* 580; Talloss *v.* Rapalje, 3 *Abb. Pr.* 93.

The indorser of a negotiable promissory note is not an assignor. Potter *v.* Potter, 18 *N. Y.* 52; Anderson *v.* Busteed, 5 *Duer*, 485; Gardner *v.* Gordon, 3 *Bosw.* 369; Hicks *v.* Wirth, 4 *E. D. Smith*, 78, 10 *How. Pr.* 555.

The payee of a promissory note, drawn payable to bearer, who transfers it, is not an assignor. Calkins *v.* Packer, 21 *Barb.* 275; Watson *v.* Bailey, 2 *Duer*, 509.

The holder of a note, indorsed in blank by the payee, by transferring it without indorsement, after maturity, does not become an assignor of a thing in action. Gardner *v.* Gordon, 3 *Bosw.* 369; and see Potter *v.* Bushnell, 10 *How. Pr.* 94.

When the right of action upon a note depends upon a new promise relied upon to take the note out of a discharge in bankruptcy, or the statute of limitations, and the plaintiff holds the note by indorsement from the party to whom the new promise was made, this is a case of an assignment of a chose in action; differing from the ordinary case of indorsement before maturity. Clark *v.* Atkinson, 2 *E. D. Smith*, 112.

A grantor of lands is not an assignor. Beach *v.* Cooke, 28 *N. Y.* 508, 39 *Barb.* 360.

The vendor of a personal chattel or of a thing in action is not an assignor. Crosby *v.* Nichols, 3 *Bosw.* 450.

One who has sold a chattel, in the possession of a third person, is not deemed an assignor of a thing in action, in a suit for conversion, McGinn *v.* Worden, 3 *E. D. Smith*, 355; and his vendee is not deemed an assignee, Penny *v.* Black, 6 *Bosw.* 50.

A legatee is not an assignee of the testator, within the meaning of section 399. Wildey *v.* Whitney, 25 *How. Pr.* 75.

4. To select; point out; identify; appoint. Thus, specific errors are as-

signed, on a writ of error; particular officers in the army are assigned to various companies or regiments; members of a deliberative assembly are assigned to act as tellers in counting votes.

Assignment of dower. Ascertaining a widow's right of dower by an actual setting off one-third of her deceased husband's lands, to be for her use during her life.

Assignment of errors. The setting forth in form, as required by the practice of most appellate courts, of the specific grounds or errors on which plaintiff in error relies for obtaining a reversal of the judgment under review. The paper or memorandum containing the statement is also called the assignment of errors. In some jurisdictions, after taking an appeal, a distinct assignment of errors is requisite; in others, the errors relied on are stated in the notice of appeal; or a general notice allows the appellant to urge all that appears by the record or transcript.

Assignment with preferences. A short expression for an assignment, by an embarrassed or insolvent debtor, of his property or the bulk of it, to a trustee, for the purpose of selling it and distributing proceeds among creditors, which does not contemplate that all the creditors shall be paid proportionally, but directs payment of some demands in full, in preference to others. Such a conveyance is otherwise called a preferential assignment.

The extent to which these preferential assignments are allowed varies. It is well understood that they are contrary to the policy and purposes of a bankrupt law; and that, while a national bankrupt law is in operation, the body of law in any state allowing and regulating assignments with preferences is practically suspended, except indeed that transactions under it may be validated in a particular case by a failure of creditors to appeal to the bankrupt law seasonably. Independent of the bankrupt law, the laws of the states have varied. In some, as in New Jersey, preferential assignments have been altogether forbidden; while a debtor can retain the administration of his affairs in person, he may pay one creditor instead of another, but his general assignment must provide for a proportional distribution. In other states, as in New York, preferences are allowed, but the privilege is regulated in the endeavor to protect creditors against every species of conveyance, or charge on the assets of an insolvent, in which can be perceived a tendency to defeat or delay the conversion of assets into cash, and an immediate application of the proceeds to the debts or some of them. Along with any recognition of a debtor's right to give preferences goes the recognition of the right of creditors to have an immediate sale of the assets, and distribution of the money as far as it will go. See *Abb. U. S. Courts Prac.* 2d ed. 378, note.

Assignatus utitur jure auctoris. An assignee acquires the right of the assignor. The right of interest transferred by assignment is no greater in quantity and is of no higher quality than that of the assignor. No man can convey to another any greater right or interest than that which he himself possesses or is entitled to; and the assignee of property takes it subject to all the obligations or liabilities, and clothed with all the rights, which attached to it in the hands of the assignor. But this maxim is to be understood as subject to many important exceptions and restrictions; such as the rule of the law-merchant in regard to negotiable instruments, under which such an instrument, if transferred in good faith for value before its maturity, becomes valid in the hands of the holder, notwithstanding fraud which would have rendered it unavailable in the hands of the previous holder. So, under the rule in regard to purchases in market overt, one wrongfully in possession of a chattel could convey a good title to a purchaser in good faith. And by the English factor's act (5 & 6 Vict. ch. 39), and the similar statute of New York (N. Y. Laws, 1830, ch. 179), an exception to the general rule is made in the case of an agent or factor who, as such, is intrusted with the possession of goods for sale.

The signification of the maxim is also modified by the settled rules of law as to the extent to which rights or interests in property are capable of being assigned.

Thus, although a chose in action may be assigned, the assignee has not, in general, the right to sue thereon in his own name, unless by virtue of a statute giving such right, and does not therefore, by the assignment merely, acquire all the rights of his assignor. And many rights and interests, although things of value, and such as may be subjects of valid contracts, — *e. g.* an interest in a copartnership, — are not assignable at law in such manner as to give to the assignee all the rights and powers of his assignor in regard to the subject of the transfer.

ASSISA. An assise.

Assisa has various significations in the older law of Scotland; thus, it signifies properly a sittings; also a constitution, ordinance, or law; also a measure of quantity; and a rent due the king; and finally a jury. *Bell.*

Assisa venalium. Assise of things salable. A species of official inspection of commodities; chiefly of provisions.

ASSISE. The primary meaning of this word seems to have been a reducing of any thing to certainty, in number, quantity, quality, weight, measure, time, &c. Hence it was applied to an ordinance, statute, or regulation, considered as something fixed and established; a tax or tribute of a definite amount; and a fine, when reduced to a certainty. In another use it meant a session or sitting; an assembly for the purpose of ascertaining something judicially. Further uses were, to signify the place and time where and when such a session was held; the writ upon which it was convened; the proceedings of such a session taken as a whole; and the verdict or finding rendered.

Assise is general, as when the justices go their several circuits with commission to take all assises; or special, where a special commission is granted to certain persons (formerly oftentimes done) for taking an assise upon one or two disseisins only. Concerning the general assise, all the counties of England are divided into six circuits; and two judges are assigned by the king's commission to every circuit, who hold their assises twice a year in every county (except Middlesex, where the king's courts of record do sit, and where his courts for his counties palatine are held); and these judges have five several commissions:

1. Of oyer and terminer, directed to them and many other gentlemen of the county, by which they are empowered to try treasons, felonies, &c.; and this is the largest commission they have.

2. Of gaol delivery, directed to the judges and the clerk of assise associate, which gives them power to try every prisoner in the gaol, committed for any offence whatsoever, but none but prisoners in the gaol; so that one way or other they rid the gaol of all the prisoners in it.

3. Of assise, directed to themselves only, and the clerk of assise, to take assises, and do right upon writs of assise brought before them by such as are wrongfully thrust out of their lands and possessions; which writs were heretofore frequent, but now men's possessions are sooner recovered by ejectments, &c.

4. Of *nisi prius*, directed to the judges and clerk of assise, by which civil causes, grown to issue in the courts above, are tried in the vacation by a jury of twelve men of the county where the cause of action arises; and on return of the verdict of the jury to the court above, the judges there give judgment.

5. A commission of the peace, in every county of the circuits; all justices of the peace of the county are bound to be present at the assises; and sheriffs are also to give their attendance on the judges, or they shall be fined. *Jacob.*

Assise is derived from *assideo*, to sit together; and is usually taken for the court, place, or time where the judges of the three superior courts at Westminster try all questions of fact issuing out of those courts that are ready for trial by jury. These assises are, indeed, neither more nor less than the sittings of the judges at the various places where they visit on their circuits, and which they usually make four times in every year in the respective vacations after term. *Brown.*

Assise sometimes signifies the sittings of a court, sometimes its ordinances, and sometimes a jury. *Bell.*

Assise of Clarendon. A notable statute giving those who were liable to exile for offences, time to arrange with friends for their support abroad.

Assise of darrein presentment. Assise of last presentation. An ecclesiastical inquiry into the right to hold a benefice.

Assise of the forest. An early statute prescribing regulations to be observed in the king's forest. *Termes de la Ley.*

Assise of fresh force. An inquiry which one disseised of lands might institute (within forty days) to contest the right or claim under which he had been dispossessed.

Assise of mort d'ancestor. An as-

sise which lay in behalf of an heir when his ancestor died seised of lands, and a stranger had caused an abatement.

Assise of novel disseisin. The name of a writ of assise which lay where the claimant had been lately disseised.

Assise of nuisance. An inquiry to procure abatement of a nuisance injurious to complainant's freehold.

Assise d'utrum. An inquiry on behalf of an incumbent to recover lands of which his predecessors had allowed the benefice to be despoiled.

Assise de *utrum* lies for a parson against a layman, or for a layman against a parson, for lands or tenements; where it is doubtful if they are lay fee or fee alms. *Termes de la Ley.*

Assisers. The persons who formed that kind of court which in Scotland was called an assise, for the purpose of inquiring into and judging divers civil causes, such as perambulations, cognitions, molestations, purprestures, and other matters; like jurors in England. *Holthouse.*

ASSISUS. Rented or farmed out for a specified assise, that is, a payment of a certain assessed rent in money or provisions. *Terra assisa* was commonly opposed to *terra dominica;* this last being land retained and occupied by the lord as his own; while the former was such as he let out to tenants below him. *Jacob.*

ASSISTANCE. The name of a writ which issues from the court of chancery, or from a court in the exercise of its equitable jurisdiction, in aid of the execution of a judgment at law. If the sheriff cannot put the party in possession to whom the lands have been adjudged, a writ of assistance may be granted to aid him.

A writ of assistance, says Mr. Justice Field, in Terrell *v.* Allison, 21 *Wall.* 289, is undoubtedly an appropriate process to issue from a court of equity to place a purchaser of mortgaged premises under its decree in possession, after he has received the commissioner's or master's deed, as against parties who are bound by the decree, and who refuse to surrender possession pursuant to its direction or other order of the court. The power to issue the writ results from the principle that the jurisdiction of the court to enforce its decree is co-extensive with its jurisdiction to determine the rights of the parties, and to subject to sale the property mortgaged. The rule of that court is to do complete justice when that is practicable, not merely by declaring the right but by affording a remedy for its enjoyment. That court does not turn a party to another forum to enforce a right which it has established. When, therefore, it decrees the sale of property, it perfects the transaction by giving, with the deed, possession to the purchaser.

The writ can issue only against defendants in the foreclosure suit and persons holding under them who are bound by the decree. Burton *v.* Lies, 21 *Cal.* 87.

ASSIZES. This is not presented as a different word from assise, preceding; but as the form of it most in use, in modern English books. Though plural in form, it often signifies a single court; a judge is said to hold the assizes in the same sense as he might be said to hold the circuit. Thus used, it denotes a principal criminal court for jury-trial of offenders, held from place to place throughout an English judicial circuit, by one of the superior judges, designated for the purpose. See explanations quoted from Jacob and Brown, under assise, *supra.*

The court of assize is not an inferior court within the rule prescribing requisites of a commitment for contempt; but is one of the less principal class of superior courts of record; so that its commitment for a contempt need not set out the cause of commitment with the particular circumstances, but to state the cause generally is enough. *Re* Fernandes, 6 *Hurlst. & N.* 717.

Justices under commissions of assize, oyer and terminer, and jail delivery are in some sense a court superior to that of the sessions of the peace. But they are not a court of error or a superior court, in such a sense, as respects the sessions of the peace, that a session of the assizes in a place supersedes the jurisdiction of the sessions of the peace, in the place, for the time being. Smith *v.* Queen, 13 *Ad. & E.* N. S. 738.

ASSOCIATE, *v.* To join or unite in company. Associate, *n.*: one of several persons who are united in an organization or enterprise.

Associate judge, or **justice.** In many of the United States, various courts of appellate jurisdiction are composed of a chief justice and several associate judges or justices. The term associate, in this connection, does not import any inferiority in powers or jurisdiction; but appears rather to be

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selected to avoid any such implication, and to signify equals in the substantial authority of the position. In the decision of causes, the opinion of an associate justice and that of a chief justice are not distinguished. In this respect the organization differs from that which is seen in some courts, where laymen or judges of inferior authority sit with a chief judge, and, with him, compose the court, in a sense, and consult and advise with him, but without an equal vote in the decision.

Thus, the supreme court of the United States is composed of a chief justice of the United States, and eight associate justices; any six of whom constitute a quorum. *Rev. Stat.* § 673. The functions of the chief justice are those connected with presiding at the sessions of the court and in its deliberations; and giving general direction to the conduct of business; assigning cases to the various judges for preparing opinions, and the like.

In England, associate has been applied to a person in the common-law courts, appointed by the respective chiefs of those courts, and charged with the custody and formal preparation of records.

Associate is an officer in each of the superior courts of common law, whose duty is to keep the records and documents of the court to which he is attached, to attend its *nisi prius* sittings, and in each case to enter the verdict and to make up the *postea* or formal entry of the verdict, and deliver the record to the party entitled thereto. (*Stat.* 15 & 16 *Vict.* ch. 73, §§ 1–6; *Lush's Pr.* 569. See also 17 & 18 *Vict.* ch. 125, § 2.)

Also a person associated with the judges and clerk of assise in the commission of general jail delivery. *Mozley & W.*

Associates, in a charter incorporating persons named, "and their associates," may mean either persons already acting with those named, or persons expected to come in and unite in the enterprise in future. Parol evidence may be received to show who are meant in the particular case. Lechmere Bank *v.* Boynton, 11 *Cush.* 369.

ASSOCIATION. 1. This term is used throughout the United States to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise. It also enters into the names bestowed by the legislatures upon many corporations. In this connection it is used without any very uniform discrimination as to its precise meaning; but seems to be, on the whole, preferred for bodies which are not vested with full and perfect corporate rights and powers; also for organizations formed to promote the improvement, welfare, or advantage of the public, as distinguished from the improvement of members, for which "society" is preferred, or making profits, for which "company" is the better name.

2. Association is also the name of an English writ or patent sent by the king, either at his own motion or at the suit of a party, plaintiff, to the justices appointed to take assises, or of oyer and terminer, &c., to have others associated with them. *Jacob.*

Commissions of assise are constantly accompanied by writs of association in pursuance of Stat. 27 Edw. I. ch. 4, and 12 Edw. II. ch. 3, whereby certain persons (usually the clerk of assise and his subordinate officers) are directed to associate themselves with the justices and serjeants, and they are required to admit these persons into their society, in order to take the assises, &c., that a sufficient number of commissioners may never be wanting. 3 *Bl. Com.* 59.

Association is a patent sent by the king, either at his own motion or at the suit of the plaintiff, to the justices of assise, to have other persons associated with them to take the assise. And upon this patent of association, the king will send his writ to the justices of assises, by it commanding them to admit them that are so sent. How it may be used upon death of a justice. *Termes de la Ley.*

ASSUMPSIT. One of the forms of action in use in jurisdictions maintaining procedure according to the course of the common law. It is appropriate for the recovery of damages for non-performance of an oral or simple contract, and derives its name from the Latin *assumpsit*, he has undertaken, — the basis of the action being the defendant's undertaking or agreement to do something which he has failed to perform. It thus differs from trespass and trover, which are founded on a tort, not upon a contract; from covenant and debt, which are appropriate where the ground of recovery is a sealed instrument, or special obligation to pay a fixed sum; and from replevin, which seeks the recovery of specific property, if attainable, rather than of damages.

Assumpsit is also sometimes used to

signify the contract or engagement which is the foundation of an action of assumpsit; as in saying that there was not sufficient proof of an assumpsit to warrant a recovery.

ASSURE. To make certain or safe; to undertake indemnity, or warrant title.

1. Assurance was formerly much used in the sense of insurance, which has in late years replaced it, though there is some tendency towards the employment of *as*surance for life risks, and *in*surance for risks on property. Assurer and assured are, respectively, the persons (or corporations) who undertake and the persons who receive contracts of insurance.

2. Assurance was, in the old law of conveyancing, employed as a general term for all instruments disposing of property; any muniments of title, or documents operating to perfect the owner's right. Any instrument to convey or confirm the title to an estate was embraced. It is now but little used, except in the technical covenant for further assurance inserted in deeds, by which the grantor in effect engages that if the title he conveys shall ever prove defective, or require any confirmation, he will make or procure from others further assurances; that is, any confirmatory grant, deed, release, &c., which may be found needful.

ASSYTHEMENT. The Scotch law has long allowed what the common law in modern times has not afforded, — an action by the relatives or dependents of a person wrongfully killed, to recover damages from the slayer. This action is termed assythement. Its nature and objects correspond somewhat with the statutory action authorized in many of the states of the Union, to enable an administrator, widow, &c., of a person killed by the wrongful act or neglect of another, to recover damages for the loss sustained by his family through his death.

AT, is the leading word in several phrases which have a legal signification, or have been the subject of adjudication.

At is frequently synonymous with "in" or "within." Mohawk Bridge Co. *v.* Utica & Schenectady R. R. Co., 6 *Paige*, 554, 562.

At the parish of C, in an indictment, held to be equivalent to in the parish, &c. State *v.* Nolan, 8 *Rob.* (*La.*) 513.

As used in a statute making it unlawful to play at cards, dice, &c., at any tavern, storehouse for retailing liquors, &c., means in or near to such place. Ray *v.* State, 50 *Ala.* 172.

At the termini of a railroad, means near the termini. State *v.* Receiver of Taxes, 38 *N. J. L.* 299.

Under a statute authorizing a company to construct a railroad to connect with any railroad constructed or to be constructed at any point on the northern boundary of a certain county, the corporation have power to terminate the road at any point in the boundary named, in their discretion, and are not restricted, in relation to the selection of a terminus for the road, to another railroad. Commonwealth *v.* Cross Cut R. R. Co., 53 *Pa. St.* 62.

The articles of association of a railroad company declared that it was organized to construct a railroad in the counties of Kings and Queens, to commence at Brooklyn and "terminate *at* Newtown, Queens county," and to be about twenty-five miles long. The town of Newtown borders upon the city of Brooklyn, but the village of that name (included in the town) is some miles from the boundary, and twenty-five miles from the starting-point of the road. Held, that the articles contemplated the construction of a road running into the town of Newtown, and not merely to its boundary. Mason *v.* Brooklyn & Newtown R. R. Co., 35 *Barb.* 373.

A charter requiring that a railroad should commence near or at a city bounded northerly by the centre of a river, and run thence on the north side of the river, gives authority to commence it in the city, and to carry it across the river by a bridge. Mohawk Bridge Co. *v.* Utica & Schenectady R. R. Co., 6 *Paige*, 554.

Under a charter which fixes one terminus of a railroad at or near a specified point, a large discretion is conferred upon the railroad company in locating the terminus, the exercise of which will not be impugned by the court, unless they have clearly exceeded its just limits, or acted in bad faith. Thus, under a charter for a railroad "from a point at or near the present terminus of its track in Fall River, in a southerly direction to, &c., to connect with a railroad there to be constructed," a location starting at a point 2,475 feet, by the line of the railroad, northerly from the termination of the old track, is authorized. Fall River, &c. Co. *v.* Old Colony, &c. R. R. Co., 5 *Allen*, 221.

An order for militia to parade "at or near the house of B" is not objectionable as designating two places. The two words are, in this connection, synonymous. Bartlett *v.* Jenkins, 22 *N. H.* 53.

At and from. Where a policy is "at and from a port," the construction of it, as to the time when the policy attaches, depends on circumstances. If the vessel is in a foreign port, in the course of a voyage, it attaches upon her first arrival there; if

in a domestic port, then from the date of the policy. If the vessel has been long lying in port without reference to any particular voyage, it attaches from the time preparations are begun to be made for the voyage insured. If the assured becomes owner while the vessel is lying in port, the policy does not attach until after his ownership commences. Seamans *v.* Loring, 1 *Mas.* 127.

A policy of insurance on a vessel, "at and from an island," protects her in sailing from port to port in the island, to take in a cargo. Dickey *v.* Baltimore Ins. Co., 7 *Cranch*, 327.

A policy on a ship, "at and from a port," will attach, although the ship be at the time undergoing extensive repairs in port, so as to be utterly unseaworthy, in the general sense, for a voyage. M'Lanahan *v.* Universal Ins. Co., 1 *Pet.* 184.

A vessel, cargo, and freight, being insured "at and from" a foreign port, the vessel sailed thence, was found leaky, put back, was repaired, and sailed again. Held, that the insurer was liable while the vessel was in port, after her return to port, and for the subsequent voyage. Taylor *v.* Lowell, 3 *Mass.* 331; Merchants' Ins. Co. *v.* Clapp, 11 *Pick.* 56.

The words at and from, as used in certain charters, commonly include the termini to which they refer. Chesapeake & Ohio Canal Co. *v.* Key, 3 *Cranch C. Ct.* 599, 606.

At large. A dog, loose, and going through public streets at such a distance from the person in charge of him that the latter cannot exercise control over him, is going "at large." Commonwealth *v.* Dow, 10 *Metc.* (*Mass.*) 382.

A dog at play with a son of his owner, upon the owner's premises, is not "going at large," within Gen. Stat. ch. 88, § 58, authorizing the killing dogs going at large. McAneany *v.* Jewett, 10 *Allen*, 151.

At law. According to law; by, for, or in law; particularly in distinction from that which is done in or according to equity; or in titles such as sergeant-at-law, barrister-at-law, attorney or counsellor at law. *Burrill; Bouvier.*

The expression at law, in a statute, generally includes courts of equity, as well as those of law strictly. Fleming *v.* Burgin, 2 *Ired. Eq.* 584.

At least, imports uncertainty, but that it is obvious on which side the uncertainty lies; as in the expression, "eight feet wide *at least*," where the meaning is that a certain passage shall not be less than eight feet wide in any event, and may be more. Roberts *v.* Wilcock, 8 *Watts & S.* 464.

At sea, as used in a policy on time, for one year, and if the vessel should be at sea when the year expired, then the risk to continue until her arrival in port, at a *pro rata* premium, is used in contradistinction to arrival in port. If the vessel has sailed or commenced a voyage from one port to another, she must be considered to be "at sea," within the meaning of this clause, from the commencement to the termination of that voyage; although during parts of it she may have sought shelter in a place on the way. What is a departure on a voyage, and what an arrival, must be settled by the law and usage as established in reference to cases where the termini of the voyage, and not periods of time, determine the commencement and termination of the risk. Bowen *v.* Hope Ins. Co., 20 *Pick.* 275. Compare Eyre *v.* Marine Ins. Co., 6 *Whart.* 247, 255.

A clause in a time policy, extending the insurance beyond the term named, if, at the expiration, the ship is at sea, contemplates the vessel pursuing her voyage, and on her way to some port, intermediate or final, and does not cover the whole period until her final return to her home port. Gookin *v.* New England Mut. Marine Ins. Co., 12 *Gray*, 501.

A vessel, while on a voyage insured, being seized and carried into a foreign port against the will of her master, is still at sea, within the meaning of the policy. Wood *v.* New England Ins. Co., 14 *Mass.* 31.

A vessel is at sea when she has actually sailed, and is on her voyage. Union Ins. Co. *v.* Tysen, 3 *Hill* (*N. Y.*), 118. See also 2 *Pars. Mar. Ins.* 46, 55.

A vessel is at sea (within the acts of congress of 1813 and 1819) when she is without the limits of any port or harbors on the sea-coast. The Harriet, 1 *Story*, 251, 259.

At this date. These words cannot, by themselves, be held to mean, up to this date; each phrase has a distinctive import. Moore *v.* Korty, 11 *Ind.* 341.

An act declaring that a previous act shall not be so construed as to increase the emoluments of the commissioned officers of the army "at the date of its passage," must be deemed declaratory and prospective, and to take its effect only from its date. Bassett *v.* United States, 2 *Ct. of Cl.* 448.

At the end of the year, means, after a full year has elapsed. Annan *v.* Baker, 49 *N. H.* 161.

ATTACHMENT. The act or proceeding of taking into custody of a court of justice a person or property, for the purpose of making the jurisdiction of the court in ulterior proceedings effective; also, the writ or order authorizing this to be done.

1. Attachment of the person is employed to compel the appearance of a defendant; to bring before the court one who is charged with a contempt, in order that proceedings to inquire into and punish his offence may be had; to enforce the attendance of a recusant witness; and in similar cases. A warrant

of attachment having been granted by the court, upon a proper application, and proof of the requisite facts, the sheriff makes caption of the person named, in the same manner, if necessary, as upon process for arrest; but, instead of holding him to bail, brings him corporally before the court to answer interrogatories, give testimony, or do whatever may be required.

To attach is to take or apprehend by commandment of a writ or precept. (*Lamb. Eiren.* lib. 1, cap. 16.) It differs from arrest, in that he who arresteth a man carrieth him to a person of higher power, to be forthwith disposed of; but he that attacheth keepeth the party attached, and presents him in court at the day assigned, as appears by the words of the writ. Another difference there is, that arrest is only upon the body of a man; whereas an attachment is oftentimes upon his goods. (*Kitch.* 279.) An attachment is a process from a court of record, awarded by the justices at their discretion, on a bare suggestion, or on their own knowledge; and is properly grantable in cases of contempts, against which all courts of record, but more especially those of Westminster Hall, and, above all, the court of king's bench, may proceed in a summary manner. (*Leach's Hawk. P. C.* 2, ch. 22.) *Jacob.*

2. Under statutes of many of the states, attachment of property is recognized and allowed, as a remedy whereby a plaintiff, at the commencement of his action, may obtain security upon defendant's property, for the payment of any judgment he may ultimately recover.

The regulations governing the remedy differ in the various states; but, in general, the incidents may be said to be these: The plaintiff gives security to pay defendant any damages the latter may sustain by the attachment, if the plaintiff fails in his suit; and, if special grounds for the writ are required by the statute of the state, he makes affidavit to the indebtedness which he claims, and to the existence of the necessary facts authorizing attachment; and on this an application is made to the court for a warrant or order. In virtue of this process, when granted, the sheriff levies upon lands of the defendant, seizes his chattels, or notifies persons indebted to him to hold the money due for the benefit of the plaintiff; and this levy constitutes a lien upon the property for the plaintiff's security. The plaintiff's action then proceeds to ascertain his demand, for which he recovers judgment; and, if this is not satisfied directly, the attached property, or enough of it, may be sold, and the proceeds applied. The remedies known as garnishment and as trustee process, in some of the states, are substantially the same, in their object and general nature, as one branch of attachment; viz., where it is employed to secure a right in action, due from a third person to a debtor, and render it available towards payment of plaintiff's demand.

Attachments, in this sense of the term, are (in several of the states) known as domestic, those allowed against a resident of the state, usually upon some special ground, such as fraud in contracting the debt, deemed a reason why a stringent remedy should be afforded; and foreign, or those allowed against a non-resident, in the view that seizure of property is required to compel appearance or give jurisdiction.

This proceeding of attachment of property has been derived from the customary law of foreign attachment in the city of London; our legislatures having modified the use of it, as has seemed proper, from time to time, in the various states.

A process of attachment of property was introduced at an early date in London, chiefly to operate upon debtors who could not be arrested, because not "free of the city," and not subject to its jurisdiction; and as these were called foreigners, the process in question was naturally termed foreign attachment, or attachment of foreigners' goods. It was founded upon a charter provision, granting that "all debtors which do owe debts to the citizens of London shall pay them in London, or else discharge themselves in London, that they owe none." The creditor, in order to obtain payment of his debt, entered a complaint or proceeding against the debtor in either the mayor's or sheriff's court. If the debtor failed to appear, and the creditor knew of any person holding property of his debtor, he could then allege to the court that such person owed money or held property belonging

to his debtor, and then pray process to attach the debtor; that is, to place an embargo upon his property, to compel him to appear in court and answer the complaint. In default of his appearance, the creditor could take the property, or part of it, in satisfaction of his debt. Hence the process of foreign attachment was not an original proceeding, but was merely ancillary to other proceedings; and although, in many respects, guided by the principles of the common law, yet it is not to be considered strictly a common-law proceeding, but rather in the nature of a proceeding in equity, granting an injunction against any particular person parting with the property of an absent debtor in order to compel his appearance, and, in default of his appearance, an adjudication of the property towards the liquidation of his creditor's demand. *Brandon, For. Att.* 4.

This London custom, notwithstanding its local and limited character, was doubtless known to the early settlers of this country, and its essential features have since become incorporated into the legal systems of all our states. According to Drake, the most material differences between the English and American uses of the remedy are: the necessity of notice to the defendant, either actual or constructive (the essence of the English custom being that the defendant need not have notice); the direct action of the attachment on tangible property, as well as its indirect effect upon debts, and upon property in the garnishee's hands; the necessity for the presentation of special grounds for resort to it; and the requirement of a cautionary bond, to be executed by the plaintiff and sureties, to indemnify the defendant against damage resulting from the attachment. Except in some states, where it is authorized in chancery, the remedy of attachment is a special remedy at law, belonging exclusively to a court of law, and to be resorted to and pursued in conformity with the terms of the law conferring it. *Drake, Att.* § 4.

Whether attachment may properly be deemed a proceeding *in rem*, see Megee *v.* Beirne, 39 *Pa. St.* 50; Mankin *v.* Chandler, 2 *Brock.* 125.

Attachment of privilege, is when a person, by virtue of his privilege, calls another into that court to which he himself belongs, to answer some action, as an attorney, &c. It is also a power to apprehend a person in a privileged place. (*Termes de la Ley*, 59.) The 2 Wm. IV. ch. 39 (commonly called the uniformity of process act), virtually abolished this proceeding, and the 1 & 2 Vict. ch. 110, enacts that all personal actions in any of the superior courts of common law at Westminster shall be commenced by writ of summons. *Wharton.*

ATTAINDER. The extinction of the civil rights and capacities of a person consequent upon judgment in treason or felony, whether judgment of death or outlawry. Attainder was formerly the immediate and inseparable accompaniment of the sentence of death. The effect of attainder was the forfeiture of all the estate, real and personal, of the person so sentenced; the corruption of his blood, so that nothing passed by inheritance to, from, or through him; the loss of the capacity to sue, or to be a witness in any court, or "to perform the functions of another man," the person being regarded, by anticipation of his punishment, as already dead in law. Judgment of outlawry on a capital crime was considered as the equivalent of sentence of death. Attainder differed from conviction, which takes effect upon verdict of guilty, and before judgment; whereas attainder takes place only upon judgment of death or outlawry. In England, by statute 33 & 34 Vict. ch. 23, attainders, upon convictions, with the consequent corruption of blood, forfeiture, or escheat, are abolished.

Bills of attainder, in English law, were acts of parliament pronouncing sentence of death against an accused person, generally resorted to in unusual cases and against political offenders; and the consequences of forfeiture and corruption of blood followed, as in attainder upon judicial sentence. In the United States, during the revolution, and before the adoption of the federal constitution, acts of attainder were passed by several of the states; but by the provisions of the constitution, the passage of bills of attainder, either by congress or any state, is expressly prohibited; and the effect of attainder, if

imposed as a punishment for treason, is limited in such manner as not to work corruption of blood or forfeiture, except during the life of the person attainted. Hence the doctrine of attainder has become almost obsolete in American law, the only question recently arising being what is or is not a bill of attainder within the meaning of the constitutional provisions. The confiscation act of congress of July 17, 1862, although not imposing attainder, under that name, as a punishment of treason or rebellion, provided for the confiscation of the property of certain classes of persons therein described; but, lest it should be deemed to conflict with the constitutional restriction, a joint resolution passed upon the same day directed that no punishment or proceedings under the act should be so construed as to work a forfeiture of the real estate of the offender beyond his natural life. See Bigelow *v.* Forrest, 9 *Wall.* 339.

When the constitution was adopted, bills of attainder and bills of pains and penalties were well known in the English law. Each of those terms had a clear and well-defined meaning. Bills of attainder were acts of parliament whereby sentence of death was pronounced against the accused. Courts of justice were employed only to register the edict and carry the sentence into execution. Bills of pains and penalties were acts denouncing milder punishments. The term "bill of attainder" in the national constitution is generical, and embraces bills of both classes. Drehman *v.* Stifle, 8 *Wall.* 595.

Exclusion from any of the professions or the ordinary avocations of life for past conduct is punishment for such conduct; and a statute imposing such exclusion for past conduct partakes of the nature of a bill of pains and penalties, and is subject to the constitutional inhibition against the passage of bills of attainder, under which general designation bills of pains and penalties are included. *Exp.* Garland, 4 *Wall.* 333.

An attainder is the stain or corruption of blood of a criminal capitally condemned. It is the immediate inseparable consequence on the pronouncing the sentence of death. The offender is then called attaint, stained, or blackened. There is this difference between forfeiture of lands and that of goods and chattels: lands are forfeited upon attainder, and not before; goods and chattels by conviction only. Cozens *v.* Long, 3 *N. J. L.* 559 [764].

ATTAINT. The name of a writ in English law which formerly issued to inquire whether a jury of twelve men had given a false verdict, that so the judgment following thereupon might be reversed. This writ was in the nature of an appeal, and was formerly the principal remedy for the reversal of an improper verdict. The use of attaints was superseded in course of time by the practice of setting aside verdicts upon motion and granting new trials; and the writ itself was abolished by statute 6 Geo. IV. ch. 50, § 60.

ATTEMPT, *v.* To endeavor; to try to accomplish. Attempt, *n.*: an effort or endeavor; some act tending towards the accomplishment of a purpose which exceeds a mere intent or design or preparation, and falls short of an execution of it. Usually spoken, in jurisprudence, of acts tending towards perpetration of offences.

An attempt, within a statute punishing an attempt to commit a crime, can only be made by an actual ineffectual deed done in pursuance of and in furtherance of the design. Uhl, &c. *v.* Commonwealth, 6 Gratt. 706.

Attempt imports an act which, if consummated, would accomplish the purpose in view. A statutory punishment for an attempt to poison is not incurred by an unexecuted determination to poison, though preparation is made for the purpose; nor by the actual administration of a substance not poisonous, though believed to be so. State *v.* Clarissa, 11 *Ala.* 57.

Attempt implies an endeavor to accomplish some act. Words charging an attempt to destroy religious institutions are not justified by proving that the individual entertained irreligious opinions, or even that he declared them publicly, or even that he was habitually guilty of immoral conduct tending to subvert religious institutions; but there must be proof of acts done with intent and hope to destroy them. Stow *v.* Converse, 4 *Conn.* 17.

There is a marked distinction between attempt and intent. The former conveys the idea of physical effort to accomplish an act; the latter, the quality of mind with which an act was done. To charge, in an indictment, an assault with an attempt to murder, is not equivalent to charging an assault with intent to murder. State *v.* Marshall, 14 *Ala.* 411.

Where the jury found the defendant guilty of an assault with "attempt to murder," but the word attempt in the connection conveyed the same idea as intent, and something more, for it not only implies a purpose and action of the mind, but it also signifies an action of the body to put in execution the intent or purpose of the mind, the verdict was held suf-

ficiently definite and clear, and to be a response to the law and the charge. Hart *v.* State, 38 *Tex.* 382.

Preparing combustible materials, and soliciting another person to use them in setting fire to a building, are sufficient to constitute an attempt to commit arson. McDermott *v.* People, 5 *Park. Cr.* 102.

An offer to bribe is an attempt to bribe, and punishable as such. Commonwealth *v.* Harris, 1 *Pa. L. Gaz.* 455.

Aiming a pistol, loaded but uncocked, at another, is not enough to constitute an attempt to discharge a pistol with intent to kill. That the act was accompanied by threats makes no difference. Mulligan *v.* People, 5 *Park. Cr.* 105.

The filing by the mortgagor of a voluntary petition in bankruptcy is an attempt to sell, within the meaning of the usual clause in chattel mortgages. Moore *v.* Young, 4 *Biss.* 128.

ATTENDANT, or ATTENDING. Accompanying; a person or thing associated with another to serve or assist.

Attendant terms is a phrase used in conveyancing to denote estates which are kept alive, after the objects for which they were originally created have ceased, so that they might be deemed merged or satisfied, for the purpose of protecting or strengthening the title of the owner.

After the purpose for which a term for years in real property was created, such as to furnish money for payment of debts, to secure rent-charges or jointures, raise portions, &c., had been satisfied or had failed; yet, if it was not surrendered, it continued to exist, — the legal interest remaining in the trustees or their representatives; but the person entitled to the inheritance became, according to equitable principles, entitled to the beneficial interest in such term, and the termor was held to be such person's trustee. This beneficial interest was subordinate to and merely attendant upon the higher estate possessed by the owner of the inheritance, and yet completely consolidated with it, following the inheritance in all the various modifications and changes to which it might be subjected by act of law or arrangements of the owner. The advantage of preserving these terms, and assigning them to trustees (thus preventing the legal presumption of surrender), with an express declaration that they should attend upon the inheritance, was this: If it had at any time appeared that prior to the purchase or mortgage, but posterior to the creation of the term, there had been an intermediate alienation or incumbrance of the fee in favor of another person, to which the then trustee of the term had not been a party, and of which the purchaser or mortgagee had had no notice, when he paid the purchase or mortgage money, he would be protected against it through the medium of the term so assigned, which, being the elder title, would have taken the priority in point of legal effect. Hence the expression, "protecting against mesne (middle) incumbrances." The estate was thus defended from being defeated or injured by such titles or charges, however valid they might have been, or by any subsequent disposition of the vendor or mortgagor. *Wharton.*

There were instances in which a term became attendant on the inheritance by equitable construction; the great principle governing which was, that where a legal and equitable estate became vested in the same person, the one a term of years and the other an estate of inheritance, though there could be no merger (as that can only occur upon the union of two estates of the same nature; *i.e.*, both legal or both equitable, in the same person, in the same right, without any intermediate estate), yet, by analogy to the common-law doctrine of merger, the term would have been considered in equity as attendant, in the absence, of course, of any sufficient indication that the contrary was intended by the parties. *Ib.*

Terms of years created by the owner of the inheritance by way of mortgage, or otherwise, used when satisfied to become attendant upon the inheritance, either by operation of law, or by express declaration, for the protection of the inheritance. But under the satisfied terms act (8 & 9 Vict. ch. 112) all such terms are absolutely to cease for all purposes whatsoever; excepting that terms attendant by express declaration on the 31st of December, 1845, are to protect the inheritance as before. *Brown.*

Attending physician. A physician, not engaged in practice, who was present as a friend and neighbor when a wounded man was brought to his own house, and who, at the request of another neighbor, examined the wounds and administered an opiate, was held not necessarily an "attending physician," within the conditions of a life-insurance policy on that subject. Who is to be deemed an attending physician is a question for the jury. Gibson *v.* American Mut. Life Ins. Co., 37 *N. Y.* 580.

ATTENTAT. He attempts. Used as a term to designate any step improperly taken or attempted by a judge pending an appeal in a cause from his decision to a superior court. 1 *Add. Ecc.* 22, note; *Shelf. Marr. & D.* 562.

ATTEST. To signify in a certain technical way, by a formal subscription, that one has witnessed the execution of a written instrument. Attestation: the act of subscribing an instrument in token that the person subscribing has witnessed its execution in compliance with a legal requirement that it should be witnessed.

Deeds and wills, in particular, must be attested by witnesses; but the number of witnesses necessary, and the particular facts to which they must certify, are prescribed by statute, and vary in the different states. At common law, attestation of witnesses to a deed was not necessary.

Attest is also the technical word by which, in the practice in many of the states, a certifying officer gives assurance of the verity of a copy. At the foot of the instrument he writes:

"A true copy.

"Attest: M. N., *Clerk.*"

Or sometimes the word attest, without the phrase, a true copy, is used for the same purpose.

Attestation clause is the clause written at the foot of an instrument, embodying the certificate of the witnesses that the requisite formalities of execution have been observed.

Attest implies that a witness shall be present to testify that the party who is to execute the deed has done the act required by the power. Freshfield, &c. *v.* Reed, &c. 9 *Mee. & W.* 404.

Attestation is the subscription by a person of his name to a deed or will executed by another, for the purpose of testifying to its genuineness.

1. Deed. A deed ought to be duly attested, that is, show that it was executed by the party in the presence of a witness or witnesses; though this is necessary rather for preserving the evidence, than for constituting the essence, of the deed. (2 *Bl. Com.* 307; 1 *Steph. Com.* 495.)

2. Will. Every will must now, by the wills act of 1837, be made in the presence of two or more witnesses present at the same time, such witnesses attesting and subscribing the will in the presence of the testator. (1 *Steph. Com.* 598, 599.) Before this act three witnesses were necessary for a will of real property, but none for a will of personal property. *Mozley & W.*

The phrase attested copy, in Mass. Gen. Stat. ch. 117, § 10, requiring service of copy of the reasons of appeal filed in the probate office to be served on the opposite party, means a copy attested by the registrar, he being the legal custodian of the original paper. The attorney's attest is not a sufficient verification. Wait *v.* Demerritt, 119 *Mass.* 158.

An attesting witness must be one competent, at the time of the attestation, to testify in court to the subject-matter. So held, as to a wife, although at the time of the trial she would have been competent. Jenkins *v.* Dawes, 115 *Mass.* 599.

Attested, executed, and published, — defined and distinguished. Lewis *v.* Lewis, 13 *Barb.* 17, 23.

ATTORN. To recognize or accept a person who has acquired the reversion of leased lands, as one's landlord. Attornment: acts of recognition of a new landlord, implying an engagement to pay rent and perform covenants to him. The word was taken from the feudal law, where it signified the transfer, by act of the lord and consent of the tenant, of the homage, service, fealty, &c., of the tenant to a new lord who had acquired the estate.

Attornment is the tenant's acknowledgment of his new landlord on the alienation of lands by the former landlord. It is of feudal origin, for by the feudal law the feudatory could not alien or dispose of the feud without the consent of the lord, nor the lord alien or transfer his seigniory without the consent of his feudatory. (*Bract.* 41; *Spelman*, voc. *Atturnamentum.*) And, generally, to the validity of any grant of a seigniory, reversion, or remainder, the attornment of the tenant was necessary; insomuch that if two successive grants were made of the same seigniory, reversion, or remainder, and the tenant attorned to the second grantee, the first grantee was defeated. Nor was there any legal means of compelling the tenant's attornment; but the grant might be made by fine, which dispensed with the necessity of attornment. However, by Stat. 4 Anne, ch. 16, §§ 9, 10, the necessity for attornment is dispensed with in all cases, although attornment is still permissible; and by the further Stat. 11 Geo. II. ch. 19, § 11, attornments are deprived of any tortious effect, when made to strangers claiming the land as against the rightful landlord. *Brown.*

ATTORNEY. In the most general sense, a person designated or employed by another to act in his stead; an agent. More specially, one of a class of persons authorized to appear and act for suitors or defendants in legal proceedings. Strictly, these professional persons are attorneys-at-law, and non-professional agents are properly styled attorneys in fact; but the single word is much used as meaning an attorney-at-law.

There are two kinds of attorney. 1. At law: a public officer belonging to the superior courts of common law at Westminster, who conducts legal proceedings on behalf of others, called his clients, by whom he is retained; he answers to the solicitor in the courts of chancery, and the proctor of the admiralty, ecclesiastical, probate, and divorce courts. It is a popular error that the term solicitor is more honorable than

or superior to attorney. There is not any distinction whatever in the degree of respectability between them; in fact, both the terms are generally found combined in the same gentleman.

2. In fact: including all agents employed in any business or to do any act *in pais* for another; also a person acting under a special agency, whose authority must be expressed by deed, commonly called a power of attorney. *Wharton.*

There are two kinds of attorneys, — one who acts in a private capacity, and is simply called an attorney, while his authority to act for such other party is in existence; the other, who acts in a public capacity as an officer in her majesty's courts at Westminster, and who is called an attorney-at-law, and whose duty consists in transacting and superintending the legal business of his clients, as in prosecuting and defending actions at law, in furnishing his clients with legal advice, and in performing various other important matters connected with the practice of the law. Such latter attorneys are sometimes, and indeed more commonly, called solicitors. *Brown.*

A person may be an attorney in fact for another, without being an attorney-at-law; a distinction well understood as existing in all kinds of business transactions. An attorney is sometimes distinguished by the designation attorney in fact, or private attorney, and attorney-at-law, or public attorney. The former is one who is authorized by his principal, either for some particular purpose, or to do a particular act, not of a legal character. The latter is employed to appear for the parties to actions, or other judicial proceedings, and is an officer of the courts. Hence the mere addition of the word attorney after the name of the principal does not of necessity carry with it the idea that the attorney is an officer of the court, or an attorney-at-law. Hall *v.* Sawyer, 47 *Barb.* 116.

The word attorney, when not coupled with any qualifying expression, will be construed as meaning attorney-at-law. Ingram *v.* Richardson, 2 *La. Ann.* 839; Trowbridge *v.* Weir, 6 *La. Ann.* 706.

A statute authorizing affidavit to be made by the agent or attorney of the party, allows an affidavit by his attorney-at-law, and does not require one from an attorney in fact. Clark *v.* Morse, 16 *La.* 575.

The words attorney, solicitor, or counsel, are only applicable to courts of record, and do not embrace practitioners in justices' courts. Fox *v.* Jackson, 8 *Barb.* 355.

Although the law now provides that candidates for admission to the bar shall be admitted as attorneys and as counsellors at the same time, yet the offices are distinct. A counsellor cannot, in virtue of a mere retainer as such, authenticate the process and proceedings in the cause. Nor under a retainer as attorney merely, can a party insist upon a right to perform duties as counsellor, and claim compensation therefor. Nor does payment of a counsel fee discharge a claim for services as attorney. Easton *v.* Smith, 1 *E. D. Smith,* 318; Brady *v.* Mayor, &c. of N. Y., 1 *Sandf.* 569.

There is no distinction, in Vermont, between being of counsel and attorney in a cause.

That there is no distinction between the office of attorney and that of counsel in respect of the power of the court to punish summarily for misconduct, see Bradley *v.* Fisher, 13 *Wall.* 335.

A statute authorizing an execution plaintiff, or his agent or attorney, to discharge a defendant from custody, authorizes the attorney who obtained the judgment and issued the execution to give such discharge. The words "his agent or attorney" are not confined to persons acting under a power for the particular purpose, but include the attorney generally employed in the cause. Neff *v.* Powell, 6 *Blackf.* 420.

A statute prescribing the salary of "the attorney" of a state bank, will be construed only as fixing the compensation of the regular attorney elected as an officer of the bank; and not as restraining the directors, by implication, from employing additional attorneys in special cases. State Bank *v.* Martin, 4 *Ala.* N. S. 615. See also Regina *v.* Prest, 1 *Eng. L. & Eq.* 250, 15 *Jur.* 554, 20 *L. J. Q. B.* 17.

ATTORNEY-GENERAL. This is a title conferred in England, also under the government of the United States, and in many states of the Union, on the chief law officer of the government.

In England, the attorney-general is appointed by letters-patent from the crown, and is the principal law officer of the government, and the head of the English bar. It is his duty to exhibit informations and prosecute for the crown in criminal matters, to file bills in the exchequer in revenue causes, and prosecute in chancery where the crown is interested.

Under the government of the United States, the attorney-general is appointed by the president, with advice and consent of the senate; and is the head of the department of justice, a member of the cabinet, and the chief law officer of the government. He advises the president and heads of departments, upon questions of law arising in the performance of their duties, conducts or superintends the conduct of causes in which the United States is a party, and directs the management and operations of the department of justice. *Rev. Stat.* 58.

Many of the states have also an attorney-general, who is the chief law officer of the state government, represents the people in criminal prosecutions and suits, in which the public are interested, and advises the governor. In some states, the name solicitor-general (*q. v.*) is bestowed on an officer of substantially the same powers.

Au besoin. In case of need. See ACCEPTANCE AU BESOIN.

AUCTION. A mode of sale, which consists in offering property or a right in action to whoever of the persons present will take it at the price most favorable to the seller. Auctioneer: one who conducts a sale by auction.

Auction is very generally defined as a sale to the *highest* bidder, and this is the usual meaning. There may, however, be a sale to the *lowest* bidder, as where land is sold for non-payment of taxes to whomsoever will take it for the shortest term; or where a contract is offered to the one who will perform it at the lowest price. And these appear fairly included in the term auction.

There can be no legal auction, if no one is present but the auctioneer. Campbell *v.* Swan, 48 *Barb.* 109, 113.

Auctioneer is one whose business it is to offer property at public sale to the highest or best bidder. Act of congress of July 13, 1866, § 9, 14 *Stat. at L.* 119.

Audi alteram partem. Hear the other side. No man should be condemned unheard. This maxim is taken in its widest signification, including in its application all judicial proceedings, civil and criminal, the awards of arbitrators or referees, as well as the judgments and decrees of the courts. It is an indispensable requirement of justice that the party who has to decide shall hear both sides, giving each an opportunity of hearing what is urged against him. *Re* Brook, 16 *C. B.* N. S. 416. By the unlimited legislative power of the British parliament, an exception may, perhaps, by force of the express wording of a statute, be engrafted upon the rule; as appears to be the effect of some statutory provisions of very limited application. But the principle is embodied in the provision of the constitution of the United States, that no person shall "be deprived of life, liberty, or property, without due process of law" (Const. Amend. art. v.); and this, with like provisions in state constitutions, operates as a restriction upon legislative power in this direction.

AUDIT, *v.* To make official examination of accounts or charges. Audit, *n.*: the act or proceeding of examining and certifying accounts. The word is often popularly used to include the official approval of an account upon examination, as well as the examination; thus the expression, the comptroller refused to audit an account, may mean not that he refused to examine it, but that he withheld his certificate or approval. Originally, the word imports the examination or inquiry; the hearing the claimant upon the items of his account; and this seems its strict sense, the phrase audit and allow being in use, when approval as well as examination is intended, as in Morris *v.* People, 3 *Den.* 381, 391.

AUDITA QUERELA. The complaint having been heard. The name of a writ at common law, issued from a court of appellate jurisdiction, by which a defendant against whom judgment has been recovered, and who is in danger of execution or actually in execution, may be relieved on showing sufficient grounds of discharge. The writ was named from its emphatic words, which state that the complaint of the defendant having been heard, the matter of the complaint being set forth, the court below is directed to call the parties before it, and cause justice to be done. The whole action or proceeding upon the writ was also termed *audita querela.*

The writ issues on account of any matter amounting to a discharge of the defendant, but of which he could not avail himself otherwise, whether it occurred after judgment or before judgment, if he had no opportunity of pleading it, as through want of notice, or through collusion or fraud of the plaintiff. Such matters are a general release; payment of a judgment without satisfaction entered of record; and any matters of defence which the party is too late to plead, or facts showing that execution has been improperly issued. But it must be based upon matters of

fact, and not upon the erroneous judgments or acts of the court. It does not lie for matters which might be taken advantage of upon writ of error. Although a common-law writ, and issuing as a matter of common right, it is equitable and remedial in its nature, its purpose being to prevent a defect of justice and oppression by a plaintiff under forms of law.

The action or proceeding of *audita querela* is considered a regular action, based on the wrongful acts of the opposite party, and, therefore, sounding in tort. The parties appear and plead, the proper plea being not guilty. Damages may be recovered in a proper case, as for the improper issue and levy of an execution; although the relief usually sought is the setting aside the judgment, or the vacating, recalling, or preventing an execution.

In modern practice, these objects are usually effected in a more summary manner by motion; and in the United States the remedy by motion has, in many of the states, entirely superseded the proceeding by *audita querela*. In other states, however, where the proceeding is recognized and regulated by statute, the ancient remedy, or its statutory substitute, is still frequently employed.

AUDITOR. 1. An officer of government, whose function it is to examine, verify, and approve or reject, accounts of persons who have had the disbursement of government moneys, or have furnished supplies for government use. In England, the term seems in use for the agent of a corporation or wealthy individual charged with like duties; this employment of the term, however, is not frequent. In several of the states, the auditor is an important fiscal officer.

2. In the practice of the courts, auditor signifies a person appointed by a court to take and state an account, according to a course prescribed by statutes which prevail in some of the states.

Auditor, in this sense, designates an agent or officer of the court, either at law or in equity, appointed to examine and digest accounts and exhibit the balance, for the decision of the court; not to adjudge or decree, but to prepare materials on which a judgment or decree may be made. Field *v.* Holland, 6 *Cranch*, 8, 21; Whitwell *v.* Willard, 1 *Metc.* (*Mass.*) 216. It is confined to one who examines accounts. A person appointed pending an action of trover to find the value of articles not delivered up according to a stipulation of the parties, and not required to examine accounts and vouchers, although designated in the record as an "auditor," is only a commissioner, and not an auditor. Blain *v.* Patterson, 48 *N. H.* 151.

The nature and scope of the auditor's function depend on the law of the jurisdiction. Thus, in Massachusetts, a statute in force for many years provides that, when the trial of the issue in a cause will require an investigation of accounts or an examination of vouchers, the court may appoint one or more auditors to hear the parties, and examine their vouchers and evidence, and state the accounts, and make report thereof to the court. Rev. Stat. ch. 96, § 25. Under this statute a well-understood system of employing auditors in aid of the labors of the courts in actions embracing accounts has been developed. The employment of auditors is appropriate to actions involving matters of debt and credit, or demands in the nature of debt and credit, between parties, such as imply that one is responsible to another on the score of contract or of some fiduciary relation; thus the court is not authorized to appoint an auditor, without the consent of both parties, "to examine vouchers, state accounts," &c., in an action against an officer for not attaching or levying upon certain enumerated articles of personal property, although the articles are small and very numerous, and the examination of the evidence concerning them before a jury must necessarily require much time. Whitwell *v.* Willard, 1 *Metc.* (*Mass.*) 216. The powers of auditors are limited to the matters involved in the accounting; grounds of defence, which go in bar of an action, or which are not matters of account, are not to be passed upon by an auditor; and, if he hears them without consent of parties, such matters should be stricken from his report, or

the report should be recommitted or rejected; but where evidence offered bears directly or incidentally on the matters of account, the auditor should examine it, and may state it, if he deem it necessary to render his report intelligible. Jones *v.* Stevens, 5 *Metc.* (*Mass.*) 373. So he may take cognizance of promissory notes, which are adduced as vouchers for the mutual claims of the parties, Barnard *v.* Stevens, 11 *Metc.* (*Mass.*) 297; and may consider and determine how far a matter of set-off claimed is sustainable. Bradley *v.* Clark, 1 *Cush.* 293; whether a particular individual was the authorized agent of one of the parties, to purchase, on his behalf, the goods charged by the other in account against him, Locke *v.* Bennett, 7 *Cush.* 445; whether the work and materials in controversy were furnished under a special contract, Lowe *v.* Pimental, 115 *Mass.* 44; and the like. He has not the power of a referee, to award costs. Lyman *v.* Warren, 12 *Mass.* 412. The report of auditors is not, of itself, conclusive, Lyman *v.* Warren, 12 *Mass.* 412; Crafts *v.* Crafts, 13 *Gray*, 360; Fair *v.* Manhattan Ins. Co., 112 *Mass.* 320, 329; but, so far as it covers matters properly submitted (a report on a matter not distinctly submitted cannot be considered. Flint *v.* Hubbard, 1 *Allen*, 252), it is presumptive evidence of the facts found, and entitles the plaintiff to whatever verdict those facts call for, unless some evidence to meet it is produced by the defendant, Allen *v.* Hawks, 11 *Pick.* 359; Lazarus *v.* Commonwealth Ins. Co., 19 *Id.* 81; Jones *v.* Stevens, 5 *Metc.* 373; Taunton Ins. Co. *v.* Richmond, 8 *Id.* 434; Barnard *v.* Stevens, 11 *Id.* 297; Locke *v.* Bennett, 7 *Cush.* 452; Morgan *v.* Morse, 13 *Gray*, 150; Nolan *v.* Collins, 112 *Mass.* 12; Crafts *v.* Crafts, 13 *Gray*, 360. But it does not "change the burden of proof" in any stronger sense of that phrase than that the plaintiff prevails upon it, unless it is overthrown by counter evidence, Morgan *v.* Morse, 13 *Gray*, 150; thus, it does not change the burden of proof in such sense as to give the defendant the right to open and close; for the court cannot know, at the opening, whether the plaintiff will offer the report; he is not bound to, Snow *v.* Batchelder, 8 *Cush.* 513. The report is *prima facie* evidence of the facts therein stated, and not merely of the result of the accounts, assuming such facts. Lazarus *v.* Commonwealth Ins. Co., 19 *Pick.* 81. It establishes only the facts reported: conclusions of the auditor founded upon the facts are not binding upon the court, Morrill *v.* Keyes, 14 *Allen*, 222; and where an auditor's report states the facts found by him, and also his conclusions from those facts, the court will reject his conclusions, although stated, in form, in the report, as facts found by him, Ropes *v.* Lane, 9 *Allen*, 502.

The fact that an auditor reports the evidence in detail, does not prevent his report from being *prima facie* evidence of the facts found by him. Taunton Iron Co. *v.* Richmond, 8 *Metc.* (*Mass.*) 434; Leathe *v.* Bullard, 8 *Gray*, 545. And the fact that a party who introduces an auditor's report at the trial, relies upon a part of it as evidence, does not conclude him from controlling by other evidence the *prima facie* case made out by the report in other respects. Fogg *v.* Farr, 16 *Gray*, 396. Witnesses examined before the auditors may be re-examined upon the trial before the jury, for the report does not supersede or exclude any other competent evidence. Allen *v.* Hawks, 11 *Pick.* 359.

Where an auditor reports the evidence concerning the value of labor which is the subject of an account that is referred to him, his report may be impeached by the evidence reported, and by other evidence, and may be controlled by the jury. Commonwealth *v.* Inhabitants of Cambridge, 4 *Metc.* (*Mass.*) 35. Either party may impeach the report by proof that a greater or less sum is due than it allows; and a witness called by a party who seeks to impeach it may be asked if he testified before the auditor. Kendall *v.* Weaver, 1 *Allen*, 277. But the testimony of an auditor to whom a case has been referred is inadmissible to control or in any way affect his report. Monk *v.* Beal, 2 *Allen*, 585; Packard *v.* Reynolds, 100 *Mass.* 153.

AULA REGIA, or REGIS. Literally, the royal, or king's, hall. The

name of the court established by William the Conqueror, to advise the king in his determination of controversies among his subjects, and other difficult questions. This court was composed of the king's great officers of state resident in his palace, and usually attendant on his person, assisted by persons learned in the laws, who were called the king's justiciars, or justices, and by the greater barons of parliament. This court at first followed the king's household in all his progresses and expeditions; hence, doubtless, the transfer of the word court from the royal household to the tribunal of justice. But this becoming inconvenient to the subjects, Magna Charta enacted that the court should be held in some certain place. This certain place was established in Westminster Hall, where the court of *aula regia* continued to be held, it is said, until the reign of Edward I.; when it was superseded by the four courts so long famous in English jurisprudence, — chancery, king's bench, common pleas, and exchequer. Of these, the common pleas seems, by several of the authorities, to be more particularly the successor of the *aula regia*.

AUTER. See AUTRE.

Aurum reginæ. The queen's gold. This is a royal revenue belonging to every queen-consort during her marriage, from every person who hath made a voluntary offering or fine to the king, of ten marks or upwards, in consideration of any grants, &c., by the king to him; and it is due in the proportion of one-tenth part more, over and above the entire fine to the king. (1 *Bl. Com.* 221.) *Jacob.*

AUTHENTIC ACT. A designation employed in the civil law, also in Louisiana (see Civ. Code, art. 2231), for an act, such as a conveyance, contract, &c. (see ACT), which has been solemnly executed before a notary public, or officer authorized to execute like functions, and attested by public seal, by witnesses, or other prescribed formalities. Such act is full proof of the agreement contained in it, against the contracting parties and their heirs or assigns, unless it be declared and proved to be a forgery.

AUTHOR. The copyright laws provide that any citizen of the United States, or resident therein, who shall be the author, &c., proprietor of any book, map, chart, dramatic or musical composition, &c., may obtain a copyright for his work (Rev. Stat. § 4952); and this has given rise to some decisions as to who is an author, and what constitutes authorship, within the purview of the law.

To constitute a person an author within the copyright law, he must, by his own intellectual labor applied to the materials of his composition, produce an arrangement or compilation new in itself. One who procures another to arrange a piece of music is not entitled to a copyright as author. Atwill *v.* Ferrett, 2 *Blatchf.* 39; Binns *v.* Woodruff, 4 *Wash.* 48.

If a musical composition is borrowed from a former one, or is made up of different parts copied from older compositions, without material change, and put together into one tune, with only slight alterations or additions, the person so combining is not an author within the copyright law; but the circumstances that the piece corresponds with older musical compositions, and belongs to the same style of music, do not constitute it a plagiarism, provided it is in its main design and in its material and important parts the efforts of the composer's own mind. Reed *v.* Carusi, *Taney*, 72; 8 *Mo. Law Rep.* 410.

The plaintiff, an artist, accompanied an expedition to Japan, fitted out by the United States government, and received pay as a master's mate, with the understanding that all sketches and drawings he might make were to be the property of the United States. The sketches made by him were incorporated into the report of the expedition made to the navy department, and congress ordered a large number of copies of the report printed for distribution. The plaintiff afterwards entered some of the prints and engravings for copyright. It was held that he was not author or proprietor of the same, in such a sense as to enable him to obtain an exclusive right to them. Heine *v.* Appleton, 4 *Blatchf.* 125.

AUTHORITY. 1. The power delegated by a principal to his agent, or exercised by a person in virtue of his office or trust, is called his authority. Authority in this sense is sometimes called express or implied, according as it is conferred in terms, or deduced by the law from the circumstances of the case. It is called general or special, according as it extends to all acts of a certain nature, or is confined to a single transaction.

2. The obligation of a constitution, statute, or treaty; the jurisdiction or power of a court or officer is often spoken of as its or his authority.

3. Authority is applied sometimes in the singular, and still more often in the plural, to designate the decisions of the courts and writings of jurists, such as are recognized as controlling the decision of cases newly brought forward; and, when used in a general way, may well be understood as including any constitutional or statutory provisions applicable; though, in such expressions as "the judgment is supported by the authorities," "many authorities were cited in the argument," the prominent idea is that of adjudications and judicial writings founded upon them.

The exercise of a power, conferred on a corporation, to be exercised for the public good, is not discretionary, but imperative; and the words power and authority may be construed "duty" and "obligation." Commissioners *v.* Allegany, 20 *Md.* 449; Commissioners *v.* Duckett, *Id.* 468.

A statute declaring that a board of officers is "authorized and empowered" to hear and determine a certain class of applications, does not give them a discretion to hear or not. It is mandatory. People *v.* Herkimer County, 56 *Barb.* 452.

That a statute requiring a "previous authority" for an act, may be satisfied by a subsequent ratification, see Palmer *v.* Yates, 3 *Sandf.* 137.

A mere permission to overdraw, revocable at pleasure, is not an "authority" to overdraw which binds the bank to honor checks, and so warrants the party drawing the check in stating that the check is good. Ballard *v.* Fuller, 32 *Barb.* 68.

AUTRE. Another. *Autrefois:* another time. Used in several phrases common in the older law-books, such as the following:

Autre droit. Another's right. Occurs more often in the form, *en autre droit.*

Autre vie. Another's life. A person holding an estate for or during the life of another is termed a tenant *pur autre*, or *pur terme d'autre vie.* Such an estate is an estate of freehold, though it is the lowest or least estate of freehold which the law acknowledges, and is not so great as an estate for one's own life.

Autrefois acquit. Formerly acquitted. The name of a plea, allowed in criminal cases, setting forth that the accused has already been tried and acquitted of the offence of which he is now again charged. As the law forbids that a person should be twice put in peril for the same offence, a former acquittal, upon a competent trial, is a complete bar to a second indictment, no matter what new evidence of guilt may be forthcoming. But the new indictment must be for the same offence as the first. *Wharton.*

The true test by which the question, whether such a plea is a sufficient bar in any particular case, may be tried, is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. Rex *v.* Emden, 9 *East*, 437.

Autrefois attaint. Formerly attainted. The name of a plea to an indictment setting up the fact that the accused had been formerly attainted. The ancient rule was, that, after a man had been attainted of treason or felony, whilst the attainder remained in force, he could not, with certain exceptions, be indicted for another felony, whether such other felony were committed before or after his attainder; because, being already attainted, and, therefore, dead in contemplation of law, and his property forfeited, a prosecution for any other offence was considered useless. But, since the statute 7 & 8 Geo. IV. ch. 28, § 4, attainder is no bar, unless for the same offence as that charged in the indictment; and the plea is disused.

Autrefois convict. Formerly convicted. The name of a plea to an indictment, setting up that the accused has been formerly convicted of the same identical crime. The scope of the plea was originally much wider. A man who had been convicted of a clergyable felony, and who had prayed the benefit of clergy, might plead such conviction and prayer of clergy in bar of any subsequent indictment, either for the felony of which he was convicted, or for any other clergyable felony committed by him previously to his conviction. The statute 6 Geo. IV. ch. 25, restricted the benefit of the allowance of clergy to the individual charge upon which it was allowed; and now, the benefit of clergy having been abolished, a previous conviction can only be pleaded in bar of any subsequent indictment for the felony of which the defendant has previously been convicted.

AVAILABLE MEANS, used as distinguished from money, must be understood as meaning notes, bills of exchange, drafts, stocks, and other choses in action, — all that class of securities easily converted into money, but not money. Where an assignment authorized the assignee to convert the property into "money or available means," this was held to import an authority to sell on credit, and to avoid the assignment; for under the assignment the trustees would be authorized to sell on credit, and take in payment notes, bonds, and mortgages, and other available means. Brigham *v.* Tillinghast, 13 *N. Y.* 215.

AVER. To allege or assert; to declare distinctly and formally, as in a pleading. Averment: an assertion of facts; usually spoken of a written statement.

Averment is an offer of the defendant to make good or justify an exception pleaded by him in abatement or bar of the plaintiff's action; and it signifies the act as well as the offer of justifying the exception; and not only the name but the matter thereof. (*Co. Litt.* 362.) Averment is either general or particular. General averment includes every plea containing matter affirmative, and ought to conclude with the words "and this he is ready to verify." Particular averment is when the life of tenant for life or of tenant in tail is averred. *Jacob.*

Averment, is a positive statement of facts, in opposition to argument or inference. Prigmore *v.* Thompson, *Minor*, 420.

Averment, colloquium, innuendo, &c., defined and distinguished. Van Vechten *v.* Hopkins, 5 *Johns.* 211, 220; Cheetham *v.* Tillotson, *Id.* 430.

AVERAGE. A medium; a mean proportion; used in five senses:

1. A service which a tenant owes to his lord by horse or carriage.

2. A contribution, which merchants and others make towards their losses when they have their goods cast into the sea, for the safety of a ship, or of the other goods and lives of persons, during a tempest. It is apportioned and allotted after the rate of every man's goods carried. So if goods insured for a voyage reach their destination, but are in some degree injured by any of the accidents insured against, this is an average loss, and the insurers are bound to compensate the insured in the proportion which the average loss bears to the whole iosurance. (*Park Ins.*)

3. Also, a small duty paid to masters of ships, when goods are sent in another man's ship, for their care of the goods, over and above the freight. (2 *Sel. N. P.* 952.)

4. Stubble, or remainder of straw and grass left in corn-fields after harvest. In Kent it is called gratten, and in other parts roughings.

5. Average prices, such as are computed on all the prices of any article sold within a certain period or district. *Wharton.*

Average is more commonly used for a contribution which merchants and others make towards losses of those who have their goods cast into the sea for the safeguard of the ship, or of other goods and lives of persons that are in the ship, during a tempest. This is called average because it is proportioned and allotted after the rate of every man's goods carried. *Jacob.*

By the phrase, general average, is meant a loss of a part of the property, which is averaged upon the whole. 2 *Pars. Ins.* 201.

General average, expresses that contribution to a loss or expense voluntarily incurred for the preservation of the whole, in which all who are concerned in ship, freight, and cargo are to bear an equal part, proportionable to their respective interests. And for the loss incurred by this contribution, however small in amount, the respective owners are to be indemnified by their insurers. Padelford *v.* Boardman, 4 *Mass.* 548.

Cases of general average arise where loss or damage is voluntarily and properly incurred in respect of the goods on board ship, or in respect of the ship, for the general safety of both ship and cargo; the loss sustained by the particular owners having inured to the advantage of the owners generally, it is only equitable to distribute, *i.e.* adjust, the loss ratably over all the owners; and such adjustment is general average. The phrase, simple or particular average, is an inaccurate and misleading phrase, meaning nothing more than that a particular damage, *e.g.* the souring of a cask of wine, must rest where it falls. *Brown.*

AVOCATION. The selling of liquors is an avocation, within the meaning of a statute forbidding one to pursue his usual avocation on Sunday. Voglesong *v.* State, 9 *Ind.* 112.

Gaming cannot be a person's usual avocation, within the meaning of the Sunday law. State *v.* Conger, 14 *Ind.* 396. See BUSINESS.

AVOID. To nullify; to render void; to cause a thing to be inoperative or of none effect. Avoidance: nullifying; setting aside.

In pleading, the setting-up of matter in answer to averments, which does not deny their truth, but shows reason why they should have no effect, is called avoidance, or, more fully, confession and avoidance.

Avoidance, in English ecclesiastical law, is applied to the condition of a benefice when it has no incumbent. *Holthouse.*

In parliamentary language, avoidance of a decision signifies evading or superseding a question, or escaping the coming to a decision upon a pending question. *Holthouse.*

AVOWRY. Acknowledgment, with justification, of an act charged. In the action of replevin, particularly, avowry is usual where defendant, not denying that he took and detains the property in suit, sets forth a reason why he did so rightfully; a justification of the taking; as that he took the property by distress for rent in arrear.

AVULSION. Lands torn off by an inundation or current from property to which they originally belonged, and gained to the estate of another; or where a river changes its course, and, instead of continuing to flow between two properties, cuts off part of one and joins it to the other property. The property of the part thus separated continues in the original proprietor, in which respect avulsion differs from alluvion, by which an addition is insensibly made to a property by the gradual washing down of the river, and which addition becomes the property of the owner of the lands to which the addition is made. *Wharton.*

AWARD. The decision or determination rendered by arbitrators or commissioners, or other private or extra-judicial deciders, upon a controversy submitted to them; also, the writing or document embodying such decision. The general requisites of an award are, that it must be within the submission, must be final and certain, and performance of it must be lawful and possible.

Award may be deemed equivalent to a judgment, when the context shows a determination of a court is intended. Richards *v.* Griffin, 5 *Ala.* 195.

An award is, in a very limited and restricted sense, a contract; but does not involve a promise to perform. Johnson *v.* Maxey, 43 *Ala.* 521.

In equity, an award rendered in pursuance of a submission by order of the court is regarded as a decree, and as equally, if not more, conclusive. *Morse Arb.* 489.

AWAY-GOING CROP. A crop sown by a tenant, towards the close of his term, which does not become ripe until after the term has expired. Whether it belongs to the tenant or to the landlord, whether the tenant may enter to reap and remove it, &c., are questions of nicety.

AYEL; AYLE. An ancient English writ, which lay for one whose grandfather had died seised of lands, against a stranger who entered on that day in prejudice of the rightful heir. It was abolished by Stat. 3 & 4 Wm. IV. ch. 27.

AYUNTAMIENTO. A Spanish term for a species of municipal council.

The laws of Spain for the government of California made provision for ayuntamientos or municipal councils whose ordinary members were elective. United States *v.* Castillero, 2 *Black*, 17, 194. The word occurs in discussions upon titles to lands in California, where action of these municipal councils is drawn in question, or is relied on as a foundation of any claim or right.

B.

B, the second letter of the alphabet, is used to denote the second of a series of pages, notes, &c., — A being used for the first, and the subsequent letters for the third and following numbers. B is also used in several legal abbreviations, *e.g.* for *banc* or bench, meaning court; sometimes for bankruptcy, or book; and for names of some reporters.

BACHELOR. 1. Originally, an inferior neophyte, or learner (from the French *bachelier*). In the English universities there are bachelors of arts, &c., which is the first degree taken by students before they come to greater dignity; and bachelor of arts and bachelor of laws have been the earliest collegiate degrees in literature and jurisprudence, usually conferred by American colleges. So the persons "called bachelors of the companies of London are such of each company as are springing towards the estate of those that are employed in council, but as yet are inferiors." *Jacob.* The word, in early English use, also signifies

knight bachelor, a simple knight, and not knight banneret, or knight of the bath; also applied to a species of esquire.

2. Bachelor also denotes a man who has never been married.

BACK. To indorse. When a warrant issued by a justice of the peace in one county requires to be executed in another, it must (in England, Scotland, and several of the United States) be indorsed by a justice of the latter county; and this is sometimes called backing the warrant.

BACKBEARING, or BACKBEREND. A term applied in ancient English law to denote that a thief, poacher, &c., was caught while carrying the property or game he had stolen or snared. This was, of course, a circumstance strongly corroborative of guilt.

BACK-BOND. A bond given back. A declaration of trust or defeasance; an instrument given by one apparently absolute owner, which reduces his right to that of a trustee; used in distinguishing qualifications of a right. *Bell.*

BACULUS. A staff. This term was formerly used to designate the wand, rod, or staff employed in many ancient ceremonies and proceedings. Thus, livery of seisin of land upon which there was no building was made *per fustim et per baculum*, — by rod and by staff. *Bract.* fol. 40. The white wand or staff used by the criers of courts, by erecting which upon the lands of a defendant in a real action he was warned or summoned to appear in court, was termed *baculus nunciatorius*, — a summoning staff. 3 *Bl. Com.* 379. The staff and ring used in feudal investitures were termed *baculus et annulus*, — the staff being the symbol of the aid or support, the ring, of the faith by which the vassal was bound to his lord; hence ecclesiastical investitures were also granted *per annulum et baculum*, by ring and crozier, — the crozier being the pastoral staff.

BADGER. A term applied in old English law to one who made a practice of buying corn or victuals in one place, and carrying them to another to sell and make profit by them. They were required to be licensed by the justices of peace in the sessions, and to enter into a recognizance that they would not by color of their licenses forestall or do any thing contrary to the statutes made against forestallers, engrossers, and regrators.

BAGGAGE. Such effects as a traveller carries for personal use on a journey; luggage.

What is included in the term baggage has been a subject of frequent discussion in reference to the liability of carriers, and also to that of innkeepers, for the baggage of their passengers and guests.

Baggage, within the rule of the carrier's liability, is confined to such articles as are usually carried as baggage, for the personal use of the passenger, or for his convenience, instruction, or amusement on the way, and does not include samples of the merchandise which he wishes to sell. Hawkins *v.* Hoffman, 6 *Hill*, 586; Blanchard *v.* Isaacs, 3 *Barb.* 388; Nordemeyer *v.* Loescher, 1 *Hilt.* 499; Dwight *v.* Brewster, 1 *Pick.* 50; Beckman *v.* Shouse, 5 *Rawle*, 179.

It includes what travellers usually carry with them, or what is essential or necessary to the traveller in the course of his journey, Van Wyck *v.* Howard, 12 *How. Pr.* 147, 151; Walsh *v.* The H. M. Wright, 1 *Newb.* 494; within a reasonable limit, the jury to determine the amount, Nevins *v.* Bay State Steamboat Co., 4 *Bosw.* 225.

A common carrier is liable for the loss of a valise of a passenger received in the ordinary way, only for a sum found to be the value of his wearing apparel and personal effects, and for a sum of money contained in a valise necessary to defray his travelling expenses. Dunlap *v.* International, &c. Co., 98 *Mass.* 371.

An innkeeper is responsible only for his guest's baggage; which term includes articles for use and convenience on the journey, but not merchandise or other valuables. Pettigrew *v.* Barnum, 11 *Md.* 434; Giles *v.* Fauntleroy, 13 *Id.* 126.

A sum of money reasonably necessary to defray the expenses of the journey is properly baggage, and may be carried in a trunk at the risk of the carrier. The amount of money which may be thus carried will depend on the length of the journey, and, to some extent, on the wealth of the traveller. In regard to amount, the jury must be guided by considerations similar to those which would govern them in determining what would be necessary clothing in a given case. Merrill *v.* Grinnell, 30 *N. Y.* 594.

The amount of money which a passenger is entitled to claim as a part of his baggage must necessarily be measured, not alone by the requirements of the transit over a particular part of the entire route, to which the line of one carrier extends, but must embrace the whole of the contemplated journey, and include such an allowance, for accidents or sickness, and for sojournings on the way, as a reasonably

prudent man would consider it necessary to make. It does not include funds carried for the purpose of transportation or remittance, or for investment in another locality, but should be limited to money taken for travelling expenses, properly so called. *Ib.*

Money, except what may be carried for the expenses of travelling, is not included in the term baggage. Orange County Bank *v.* Brown, 9 *Wend.* 85; Grant *v.* Newton, 1 *E. D. Smith*, 95. Compare 2 *Abb. Dig. Corp.* tit. Railroads.

The traveller's watch, and other articles of jewelry usually worn about his person, are, when placed in his trunk, a part of his baggage, for which the carrier is liable, McCormick *v.* Hudson River R. R. Co., 4 *E. D. Smith*, 181; or for which the innkeeper is liable, Prescott *v.* Bruce, 2 *Cin.* 58; and so of an opera glass. Toledo, &c. R.R. Co. *v.* Hammond, 33 *Ind.* 379.

A watch is a part of a traveller's baggage, and may properly be deposited in his trunk. Jones *v.* Voorhees, 10 *Ohio*, 145.

Owners of a steamboat are not liable for a watch worn by a passenger through the day and kept at hand at night, as being part of his baggage. Clark *v.* Burns, 118 *Mass.* 275.

As between carrier and passenger, baggage does not include a gold watch and chain, of large value; gold ornaments carried for presents; or money. The Ionic, 5 *Blatchf.* 538; Nevins *v.* Bay State Steamboat Co., 4 *Bosw.* 225.

Linen cut into shirt bosoms is wearing apparel, for the loss of which, if carried as baggage by a passenger, a carrier is liable. Duffy *v.* Thompson, 4 *E. D. Smith*, 178.

Valuable laces held baggage. Fraloff *v.* N. Y. Central R. R. Co., 10 *Blatchf.* 16.

Baggage includes the manuscript of a student, author, or professional man, carried in his trunk for purposes incidental to the studies or business on which he travels. Hopkins *v.* Westcott, 6 *Blatchf.* 64.

Tools used by the plaintiff in his trade, and also a gun, carried in his trunk, are properly included under the term baggage, and recoverable as such. Davis *v.* Cayuga & Susquehanna R. R. Co., 10 *How. Pr.* 330.

A carpenter took passage in a stage-coach to go a certain distance, and his trunk, containing some clothing and tools to the value of fifty-five dollars, was lost. Held, that the stage proprietors were liable for all the contents of the trunk. Porter *v.* Hildebrand, 14 *Pa. St.* 129.

Guns for sporting purposes, and a small quantity of clothing materials, may be included in the baggage of a passenger from Europe to New York, for which the carrier is responsible. Van Horn *v.* Kermit, 4 *E. D. Smith*, 453; Duffy *v.* Thompson, 4 *Id.* 178.

A common carrier of passengers is liable for the loss of a pocket-pistol and a pair of duelling-pistols. Woods *v.* Devin, 13 *Ill.* 746.

Carrier held liable for one pistol, not for two. Chicago, &c. R. R. Co. *v.* Collins, 56 *Ill.* 212.

The phrase "goods and merchandise" has been long understood as designating only commodities bought and sold by merchants and traders; while "baggage" is as clearly understood to relate only to the clothing and other conveniences which a traveller carries with him on his journey. Chamberlain *v.* Western Transportation Co., 45 *Barb.* 218.

Merchandise not intended for personal use, carried by a traveller, is not part of his baggage for which a carrier of passengers is responsible. Collins *v.* Boston & Maine R. R. Co., 10 *Cush.* 506.

A carrier is not liable for the loss of a box of jewelry belonging to a third person, put up for sale as merchandise, although packed in a trunk. Deception may as easily be effected by imposing upon the carrier valuable merchandise, under the guise of the owner's travelling baggage, as by a direct verbal misrepresentation. Richards *v.* Westcott, 2 *Bosw.* 589; Orange Co. Bank *v.* Brown, 9 *Wend.* 85.

A trunk containing nothing but merchandise, is not baggage for the safety of which a carrier is liable. Pardee *v.* Drew, 25 *Wend.* 459. See Michigan, &c. R. R. Co. *v.* Oehm, 56 *Ill.* 293.

Silver-ware in a trunk is not baggage. Bell *v.* Drew, 4 *E. D. Smith*, 59.

Baggage does not include a feather-bed which a passenger on an ocean steamship carries with her, but does not require for use on the voyage. Connolly *v.* Warren, 106 *Mass.* 146.

Baggage does not include a dog, — especially upon a railroad having a public regulation that "live animals are allowed as baggagemen's perquisites." Cantling *v.* Hannibal, &c. R. R. Co., 54 *Mo.* 385.

BAIL, *v.* To undertake that a defendant will appear and submit to the jurisdiction and judgment of the court. Bail, *n.*: persons who engage as sureties for a defendant that he will appear when called in court and answer to its process.

This is an important topic in common-law practice, connecting closely with arrest. A defendant being arrested, gives bail; that is, procures sureties who will undertake that he shall appear when called. On their executing a formal engagement to this effect, pursuant to the law of the jurisdiction, the defendant is, in theory of law, delivered to the custody of (bailed to) his sureties; but practically is allowed to go at large. Should the bail, *i.e.* the sureties, become distrustful that he will keep his engagement, they may surrender him to judicial custody.

Bail, meaning now the sureties, are termed bail above, *i.e.* sureties who bind themselves either to satisfy the plaintiff

for his demand as recovered, with costs, or to see that defendant shall render himself to the proper person. Bail of this description have the authority of jailers to take the principal into their actual custody (even on Sunday), and to surrender him to prison. This power distinguishes them from mainpernors. Or bail are termed bail below; by which are meant sureties who enter into a bond conditioned that the defendant will appear at the court and day named in the process of arrest. Bail below, and bail above, are currently called, respectively, common bail, which expression means fictitious sureties, entered as matter of form, and amounting only to an appearance by defendant, but involving no real security to the plaintiff; and special bail, meaning real persons, who undertake, responsibly, for defendant's appearance.

Bail is also employed in several phrases in the French law, denoting several kinds of contracts; for instance:

Bail à cheptel: a contract for letting animals.

Bail à ferme: a contract of letting lands.

Bail à loyer: a contract of letting houses.

Bail à rente: a contract which partakes of the nature of the contract of sale, and that of the contract of lease; it is translative of property, and the rent is essentially redeemable. (*Poth. Bail à Rente*, 1, 3.) Clark *v.* Christ's Church, 4 *La.* 286.

BAIL COURT. An English court, auxiliary to the queen's bench. It hears and determines ordinary motions, and questions of pleading and practice; and is otherwise known as the practice court. *Brown; Wharton.*

BAILIFF. Originally, a person put in charge of something; one to whom powers of custody or care are intrusted.

Hence, 1. In early English law, a class of local magistrates.

2. A sheriff's deputy; one to whom a sheriff intrusts his prisoners for immediate safe-keeping.

3. A private person who has the care, custody, and management of lands or goods, for the benefit of their owner. In this sense the word is used in cases speaking of the action of account render, which is brought to compel an accounting from a custodian of property, who is often termed bailiff.

There are several kinds of bailiffs, whose offices and employments greatly differ from one another, yet they agree in that the keeping or protection of something belongs to them all. *Ency. Lond.*

Every county is divided into hundreds, within which, in ancient times, the people had justice administered to them by the several officers of every hundred, which were the bailiffs; but now the bailiff's name and office is grown into contempt, they being generally officers to serve writs, &c., within their liberties; though chief magistrates in divers towns are called bailiffs. Of the ordinary bailiffs there are several sorts, viz.: bailiffs of liberties; sheriff's bailiffs; bailiffs of lords of manors; bailiffs of husbandry, &c. Bailiffs of liberties are those bailiffs who are appointed by every lord within his liberty. Bailiffs errant or itinerant, to go up and down the county to serve process, are out of use. *Jacob.*

Bailiff usually signifies sheriffs' officers, who are either bailiffs of hundreds or special bailiffs. Bailiffs of hundreds are officers appointed over those respective districts, by the sheriffs, to collect fines therein, to summon juries, to attend the judges and justices at the assizes or quarter sessions, and also to execute writs and processes in the several hundreds. Special bailiffs are that lower class of persons employed by the sheriffs for the express purpose of serving writs, and making arrests and executions, &c. Those persons also who have the custody of the king's castles are called bailiffs, as the bailiff of Dover Castle. The chief magistrates of particular jurisdictions are also called bailiffs, as the bailiff of Westminster for example. There are also bailiffs of courts baron, bailiffs of the forest, &c. (*Cowel; Termes de la Ley.*) *Brown.*

BAILIWICK. The territory over which a sheriff or bailiff exercises jurisdiction.

BAILMENT. A contract whereby chattel property is delivered by one to another, upon an engagement that the latter shall do something with or to it, and afterwards return or account for it. Bail, *v.*: to deliver a thing to a person, upon his engagement to do some act to or with it; and then return or account for it. Bailor, one who delivers, and bailee, one who receives, something, to perform some act in respect to it.

Many definitions of bailment have been given; the idea involved is so complex and comprehensive, that it can

scarcely be expressed with accuracy in a single proposition.

Bailment, according to Blackstone (2 *Com.* 455), is "a delivery of goods in trust upon a contract, expressed or implied, that the trust shall be faithfully executed on the part of the bailee;" to which Sir William Jones adds, "and the goods redelivered as soon as the time or use for which they were bailed shall have elapsed or been performed." (*Law of Bailm.* 117.) *Jacob.* This definition has been adopted in substance by several writers. See *Bell;* 2 *Kent,* 558; *Tomlins.*

Bailment, from the French *bailler,* to deliver, is a delivery of goods for some purpose, upon a contract, express or implied, that, after the purpose has been fulfilled, they shall be redelivered to the bailor, or otherwise dealt with, according to his directions, or (as the case may be) kept till he reclaims them. 2 *Steph. Com.* 80. Blackstone's definition (quoted *supra*) does not point to the duty of redelivery or delivery over according to the directions of the bailor, which seem to be usually involved in the idea of a bailment. *Id.* note *m.*

Bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust. *Story Bailm.* 3.

Jones' decision has been criticised as defective because it does not include chattels delivered under such circumstances that a return of them is not contemplated; as in the case of goods sent to a factor for sale, Yet it is doubted whether the term bailment is strictly applicable to goods thus entrusted to a factor. *Edw. Bailm.* 33, 34.

Bailment is a word of French origin, significant of the curtailed transfer, the delivery or mere handing over, which is appropriate to the transaction. *Schouler, Pers. Pr.* 695.

Chief Justice Bronson (in a dissenting opinion) declared the distinction between cases of bailment and of sale to be this: when the identical thing delivered, though in an altered form, is to be restored, the contract is one of bailment, and the title to the property is not changed; but where there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becoming a debtor to make the return, and the title to the property being changed, the transaction is a sale. (7 *Cow.* 752, 756, note *a;* 21 *Wend.* 83; 2 *Barb.* 520; 2 *N. Y.* 153; 3 *Mas.* 478; 1 *Blackf.* 353; 2 *Kent,* 589; *Jones Bailm.* 64, 102; *Story Bailm.* § 283, 439.) Mallory *v.* Willis, 4 *N. Y.* 76.

The test of a bailment is that the identical thing is to be returned; if another thing of equal value is to be returned, the transaction is a sale. Marsh *v.* Titus, 0 *Thomp. & C.* 29; 3 *Hun,* 550.

Many of the definitions involve the idea of a return of the property, as a part of the bailee's engagement; and this seems well warranted by the scope of the duty of the bailee, as understood in former years. But, in modern times, many engagements which are understood to be bailments do not involve a return, except in a most remote and strained sense. Thus, a delivery of goods to a carrier is commonly considered a bailment; yet the carrier does not return them, except upon the fiction that a delivery to the consignee operates as a return to the consignor. It seems better to regard the idea of return as not being an essential element in the definition.

Sir William Jones, following the principles of the civil law, acknowledges five species: 1. *Depositum,* which is a naked bailment, without reward, of goods to be kept for the bailor. 2. *Mandatum,* or commission: when the mandatory undertakes, without recompense, to do some act about the thing bailed, or simply to carry them. 3. *Commodatum,* or loan for use; when goods are bailed, without pay, to be used for a certain time by the bailee. 4. *Pignori acceptum;* when a thing is bailed by a debtor to his creditor in pledge, or as a security for the debt. 5. *Locatum,* or hiring; which is always for a reward; and this bailment is either (1) *locatio rei,* by which the hirer gains the temporary use of the thing; or (2) *locatio operis faciendi,* when work and labor or care and pains are to be performed or bestowed on the thing delivered; or (3) *locatio operis mercium vehendarum,* when goods are bailed for the purpose of being carried from place to place, either to a public carrier, or to a private person. *Jones Bailm.* 36.

Bailments are divisible into three kinds: 1. Those in which the trust is exclusively for the benefit of the bailor, or of a third person; 2. Those in which the trust is exclusively for the benefit of the bailee; 3. Those in which the trust is for the benefit of both parties, or of both or one of them and a third party. The first embraces deposits and ma ıdates; the second, gratuitous loans for use; the third, pledges or pawns, and hiring and letting to hire. A deposit is a naked bailment of goods to be kept for the bailor without recompense; and to be returned when the bailor shall require it. A mandate is a bailment of goods without reward, to be carried from place to place, or to have some act performed about them. A loan for use, or *commodatum,* is a bailment of goods to be used by the bailee temporarily, or for a certain time, without reward. A pledge, or pawn, is a bailment of goods to a creditor as security for some debt or engagement. A hiring, or *locatio-conductio,* is a bailment always for a reward or compensation. *Story Bailm.* 4

BALLOT. The paper embodying a vote; the choice of an elector, expressed in writing or print.

Is opposed to a vote by words or signs, such as a vote by yeas and nays, by raising the hand, or by rising. A printed paper may be a ballot: writing with pen and ink is not essential. Opinion of the Justices, 7 *Me.* 414.

A constitutional provision that elections shall be by ballot, means and requires that the voter shall be protected in absolute secrecy, as to the vote which he casts. Williams *v.* Stein, 38 *Ind.* 89.

BAN ; BANN. A proclamation, or public notice; an edict, particularly one embodying a prohibition, excommunication, or curse.

Bans of matrimony. Public notice has long been required, by English statutes, to be given, by audible announcement in parish church or authorized public chapel, of any intended marriage. It involves an opportunity to any person to interpose an objection to the marriage ; which is called forbidding the bans.

BANCUS. A bench; a high seat. The original name of one of the English courts, afterwards termed *communis bancus*, the common bench, by way of distinction from *bancus regis*, the king's bench, and known in later times as the court of common pleas. The term *banci narratores* was used to designate advocates in this court.

Bancus regis. The king's bench. The name of one of the English courts, which during its existence was the supreme tribunal after parliament. It was so termed because in theory it was held and its proceedings were had *coram ipso rege*, — before the king himself ; and in ancient times the king in person sometimes sat in the court. James I., however, was not allowed to sit *in banco regis* for the purpose of deciding a cause or delivering an opinion, Lord Coke being at the time chief justice. The initial letters B. R. are frequently used in the old reports to designate the court.

BANK. A bench. 1. The bench or seat occupied by judges. Hence, the seat of justice; a court. Particularly, the full court sitting for the determination of questions of law, termed sitting in bank; as distinguished from one or more judges sitting to determine questions of fact, generally with a jury, termed sitting at *nisi prius*. In this sense the word more frequently occurs in the form *banc*.

2. An establishment for the custody of money; or for the loaning and investing of money; or for the issue, exchange, and circulation of money; or for more than one or all of these purposes. The term is applied to the incorporation or association authorized to perform such functions; to the body of directors or other officers authorized to manage its operations; and to the office or place where its business is conducted. According to the functions exercised by them, as enumerated above, banks are classified as banks of deposit, of discount, and of circulation. Savings banks (*q. v.*) are banks for deposit and investment of money merely ; and all banks which receive money on deposit, to be repaid on demand or on notice, with or without interest, are banks of deposit. Banks of discount loan or advance money on negotiable paper or other security, deducting, as discount, an allowance for interest. Banks of circulation issue their notes intended to circulate as money, which are termed bank-notes, or bank-bills. All these operations are, in general, performed by the same bank; and, in addition, the transmission of money by means of bills of exchange is largely engaged in. The word is generally limited in application to a corporate body, the term banker designating an individual engaged in the business of banking.

The receiving of deposits by a chartered company, and loaning or investing the same for the benefit of depositors, is a business of banking. Banks, in the commercial sense, are of three kinds: 1. Of deposit; 2. Of discount; 3. Of circulation. It may be that all or any two of these functions are exercised by the same association; but there are banks of deposit without authority to make discounts or issue a circulating medium. Thus an institution for receiving savings, though established for the encouragement of thrift among laborers and others, and required by the charter to invest all moneys, and divide among depositors all the net income, without compensation to its managers, may be regarded as a bank; and such an institution is "a bank or company engaged in the business of banking," within the purview of the United States internal revenue laws. Bank for Savings *v.* The

Collector, 3 *Wall.* 495. Compare State *v.* Louisiana Savings Co., 12 *La. Ann.* 568.

Banks, in the commercial sense, are of three kinds: 1. Of deposit; 2. Of discount; 3. Of circulation. An institution exercising one only of these functions may be a bank in the strictest commercial sense. Oulton *v.* Savings Institution, 17 *Wall.* 109.

The term "incorporated bank," in Mass. Gen. Stat. ch. 161, § 39, — punishing an officer, &c., of any incorporated bank who fraudulently converts to his own use any money, &c., belonging to the bank or deposited therein, — includes banks chartered since the passage of that act as well as those then existing, and includes banking corporations organized under the laws of the United States and located in Massachusetts, as well as like corporations created by the laws of the commonwealth. Commonwealth *v.* Tenney, 97 *Mass.* 50.

Banking powers consist in the right of issuing notes, making discounts, and receiving deposits. N. Y. Firemen Ins. Co. *v.* Ely, 2 *Cow.* 678.

A corporation whose charter, passed before the existence of any restraining acts, provides that "it shall be lawful for them to employ all such surplus capital as may belong or accrue to said company in the purchase of public or other stock, or in any other moneyed transaction or operation not inconsistent with the constitution and laws of this state, or of the United States, for the sole benefit of said company," possesses banking powers; and, even after the main object of their incorporation has been accomplished, they may continue the banking business. So held, where statutes passed subsequent to the charter recognized the corporation as a bank. People *v.* Manhattan Bank, 9 *Wend.* 351, 383.

The name bank imports a corporation, and a statute referring to a bank by name may be deemed a legislative recognition of its corporate existence. State *v.* Helmes, 3 *N. J. L.* 764.

Bank means an institution incorporated for banking purposes; and does not, as used in Massachusetts, include offices of individuals or copartnerships doing business as private bankers. Way *v.* Butterworth, 106 *Mass.* 75.

Bank includes banking institutions, whether owned by a natural person, a partnership, or a joint-stock company. *Re* Leavenworth Sav. Bank, 14 *Bankr. Reg.* 92.

The phrase "any other bank," as used in a bank charter, applies only to incorporated banks. Campbell *v.* Farmers' Bank, 10 *Bush*, 152.

The terms bank and banking institutions, as used in the legislation of Ohio, are confined to corporations authorized to issue bills or notes for circulation. Ohio Life Ins., &c. Co. *v.* Debott, 16 *How.* 416, 438.

The terms bank or banker include any person, firm, or company having a place of business where credits are opened by the deposit or collection of money or currency subject to be paid or remitted upon draft, check, or order; or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes; or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount, or for sale. Act of congress of July 13, 1866, § 9, 14 *Stat. at L.* 115.

Bank-bill; bank-note. A promissory note, made and issued by a bank or banker under authority of law, payable on demand to the bearer. On account of the legal regulation of their issue, a certain credit is attached to bank-notes, and the readiness with which they pass from hand to hand, being payable to any holder on demand, makes them a convenient substitute for legal money; and they circulate as cash in ordinary business transactions. They are generally deemed a good tender, unless objected to. They are not, at common law, subject to be taken on execution; but this rule has been changed by statute in many of the United States, and they may be levied upon under an execution; but, usually, are not sold, being applied upon the execution as cash. They differ from ordinary promissory notes only in the recognition of them by general consent, and by the law to some extent, as a substitute for and equivalent to legal money; in other respects they are governed by the rules applicable to promissory notes payable to bearer. Indorsement of them not being usual or proper, many questions arising as to rights of parties to other negotiable paper have no application to bank-bills.

Promissory notes issued by an individual in his own name, printed or embellished in the style usual in bank-notes, made payable at the subscriber's exchange and banking office, and countersigned by a "cashier," are not bank-notes within the meaning of a rule that notes in the similitude of authorized bank-notes issued by any other bank, to be circulated as money, are void. James *v.* Rogers, 23 *Ind.* 451.

Unsigned sheets of paper, although duly engraved and adapted for bank-bills, are not bank-bills. Commonwealth *v.* Clancy, 7 Allen, 537.

A note forged in the name of a bank, which promises to pay "out of the joint funds of the association," is within the statute forbidding the passing and intent to pass counterfeit notes. Knapp's Case, 6 *City H. Rec.* 18; and see United States *v.* Winslow, 2 *Cranch C. Ct.* 47.

The words bank-bill and bank-note, in their popular sense, are used synonymously. State *v.* Hays, 21 *Ind.* 176; Low *v.* People, 2 *Park. Cr.* 37.

Bank-notes, bank-bills, and promissory notes, such as are issued by the directors of a bank incorporated by the legislature of Vermont, mean the same thing; so that the expression in a statute, "bank-bill or promissory note," is an evident tautology. State *v.* Wilkins, 17 *Vt.* 151.

Bank-notes are not "goods and chattels," nor "money." United States *v.* Bowen, 2 *Cranch C. Ct.* 133.

The terms bank-notes and current funds, when used in notes and obligations, import generally such as are convertible into gold and silver at par. Williams *v.* Arnis, 30 *Tex.* 37, 49.

Bank money means that species of money called bank-notes; and of that species the parties in this case meant that sort or variety called Mississippi bank-notes. Hopson *v.* Fountain, 5 *Humph.* 140.

3. A slight acclivity or elevation of the land; particularly the earth bordering on a river, canal, or other watercourse.

The banks of a river are understood to be the earth which contains it in its ordinary state of high water; on the Mississippi, where there are levees, the levees form the banks. (*La. Code*, art. 859.) Pulley *v.* Municipality No. 2, 18 *La.* 278; and see Stone *v.* Augusta, 46 *Me.* 127; Howard *v.* Ingersoll, 13 *How.* 381, 416.

"On the west bank" of a river, does not include military posts which are 92, 132, and 191 miles west of the river. Caldwell's Case, 19 *Wall.* 264.

A grant bounding on "the bank" of a creek does not convey the land to the centre of the creek, but only to low-water mark. Halsey *v.* McCormick, 13 *N. Y.* 296.

BANKER. A person who deals in money; a person engaged in the business of banking, as an individual or as a member of a copartnership. Where persons carrying on such business constitute a corporate body, the institution is termed a bank (*q. v.*), or a banking association.

Banking, in its most enlarged signification, includes the business of receiving deposits, loaning money, and dealing in coin, bills of exchange, &c. And the banks created by the authority of law are those which, in addition to the ordinary business of banking common for all persons to engage in, make and issue their paper to circulate as money, which are termed banks of circulation. By a long course of legislation in Ohio, banking has acquired a restricted legal signification, applying only to those banks which exercise the functions of issuing paper money. And a statute relating to taxation of banks and bankers should be construed, not as including private dealers in deposits, exchange, and discounts, but as confined to incorporated institutions and incorporated associations clothed with power of issuing paper money. Exchange Bank of Columbus *v.* Hines, 3 *Ohio St.* 1, 3.

The term banker includes all the business of a money-changer, and the term money-changer signifies a broker who deals in money and exchanges. A banker may be required to take out a license under a provision of a city charter which applies to money-changers. Hinckley *v.* Belleville, 43 *Ill.* 183.

A dealer in capital; an intermediate party between the borrower and lender. Curtis *v.* Leavitt, 15 *N. Y.* 9, 167.

BANKRUPTCY. A system or branch of jurisprudence, founded on positive law, devoted to ascertaining the insolvency of traders, collecting their assets for distribution among creditors, and giving to themselves, in proper cases, a discharge from indebtedness. Also, a condition of indebtedness or pecuniary embarrassment, which exposes or entitles a person to have his property taken for division among his creditors, and (in cases) to be discharged from their claims. Bankrupt: a person who has been judicially ascertained to be, by law, entitled or subject to have his property taken for distribution among creditors, while he may receive discharge from their claims. Also, often, but loosely, applied to one who is unquestionably subject to such adjudication, though it has not yet been passed.

The above definitions are framed upon the actual employment of the terms in American jurisprudence at the present day, rather than upon their etymology or original meanings. The relative force of the words bankruptcy and insolvency has been the subject of much discussion in the American courts, in cases involving a consideration of the powers of congress and of the states, over the status of embarrassed debtors. Were the language of the subject to be framed anew, we should advise employing the term insolvency to signify the condition of being indebted beyond the value of one's assets; and bankruptcy to signify an intention (either fraudulent or compelled by inability) not to pay indisputable debts, evidenced by some act which the law designates as sufficient proof of the intent to warrant a judicial distribution of the estate. An insolvent law would then be a law under which a *debtor* might obtain relief, by way of discharge, from overwhelming indebtedness, upon compliance with proper conditions as to proof of good faith in incurring the debts, and surrender of

all available assets, to be applied towards payment. And a bankrupt law would be a law under which a *creditor* might institute proceedings against a debtor, who, by an act of bankruptcy, had manifested an intent not to pay a conceded debt, to compel a surrender of all assets, and a judicial distribution of them, upon the condition of a just discharge of the debtor from indebtedness that might remain. But it is not practicable to reconcile all the existing legislation as conforming to this or to any systematic use of the two words: they have not been kept distinct in meaning. The power conferred upon congress by the constitution, to legislate upon the subject, is a power to establish "uniform laws on the subject of bankruptcy;" yet congress has unhesitatingly authorized proceedings of involuntary bankruptcy, and discharges of debtors, not traders, and at their own request; implying that the term bankruptcy fairly extends to these subjects.

Bankruptcy was, under the act of congress of March 2, 1867, and amendatory act of June 22, 1874 (now repealed), incurred by, and might be predicated of, any person:

Who departs from the state, &c., of which he is an inhabitant, with intent to defraud his creditors;

Who, being absent, remains absent, with such intent;

Who conceals himself, to avoid the service of legal process, &c.;

Who conceals or removes any of his property, to avoid its being attached, &c.;

Who makes any assignment, &c., of his estate, property, &c., with intent to delay, defraud, or hinder his creditors;

Who has been arrested and held in custody under process out of any court where he resides or has property, founded upon a demand provable against a bankrupt's estate, and for a sum exceeding one hundred dollars, such process remaining in force for a period of twenty days, or who has been actually imprisoned for more than twenty days in a civil action founded on contract for the sum of one hundred dollars or upward;

Who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, makes any payment, gift, or other transfer of money or other property, &c., or confesses judgment, or procures his property to be taken on legal process, with intent to give a preference to creditors, or to persons liable for him as indorsers, &c., or with the intent to defeat or delay the operation of the bankrupt laws;

Who, being a bank, banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment, or has stopped or suspended and not resumed payment, within a period of forty days, of his commercial paper;

Or who, being a bank or banker, fails for forty days to pay any depositor upon demand of payment lawfully made.

The definition of bankrupt has varied at different periods of our legal history. A bankrupt may perhaps be defined generally as a person who, by reason of some act or circumstance indicating a failure to meet his liabilities, and called an act of bankruptcy, has been adjudicated a bankrupt by a court of competent jurisdiction for that purpose. *Mozley & W.*

As to the distinction between bankruptcy and insolvency, it may be said that insolvent laws operate at the instance of an imprisoned debtor; bankrupt laws, at the instance of a creditor. But the line of partition between bankrupt and insolvent laws is not so distinctly marked as to define what belongs exclusively to the one and not to the other class of laws. Sturges *v.* Crowninshield, 4 *Wheat.* 122.

Insolvency means a simple inability to pay, as debts should become payable, whereby the debtor's business would be broken up; bankruptcy means the particular legal status, to be ascertained and declared by a judicial decree. Matter of Black, 2 *Ben.* 196.

Bankruptcy does not consist in the proceedings in court: it occurs in the course of a man's business. The proceedings are to ascertain whether or not he is a bankrupt. *Exp.* Breneman, *Crabbe*, 456, 465.

Bankruptcy is an inability to pay one's debts; as used in the constitution of the United States, it is synonymous with insolvency, and not confined to traders. Many other definitions collected. Sackett *v.* Andross, 5 *Hill*, 327; but see Kunzler *v.* Kohaus, *Id.* 317, 319.

The leading distinction between a bankrupt law and an insolvent law, in the proper technical sense of the words, consists in the character of the persons upon whom it is designed to operate, — the former contemplating as its objects bankrupts only, that is, traders of a certain description; the latter, insolvents in general, or persons unable to pay their debts. This has led to a marked separation between the two systems, in principle and in practice, which in England has always been carefully main-

tained, although in the United States it has of late been effectually disregarded. In further illustration of this distinction, it may be observed that a bankrupt law, in its proper sense, is a remedy intended primarily for the benefit of creditors; it is set in motion at their instance, and operates upon the debtor against his will (*in invitum*), although in its result it effectually discharges him from his debts. An insolvent law, on the other hand, is chiefly intended for the benefit of the debtor, and is set in motion at his instance, though less effective as a discharge in its final result. *Ib.*

The only substantial difference between a strictly bankrupt law and an insolvent law, lies in the circumstance that the former affords relief upon the application of the creditor, and the latter upon the application of the debtor. In the general character of the remedy there is no difference, however much the modes by which the remedy may be administered may vary. Martin *v.* Berry, 37 *Cal.* 208, 222.

Certain *pro rata* advances by the stockholders of a manufacturing company were, by the vote of the company, to be allowed and paid as debts "if the company should become bankrupt and discontinue business." Held, to mean a bankruptcy in the legal sense, and not merely such financial embarrassment as obliged the company to discontinue business. Barr *v.* Bartram Manuf. Co., 41 *Conn.* 502.

BANNERET. A name of dignity in England, denoting a degree next to a baron, and above a knight. Knights banneret were made in the field by the ceremony of cutting off the point of the standard, and making it, as it were, a banner; this conferred a dignity accounted so honorable that they were allowed to display their arms in the royal army, as barons did, and might bear arms with supporters. It is not a title of nobility, and is now nearly if not quite extinct. The word is sometimes spelled Baneret.

BANNS. A proclamation of intention to marry, which the law of England, and of some of the United States, requires should be made before the ceremony, to afford opportunity for objections. See BAN.

BAR has two technical senses in jurisprudence. 1. In pleading, any matter which is a final defence to the action is called matter in bar, or a defence in bar, in distinction from an objection or defect which may be supplied, such as a misnomer or non-joinder of a party, after which the suit can proceed. Thus, a plea which sets up an absolute or final defence is called a plea in bar; such pleas are payment, infancy, fraud, denial of having made the contract or committed the tort sued upon, &c.

2. From a practice, not very extensive in the United States, but said to be more distinct in England, of calling a space in a court-room inclosed by rails or other convenient barrier, and appropriated to advocates, "the bar of the court," there has arisen a use of the term bar to signify the members of the legal profession; those who are entitled to sit within the bar. So, admission to the franchise or office of attorney or counsellor is often styled admission to the bar; and proceedings in the presence of the court are said to take place at bar. The particular cause on argument is often spoken of as the case at bar, in distinction from causes previously decided, and cited as precedents; and, in criminal trials, the person arraigned is styled the prisoner at the bar.

Bar, or barr, in a legal sense, is a plea or peremptory exception of a defendant, sufficient to destroy the plaintiff's action. And it is divided into bar to common intendment, and bar special; bar temporary, and perpetual. Bar to a common intendment is an ordinary or general bar, which usually is a bar to the declaration of the plaintiff; bar special is that which is more than ordinary, and falls out upon some special circumstances of the fact, as to the case in hand. (*Termes de la Ley.*) *Jacob.*

Bar is used in several senses:

1. Of the place where prisoners stand to be tried; hence the expression "prisoner at the bar."

2. Of the place where barristers stand in court to speak for their clients; hence the term barristers.

3. Of the profession of a barrister, and the persons who practise it.

4. Of an impediment; thus we speak of uses or limitations in a deed "in bar of dower," because they are intended to prevent a wife becoming entitled to dower out of the lands comprised in the deed.

5. Of pleas in bar, which are pleas which go to the root of a plaintiff's action, and, if allowed, destroy it entirely.

6. A trial at bar in one of the superior courts of common law (generally the court of queen's bench) means a trial before the full court, or a quorum which shall represent the full court. *Mozley & W.*

Barring estate tail. Formerly, an estate tail could only be barred by levying a fine or suffering a common recovery. At

the present day, it can only be barred, in the case of freeholds, by a disentailing deed, and, in the case of copyholds, by surrender, or (if the estate is equitable) by a disentailing deed executed in accordance with the Stat. 3 & 4 Wm. IV. ch. 74. Neither a will, nor a contract of sale, nor any other deed or instrument, not being a special act of parliament, is of any force or efficacy whatsoever, unless preceded by the proper statutory mode of bar, to pass or to convey an estate tail to the devisee or contractee, or other person whatsoever; nor may the courts of equity, in favor of a purchaser for value, execute the contract by decreeing the heir in tail to carry out the act which his ancestor has left incomplete. *Brown.*

BARGAIN. A mutual agreement.

If there is any distinction between the words bargain and agreement, it is that bargain more prominently brings into view the mutuality of contract than does agreement. Sage *v.* Wilcox, 6 *Conn.* 81.

Bargain involves the idea of a mutual act of two persons, even more strongly than agreement. The latter is sometimes used in the sense of promise or engage. But bargain is seldom used, unless to denote a mutual contract or undertaking. Packard *v.* Richardson, 17 *Mass.* 122.

That bargain, in a statute of frauds requiring some memorandum of the bargain to be made, &c., does not involve or require the consideration to be stated, see Egerton *v.* Matthews, 6 *East,* 307.

Bargain and sale. The transfer of the property in a thing from one person to another, upon valuable consideration, by way of sale. Also, the instrument or conveyance by which such transfer is made; which (of lands) is frequently termed a deed of bargain and sale.

The term bargain and sale was used in early English law in the sense of a mere contract for the conveyance of land for a valuable consideration: the land itself did not pass, there being no livery of seisin; and as the seisin and possession remained in the bargainor, the contract was merely a sale of a use. The bargainor stood seised of the land to the use of the bargainee, to the extent to which it was affected by the transaction; and the bargainor's estate was still good at law, though a court of equity considered the estate as belonging to the bargainee, who had paid the money. After the statute of uses, however, the bargainee's interest was, by the operation of that statute, transferred into a legal estate, the possession being transferred and annexed to the use by the statute; and bargain and sale became one of the ordinary modes of conveying land, and has since continued to be used for that purpose in England and the United States. The operative words of conveyance usually employed are "bargain and sell," or "bargained and sold," but these are not essential; any equivalent words, or words which would have been sufficient to raise a use upon a valuable consideration before the statute of uses, are sufficient.

The term bargain and sale is also used of transfers of personal property; meaning an agreement to sell, followed and completed by an actual sale: the word bargain expressing the agreement as to the terms of the transfer, the word sale denoting the completion of the contract, passing the property from the seller to the buyer. A bargain and sale may, in general, be made by mere word of mouth. Instruments in writing are frequently resorted to, however, and in some cases — as the sale of a vessel — are necessary. Sometimes a mere note or memorandum of the terms of the contract is sufficient, but, in general, a formal conveyance, termed a bill of sale (*q. v.*), is employed. As in bargain and sale of real property, the distinguishing characteristic is the pecuniary or other valuable consideration for which the property is transferred. The party agreeing to sell is termed the bargainor; the party agreeing to purchase, the bargainee.

BAR-MASTER. The bar-master of the High Peak is an officer appointed by her majesty, under Stat. 14 & 15 Vict. ch. 94, § 9, to execute all precepts and warrants directed to him by the steward of the barmote courts, and to accompany the steward in taking views of the mines. He holds his office during the pleasure of her majesty, and may (with such consent as is specified in the act) appoint deputy barmasters for certain districts or "liberties" (seven in number) within the jurisdiction of the barmote courts. *Mozley & W.*

BARMOTE COURTS. Two courts, called the great and small barmote courts, having jurisdiction, under section 16 of the High Peak mining customs and mineral courts act (Stat. 14 & 15 Vict. ch. 94), of controversies involving the regulation of groves, posses-

sions, and trade of miners, within the hundred of High Peak, in Derbyshire. *Mozley & W.; Wharton.*

BARN. See State *v.* Wolfenberger, 20 *Ind.* 242; State *v.* Shaw, 31 *Me.* 250; People *v.* Taylor, 2 *Mich.* 250; State *v.* Laughlin, 8 *Jones L.* 354; *Id.* 455; State *v.* Jim, *Id.* 459; State *v.* Cherry, 63 *N. C.* 439; Ratekin *v.* State, 26 *Ohio St.* 420.

BARON. 1. A vassal holding directly from the king. Its original signification was probably the same as the Latin *vir*, gradually limited to a man able to bear arms, then to one bound to render military or other service to the king, or to a tenant holding directly from the crown.

2. As a title of nobility, baron denotes a degree next in rank to a viscount, being the fifth and lowest degree of nobility. This use of the word grew out of a further limitation of the original meaning; the term baron at one time including all the nobility of England. But it has long been applied only to the particular rank mentioned.

It is probable that, formerly, in this kingdom, all those were called barons that had such seigniories as we now call courts-baron; as they were called seigneurs in France who had any manor or lordship: and soon after the conquest all such came to parliament, and sat as peers in the lords' house. But when, by experience, it appeared that the parliament was too much thronged by these barons, who were very numerous, it was, in the reign of King John, ordained that none but the *barones majores* should come to parliament, who, for their extraordinary wisdom, interest, or quality, should be summoned by writ. After this, men observing the estate of nobility to be but casual, and depending merely upon the king's will, they obtained of the king letters-patent of this dignity to them and their heirs male, who were called barons by letters-patent, or by creation, whose posterity are now, by inheritance, those barons that are called lords of the parliament; of which kind the king may create at his pleasure. Nevertheless, there are still barons by writ, as well as barons by letters-patent; and those barons who were first by writ may now also justly be called barons by prescription, for that they and their ancestors have continued barons beyond the memory of man. *Jacob.*

The present barons are: By prescription; for that they and their ancestors have immemorially sat in the upper house. By patent, having obtained a patent of this dignity to them and their heirs male, or otherwise. By tenure, holding the title as annexed to land; it is said that it is the possession of their ancient landed territories which imparts the barony to the bishops, thereby giving them a place in the upper house, although they hold by succession, not by inheritance; but it is rather thought that they sit in the upper house by immemorial usage. *Wharton.*

3. As a title of office, the judges of the English court of exchequer were termed barons, from the fact that barons of the realm were formerly appointed to that office. The chief magistrates of London, before there was a lord mayor, were also anciently called barons. The barons of the Cinque Ports were members of the house of commons, elected for those ports, two for each.

4. Baron was also much used in the sense of husband; principally in the phrase *baron et feme*, — husband and wife, — which is now nearly obsolete; although *feme* continues in use, to some extent, in its original signification of woman.

BARONET. A name of dignity in England. It is created by letters-patent, and is hereditary, but is not a title of nobility. The order was created by King James I. in 1611, and it is supposed that, where the word baronet occurs in the statutes and authors previous to that date, it is used for baneret or banneret.

BARRATRY. 1. Fraudulent or unlawful conduct by a master of a vessel, or by the mariners, in violation of their duty, and to the injury of the owner of the vessel or cargo. Destroying or running away with a vessel or cargo, the stealing of portion of the cargo by the mariners, and like acts on the part of the master or mariners, for some illegal or fraudulent purpose of their own, are usual examples. Fraud is generally said to be essential to constitute barratry; but the term fraud, as used in this connection, does not always imply a dishonest or injurious intention towards the owners. But there must be wilful wrong; mere neglect does not constitute barratry.

The authorities that fraud must be a constituent of barratry do not mean fraud in the sense of a dishonest or injurious intention towards the owner, or *dolus*, but only require *culpa* or *maleficium*. Wilful refusal of a master to make efforts to extinguish a fire

in the ship may be barratry, although not prompted by a desire to defraud the owners; mere want of care or skill would not be. Patapsco Ins. Co. *v.* Coulter, 3 *Pet.* 222.

Barratry involves fraud or criminal conduct. Such terms as "villany, knavery, cheat, malversation, trick, deceit, or fraud, of the master," are used as synonymous with it. Sometimes, indeed, it is difficult to distinguish the lower species of fraud from the higher degrees of mere misconduct. But one thing is clear, if the facts are not strong enough to import some fraud or criminal conduct in the master, whatever name we may find to his conduct, we cannot call it barratry. Hood *v.* Nesbit, 2 *Dall.* 137.

Any fraudulent act of the master, in the course of a voyage, in breach or evasion of his orders, for his own benefit and to the prejudice of his owner, is an act of barratry. Crousillat *v.* Ball, 4 *Dall.* 294.

Barratry is an act committed by the master or mariners of a ship, for some unlawful or fraudulent purpose, contrary to their duty to their owners, whereby the latter sustain an injury. It follows from the very terms of the definition that it cannot be committed by a master who is owner for the voyage; because he cannot commit a fraud against himself. But it may be committed against a person who is owner for the voyage, although he may not be the general owner of the ship. Marcardier *v.* Chesapeake Ins. Co., 8 *Cranch*, 39.

Barratry is some act of the master or mariners, contrary to their duty to the owners, and whereby the owners sustain an injury (2 *Marsh. Ins.* 515); some trick, cheat, or fraud practised by the captain to the prejudice of the owners (*Id.* 534, note). These definitions may not in all respects be accurate; but on one point there is no doubt, if the act complained of was committed with the consent of the owner, it cannot be considered as constituting that offence. Dufour *v.* Camfrane, 11 *Mart.* 602.

There can be no barratry without fraud or crime. Wiggin *v.* Amory, 14 *Mass.* 1; Walden *v.* Firemen's Ins. Co., 12 *Johns.* 128; Messonier *v.* Union Ins. Co., 1 *Nott & M.* 155. Compare Dederer *v.* Delaware Ins. Co., 2 *Wash. C. Ct.* 61.

Barratry is some fraudulent act of the master or mariners, tending to their own benefit, to the prejudice of the owner of the vessel, without his privity or consent. Kendrick *v.* Delafield, 2 *Cai.* 67.

The term includes every species of fraud, committed by the master, to the injury of the owners or shippers. Cook *v.* Commercial Ins. Co., 11 *Johns.* 40. Barratry cannot be committed by hirer of vessel, Taggard *v.* Loring, 16 *Mass.* 336; nor in obeying owners' instructions, Ward *v.* Wood, 13 *Id.* 539.

Barratry, as used in English and American policies, means fraudulent and injurious conduct by the master, acting in the relation of master to the owner, contrary to the orders and instructions, against the interest and rights of the owners, and without their consent. One who is owner as well as master cannot commit a fraud upon himself: he cannot act without his own knowledge and consent, and, therefore, cannot commit barratry; and this is so where the master is part owner only. Wilson *v.* General Mut. Ins. Co., 12 *Cush.* 360.

Barratry consists in wilful acts or conduct of the master or mariners, done for some unlawful or fraudulent purpose, contrary to their duty to the owners of the vessel. The act must be wilful, and not accidental, or caused by negligence, unless the negligence be so gross as to amount to evidence of fraud. There need not be fraud, in the sense of an intention on the part of the master to promote his own benefit, at the expense of the owners: any wilful act of known criminality, or of gross malversation, operating to the prejudice of the owner, is barratry. Lawton *v.* Sun Mut. Ins. Co., 2 *Cush.* 500.

Barratry implies an intentional injury; does not include negligence. Atkinson *v.* Great Western Ins. Co., 4 *Daly*, 1.

Resistance by master and mariners of a neutral vessel to a lawful exercise of the right of search by a belligerent has been held barratry, notwithstanding the authorities to the proposition, that, in general, intent to defraud the owners is essential to barratry; upon the ground that, the lawfulness of the search being conceded, it necessarily follows that the resistance is criminal, and, being the ground of condemning the ship, must discharge the insurers as against the owner, though intended for his benefit. Brown *v.* Union Ins. Co., 5 *Day*, 1, 7.

Barratry includes stealing portions of the cargo (other than petty thefts) by members of the crew, notwithstanding the property taken belongs to the mate. Stone *v.* National Ins. Co., 19 *Pick.* 34.

Barratry is a generic term, which includes many acts of various kinds and degrees. It comprehends any unlawful, fraudulent, or dishonest act of the master or mariners, and every violation of duty by them arising from gross and culpable negligence contrary to their duty to the owner of the vessel, and which might work loss or injury to him in the course of the voyage insured. A mutiny of the crew, and forcible dispossession by them of the master and other officers from the ship, is a form of barratry. Greene *v.* Pacific Mut. Ins. Co., 9 *Allen*, 217.

2. The offence of frequently exciting and stirring up suits and quarrels. A single act of that description is not sufficient to constitute barratry; nor will any number of false and groundless actions brought by a man in his own right amount to the offence. The habitual moving others to quarrels or suits is essential.

The word in this sense is also spelled

Barretry; and a person guilty of the offence is termed a common barrator, or common barretor.

3. In Scotch law, the offence committed by a judge in taking a bribe for his decision.

BARREL, as used in the description of articles to be seized, in a writ of replevin, does not necessarily import a definite and precise description of a particular article or thing. It may be and often is used to designate a certain quantity, and not the vessel or cask in which an article is contained. Gardner *v.* Lane, 9 *Allen,* 492.

In a contract for the sale of one thousand barrels of petroleum oil, the term barrel may mean either a quantity or a vessel; and parol evidence is admissible to show in which sense the parties used it. Miller *v.* Stevens, 100 *Mass.* 518.

In a contract for the delivery of salt in barrels, such barrels as are directed by statute to be used in packing salt (1 N. Y. Rev. L. of 1813, 249) are intended. Clark *v.* Pinney, 7 *Cow.* 681.

A barrel of turpentine, or a barrel of flour, or a hogshead of tobacco, in agricultural and mercantile parlance, as also in the inspection laws, means, *prima facie,* not a certain quantity merely, but, further, a certain state of the article; namely, that it is in a cask. A barrel of turpentine or flour is one thing, constituted by both the cask and its contents. State *v.* Moore, 11 *Ired. L.* 70.

BARRISTER. The English name for an advocate in the courts; one who makes it his business to conduct the public trial or argument of causes, as distinguished from the attorney, who prepares and serves pleadings, and conducts matters out of court. The office is substantially the same as that of counsellor in the United States, so far as any distinction is there made between attorneys and counsellors.

BARTER. That species of contract in which merchandise is exchanged for merchandise. It is a sale, except that goods, instead of a money price, are received in payment.

BASE. Inferior; of low degree. The word is used in some phrases, such as the following:

Base court. An inferior court, not of record.

Base estate. The estate which base tenants had in their lands.

Base fee. Formerly, an estate held at the will of the lord.

In modern times, the term signifies an estate descendible to heirs general, but terminable on an uncertain event. So long as it lasts, it is equivalent to a fee-simple; but its continuance is contingent.

Base tenants. Those who held at the will of a feudal lord; those who were bound to perform inferior services to feudal lords.

BASILICA. A compilation of the ancient civil law, being chiefly an abridgment of the *Corpus Juris Civilis* of Justinian, made about the beginning of the tenth century, in the Greek language. The *Basilica* formed the basis of municipal law throughout the Eastern empire, from their promulgation until the end of the dynasty of Greek emperors, upon the conquest of Constantinople by Mahomet, in 1453. *Bouvier; Burrill.*

BASTARD. A child begotten of an unlawful intercourse, and born while its parents are not united in marriage; an illegitimate or natural child.

It is scarcely possible to frame a single sentence which shall precisely discriminate and include all the cases. Blackstone says, A bastard, by our English laws, is one that is not only begotten, but born, out of lawful matrimony. Kent says, One begotten and born out of lawful wedlock. Bouvier criticises these definitions as open to the objection that they "do not include with sufficient certainty those cases where the children are born during wedlock, but are not the children of the mother's husband;" and gives the following substitute: One born of an illicit connection, and before the lawful marriage of its parents. As to this definition one may observe, in turn, that it does not include the possible case of intercourse and birth of progeny between parents who have been previously intermarried, but are divorced or separated by a decree still in operation. Further refinements are suggested by the varying rules of law in different jurisdictions as to the effect of the subsequent intermarriage of the parents of one born a bastard, upon the status of the child. By the civil law, also by the law of Scotland, such marriage legitimated the offspring; and this principle has been embodied in general statutes of several of the states; and there are in-

stances, also, where individuals, illegitimate at birth, have been declared legitimate by special or private legislative act. By the common-law rule, long and steadfastly adhered to in England and throughout many of the states, while a person born after wedlock is legitimate, no matter though begotten before, wedlock after birth has no operation to relieve from the condition of bastardy. Again, a child born during wedlock, under circumstances which render it impossible that the mother's husband can be its father, or which disprove possibility of the husband's access to the mother, is thereby shown to be a bastard; as also a child born so long after the death of its mother's husband that he cannot by possibility have begotten it. But the severest proof is necessary to establish illegitimacy in cases falling within these two classes; indeed, a technical rule, requiring continuous and absolute absence of the husband from the realm or state for a specific period extending beyond any possible term of gestation, prevails in several jurisdictions. See 1 *Bl. Com.* 454; also *Sharswood's notes in loco;* 9 *U. S. Dig.* 715, ¶ 294.

By the New York statute, every child shall be deemed a bastard who shall be begotten and born:

1. Out of lawful matrimony.

2. While the husband of its mother continued absent out of this state for one whole year previous to such birth, separate from its mother, and leaving her during that time continuing and residing in this state.

3. During the separation of its mother from her husband, pursuant to a decree of any court of competent authority. 1 *Rev. Stat.* 641, § 1; 1 *Edm.* 595.

By the Spanish law, children begotten after both parties know with certainty of the existence of an impediment to their marriage, are illegitimate; otherwise as to children begotten while both or one of the parties was ignorant of such impediment, or while a doubt existed in the mind of either as to the fact of any impediment. Patton *v.* Philadelphia & New Orleans, 1 *La. Ann.* 98.

The legal definition of bastard, a child born out of lawful wedlock, includes those born of parties under disability, such as slaves, who cannot exercise the freedom of consent essential to the contract of marriage. Timmins *v.* Lacy, 30 *Tex.* 115, 135.

When a man has a bastard son, and after marries the mother, and by her has a legitimate son, the eldest son is *bastard eigne* (*eigné* being from the French *aisné* or *aîné*), and the younger son is *mulier puisné.* (2 *Bl. Com.* 248; 1 *Steph. Com.* 438, 439.) *Mozley & W.*

BASTARDY. The status or condition of being a bastard; illegitimacy. Also, a proceeding authorized by the laws of England, and by the statutes of the various states, for ascertaining the paternity of an illegitimate child, particularly of one about to be born, and compelling the father to indemnify the public authorities against the probability of its becoming chargeable to them. Also, sometimes, the offence of begetting an illegitimate child.

In its sense of begetting a child unlawfully, bastardy seems to import a misdemeanor; in its sense of an inquiry, it appears deemed a civil proceeding.

BATTEL. Trial by combat. A species of trial by single combat, in which the parties, or their champions, were allowed to fight, in the expectation that Providence would give the victory to the innocent or injured party. This mode of trial was introduced in England by William the Conqueror, and was allowed in both civil and criminal cases. In criminal cases, it might be allowed at the defendant's choice, in appeals of murder or other felonies, unless there was a violent presumption of the defendant's guilt; but not if plaintiff was under an apparent disability to fight, for the combat was between the parties in person, champions not being allowed in criminal appeals. The proceeding by appeal and the wager of battel in such cases, although disused, were recognized as the law of the land so late as 1818, in the celebrated case of Ashford *v.* Thornton, 1 *Barn. & Ald.* 405; but trial by battel was immediately abolished by statute 59 Geo. III. ch. 46. The proceeding by appeal was in the nature of a civil remedy for the private injury inflicted by the crime; and the trial by battel was a proceeding of civil, not criminal, cognizance.

This was also the established mode of trial of issues joined upon a writ of right, formerly the most important proceeding with regard to real property; as it involved the right of property, other

real actions involving merely questions of the right of possession. In trials upon a writ of right, the battel was by champions, and not by the parties in person; for the reason that, if either party should be slain, the suit must abate, and no judgment for the lands in question could be given. No party could claim exemption from this mode of trial of writs of right, and it remained the only mode of decision in such cases until the proceeding by assise (*q.v.*) was introduced by Henry II., after which time it was disused.

BATTERY. A wilful and unlawful use of force or violence upon the person of another.

The actual offer to use force to the injury of another person is assault; the use of it is battery; hence the two terms are commonly combined in the term assault and battery. See ASSAULT.

Battery, also, to beat, means, in the legal acceptation of the term, not merely to strike forcibly with the hand, or a stick, or the like, but includes every touching or laying hold, however trifling, of another's person or clothes, in an angry, revengeful, rude, insolent, or hostile manner. *Wharton.*

The least force is sufficient to constitute battery: merely touching another person wilfully and in anger is a battery; and every battery includes an assault. Johnson *v.* State, 17 *Tex.* 515.

BATTURE. A marine term, used to denote a bottom of sand, stone, or rock, mixed together, and rising toward the surface of the water: its etymology is from the word *battre*, to beat; because a *batture* is beaten by the water. Both as a technical word and in common parlance it means an elevation of the bed of a river, under the surface of the water, since it rises towards it. It is, however, sometimes used to denote a similar elevation of the bank when it has arisen above the surface of the water, or is as high as the land on the outside of the bank. Morgan *v.* Livingston, 6 *Mart.* (*La.*) 216.

BAWDY-HOUSE. An abode or dwelling kept for the convenience and shelter of persons desiring unlawful sexual intercourse; a brothel; a house of ill-fame.

Such a house is a common nuisance, and to maintain one is punishable by early English law, as well as under statutes of Great Britain, and probably of all the states. To constitute a bawdy-house such as is thus punishable, it need not be an entire building: keeping a single room for the general resort of lewd women is enough, Reg. *v.* Pierson, 1 *Salk.* 382; 1 *Ld. Raym.* 1197; nor need it be kept for profit, State *v.* Bailey, 21 *N. H.* 343; but it must have acquired repute as a house of ill-fame, Caldwell *v.* State, 17 *Conn.* 467; and be the resort or abode of more than one woman of unchaste character, State *v.* Evans, 5 *Ired. L.* 603.

BEACH, designates land washed by the sea and its waves; is synonymous with shore. Littlefield *v.* Littlefield, 28 *Me.* 180.

When used in reference to places near the sea, beach means the land between the lines of high water and low water, over which the tide ebbs and flows. Hodge *v.* Boothby, 48 *Me.* 68.

Beach means the shore or strand. Cutts *v.* Hussey, 15 *Me.* 237.

Beach, when used in reference to places anywhere in the vicinity of the sea, means the territory lying between the lines of high water and low water, over which the tide ebbs and flows. It is in this respect synonymous with shore, strand, or flats. Doane *v.* Willcutt, 5 *Gray*, 328, 335.

Beach generally denotes land between high and low water mark, East Hampton *v.* Kirk, 13 *N. Y. Supreme Ct.* 257; but not necessarily, Merwin *v.* Wheeler, 41 *Conn.* 14.

BEACONAGE. Money paid as the expenses of maintaining a beacon, or signal-light.

BEADLE. A parish officer in England, chosen by the vestry of the parish and charged with the duty of attending vestry meetings, notifying parishioners of time of holding them, assisting the constabulary in arrests of vagrants, and performing various services in the administration of the poor-laws.

Beadle, or bedel, signifies a messenger or apparator of a court that cites men to appear and answer; also, an inferior officer of a parish or liberty. Bedelary: the same to a bedel as *baliva*, or bailiwick, is to a bailiff. (*Cowel.*) *Mozley & W.*

BEARER. 1. This word is familiarly used in bills of exchange, checks, and promissory notes where the maker designs that the money shall be payable to any person who may present the instrument for payment.

The words, or order, or bearer, and bearer, in notes, bills, and checks, are

words of negotiability, and the use of either of them makes the paper negotiable, although impersonal words are used in place of naming a payee. Mechanics' Bank *v.* Straiton, 3 *Keyes*, 365, 36 *How. Pr.* 190, and more fully, 5 *Abb. Pr.* N. S. 11.

In respect to a note drawn, "Due to the bearer hereof, £3, which I promise to pay T or order, on demand," it was held that the word bearer had reference to T as payee, and another person could not maintain an action on the note without the indorsement of T. Cock *v.* Fellows, 1 *Johns.* 143.

2. In old English books, bearers is used to denote oppressors; persons who bore down upon or tyrannized over others. *Jacob.*

BEAST. A general designation of the four-footed land animals which are of use or value for work, food, or sport.

In vernacular use, "beast" would be regarded as a broader term than "cattle"; but it is not easy from American decisions to show any definite distinction, in legal senses. See CATTLE.

The Mass. estray law, Gen. Stat. 185, makes provision for impounding swine, sheep, horses, asses, mules, goats, or neat cattle, naming all these in the first section, and then employs "beasts" as a comprehensive term in following provisions intended to apply to all; while the different kinds are specifically mentioned in provisions applying to them separately.

Under Minn. Rev. Stat. ch. 101, § 31,—punishing the killing "horses, cattle, or other beasts,"—it was held that the term beasts (the statute being penal) must be strictly construed, and includes only domesticated animals of value. It evidently includes such animals as have an intrinsic value, in the same sense as there is value in horses, oxen, and cows. It may be intended to include asses, mules, sheep, swine, and perhaps some other domesticated animals. But dogs are not embraced. Maliciously killing a dog is not punishable under the statute. United States *v.* Gideon, 1 *Minn.* 292, 296.

Beasts of chase (*feræ campestres*) are five: the buck, doe, fox, marten, and roe. (*Manw.* Pt. I. 342.) Beasts of the forest (*feræ silvestres*), otherwise called beasts of venery, are the hart, hind, boar, and wolf. (*Ib.* Pt. II. ch. 4.) Beasts and fowls of the warren are the hare, coney, pheasant, and partridge. (*Ib.*; *Reg. Orig.* 95, 96, &c.; *Co. Litt.* 233.) *Jacob.*

BED. 1. Cohabitation, or the right of connubial intercourse. Thus the expression a divorce from bed and board signifies that the right of sexual intercourse and the relation of maintenance or support are suspended.

2. In reference to streams, the bed is the channel in which the water runs; the soil which is so often covered by water as to acquire distinct character and features by the submersion.

The banks of a river are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually covered by water as to be distinguishable from the banks, by the character of the soil, or vegetation, or both, produced by the common presence and action of flowing water. But neither the line of ordinary high-water mark, nor of ordinary low-water mark, nor of a middle stage of water, can be assumed as the line dividing the bed from the banks. This line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself. The bed of a river is a natural object, and is to be sought for, not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearances they present; the banks being fast land, on which vegetation appropriate to such land in the particular locality grows wherever the bank is not too steep to permit such growth, and the bed being soil of a different character and having no vegetation, or only such as exists when commonly submerged in water. Howard *v.* Ingersoll, 13 *How.* 381.

The bed of a river is the space contained between its banks. Pulley *v.* Municipality No. 2, 18 *La.* 278.

BEDEL. See BEADLE.

BEDEREPE. A feudal service, consisting in reaping the lord's grain at harvest-time. *Jacob; Cowel; Blount.*

BEER. In its ordinary sense, denotes a beverage which is intoxicating, and is within the fair meaning of the words "strong or spirituous liquors," used in the statutes on this subject. People *v.* Wheelock, 3 *Park. Cr.* 9; Nevin *v.* Ladue, 3 *Den.* 437; Excise Commissioners *v.* Taylor, 21 *N. Y.* 173. To the contrary, People *v.* Crilley, 20 *Barb.* 246. See the cases 3 *Den.* 437, for an extended history of the subject.

Beer, in statutes regulating sales, means strong liquor; that is, strong enough with the inebriating principle or element, whether obtained by distillation or fermentation, to produce intoxication. People *v.* Hart, 24 *How. Pr.* 289.

BEFORE. Before trial, in an act requiring exceptions which go to the form of an

indictment merely, to be made before trial, means before pleading to the merits. Winship *v.* People, 51 *Ill.* 296.

A statute providing for offer to confess judgment at "any time before trial," was held not to include time before the commencement of the suit. Horner *v.* Pilkington, 11 *Ind.* 440.

Before the wind. Under section 5 of the act of congress of March 4, 1849 (9 Stat. at L. 382), — which provides that vessels on the larboard tack shall show a green light, and vessels "going off large or before the wind, or at anchor, a white light," — the phrase "before the wind" is not definitive of "going off large;" and therefore a vessel off large, though on a larboard tack, is right in showing a white light. Ward *v.* The Fashion, 1 *Newb.* 8; s. c. *sub nom.* The Fashion *v.* Wards, 9 *McLean*, 152.

BEHALF. Testimony of a witness called and examined by a party, is testimony in his behalf, notwithstanding it may be unfavorable to his cause. Richerson *v.* Sternburg, 65 *Ill.* 272.

BEHAVIOR. Conduct; personal carriage and demeanor; one's whole manner of deporting one's self. Used in the expression requiring a person to give surety to be of good behavior. See ABEARANCE.

BELIEF. The act of believing. Persuasion of the truth of a proposition or affirmation, or the acceptance of a fact as real or certain, without immediate personal knowledge. The distinction between belief and knowledge has become important in many of the United States where codes of procedure have been enacted, requiring the verification of a pleading to be in form that the pleading is true to the knowledge of the person making it, except as to matters stated on information and belief, and as to such matters, that he believes it to be true. By the New York code of civil procedure, taking effect Sept. 1, 1877, every allegation or denial in a verified pleading, not expressly stated to be made on information and belief, is regarded for all purposes, including a criminal prosecution, as made upon the knowledge of the person verifying the pleading. The distinction between the two mental conditions seems to be, that knowledge is an assurance of a fact or proposition founded on perception by the senses, or intuition; while belief is an assurance gained by evidence, and from other persons.

The difference between belief and knowledge consists in the degree of certainty. With regard to things which make not a very deep impression on the memory, it may be called belief. Knowledge is nothing more than a man's firm belief. Hatch *v.* Carpenter, 9 *Gray*, 271.

Believe and suspect are not equivalent in meaning. An affidavit that affiant "suspects" or "has cause to suspect," is not sufficient under a statute requiring an affidavit that he believes. Commonwealth *v.* Certain Lottery Tickets, 5 *Cush.* 369.

"If you believe from the evidence," is synonymous with "if you find." State *v.* O'Hagan, 38 *Iowa*, 504.

Bello parta cedunt reipublicæ. Things acquired in war go to the state. The right to all captured property vests primarily in the state, whether the capture is made with or without its authority.

The sole and exclusive right to all prizes rests in the government; and all captures made without its commission inure to the use of the government, by virtue of its general prerogative.

BELONGING, as used in statutes regulating liability of a town for poor persons belonging therein, relates to the place of a pauper's legal settlement, and not to his place of residence. Reading *v.* Westport, 19 *Conn.* 561; Columbia *v.* Williams, 3 *Id.* 467.

BENCH. Originally, the dais or elevated seat allotted to the judges in a court of justice. Hence, secondarily, the judges themselves, either the court as a tribunal, as in the expressions, the full bench, the common bench; or judges taken collectively and as a professional class, as in the phrase the bench and bar, *i.e.*, judges and lawyers.

BENCH WARRANT. A warrant issued by the presiding judicial officer at assizes or sessions for the apprehension of an offender; so called in opposition to a justice's warrant, issued by an ordinary justice of the peace or police magistrate. (4 *Steph. Com.* 381.) *Mozley & W.*

Process issued against a party against whom an indictment has been found, for the purpose of bringing him into court to answer the charge preferred against him. When an indictment has been found for a misdemeanor during the assizes or sessions, it is the practice for the judge attending the assizes, or for two of the justices attending the sessions, to issue a bench warrant, signed by him or them, to apprehend the defendant. (*Cowp.* 239; *Hawk. Pl. Cr.*; 1 *Ch. Crim. Law*, 338, 339.) *Brown.*

BENCHER. A dignitary of the inns of court is so termed. Each inn of court is presided over by a certain number of

benchers, who exercise the right of admitting candidates as members of their society, and also of ultimately calling them to the bar. They are usually selected from those of their members who have distinguished themselves in their profession; and it is the ordinary practice, but subject to a discretion in the body of benchers, for each inn of court to elect its member a bencher as soon as he has attained the rank or degree of queen's counsel. They also exercise a general supervision over the professional conduct of all counsel that are members of the inn. *Brown.*

Benedicta est expoaitio quando res redimitur a destructione. The interpretation is commendable when the subject-matter is rescued from destruction. The interpretation which gives effect to an instrument is to be preferred to that which makes it void. This maxim expresses a principle which is more fully stated in the maxim, *benigne faciendæ sunt interpretationes*, &c., *q. v.*

BENEFICE. In modern usage, a comprehensive term for ecclesiastical livings and church preferments, under the church of England. It has also been used in special or restricted senses, as indicated by authorities quoted below.

According to Blackstone, feudal estates, at the time when the papal supremacy spread to England, were known as *beneficia*, being originally gratuitous donations; and the term was adopted by the priesthood for appointments to the cure of souls in a parish: 4 *Bl. Com.* 107; and it seems to have become gradually engrossed for that use. See also *Shipley*, voc. Benefice.

Benefice is generally taken for any ecclesiastical living or promotion; and all church preferments and dignitaries are benefices; but they must be given for life, not for years, or at will. But, according to a more strict and proper acceptation, benefices are only rectories and vicarages.

The word benefice was formerly applied to portions of land, &c., given by lords to their followers for their maintenance; but afterwards, as these tenures became perpetual and hereditary, they left their name of *beneficia* to the livings of the clergy, and retained to themselves the name of *feuds*. And *beneficium* was an estate in land at first granted for life only, so called because it was held *ex mero beneficio* of the donor; but at length, by the consent of the donor or his heirs, they were continued for the lives of the sons of the possessors, and by degrees passed into an inheritance. *Jacob.*

Benefice is generally taken for any ecclesiastical living or church preferment, whether a dignity or not; and it must be given for life, not for years or at will. *Brown.*

Prior to the reformation, benefices were of two kinds. They consisted either of lands or teinds; the former were called the temporality, the latter the spirituality of benefices. *Bell.*

BENEFICIARY. One who is entitled to the profit or advantage of an estate or contract, but has not the legal title, nor the custody or control; a *cestui que trust*.

Also, in English ecclesiastical parlance, the incumbent of a benefice. *Wharton.*

Judge Story, 1 *Eq. Jur.* § 321, has recommended that beneficiary, or the equivalent term of the civil law, *fide commissary*, should be substituted for *cestui que trust*, in order "to escape from the awkwardness of a barbarous foreign idiom." Mr. Burrill's views are in favor of retaining the phrase *cestui que trust*. *Burrill Dict.*, voc. *Cestuy.*

BENEFIT. Advantage; good; profit. Beneficial: advantageous; profitable. Usually applied to an interest or estate of one who is entitled to the pecuniary benefit of a contract, or of property, but who is not vested with the legal estate, or with power of control.

Benefit of clergy. A privilege in the nature of an exemption from capital punishment, anciently allowed in England to criminals in holy orders, afterwards extended to the laity, as a mode of mitigating the severity of the penal law. The mode of determining the question of the right of a person claiming the privilege, or, as it was termed, "praying his clergy," was to tender him a psalm to read, usually the fifty-first psalm; and, if he read it correctly, he was allowed a trial in the ecclesiastical court, where he could be discharged by purgation on oath. The privilege was extended to all who could read, probably upon a theory that, if not clerks, they were capable of becoming so; but was then limited to the less important felonies. It seems never to have been allowed in cases of high treason, or of misdemeanor. In cases of laymen who claimed and were allowed their clergy, they were discharged after

undergoing the punishment of burning in the hand; for which afterwards whipping, fine, and imprisonment were substituted. Benefit of clergy was abolished in England by Stat. 7 & 8 Geo. IV. ch. 28. In the United States, by act of congress of April 30, 1790, benefit of clergy is not to be allowed upon conviction of any crime punishable by death under any statute of the United States.

Benefit building societies. Certain associations which have been established in different parts of the kingdom, principally amongst the industrious classes, for the purpose of raising, by small periodical subscriptions, a fund to assist the members thereof in obtaining a small freehold or leasehold property. The legislature has afforded encouragement and protection to such societies and the property obtained therewith, by 6 & 7 Wm. IV. ch. 32. *Wharton.*

Benefit societies. Under this and several similar names, in various states, corporations exist to receive periodical payments from members, and hold them as a fund to be loaned or given to members needing pecuniary relief. Such are beneficial societies of Maryland, fund associations of Missouri, loan and fund associations of Massachusetts, mechanics' associations of Michigan, protection societies of New Jersey. Friendly societies in Great Britain are a still more extensive and important species belonging to this class.

Benefit societies are friendly associations, chiefly among the industrious and lower classes of society, for the purpose of affording each other relief in time of sickness, and their widows and children assistance at their death. *Wharton.*

BENEVOLENCE. 1. Is used in the chronicles and statutes of this realm for a voluntary gratuity given by the subjects to the king. (*Stow's Annals*, p. 701.) And Stow saith that it grew from Edward the Fourth's days; you may find it also *anno* 11 Hen. VII. ch. 10, yielded to that prince in regard of his great expenses in wars, and otherwise. (12 *Rep.* 19.) And by act of parliament, 13 Car. II. ch. 4, it was given to his majesty king Charles II., but with a proviso that it should not be drawn into future example; as those benevolences were frequently extorted without a real and voluntary consent, so that all supplies of this nature are now by way of taxes, by grant of parliament; any other way of raising money for the crown is illegal. (*Stat.* 1 *Wm. & M.* st. 2, ch. 2.) In other nations benevolences are sometimes given to lords of the fee by their tenants, &c. *Cassan de Consuet.* (*Burg.* pp. 134, 136.) *Jacob.*

2. Is no doubt distinguishable from the words liberality and charity; for although many charitable institutions are very properly called benevolent, it is impossible to say that every object of a man's benevolence is also an object of his charity. James *v.* Allen, 3 *Mer.* 17.

BENEVOLENT. Is certainly more indefinite, and of far wider range, than charitable or religious; it would include all gifts prompted by good-will or kind feeling towards the recipient, whether an object of charity or not. The natural and usual meaning of the word would so extend it. It has no legal meaning separate from its usual meaning. Charitable has acquired a settled limited meaning in law, which confines it within known limits. But in all the decisions in England on the subject it has been held that a devise or bequest for benevolent objects, or in trust to give to such objects, is too indefinite, and therefore void. Norris *v.* Thomson, 19 *N. J. L.* 307, 313; Thompson *v.* Norris, 20 *Id.* 489.

The masonic fraternity is a benevolent institution, within the meaning of the Indiana statute (1 *Gav. & H.* 70), which exempts from taxation buildings "erected for the use" of such institutions. Indianapolis *v.* Grand Master, &c., 25 *Ind.* 518.

BENGAL REGULATIONS (abbreviated Ben. Reg.). The regulations passed by the governor-general of India in council for the provinces of Bengal, Behar and Orissa, and other provinces, relating for the most part to the administration of justice and to the revenue. Such of them as were in force at the end of 1853 were published in three volumes, by Richard Clarke, Esq., late of the Madras civil service. *Mozley & W.*

Benigne faciendæ sunt interpretationes chartarum, propter simplicitatem laicorum, ut res magis valeat quam pereat; et verba intentioni, non e contra, debent inservire. The interpretation of written instruments is to be liberal, on account of the unskilfulness of the laity, so that the subject-matter may have effect rather than become void; and the language should be subject to the intention, not the contrary.

This maxim is one of the oldest in the law, being mentioned by Bracton (fol. 95 *a*, *b*) as an ancient rule of construction in his time. It occurs in many forms, abbreviated or modified somewhat by the omission of words or clauses, and the substitution of others. The general principle, however, has

remained the same under all forms of expression, and may be briefly stated in the following terms: Written instruments should have a liberal construction, so as to uphold them, if possible, and to carry into effect the intention of the parties. The maxim is the most important rule applicable to the construction of written instruments, and the most comprehensive in its meaning; its application being restricted only in a few cases by the operation of technical rules, which either impose fixed and definite meanings upon particular words and phrases, or establish certain limitations upon freedom of construction of particular instruments.

The reason assigned in the maxim itself, *propter simplicitatem laicorum*, extends to all cases where the parties to an instrument, by the inapt and unskilful use of the language employed by them, have failed to express their real intention; and in such cases the maxim applies, and the courts should rather construe the words to fulfil the intent of the parties, than destroy the intent by reason of the insufficiency of the language. 1 *Plowd.* 159. Words of art, for instance, which, in the understanding of conveyancers, have a peculiar technical meaning, should not be scanned and construed with a conveyancer's acuteness, if, by so doing, one part of the instrument is made inconsistent with another, and the whole is incongruous and unintelligible. The courts will understand the words used in their popular sense, and will interpret the language of the parties according to the particular subject-matter of the writing, so that full and complete force may be given to the whole.

But where the difficulty arises from the fact that the parties, at the time of executing the instrument, failed to foresee and contemplate the happening of some particular event, or the existence of some particular state of facts at a subsequent period, the courts must follow the meaning of the words actually used; reading the words in their ordinary and grammatical sense, and giving them effect, unless such a construction would lead to some absurdity or inconvenience, or would be plainly repugnant to the intention of the parties to be collected from other parts of the deed. Bland *v.* Crowley, 6 *Exch.* 529.

The object to be accomplished by the rule, *ut res magis valeat quam pereat*, is understood to be the carrying into effect of the whole instrument, if possible; so that every part of it shall take effect, and every word be made to operate in some way. *Plowd.* 156; *Shep. Touch.* 84. And where the instrument cannot operate to the extent intended by the parties, it shall, as far as possible, be made to effectuate their intention. Instances are, a deed in which different grantors join, some of whom have and others have not the capacity to make such deed, which is held to be the valid deed of the parties capable of making it. So a deed made to one that is capable and one that is incapable of taking the estate intended to be conveyed, inures as a valid conveyance to the party capable of taking under it. *Shep. Touch.* 81, 82. And a joint lease by a tenant for life and remainder-man operates during the life of the tenant as his demise, confirmed by the remainder-man, and afterwards as the demise of the remainder-man. Treport's Case, 6 *Rep.* 15; *Broom Max.* 545.

The intention of the parties, as contrasted with their language in the last clause of the maxim, *verba intentioni, non e contra, debent inservire*, is the intention collected from the entire instrument, not considering merely the words of the clause under construction. Thus, in determining whether a particular instrument is to be construed as a lease or as a mere agreement for a lease, the whole instrument is to be looked at to judge of the intention of the parties as declared by the words of it. So to charge a party with a covenant, express words of covenant or agreement are not necessary, if the intention of the parties to create a covenant be apparent, even from words of recital or reference only. Wherever the court can collect from the instrument an engagement on the one side to do or not to do something, it amounts to a covenant, whether it is in the recital or any other part of the instrument. Great Northern R. Co. *v.* Harrison, 12 *Com. B.* 609. And such

questions as whether covenants are joint or several; whether they are dependent or independent; what is or is not a condition precedent, — are to be determined by the intention or meaning of the parties as it appears on the whole instrument; to the intention, when discovered, all technical forms of expression must give way. *Broom Max.* 548.

As to different kinds of instruments, no distinction is made in the application of the maxim to different classes of agreements; the same sense is put upon the same words of a contract in an agreement under seal and in one not under seal. But the rules of interpretation of wills are more liberal than of contracts. The intention of the testator is the only guide as to the interpretation of his will, subject only to these limitations, — that his intent should be agreeable to the rules of law; and that his intent should be collectible from the words of the will. Blamford *v.* Blamford, 3 *Bulst.* 103. No surmise or conjecture as to the objects he may be supposed to have had in view can be allowed to control, if a lucid intent can be derived from the plain language of the will. *Broom Max.* 555. Yet even in the interpretation of wills technical rules of construction prevail to some extent, even where their application may seem to tend to defeat the intention of the testator; of which the rule in Shelley's Case, by which the word heirs is construed as a word of limitation, is a familiar example. Deeds are subject to like technical rules.

The doctrine of *cy près*, which proceeds upon the principle of carrying into effect, as far and as nearly as possible, the intention of the testator, is within the spirit of this maxim. Instances of the application of this doctrine by courts of equity are cases where a condition precedent is annexed to a legacy, but a literal compliance therewith has become impossible from unavoidable circumstances, and without any fault of the legatee; or bequests for charitable purposes, a literal compliance with which has become impracticable or inexpedient; in which cases a court of equity will endeavor substantially, and as nearly as possible, to carry into effect the intention of the testator. *Broom Max.* 565.

Benignior sententia in verbis generalibus seu dubiis est preferenda. The more liberal interpretation of general or doubtful words is to be preferred. When the words of a written instrument are vague, general, or doubtful, they are to be interpreted liberally, so as to give effect to the intention of the parties. This rule of interpretation is more fully expressed by the maxim, *benigne faciendæ sunt interpretationes*, &c., *q. v.*

BEQUEATH. To give personal property by will. Bequest: a gift of personal property by will. Also, sometimes the thing given, or the clause in the will making the gift.

Bequeath, though not in its primary and legal acceptation synonymous with devise, may be so construed, if the context requires it. Dow *v.* Dow, 36 *Me.* 211.

Devise is the appropriate term, in a will, to pass real estate, and bequeath, to give personal property, Lasher *v.* Lasher, 13 *Barb.* 106; but not a necessary one, Ladd *v.* Harvey, 21 *N. H.* 514.

BERGHMOTH, or BERGHMOTE. The ancient name of the court now called barmote, *q. v.*

BESAIEL, BESAILE, or BESAYLE. An English writ that lay for one who was entitled as heir to enter upon the lands of a deceased great-grandfather, against a stranger who had wrongfully entered into possession of the lands. (*Cowel*; 3 *Bl. Com.* 186.) Now abolished by Stat. 3 & 4 Wm. IV. ch. 27, § 36. *Mozley & W.*

BEST EVIDENCE. By a familiar, long-settled rule of the law of evidence, litigants are required to produce the best evidence. This rule means that evidence inferior in nature which indicates the existence of evidence of a higher grade cannot be received until the existence or accessibility of the other is disproved; or, in other words, evidence should be rejected which presupposes that higher evidence may be within the party's possession or power; for to offer evidence of an inferior grade raises a presumption that there is some sinister motive for withholding the superior. Thus the rule relates to the grade of evidence, not to its conclusiveness. Evidence in its nature primary and relevant will not be excluded be-

cause stronger proof might have been attained. The best evidence is not necessarily that which is most conclusive, but is that which is most naturally connected with or appropriate to the fact to be proved. Primary evidence is an equivalent and more accurate and appropriate term than best; and contrasts more clearly with secondary, that being some means of proof which, of itself, shows that a higher kind may be supplied. A familiar example is where the contents of a writing are in question. Here, a production and inspection of the writing itself form the natural and first suggested mode of arriving at the truth. Hence our rule treats the instrument itself as the best evidence, and will not allow witnesses who may have read it to testify what it contained, until some reason has been shown why the paper should not be produced. See U.S. Dig., tit. Evidence, IV.

BET. A bet is a wager, and the bet is complete when the offer to bet is accepted. The placing money, or its representative, on the gaming table is such an offer; and, if no objection be made by the player or owner of the table or bank, it is an acceptance of the offer, and the offence is against the Alabama gaming statute complete, although, from any cause whatever, the game should never be played out, and the stake be neither lost nor won. State *v.* Welch, 7 *Port.* 463.

A game is a thing played or done. A wager is the bet or stake laid upon the result of a game. Bet and wager are synonymous terms, and are applied both to the contract of betting and wagering, and to the thing or sum bet or wagered. Bets or wagers may be laid upon games and things that are not games. Every thing upon which a bet or wager may be laid is not a game. Woodcock *v.* McQueen, 11 *Ind.* 14.

A promissory note, payable "providing Abraham Lincoln receives the electoral votes of the state of Illinois," is a bet on an election, and consequently void. Guyman *v.* Burlingame, 36 *Ill.* 201; S. P. Nudd *v.* Burnett, 14 *Ind.* 25; Sipe *v.* Finarty, 6 *Iowa*, 394.

If parties play at a game of cards with the understanding that the loser shall pay the bill for liquor for the company, it is, in effect, a betting of money upon the game. Bachellor *v.* State, 10 *Tex.* 260.

A contract upon a contingency by which one may lose, though he cannot gain, or the other may gain but cannot lose, as where property is sold at its real value, to be paid for if A be elected, is a bet. Shumate's Case, 15 *Gratt.* 653.

BETTER EQUITY. Where A has, in the contemplation of a court of equity, a superior claim to land or other property than B has, he is said to have a better equity. Thus, a second mortgagee, advancing his money without knowledge of a prior mortgage, has a better equity than the first mortgagee who has not secured for himself the possession of the title-deeds, or has parted with them so as to enable the mortgagor to secure the second advance as upon an unincumbered estate. *Mozley & W.*

BETTERMENTS. Improvements put upon real property, which are more extensive than repairs, so that they result in a substantial increase of the value of the property. The improver may, often, claim compensation.

BETWEEN. Excludes the termini Revere *v.* Leonard, 1 *Mass.* 91.

The expression, between two designated points, does not necessarily exclude the points named. A charter power to lay new lines of railroad at any point or points between P and E carries the right to lay such lines in P and E. Morris, &c. R. R. Co. *v.* Central R. R. Co., 31 *N. J. L.* 205, 212.

Between may mean in the intermediate space, without regard to distance, or it may mean extending or passing from city to city. Delaware R. R. Co., &c. *v.* Raritan, &c. R. R. Co., 16 *N. J. Eq.* 321, 368.

Where a reserve of lands designates the territory as that lying between two rivers, it includes the whole country from their sources to their mouths; and if no branch of either of them has acquired the name, exclusive of another, the main branch, to its source, must be considered as the true river. Doddridge *v.* Thompson, 9 *Wheat.* 469.

A power to erect a dam upon a stream named, between R and M's Falls, excludes building it upon M's Falls. That which lies between one given place and another is something distinct from the place given on either side; between indicates an intermediate space, which excludes, and cannot include, that to which it refers. If land is granted between one township and another, both are excluded from the grant. If land is conveyed, lying between lot number 1 and number 3, it could not be pretended that either of these lots passed by the deed. State *v.* Godfrey, 12 *Me.* 361.

A stipulation to deliver between certain days, excludes the last day named. Fowler *v.* Rigney, 5 *Abb. Pr.* N. S. 182.

Under a contract to purchase merchandise to be delivered at the seller's option, between the date of the contract and a specified day, four days' notice of delivery to be given, — the last day for the delivery is the day before the specified day fixed by the contract. And in order to sustain an action for a refusal to receive the merchandise, the seller must give the four days' notice, on or before the fifth day before the day specified in the contract. *Ib.*

A contract to pay "$400 between now and the first day of September," is not fulfilled by a tender of payment on the first day of September. Richardson *v.* Ford, 14 *Ill.* 332; Cook *v.* Gray, 6 *Ind* 335.

That till includes the day to which it is prefixed; but between, when properly predicable of time, is intermediate. Bunce *v.* Reed, 16 *Barb.* 347.

BEYOND SEA. A phrase used in English law to describe the situation of places and persons out of the jurisdiction. This and the like phrases, "beyond the seas," "beyond the four seas," used in the same sense, were evidently suggested by the geographical situation of England, and seem to have been originally applied to all places not within that kingdom. In the cases of King *v.* Walker, 1 *W. Bl.* 286, and Anon., 1 *Show. K. B.* 91, it appears to have been held that Dublin, or any place in Ireland, was beyond seas within the meaning of the statute of limitations of 21 Jac. I. ch. 16. But previous to the union of the crowns of England and Scotland under James I., the meaning was merely "out of the realm of England." In the construction of the modern statute, 3 & 4 Wm. IV. ch. 27, no part of the United Kingdom of Great Britain and Ireland, nor the Isle of Man, Guernsey, Jersey, Alderney, or Sark, nor any islands adjacent to any of them, being part of the queen's dominions, are deemed beyond the seas.

Besides its use in statutes of limitations, as above cited, where it designates persons as to whom an exception is made, and the time during which they are out of the jurisdiction is not reckoned as a portion of the time limited for bringing an action, the expression occurs frequently in the reports and treatises in connection with other rules of law; as that, while a husband is beyond sea, access to his wife will not be presumed, to sustain the legitimacy of her offspring.

In the United States, the phrase was adopted in the earlier statutes of limitations of many of the states, without regard to its unfitness geographically. In some of the states, the words have been held to mean without the limits of the United States, which approaches the literal signification; but in most states the expression is treated as equivalent to out of the state, or beyond the jurisdiction of the state.

Beyond sea, beyond the four seas, beyond the seas, and out of the realm, are synonymous. Prior to the union of the two crowns of England and Scotland, on the accession of James I., the phrases beyond the four seas, beyond the seas, and out of the realm, signified out of the limits of the realm of England. Pancoast *v.* Addison, 1 *Harr. & J.* 350.

By the Pennsylvania act of April 13, 1791, "out of the limits of the United States" must be understood to be intended as equivalent in meaning to the words beyond sea. Thurston *v.* Fisher, 9 *Serg. & R.* 289; Ward *v.* Hallam, 2 *Dall.* 217; 1 *Yeates*, 329.

That clause in the act of limitations of Maryland, exempting from its operation all persons who were beyond the seas at the time the cause of action accrued, until their return, was borrowed from the English statute of limitations of James I. ch. 21; and has been always construed to mean "without the jurisdiction of the state," as, for example, in another state of the Union. Bank of Alexandria *v.* Dyer, 14 *Pet.* 141.

The term beyond seas, in the proviso or saving clause of a statute of limitations, is equivalent to without the limits of the state where the statute is enacted; and the party who is without those limits is entitled to the benefit of the exception. Faw *v.* Roberdean, 3 *Cranch*, 174; Murray *v.* Baker, 3 *Wheat.* 541; Shelby *v.* Guy, 11 *Id.* 361; Piatt *v.* Vattier, 1 *McLean*, 146; Forbes *v.* Foot, 2 *McCord*, 331; Wakefield *v.* Smart, 8 *Ark.* 488; Denham *v.* Holeman, 26 *Ga.* 182; Galusha *v.* Cobleigh, 13 *N. H.* 79.

Beyond sea is equivalent to "beyond the limits of the state," in a statute of limitations. Smith *v.* Bartram, 11 *Ohio St.* 690; Richardson *v.* Richardson, 6 *Ohio*, 125; West *v.* Hejmar, 7 *Id.* Pt. II. 235.

These words, in an exception clause in a state limitation law, are, in the absence of any other statute explaining their meaning, construed to mean beyond the jurisdiction of the state. Stephenson *v.* Doe *dem.* Wait, 8 *Blackf.* 508.

Persons coming from beyond the seas, as referred to in laws of Alabama, are taken to include those persons who have never resided in the state, as distinguished from those who have resided there, but are temporarily absent. Tomason *v.* Odum, 23 *Ala.* 480.

The state of Delaware is beyond seas in regard to the district of Columbia, within the meaning of the statute of limitations. Ferris *v.* Williams, 1 *Cranch C. Ct.* 475.

Where two counties belonging to different states, and therefore regarded as beyond the seas in relation to each other, in the sense of which those words are used in the statute of limitations, are, by cession, united within the same jurisdiction, the in-

habitants are no longer to be regarded as in the former relation, but as one political community united under one government, and a citizen of one is no longer protected by this saving clause. Bank of Alexandria *v.* Dyer, 14 *Pet.* 141.

Persons resident in that part of the district of Columbia ceded by Virginia are not (within the meaning of the Maryland statute of limitations) beyond seas, as respects persons resident in that part of the district ceded by Maryland. Bank of Alexandria *v.* Dyer, 14 *Pet.* 141; to nearly same effect, Suckley *v.* Slade, 5 *Cranch C. Ct.* 617.

A defendant must be deemed to have been beyond sea, within the meaning of the statute of limitations, during the time when, although within the geographical boundaries of the state, he was out of the jurisdiction of the state, and in a portion of the state where the authority which was exercised was not derived from the state, but from the king of Great Britain by right of conquest. Sleght *v.* Kane, 1 *Johns. Cas.* 80.

These words, standing alone in an exception in a statute of limitations, have been held to mean beyond the limits of the state passing the statute, so as to bring persons within another of the United States within the exception. This construction cannot be applied to Mass. Stat. 1786, ch. 52, § 4, where the exception is of persons "beyond sea without any of the United States." Whitney *v.* Goddard, 20 *Pick.* 304.

BIAS, is not synonymous with prejudice. By the use of this word in a statute declaring disqualification of jurors, the legislature intended to describe another and somewhat different ground of disqualification. A man cannot be prejudiced against another without being biased against him; but he may be biased without being prejudiced. Bias is "a particular influential power, which sways the judgment; the inclination of the mind toward a particular object." (*Bouvier.*) It is not to be supposed that the legislature expected to secure in the juror a state of mind absolutely free from all inclination to one side or the other. The statute means, that, although a juror has not formed a judgment for or against the prisoner, before the evidence is heard on the trial, yet if he is under such an influence as so sways his mind to the one side or the other as to prevent his deciding the cause according to the evidence, he is incompetent. Willis *v.* State, 12 *Ga.* 444.

If a juror has formed an opinion as to the guilt of an accused party, upon the information of those, perhaps, who were eye and ear witnesses to the transaction, and in whose veracity the juror reposes the most implicit confidence, a mind thus preoccupied has a bias resting on it. Hudgins *v.* State, 2 *Ga.* 173.

BID. An offer at an auction sale to pay a certain price for the property on sale. Bidder: one who makes offer for property on sale at auction.

BIGAMY. 1. In criminal law. The crime of contracting a second marriage with actual or constructive knowledge that a previous marriage is still binding. The Stat. 1 Jac. I. ch. 11, declared this offence felony; but excepted the cases of a person legally divorced, and a person whose husband or wife may have remained absent without being heard of seven years before the second marriage. The statutes enacted in the United States against bigamy generally contain similar exceptions, and in some of the states others are added; such as continued absence from the United States, or sentence to imprisonment for life of the husband or wife by the first marriage.

The use of the word bigamy to describe this offence is well established by long usage; although often criticised as a corruption of the true meaning of the word. Polygamy is suggested as the correct term, instead of bigamy, to designate the offence of having a plurality of wives or husbands at the same time, and has been adopted for that purpose in the Massachusetts statutes. But as the substance of the offence is marrying a second time, while having a lawful husband or wife living, without regard to the number of marriages that may have taken place, bigamy seems not an inappropriate term. The objection to its use urged by Blackstone (4 *Bl. Com.* 163) seems to be founded not so much upon considerations of the etymology of the word, as upon the propriety of distinguishing the ecclesiastical offence termed bigamy in the canon law, and which is defined below, from the offence known as bigamy in the modern criminal law. The same distinction is carefully made by Lord Coke (3 *Inst.* 88). But the ecclesiastical offence being now obsolete, this reason for substituting polygamy to denote the crime here defined ceases to have weight.

The offence of having a plurality of wives at the same time is commonly denominated polygamy; but the name bigamy has been more frequently given to it in legal proceedings. 1 *Russ. Crimes*, 185.

Bigamy is the offence of having two husbands or wives at the same time, the one *de jure* and the other *de facto*. 1 *Bish. Mar.* § 296.

Every person having a husband or wife living, and marrying any other, in a territory, or other place over which the United States have exclusive jurisdiction, shall be adjudged guilty of bigamy. 12 *U. S. Stat. at L.* (1862) 501.

A person who, having a husband or wife living, shall marry any other person, shall be adjudged guilty of bigamy. 2 *N. Y. Rev. Stat.* 687, § 8.

The following cases excepted: Where the former husband or wife of such person shall have been absent five successive years without being known to such person to be living, or shall have been for that period continually without the United States.

Where the former marriage of such person shall have been dissolved, by the decree of some competent court, for some cause other than the adultery of such person, or shall have been pronounced void, on the ground of nullity of the marriage contract, or as having been contracted within the age of legal consent.

Where the former husband or wife shall have been sentenced to imprisonment for life. *Id.* § 9.

It is not bigamy within the New York statute for a person divorced on the ground of his own adultery to marry again. After such a divorce, the defendant can no longer be said to "have a wife living." The terms "husband" and "wife" are only applicable while the marriage relation continues. After divorce, neither party has a husband or wife. So held, notwithstanding the exception stated in 2 Rev. Stat. 687, § 9. People *v.* Hovey, 5 *Barb.* 117.

Bigamy is not committed if the first marriage was unlawful through near relationship, or if it was dissolved by divorce (unless the divorce was obtained by the fraud of the accused and is afterwards set aside), or if the accused believed, on reasonable grounds, that the first marriage was dissolved by death. The crime is committed, however exceptionable and vicious the second marriage may be, provided it has been regularly celebrated. The clergyman and second spouse are art and part if they were aware that the former marriage subsisted. *Bell.*

2. In the canon law. The offence of a double marriage by a clerk or other ecclesiastic forbidden to enter into a second marriage. It might be committed either by marrying a second wife after the death of a first, or by marrying a widow.

Bigamy is a word used in the common law for an impediment that hindereth a man to be a clerk, by reason that he hath been twice married; grounded upon the words of St. Paul in 1 Tim. ch. iii. ver. 2. (*Cowel.*) *Mozley & W.*

According to the canonists, bigamy consisted in marrying two virgins successively, one after the death of the other; or in once marrying a widow. 4 *Bl. Com.* 163, note.

BILATERAL. A term used chiefly in the civil law to designate a contract in which both the contracting parties are bound to fulfil obligations reciprocally towards each other; a contract executory on both sides; as a contract of sale, where one becomes bound to deliver the thing sold, and the other to pay the price of it.

BILINGUIS. Of a double language; speaking two languages. A term anciently used of a jury composed in part of Englishmen and in part of foreigners, allowed, by English law, if the cause to be tried lay between an Englishman and a native; more properly called a jury *de medietate linguæ. Jacob; Holthouse.*

BILL. A formal statement of particular things in writing.

I. In Legal Procedure. A formal written statement of complaint to a court of justice, such as the original bill, in common-law practice; a bill in chancery; a bill of indictment. Also a written statement or record of proceedings in an action; as a bill of exceptions.

1. **A bill**, sometimes termed by way of distinction an original bill, was one of the ancient modes of commencing an action at common law, and was the method usually adopted in the court of king's bench of England. The bill contained a statement of the plaintiff's cause of action, alleging it as a trespass in order to bring it within the jurisdiction of the king's bench; and resembled, in general, the modern declaration, which superseded it in practice. The bill was sometimes termed a plaint. Actions commenced in this way were said to be by bill, or by bill without writ, as other actions were founded upon an original writ.

2. **Bill in chancery; Bill in equity.** A written statement of the facts upon which a complainant in a suit in chancery seeks equitable relief, with a prayer for such relief or redress and for the proper process. It is in the nature and style of a petition, containing: 1, the address to the chancellor or judge of the court of equity; 2, the names and descriptions of the parties to the suit; 3, a statement of the facts material to the complainant's case, termed the stating part; 4, a general charge of confed-

eracy between the defendants, called the confederacy clause; 5, a statement of the pretences and excuses which it is supposed the defendants will set up in defence, called the charging part; 6, an averment that the acts complained of are contrary to equity, and that the complainant has no remedy at law, termed the jurisdiction clause; 7, a prayer that the defendants may answer the complainant's interrogatories, known as the interrogating part; 8, a prayer for relief; and 9, a prayer for process. By the rules in equity of the United States courts, the confederacy clause, the charging part, and the jurisdiction clause, may be omitted; and those clauses are usually omitted in equity practice generally, unless combination to defraud is intended to be specifically alleged. The bill is sworn to by the complainant, signed by his solicitor or counsel, and filed with the clerk of the court; and thereby suit is deemed to be commenced, and process issues upon filing the bill. Bills in equity are frequently designated by some term expressing the nature of the suit, or the purpose sought to be accomplished. They are thus distinguished as original or supplemental bills; cross bills; bills of discovery, of interpleader, of peace, of review, of revivor, and many others, further explanations as to which may be found under the particular term.

Bill of conformity. The name of a bill in equity, filed by an executor or administrator, when the affairs of the deceased are so much involved that he cannot safely administer the estate except under the direction of the court.

Bill of discovery. The name of a bill in equity praying for the disclosure of facts believed to lie within the defendant's knowledge; or for the production of books or writings in his control. The name is appropriate to a bill prosecuted to aid an action or defence at law, by giving complainant the means of establishing his rights there; and not to a bill framed for obtaining equitable relief. As to the grounds of the proceeding, and the cases in which it lies, see DISCOVERY.

Bill of interpleader. The name of a bill in equity to obtain a settlement of a question of right to money or other property adversely claimed, in which the party filing the bill has no interest, although it may be in his hands, by compelling such adverse claimants to litigate the right or title between themselves, and relieve him from liability or litigation. As to the nature and incidents of the proceeding, see INTERPLEADER.

Bill of peace. The name of a bill in equity, filed by a person threatened with a multiplicity of actions involving the same point, seeking the quieting of litigation. In such cases a bill of peace will be entertained, to prevent multiplicity of suits, and an issue directed to determine the right, and an injunction ultimately granted to restrain the threatened litigation.

Bill quia timet. Bill because he fears. The name of a bill in equity filed by a person who apprehends some injury to his rights or interests in property from the neglect or fault of another, and seeking to prevent such injury. In American practice it is not limited to cases of rights in personalty. It would lie to prevent a life tenant of slaves from removing them from the State and selling them, to the prejudice of the remainderman; Riddle *v.* Kellum, 8 *Ga.* 374; or to prevent a wrongful sale of lands in which complainant has an interest. Peebles *v.* Estill, 7 *J. J. Marsh.* 408. But there must be danger that complainant will be subjected to loss by the anticipated neglect or culpable conduct of defendant. Randolph *v.* Kinney, 3 *Rand.* 394.

Bill of review. The name of a bill in equity seeking to have a decree of the court reviewed, and reversed or modified. Such a bill may be filed, by leave of the court, either upon the ground of error in law, or for new matter of fact not known in time for hearing previous to the decree. A bill which, instead of praying that the former decree may be reviewed and reversed, prays, merely, that the cause may be heard with respect to the new matter made the subject of the supplemental bill, at the same time that it is reheard upon the original bill, is termed a bill in the nature of a bill in review, and may be filed by

any person claiming not to be bound by the bill.

A bill of review is in the nature of a petition for a new trial in an action at law, and is brought on the ground of new discovered evidence, or of the party's having mistaken his defence, or for other reasonable cause. But for error in the proceedings, record or decree, apparent upon the record, files, or exhibits, a writ of error is the proper remedy. It must state the case, the cause of its failing to recover, and the new discovered evidence, if it is asked on that ground. If it is asked for on the ground of having mistaken his defence, it must set forth what that was, and what the defence is which he ought to have made, and that he is able to support it; as in a petition for a new trial at law. 1 *Root*, 578.

A bill stating that the complainant had an interest in the subject-matter of a former suit in equity, that he applied to be admitted a party, was refused, and that a decree was made in fraud of his rights, and praying to have that decree set aside, &c., is an original bill, and not a bill of review. Wickliffe *v.* Eve, 17 *How.* 468. And see Kennedy *v.* Georgia Bank, 8 *Id.* 586.

Bill of revivor. The name of a bill in equity filed to revive and continue a suit which has abated, as by death, or by marriage of a female plaintiff, before the final consummation of the proceedings. The personal representatives of a deceased person, with respect to the subject-matter of the suit, are the proper parties to bring the bill of revivor.

A bill of revivor lies where a petition is abated by the death of either of the parties, or for other cause, to revive the same; and must state the former petition, the cause of its abating, and that it is necessary for the purposes of justice it should be revived; it must also set forth the proper party in whose favor, or against whom, it ought to be revived. 1 *Root*, 578.

Bill of revivor and supplement. The name of a bill in equity partaking of the characteristics of a bill of revivor and a supplemental bill; seeking both to continue a suit which may have abated by the death of the plaintiff, or the like, and to supply any defects in the original bill arising from subsequent events, so as to entitle the party to relief on the whole merits of his case.

A bill of revivor and supplement is a compound of a supplemental bill and bill of revivor, and where a complainant has a right to revive a suit, he may add to the bill of revivor such supplemental matter as is proper to be added. But the supplemental matter must have been newly discovered, and verified by affidavit. Bowie *v.* Minter, 2 *Ala.* 406.

3. **Bill of exceptions.** A written statement of exceptions to the decision or direction of a judge during the trial of a cause, taken by a party to the cause, and properly certified as correct by the judge. The bill sets forth the proceedings upon the trial, the decisions or directions excepted to, and the exceptions. The object of the bill of exceptions is to put the decisions excepted to upon record for the information of the court before which proceedings to review such decisions are taken. In theory, the bill of exceptions is engrossed and tendered to the judge during the course of the trial, or other proceeding out of which the exception arises, and is then signed or sealed. In practice, however, the substance of the exception is merely noted at the time it is taken, and the bill is afterwards settled, drawn up in form, and tendered to the judge, to be signed or sealed. In general, no objection could be raised on appeal which did not appear in the bill of exceptions; and, as between the parties, it was conclusive as to the facts therein stated. Bills of exceptions have been abolished in England by the judicature act of 1873; and their use in the United States has been generally much modified by the practice acts and codes of procedure adopted in most of the States, which regulate the mode of taking appeals and procedure upon appeal and error.

Bill of particulars. A written statement of the particulars of the demand for which action is brought, or of a defendant's set-off against such demand. The particulars stated are generally the dates, sums, and items of the demand or set-off, in detail, and should be as full and specific as the nature of the case admits, or as may be necessary to give the opposite party information to which he is entitled, and to prevent surprise. By statutory provisions in most of the United States, a bill of particulars is required either upon first pleading the demand, or upon a subsequent request of the opposite party, or an order of the court. The party is generally held to be precluded by his bill when filed; and is also precluded from giving evidence in

support of his demand if he fails to furnish a bill when legally bound so to do.

A bill of particulars is an amplification, or more particular specification, of the matter set forth in the pleading. Starkweather *v.* Kittle, 17 *Wend.* 20.

The term bill of particulars does not apply to a statement of a partnership account, especially when not filed as such bill. Welles *v.* Allen, 41 *Conn.* 140.

Bill of costs. A written statement of the items of the costs in a legal proceeding. In American practice the term is applied to the formal statement of the costs allowed as between the parties to the action, which is presented for adjustment or taxation to an officer of the court. By the English usage, it was applied also to the statement of the charges and disbursements of an attorney or solicitor incurred in the conduct of his client's business, and which might be taxed upon application, even though not incurred in any suit. Thus conveyancing costs might be taxed.

4. Bill of indictment. A written statement of facts constituting a crime, in the form of an accusation against one or more persons, lawfully presented to a grand jury. If the jury, on examination, find this accusation to be supported by evidence, they write upon it the words "a true bill" anciently *billa vera*. This is called finding an indictment; and the bill is thenceforth called an indictment. If the jury deem that the evidence produced is not sufficient for putting the accused on trial, they indorse the bill "not a true bill" or "not found;" anciently, "Ignoramus."

II. In Legislation and Constitutional Law. A draft of a law submitted to a legislative body for consideration. A proposed or projected law is termed a bill; if enacted as law, it is called an act or a statute.

A special act passed by a legislative body in the exercise of a *quasi* judicial power. Such are bills of attainder, and bills of pains and penalties.

A solemn written declaration by a legislative or constituent body of fundamental principles of government; generally of popular rights and restrictions upon governmental power, termed a bill of rights.

In the constitution of New York, of 1846, the terms bill, law, and act are used somewhat indefinitely, throughout the instrument. 36 *Barb.* 187.

1. Bill of attainder. A special legislative act declaring the attainder of a particular person; usually as a punishment for treason or some political offence, without judicial trial. As to the nature and effect of attainder, see that word.

The passing of bills of attainder is expressly prohibited by the constitution of the United States, both to congress and the several states.

Bills of attainder are statutes enacted by the supreme legislative power, *pro re nata*, inflicting capital penalties, *ex post facto*, without conviction in the regular course of administration through courts of justice. Acts of attainder generally named the persons attainted, but not always; there are in the statute books, both of England and Ireland, many statutes of attainder wherein whole classes of people, in bulk, were attainted, adjudged, and convicted of high treason, without being named or otherwise legally designated, and without being called, arraigned, or tried. The dead as well as the living might be attainted and convicted, as were Oliver Cromwell and others, who had sat in judgment upon Charles I., and whose bodies were taken out of their graves and hanged. Hence, bills of attainder need not name the persons accused, nor call upon them to appear and defend. *Exp.* Law, 35 *Ga.* 285.

Bill of indemnity. This term is applied in England, to an act of parliament, usually passed at every session, for the relief of officers who have unwittingly or unavoidably neglected to take the necessary oaths, or otherwise to qualify themselves to hold their respective offices.

Bill of pains and penalties. A special legislative act imposing a punishment, less than death, upon a person supposed to be guilty of treason or felony, without any conviction in the ordinary course of judicial proceedings. It differs from a bill of attainder, in that attainder implied the punishment of death. But the prohibition in the constitution of the United States against the passage of bills of attainder is construed to include also bills of pains and penalties.

In England, a distinction is taken between bills of attainder and bills of pains and penalties; but when carefully noted and compared they will be found akin, and

in close fellowship. And a statute imposing a retrospective oath as a condition of practising as an attorney or counsellor, notwithstanding a previous admission to practice, and which in this manner by its own inherent force effectuates the destruction of the rights of a large order of persons, is substantially and in effect a bill of pains and penalties, possessing the characteristic attributes of a bill of attainder, except the death penalty, and is within the meaning of the prohibition of bills of attainder in the United States constitution. *Exp.* Law, 35 *Ga.* 285.

2. **Bill of rights.** A formal and public written declaration of popular rights and liberties. Bills of rights have frequently been promulgated upon the establishment of new forms of government or new constitutions, and are usually expressed in the form of statutes or constitutional provisions. The English statute, known as the bill of rights, was originally a declaration delivered by the two houses of parliament to the Prince and Princess of Orange, which was afterwards enacted as a statute when they became king and queen. The rights and liberties asserted were insisted upon as the "true, ancient, and indubitable rights of the people." The bill asserted the illegality of suspending laws by royal authority without consent of parliament; of the commitments and prosecutions of subjects for petitioning the king; of the raising and keeping a standing army within the kingdom in time of peace, without consent of parliament; that elections ought to be free; that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; that parliaments ought to be held frequently, &c. In the United States, formal bills of rights have been incorporated into the constitutions of several of the states.

III. In Mercantile Law. A written statement of the amount or items of a demand; or of the terms of an agreement or undertaking, particularly for the payment of money. Such are bills of sale, bills of parcels, bank-bills, bills of exchange, bills of lading, and others which are more particularly defined below.

1. **Bill; bill obligatory; bill penal; bill single.** Bill was an early English term corresponding with obligation, but used particularly of engagements for simple payment of money. "Bill is all one," says Termes de la Ley, "with an obligation, saving that when it is in English it is commonly called a bill; in Latin, an obligation. Bill single, often simply called a bill, was the simplest form; it was an undertaking, without condition or seal, to pay to a person named a certain sum of money at a specified time. Bill penal contained the like engagement, but was drawn with a condition annexed, and in a penal sum. Bill obligatory was either a bill single or a bill penal in form, but bore a seal.

By a bill we now ordinarily understand a single bond without a condition; by an obligation, a bond with penalty and condition. *Termes de la Ley.*

Bill is a common engagement for money, given by one man to another, being sometimes with a penalty, called a penal bill, and sometimes without a penalty, called a single bill; the latter is most frequently used. *Tomlins.*

Bill obligatory is a bond without a condition; sometimes called a single bill; and differing from a promissory note in nothing but the seal which is affixed to it; but, when required by the context of a particular act, the term may be understood differently; as to mean an instrument (*Mal. Lex Mer.* 72, 74; *Com. Dig.* 1st ed. 238), whereby one merchant, by writing, acknowledges himself in debt to another in such a sum, to be paid at such a day, and subscribes it at a day and place certain. Sometimes a seal is put to it; but it binds by the custom of merchants, without seal, witness, or delivery. The expression is susceptible of that meaning. Farmers', &c. Bank *v.* Greiner, 2 *Serg. & R.* 114.

2. **Bill; bill rendered.** A statement of his claim made by a creditor in writing, specifying the items. It does not, in general, preclude the party from suing for a larger sum, no payment or agreement as to the amount being shown; and is therefore to be distinguished from an account stated, which is generally deemed conclusive upon the parties. In England, however, a bill of items rendered to a debtor has been held conclusive against an increase of amount of any items contained in it, and strong evidence against additional items. See Loveridge *v.* Botham, 1 *Bos. & P.* 49. The contrary has been held in New York, of a bill rendered for a gross sum. Williams *v.* Glenny, 16 *N. Y.* 389.

Bill payable; bill receivable. Instruments for payment of money are called bills payable with respect to the person who has to pay them; bills receivable, with respect to the one who is to get the money. Thus, if a merchant's bills payable are less in amount than his bills receivable, he will have a surplus; if more, a deficiency.

In other words, bills receivable are the assets (in commercial paper) of a business man, of an estate, &c., and bills payable are the debts. "Bills," in these phrases, is not always confined to bills of exchange, or even to formal written evidences of debt, but may mean demands, generally; claims or obligations.

4. **Bill of credit.** A bill or note for the payment of money, issued by the sovereign power of a state, containing a pledge of its faith, and designed to circulate as money. The emission of bills of credit by any of the United States is prohibited by the federal constitution; and the meaning of the term so employed has frequently been considered by the courts. In Briscoe *v.* Bank of Kentucky, cited below, McLean, J., remarks, "The definition of the term bills of credit, as used in the constitution, if not impracticable, will be found a work of no small difficulty." And in state of Indiana *v.* Woram, 6 *Hill*, 33, Bronson, J., after referring to the decisions in the above case and others, says, "All attempts to give a full, accurate, and satisfactory definition of bills of credit, within the meaning of the constitution, have, thus far, failed."

In its enlarged sense, the term bill of credit may comprehend any instrument by which a state engages to pay money at a future day; thus including a certificate given for money borrowed. But the language of the constitution itself, and the mischief to be prevented, equally limit the interpretation of the terms. The word emit is never employed in describing those contracts by which a state binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated bills of credit. "To emit bills of credit," means to issue paper intended to circulate through the community, for its ordinary purposes, as money, which paper is redeemable at a future day. Craig *v.* State of Missouri, 4 *Pet.* 410, 431.

A bill of credit is a paper issued by the sovereign power, containing a pledge of faith, and designed to circulate as money. This definition includes all classes of bills of credit emitted by the colonies or states. Briscoe *v.* Bank of Kentucky, 11 *Pet.* 257, 313.

The term bills of credit, in its mercantile sense, comprehends a great variety of evidences of debt, which circulate in a commercial country. The notes of banks in modern times are either called bank bills or bank notes. But the inhibitions of the constitution apply to bills of credit in a limited sense, not including ordinary bank notes, even where the state owns the whole of the stock of the bank in question, controls its management, and in effect guarantees the payment of its paper. Briscoe *v.* Bank of Kentucky, 11 *Pet.* 257. And see Darlington *v.* State Bank, 13 *How.* 12; Lampton *v.* Commonwealth Bank, 2 *Litt.* 300; Bank *v.* Spilman, 3 *Dana*, 150; Owen *v.* Branch Bank, 3 *Ala.* 258; McFarland *v.* State, 4 *Ark.* 44. But see to the contrary, Linn *v.* State Bank, 2 *Ill.* 87; Commonwealth Bank *v.* Clark, 4 *Mo.* 59; Griffith *v.* Commonwealth Bank, *Id.* 255.

The bills of credit prohibited by the constitution can only be such as are designed to circulate as money, or answer the ordinary purposes of coin. State of Indiana *v.* Woram, 6 *Hill*, 33.

Whether warrants or certificates of state indebtedness, issued in the name of a state, by its fiscal officers, and under its authority, being made on a pledge of the state resources, or being sometimes used as a circulating medium, are bills of credit, see Craig *v.* Missouri, 4 *Pet.* 431; Pagaud *v.* State, 5 *Smed. & M.* 191.

Certificates of indebtedness, which are issued by the governor of a state under a statute authorizing such issue, and directing for the purpose of paying the current expenses of the state, that they shall be of such form and denominations as the governor may direct, and shall be engraved and printed under his direction, which are declared receivable for all state taxes, &c., and which, as actually issued, contain a recital that the sum specified is due by the state, and that the certificate is receivable in payment of all state dues, are bills of credit, and within the prohibition of the constitution. They are a paper issue, by the sovereign power, containing a pledge of its faith, and designed to circulate as money; which is the definition of a bill of credit. City Nat. Bank *v.* Mahan, 21 *La. Ann.* 751.

Bills of credit, as defined by the supreme court, are paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money. In the seceded states (so called) the sovereign authority was, for a time, displaced, the constitutional governments were overthrown, and their functions usurped by spurious and revolutionary governments

These usurping governments could not, by legislation or otherwise, bind the public faith for the redemption of the notes in question. But though said notes were not bills of credit, they were, nevertheless, illegal; and a promissory note given for them, by the borrower to the lender, is void, and does not constitute a debt provable in bankruptcy against the estate of the borrower. Baily *v.* Milner, 35 *Ga.* 330.

Bill of exchange. An order or request in writing from one person to another, for the payment of money, absolutely, and at all events.

If directed to be paid to the order of a person named, or to bearer, the bill is termed negotiable, and may be transferred by indorsement. The various parties to such a bill are thus designated:

The person who draws or makes the bill is called the drawer; the person to whom it is addressed is called the drawee; and when the drawee has undertaken to pay the amount, which undertaking he may signify by writing across the bill of exchange the word accepted, together with his name, with or without adding the place where the money is to be paid, then he is called the acceptor; the person to whom the money is ordered to be paid is called the payee; and if the payee transfers it over to another, which he may do by simply writing his name across the back, he is then called the indorser, and the person to whom he thus transfers it is called the indorsee; the latter person may also, if he pleases, in his turn transfer it to another party, by the same process of signing his name on the back, or indorsing it, as it is termed, and thus it may be transferred from one person to another, the party transferring it always being called the indorser, and the party to whom it is transferred the indorsee. Further explanations as to the meaning of these terms may be found under the words, respectively.

A bill of exchange must be dated, showing both the time and place of making it; it should express the time of payment, but if no time is mentioned it is considered payable on demand; the place of payment may be fixed by the drawer in the body of the bill, or if not, then by the acceptor in his acceptance; but if not expressed by either, it is payable and to be presented for payment at the place of business of the drawee, or at his residence, or where it was made, or to him personally anywhere. The request to pay must be absolute and not contingent; and must be made as a right, not as a favor; although the word pay is not essential, the words used must require payment. The payment required must be in money, not in merchandise; and if in any currency other than legal money, the bill is not negotiable. The amount must be fixed and certain, not contingent; and the sum should be written in full in the body of the bill, as words so written will, in case of doubt, control the figures usually written in the margin. The phrase value received is often inserted, but, although proper in a promissory note, is not essential or of any use in a bill of exchange. A direction to charge to the account of the drawer or some other person is sometimes added, but is not necessary. If the request to pay is limited by the addition of the words, "as per advice," the drawee has no authority to pay unless instructed so to do by the drawer. The subscription by the drawer and address to the drawee complete the instrument.

In common speech, bills of exchange are frequently called drafts. Checks upon banks are generally considered as of the nature of bills of exchange.

Bills of exchange are classified as foreign bills or inland bills, according to the residence of the parties; a bill of which the drawer and drawee are residents of countries foreign to each other is termed a foreign bill, one of which the drawer and drawee are residents of the same country is termed an inland bill. In respect to this distinction, the several states of the United States are considered foreign as to one another. This distinction is important with reference to the question whether protest and notice are or are not necessary in case of non-acceptance.

A bill of exchange is an order in writing, directing one person to pay to another a given sum of money absolutely. Whether an instrument is a bill of exchange or not, must be determined from its face; its character cannot be changed by extrinsic evidence. Rice *v.* Ragland, 10 *Humph.* 545.

The essential qualities of a bill of exchange are, that it must be payable at all events, not dependent on any contingency, nor payable out of a particular fund; and must be for the payment of money only, and not for the performance of any other act, or in the alternative. Gillilan *v.* Myers, 31 *Ill.* 525; Strader *v.* Batchelor, 8 *B. Mon.* 168.

It is essential to a bill of exchange, that it should be payable in money only; and payable at all events, not out of a particular fund. Cook *v.* Satterlee, 6 *Cow.* 108; Atkinson *v.* Manks, 1 *Cow.* 691; Waters *v.* Carleton, 4 *Port.* 205; Tucker *v.* Maxwell, 11 *Mass.* 143; Nichols *v.* Davis, 1 *Bibb*, 490; Mershon *v.* Withers, *Id.* 503; Smurr *v.* Foreman, 1 *Ohio*, 272; Wooley *v.* Sergeant, 8 *N. J. L.* 262; Coyle *v.* Satterwaite, 4 *T. B. Mon.* 124; Carlisle *v.* Dubree, 3 *J. J. Marsh.* 542; Curle *v.* Beers, *Id.* 174; Mills *v.* Kuykendall, 2 *Blackf.* 47; May *v.* Lansdown, 6 *J. J. Marsh.* 170.

The requisites of a bill of exchange are, that it be payable at all events, not on a contingency, nor out of a particular fund; that it be for the payment of money only; and that it exhibit so clearly the drawer, the drawee, and amount, that these can be known to strangers into whose hands it may come. That it should purport in terms to be made for value received, or to be payable to order or to bearer or at a day certain, or any specified time after date, or at any specified place, is not essential. Kendall *v.* Galvin, 15 *Me.* 131.

A check on a bank is in form and substance a bill of exchange, and the holder must give notice to the drawer, if payment by the bank is refused. Sherman *v.* Comstock, 2 *McLean*, 19; Glenn *v.* Noble, 1 *Blackf.* 104. See CHECK.

A check on a bank, payable on a future day, is not in fact an inland bill of exchange. The characteristics of checks, as contradistinguished from bills of exchange, are, that they are always drawn on a bank or banker, that they are payable immediately on presentment, without the allowance of any days of grace, and that they are never presentable for mere acceptance, but only for payment. A check is not less a check, because drawn payable on a future day. Matter of Brown, 10 *Hunt's Merch. Mag.* (Apr. 1844) 377.

A check is always payable on presentation and demand; hence, although a draft is drawn in the usual form of a check, yet if it is payable on a specified future day, it is a bill of exchange, and has days of grace. Any local custom of banks to hold as checks, and therefore not entitled to grace, drafts payable at a time certain after date, is inadmissible, and will not control the rules of law. Morrison *v.* Bailey, 5 *Ohio St.* 13; Bowen *v.* Newell, 8 *N. Y.* 190.

The circumstance that a draft for money, otherwise in the usual form of a check, is payable on a future specified day, is *prima facie* but not conclusive evidence that the instrument is a bill of exchange, and as such entitled to days of grace. Andrew *v.* Blachly, 11 *Ohio St.* 89.

All the parts of a set of exchange constitute but one bill; and payment or cancelling of either of the set extinguishes all. Durkin *v.* Cranston, 7 *Johns.* 442; Miller *v.* Hachley, *Anth.* 68; Ingraham *v.* Gibbs, 2 *Dall.* 134.

A purchase of a note is not a violation of a statute, forbidding a corporation to buy bills of exchange. American Life Ins., &c. Co. *v.* Dobbin, *Hill & D. Supp.* 252.

The words bond, bills, and notes, in an act for the relief of sureties and bail in certain cases, held, to include bills of exchange. Ohio Life Ins., &c. Co. *v.* McCague, 18 *Ohio*, 54.

Bill of lading. The name of the acknowledgment usually given by a carrier, particularly the master of a vessel, acknowledging reception of goods for transportation, and expressing the engagement to carry and deliver. A bill of lading, issued on behalf of a vessel, is usually made in three or more parts, one or more of the set being sent to the consignee, one retained by the consignor, and one by the master. The similar instrument made by a carrier by land is not usually executed in triplicate.

A bill of lading partakes of the characteristics both of a receipt and a contract; its essentials being an acknowledgment of the receipt of the goods, and an agreement to transport and deliver them. Thus the same instrument may be treated as a mere receipt, and open to contradiction or explanation by parol evidence; or as a contract which may not be explained by parol; according as the question arises upon that portion which contains the acknowledgment of receipt of the goods, with description of their condition, or that which embodies the engagement to carry and deliver.

Although signed by the master of a vessel only, it binds the vessel and her owners. If made to the order of the consignee, in the usual form, it is negotiable, and may be transferred by indorsement; and the indorsee is entitled to receive the goods, subject, however, to the shipper's right of stoppage in transit, and to prior liens.

A bill of lading is the written evidence of a contract for the carriage and delivery of goods sent by water, for a certain freight. It is signed by the captain or master of the

ship or vessel, and states, among other things, by whom the goods are shipped, and where, and to whom they are to be delivered. Contracts for the freighting of goods must have all these essential qualities, or else they cannot have the effect of bills of lading. Covill *v.* Hill, 4 *Den.* 323; Dows *v.* Cobb, 12 *Barb.* 310.

A bill of lading is to be regarded in a double aspect, — as a contract for the transportation and safe delivery of the goods covered by it, at the stipulated freight, and also as a receipt for the goods for the purposes of the contract. Goodrich *v.* Norris, *Abb. Adm.* 196; but compare Knox *v.* The Ninetta, *Crabbe,* 534.

Is an instrument possessing the characteristics of a contract and of a receipt. O'Brien *v.* Gilchrist, 34 *Me.* 554; Wayland *v.* Moseley, 5 *Ala.* 430; May *v.* Babcock, 4 *Ohio,* 334.

A contract in writing for the carriage of goods, signed by the consignor only, is not a bill of lading. Gage *v.* Jaqueth, 1 *Lans.* 207.

Bill of parcels. A written statement of the items of various goods sold together.

Bill of sale. The name of the instrument by which, usually, a conveyance or transfer of title of personal property from one person to another is declared or evidenced. It bears the same relation to sales of chattels, that a deed does to a sale of land, but as transfers of personalty may be made by simple delivery; and are not attended by many of the covenants and formalities often important in transfers of land, the bill of sale is simpler and less technical than a deed, and often dispensed with entirely.

In the case of a sale of a vessel, however, the general rule of maritime courts calls for a written bill of sale; and the U. S. Rev. Stat. § 4170, prescribes that, in every case of a sale or transfer of a registered vessel to a citizen of the United States, there shall be some instrument of writing in the nature of a bill of sale, which shall recite at length the certificate of registry; otherwise the vessel shall be incapable of being registered anew, and she ceases to be a vessel of the United States.

As fictitious bills of sale are often given for the purpose of protecting property from creditors, statutes have frequently been enacted to prevent frauds upon creditors, by which questions of the validity of such instruments as against creditors are affected; although they may be valid and binding as between the parties. Registration of bills of sale is sometimes required, as by the English bills of sale act of 1854, under which, if not registered within twenty-one days from the making thereof, and the grantor continues in possession or apparent possession, the bill of sale is void against his execution creditors and assignees in bankruptcy.

5. Bill of health. An official certificate, given by the authorities of a port from which a vessel clears, to the master of the ship, showing the state of the port, as respects the public health, at the time of sailing, and exhibited to the authorities of the port which the vessel next makes, in token that she does not bring disease. If the bill alleges that no contagious or infectious disease existed, it is called a *clean* bill; if it admits that one was suspected or anticipated, or that one actually prevailed, it is called a *touched* or a *foul* bill. (*McCull.*) *Wharton.*

Bill of mortality. An official record of the deaths in a place or district. The expression is generally used in the plural, and signifies, primarily, a series of records of deaths instituted in London at about the time of the visitations of the plague, near the commencement of the seventeenth century. Secondarily, the phrase signifies the district or region of these records; thus, to say that a parish named is within the bills of mortality, means that it is within the territory for which the records are required.

Bill of sight. A written description of goods furnished to a customs officer by an importer, who, being ignorant of the precise quality and quantity of the goods, describes them to the best of his knowledge and information.

Under the English statute, when a merchant is ignorant of the real quantities or qualities of any goods assigned to him, so that he is unable to make a perfect entry of them, he must acquaint the collector or comptroller of the circumstance; and he is authorized, upon the importer or his agent making oath that he cannot, for want of full information, make a perfect entry, to receive an entry by bill of sight for the packages, by the best description which can be given, and to grant warrant that the same may be landed and examined by the importer in presence of the officers; and

within three days after any goods shall have been so landed, the importer shall make a perfect entry, and shall either pay down the duties or shall duly warehouse the same. *Wharton.*

BILLA. A bill. Occurs in some Latin phrases, among which are:

Billa cassetur. That the bill be quashed. The form of the judgment at common law in favor of the defendant, on a plea in abatement, where the proceeding was by bill.

Billa vera. A true bill.

Billa vera is the indorsement of the grand inquest upon any presentment or indictment which they find to be probably true. *Termes de la Ley.*

In criminal matters when a grand jury, upon any presentment or indictment, consider the same to be probably true, they write on it the two words, *billa vera*, and thereupon the accused person is said to stand indicted of the crime and is bound to make answer. *Holthouse.*

BIND. To bring one under definite legal obligations; particularly under the obligation of a bond or covenant; to affect one with a contract or judgment. Binding: that which establishes legal obligations or charges. When the obligations of a contract or relation attach, it is said to become binding; when they are nullified or discharged, it ceases to be binding. Bound: charged or brought under obligation or responsibility, as by a covenant or bond.

Binding out. This expression is applied particularly to the act of making an infant an apprentice.

Binding over. Designates the act or proceeding by a court or officer, of requiring a person to enter into a bond or give bail to appear for trial, to keep the peace, or the like. So, also, a person is sometimes bound over to attend as a witness.

BIPARTITE. In two parts. A term used in the law of conveyancing to describe an instrument entered into between two parties, each of whom executes and delivers one counterpart, and receives the other.

BIRDS. Includes, according to Wharton, all creatures with wings and feathers, whether small or large, wild or tame.

BIRRETUM, or BIRRETUS. A thin cap, fitting closely to the shape of the head; formerly, in England, worn as the distinguishing cap of a judge or sergeant-at-law. *Cunningham; Spelman; Wharton.*

BISHOP. Throughout the United States, the office and dignity of a bishop have no relation to the administration of municipal law; the title imports only such authority in the affairs of a particular denomination of christians as the rules and usages of that denomination, sustained by the common consent of its members, may give to the office. In England, the bishop is an ecclesiastical officer of high dignity and important authority and jurisdiction in the administration of the law of the land touching religious matters, as well as in the care and superintendence of church ordinances and offices. He is, in effect, appointed by the crown; is the chief of the clergy of the diocese for which he is bishop; and is the assistant of the archbishop in the administration of the ecclesiastical law, and is subordinate to him, as an officer of the church.

A bishop has three powers: A power of ordination, gained on his consecration, by which he confers orders, &c., in any place throughout the world; a power of jurisdiction throughout his see or his bishopric; a power of administration and government of the revenues thereof, gained on confirmation. He has, also, a consistory court, to hear ecclesiastical causes, and visits and superintends the clergy of his diocese. He consecrates churches, and institutes priests, confirms, suspends, excommunicates, and grants licenses for marriages. He has his archdeacon, dean, and chapter, chancellor, who holds his courts, and assists him in matters of ecclesiastical law, and vicar-general. *Wharton.*

Bishop's court. The consistory court in each diocese, held, under authority of the bishop, by his chancellor. (2 *Steph. Com.* 672, 3 *Id.* 305.) *Mozley & W.*

BISSEXTILE. The leap year; or year in which an additional day is reckoned, in order to recover the six hours (nearly) which the sun requires for his annual revolution, beyond the 365 days assigned for it in intervening years. The word is compounded of two Latin words, — *bis*, twice, and *sextilis*, sixth; because anciently, the sixth day before the calends of March, was the day doubled. By modern usage, a twenty-ninth day is added to February.

But Stat. 21 Hen. III. enacted that the intercalary day and that next be-

fore it should be accounted as forming together only one day. And this statute has been recognized in some of the states as applicable to and in force in this country, while in others the same rule has been re-enacted; as in 1 N. Y. Rev. Stat. 606, § 3. The result of its adoption is of considerable importance in computation of time; for by it, in reckoning the time allowed for answering process, paying a bill or note drawn payable in a given number of days, or the like, when the 29th of February, so called, is involved in the period, that day is not to be counted. One who is entitled to thirty days from February 20th, for performance of any act, has been held entitled, in Indiana (where the rule of the Stat. Hen. III. is fully recognized), to the end of March 22d, just the same, whether in the bissextile or in an ordinary year; the 28th and 29th of February being counted as one. 5 *Ind.* 196; 7 *Id.* 219; 17 *Id.* 220; 43 *Id.* 35; but see Harker *v.* Addis, 4 *Pa. St.* 515.

BLACK. Cal. Civ. Prac. Act, § 394, and Crim. Act, § 14, provide that no black, negro, or Indian shall be permitted to testify in any suit or action in which a white person is a party. It is held that the words "black," "Indian," "negro," and "white," are generic terms, designating race, and, therefore, that Chinese and all other peoples not white, are included in the prohibition from being witnesses. People *v.* Hall, 4 *Cal.* 399.

The words "white" and "black" in the Ohio act of March 14, 1853, obliging towns to provide schools for both whites and blacks, are to be taken as commonly understood in the community, and not as legally construed under the exclusive election laws. For that act is to be construed as a law of classification and not a law of exclusion, though its practical effect may be exclusive where the number of black children is too small to fill a school. A colored child, regarded as such in the community, though more than half white (and so far entitled to vote), is not, as matter of right, entitled to admission to the white schools. Van Camp *v.* Board of Education, &c., 9 *Ohio St.* 406.

BLACK ACT. 1. A notable English statute (Stat. 9 Geo. I. ch. 22), enacted to repress outrages committed by persons who frequented Epping Forest, having their faces blackened, or being otherwise disguised, destroying the deer, and committing other offences. It was repealed by Stat. 7 & 8 Geo. IV. ch. 27. *Wharton; Mozley & W.*

2. Certain statutes printed in the old black letter, during the dynasty of the Stuarts, in Scotland, have been known as the black acts. *Wharton.*

BLACK-BOOK. What is cited as the black-book of the admiralty is an ancient and highly esteemed compilation of laws on admiralty and maritime subjects, as they existed in early times. The date of its preparation is disputed; Burrill attributes it to the reign of Edward III., and so also does Bouvier, giving, however, other opinions.

BLACK-MAIL. This expression originally designated a tribute paid by English dwellers along the Scottish border to influential chieftains of Scotland, as a condition of securing immunity from raids of marauders and border thieves.

In modern usage, black-mail designates money extorted from a person as a condition of refraining from making charge of offence against him, or publishing something to his prejudice.

Black-mail is a word used in Stat. 43 Eliz. ch. 1, and signifies a certainty of money, corn, cattle, or other consideration, given by the poor people in the north of England to men of great name and alliance in those parts, to be by them protected from such as usually rob and steal there. *Termes de la Ley.*

Black-mail, in common parlance, and in general acceptation, is equivalent to, and synonymous with, extortion — the exaction of money, either for the performance of a duty, the prevention of an injury, or the exercise of an influence. It supposes the service to be unlawful, and the payment involuntary. Edsall *v.* Brooks, 17 *Abb. Pr.* 221; 2 *Robt.* 29.

Hence, although a newspaper report of a trial of a policeman for extortion may be, in the body of it, a correct account of the proceedings, and therefore privileged under N. Y. Laws 1854, 314; yet, if it is prefixed by the editorial heading, "Black-mailing by a policeman," that caption is libellous on its face; for it imports criminal exaction of money, and is not justified by evidence that the policeman received a gratuity in violation of a rule of the department. *Ib.*

BLANCUS. Blank; white; smooth.

BLANK. 1. A space left in an instrument to be filled in future.

2. A printed form wherein the ordinary, invariable words and expressions are printed, leaving vacant spaces in which names, dates, and amounts necessary to adapt the instrument to use in a particular case may be inserted at convenience. Blank writs, blank deeds, and many other kinds are in use, thus saving the time of attorneys and conveyancers, which would otherwise be consumed in engrossing each instrument throughout.

Blank indorsement, or **indorsement in blank**, is one in which no name of an indorsee is stated. The indorser indorses his name upon the note or bill, with any restrictive words he desires to add, and delivers the instrument to the transferee, who may in turn pass it to another; and any one who may in due course acquire it may write in his own name as indorsee.

BLASPHEMY. The name of an offence which consists: 1. In wantonly casting reproach upon God, his attributes, or religion, or in denying the existence of the two former, or the truth of the latter.

2. In maliciously reviling Jesus Christ, or denying his birth and divinity.

3. In profane scoffing at the Holy Scriptures, either of the Old or New Testaments, and exposing them to ridicule. Consult Commonwealth *v.* Kneeland, 20 *Pick.* 213; *Thach. Cr. Cas.* 346; Updegraph *v.* Commonwealth, 11 *Serg. & R.* 406; People *v.* Ruggles, 8 *Johns.* 290; State *v.* Chandler, 2 *Harr. (Del.)* 553; *Eml. Pref. to St. Tr.* 8; 2 *Bish. Cr. L.* § 69; *Stark. Lib.* 496; 1 *Hawk. Pl. C.* 12; 1 *Hume Cr. L.* 559.

A denial of the being or providence of God, and all contumelious reproaches of Jesus Christ, were offences by the common law of England, and punishable by fine, imprisonment, pillory, &c. Under Stat. 9 & 10 Wm. III. ch. 32, any professed Christian who denies the Holy Trinity, or generally the Christian religion, may be indicted therefor, and upon conviction is liable to be deprived of office, and incapacitated for holding office afterwards; but the prosecution must be commenced within four days of the blasphemy uttered, and is to be desisted from, and all the penalties are to be removed, upon the defendant's renunciation of his heretical opinions.

Likewise, by Stat. 3 Jac. I. ch. 21, persons jestingly or profanely using the name of God, or of Jesus Christ, or of the Holy Ghost, or of the Triuity, in any stage-play, &c., incur a penalty of ten pounds.

The theory on which a person accused of profane scoffing at the Scriptures or a malicious reviling of our Saviour has been deemed punishable under the common law of England is that the Scriptures and the Christian religion are part of the common law. A series of decisions of the federal and state courts, including even courts of states where express statutes defining and punishing blasphemy exist, attest that the offence is punishable, upon the same theory, in the various states. But the administration of the law governing this offence has been ameliorated by the growing spirit of regard for freedom of opinion and of speech, and it is probably a sound practical restriction upon the definition as generally understood, that a moderate expression of opinions, argumentative in tone, and respectful towards the general faith, is not blasphemy, although adverse to the existence of God, the doctrine of the Trinity, or the authority of the Scriptures. The element of malice — the intent to wound the feelings or stir the passions of those who hold religious faith — is an essential element in the definition as given above. Thus the commissioners of the New York code say, that blasphemy consists in wantonly uttering or publishing words casting contumelious reproach or profane ridicule upon God, Jesus Christ, the Holy Ghost, the Holy Scriptures, or the Christian religion; but add a provision that, if it appears beyond reasonable doubt that the words complained of were used in the course of serious discussion, and with intent to make known or recommend opinions entertained by the accused, such words are not blasphemy. And they add, in their note, that this is a well-settled restriction upon the definition of blasphemy; 8 *Johns.* 290; 20 *Pick.* 213; *Thach. Cr. Cas.* 356; *Stark. Lib.* 496; for the favor

which the law shows towards liberty of speech and the free discussion of religious opinions forbids that the sincere expression of belief, however erroneous, should be embarrassed by the penalty of blasphemy. *Report of a Penal Code*, §§ 31, 32.

Blasphemy consists in maliciously reviling God or religion. People *v.* Ruggles, 8 *Johns.* 290.

In general, blasphemy may be described as consisting in speaking evil of the Deity with an impious purpose to derogate from the divine majesty and to alienate the minds of others from the love and reverence of God. It is purposely using words concerning God calculated and designed to impair and destroy the reverence, respect, and confidence due to him as the intelligent creator, governor, and judge of the world. It embraces the idea of detraction, when used towards the Supreme Being, as "calumny" usually carries the same idea when applied to an individual. It is a wilful and malicious attempt to lessen men's reverence of God by denying his existence, or his attributes as an intelligent creator, governor, and judge of men, and to prevent their having confidence in him as such. Commonwealth *v.* Kneeland, 20 *Pick.* 211, 212.

Where the jury found that defendant had proclaimed publicly and maliciously, with intent to vilify the Christian religion, &c., that "the Virgin Mary was a whore and Jesus Christ was a bastard," it was held that he was rightly convicted of blasphemy. State *v.* Chandler, 2 *Harr.* (*Del.*) 553.

BLOCKADE. A war measure; consisting in obstructing, usually by naval forces, all ingress and egress at a port, for the purpose of coercing submission.

Some of the definitions given are expressed in terms which appear to require that approach by land, as well as by sea, to the port in question, must be shut off, in order to constitute a blockade. Thus Sir William Scott defines it as "a sort of circumvallation round a place by which all foreign connection and correspondence is, as far as human power can effect it, to be cut off," The Vrow Judith, 1 *Rob. Adm.* 126; and Bouvier, as "the actual investment of a port or place by a hostile force fully competent, under ordinary circumstances, to cut off all communication therewith, so arranged or disposed as to be able to apply its force to every point of practicable access or approach to the port or place so invested." But Kent calls it the "investment of a seaport by a competent naval force, with a view of cutting off all communication of commerce;" and says that it is not necessary the place should be invested by land as well as by sea, in order to constitute a legal blockade; although if a place be blockaded by sea only, it is no violation of belligerent rights for the neutral to carry on commerce with it by inland communications. 1 *Kent Com.* 146, 147. Certainly as the word is generally used, it presents the idea of a disposition of forces to prevent communication by sea; and if all entrance to a port by sea and through the harbor is prevented, the port is not deemed the less blockaded, because, being in the enemy's territory, he has free access to it by land, from the interior.

By the modern law of nations, a blockade, to be valid and entitled to recognition, must be effective: that is, sustained by an actual naval force present and available. There must at least be a naval force stationed near the blockaded port, sufficient to make an attempt to enter apparently dangerous; and the inclination and progress of the law seems to be towards the doctrine that there must be a competent force, to make the blockade effective; to prevent communication. If, however, this is provided, an accidental and temporary interruption of the presence of the squadron, as if the vessels are blown off by high winds, will not lift the blockade.

Again, notice, either by formal announcement from the blockading power to the party offering to enter, or by notice to his government, or by general notoriety, or otherwise, is necessary to a blockade, at least when a neutral vessel is to suffer for an attempt to enter the port. But no mere proclamation or notice of intention to blockade, or prohibition upon entering the port in question, unsustained by an actual, effective force, will constitute a blockade. *Lawr. Wheat.* 819; 1 *Kent Com.* 145.

What has been called the blockade of the Southern ports, during the civil war of 1861–65, was not, in a strict sense, a blockade. It was a mere municipal regulation, founded on the power of the United States to designate what should be ports of entry within her limits, and to employ her vessels of war to enforce compliance. A blockade

only exists when forces of one nation encompass the ports of another. United States *v.* The William Arthur, 3 *Ware*, 276.

BLOOD. The terms "of the blood" and "heir," are by no means convertible or synonymous, nor does the former naturally, or *ex vi termini*, mean next of blood. A grandson, during the lifetime of his father, is of the blood, yet not heir nor next of blood, of his grandfather. A nephew is of the blood of his uncle, yet not heir nor next of blood, if the uncle have a child or descendant of a child alive. To be "of the blood" of a person means to be descended from him or from a common stock. The expression includes collaterals as well as lineals; and includes not only those on whom, under actual circumstances, a descent must be cast, as a son, but all on whom, under other circumstances, the descent may or might be cast, as a grandson, who might, if his father were dead, or an uncle, who would, take, at common law, on a failure of lineal descendants. In short, all those are of the blood of an ancestor who may, in the absence of other and nearer heirs, take by descent from that ancestor. Den *v.* Jones, 8 *N. J. L.* 346.

The phrase, of the blood, in a statute regulating descents, includes the half blood. This is the natural meaning of the word blood standing alone, and unexplained by any context. A half brother or sister is of the blood of the intestate, for each of them has some of the blood of a common parent in his or her veins. A person is with the most strict propriety of language affirmed to be of the blood of another who has any, however small a portion, of the same blood derived from a common ancestor. Gardner *v.* Collins, 2 *Pet.* 58, 86.

Brothers and sisters are said to be of the whole blood if they have the same father and mother, and of the half blood if they have only one parent in common. Baker *v.* Chalfant, 5 *Whart.* 477.

BOARD. 1. As a law term, board is descriptive of a number of persons organized, under authority of positive law, to execute some trust or perform official or representative functions. It is thus used in such phrases as board of aldermen, board of supervisors, board of trustees.

In England, the term in this sense has long had a somewhat special use to signify a department or office under the executive government, filled by several persons associated; as the board of trade, the board of works, the board of admiralty, the board of ordnance, the board of health, the board of charities, the poor law board, and the board of control. The same usage has been initiated in this country; as in the cases of the boards of health, boards of police commissioners, boards of public works, created in several of the larger cities.

2. Board, *n.*, in the sense of supplies for personal sustenance, and board, *v.*, in the sense of to provide food from day to day, have been the subject of some adjudications having reference chiefly to the distinction between the liabilities of one who undertakes to provide board, and those of an innkeeper.

Board includes the ordinary necessaries of life, and must be considered as being synonymous with entertainment in the Pa. act of March 11, 1834. Scattergood *v.* Watterman, 2 *Miles*, 323.

To board means to receive food, with or without lodging, for a compensation. An allegation that one boarded with an innkeeper does not import that he had the rights of a guest at the inn. Pollock *v.* Landis, 36 *Iowa*, 651.

Boarding-house. A boarding-house is not an inn; the distinction being that a boarder is received into a house by a voluntary contract, whereas an innkeeper, in the absence of any reasonable or lawful excuse, is bound to receive a guest when he presents himself. Dausey *v.* Richardson, 2 *El. & B.* 144.

The distinction between a boarding-house and an inn is, that in a boarding-house the guest is under an express contract, at a certain rate for a certain period of time, while in an inn there is no express agreement, the guest, being on his way, is entertained from day to day, according to his business, upon an implied contract. Willard *v.* Reinhard, 2 *E. D. Smith*, 148.

An establishment may be both a boarding-house and an inn. In respect to those who occupy rooms, and are entertained under precise contracts, it is a boarding-house; while with respect to transient persons, who, without any stipulated contract, remain from day to day, it is an inn. Seward *v.* Seymour, *Anthon's Law Student*, 51.

A boarding-house is not, in common parlance or in legal meaning, every private house where one or more boarders are kept occasionally only, and upon special considerations. It is a *quasi* public-house, where boarders are generally and habitually kept, and which is held out and known as a place of entertainment of that kind. It is a house where the business of keeping boarders generally is carried on, and which is held out by the owner or keeper as a place where boarders are kept. Cady *v.* McDowell, 1 *Lans.* 486.

A boarding-house keeper, as used in N. Y. Laws, 1860, 771, ch. 446, extending innkeepers' lien to boarding-house keepers, is one who furnishes accommodation for a definite period, as by the week or month, at

a rate of compensation agreed upon. Stewart *v.* McCready, 24 *How. Pr.* 62.

BOAT. A species of watercraft; distinguished, as the term is usually employed when used alone in American legislation, from a ship or vessel, by being of smaller size and without a deck. See United States *v.* An Open Boat and Lading, 5 *Mas.* 120, 137. When used as a part of the term steamboat, it is not subject to any such restriction.

BODY. 1. The physical person of the individual.

Body, in an indictment for murder, means the trunk in distinction from the head and limbs. Sanchez *v.* People, 22 *N. Y.* 147.

An indictment for feloniously disinterring the body of M is not defective because it omits to allege that M was a human being. That fact will be assumed. People *v.* Graves, 5 *Park. Cr.* 134.

2. A number of persons constituted one entity by law.

3. A collection of many particulars, as of distinct precepts of law, into one composite systematic whole.

Body corporate. This phrase was formerly much used to mean an artificial person, and is by some writers deemed more correct, philologically speaking, than corporation, which has replaced it.

Body of a county. A phrase used to express the territorial integrity of a county. As county means, in its first signification, an intangible corporation, it is usual, especially in older works, where one desires to signify unmistakably that the territory, not the legal incorporation, is meant, to use the phrase body of the county. Thus works on admiralty speak of causes of action arising within the body of a county, meaning within the boundaries of a county as a territorial division.

Where an arm of the sea, or creek, haven, basin, or bay, is so narrow that a person standing on one shore can reasonably discern or distinctly see and clearly distinguish from each other, by the naked eye, objects on the opposite shore, the waters are within the body of a county. United States *v.* Grush, 5 *Mas.* 209, 301.

Body of an instrument, signifies the main and operative part, the substantive provisions, as opposed to the caption, recitals, *testificandum*, and attestation clauses, &c.

Body of laws. A systematic collection of rules of jurisprudence is often styled a body of laws; as, particularly, the body of the civil law, or *corpus juris civilis*.

Body politic. A public corporation, or corporation having powers of government, is frequently spoken of as a body politic; and, in older books, "body corporate and politic" is said to be the most exact expression for a corporation of this character. Also, the term body politic is often used in a general way, as meaning the state or the sovereign power, or the city government, without implying any distinct express incorporation.

BOLTING. The sifting and debating of cases, which Cowel, writing in the seventeenth century, describes as conducted in Gray's Inn, in the manner following: An ancient and two barristers sit as judges; three students bring each a case, out of which the judges choose one to be argued; which done, the students first begin and argue, and after them the barristers. *Mozley & W.*

BOMBAY REGULATIONS. Regulations passed for the presidency of Bombay, and the territories subordinate thereto. They were passed by the governors in council of Bombay until the year 1834, when the power of local legislation ceased, and the acts relating thereto were thenceforth passed by the governor-general of India in council. *Mozley & W.*

BONA. 1. Goods; property. In this use of the Latin word, it is the nominative plural of the noun *bonum*, and signifies things of value. In the civil law, it included property of all kinds, both movable and immovable.

In the common law, it was confined to movable property. It was, however, deemed a more comprehensive term than goods, as comprehending chattels real, as well as personal. *Co. Litt.* 118 *b*. The word occurs, also, in several phrases, such as the following:

Bona et catalla. Goods and chattels. Movable property.

This expression includes all personal things that belong to a man. Knight *v.* Barber, 16 *Mee. & W.* 68.

Bona notabilia. Goods worthy of notice. Goods of sufficient value to be taken into account.

This term was applied, in English eccle-

siastical practice to that quantity or value of personal property necessary to give probate jurisdiction over a decedent estate. The sum was fixed (except for London, where £10 were required) at £5. *Wharton.*

Bona patria. An assise of good neighbors. A Scotch term for a tribunal of twelve or more approved men, chosen to pass upon an assise.

Bona peritura. Perishable goods. The phrase has relation to provisions of law allowing goods in legal custody, which cannot be kept to await the result of the proceedings pending, to be sold, and the proceeds kept in their stead. An early English statute introduced this principle with reference to goods coming ashore from shipwreck; and it has since been embodied in statutes regulating custody of chattels in other cases.

The Statute of Westm. 1, 3 Edw. I. ch. 4, as to wrecks of the sea, ordains, that, if the goods within the ship be *bona peritura*, such things as will not endure for a year and a day, the sheriff shall sell them, and deliver the money received to answer it. *Jacob.*

Bona vacantia. Goods wanting an owner. Goods in which no person claims property. By the common law such goods become the property of the first finder, excepting wrecks, waifs, estrays, treasure-trove, and other things which belong to the sovereign. 1 *Bl. Com.* 298. Used also of the goods of persons dying without successors or next of kin, to which the sovereign is entitled.

Bona waviata. Goods waived. Goods which, having been stolen, are thrown away by the thief in his flight, to facilitate his escape, or in fear of apprehension. By the common law, these belonged to the sovereign. 1 *Bl. Com.* 296.

2. Good; worthy. In this use of the word *bona*, it is the nominative feminine of the adjective *bonus;* and is used in connection with some noun which it qualifies, as in the phrases following:

Bona fides. Good faith; honesty; sincerity; the opposite of *mala fides* and of *dolus malus*, q. v. This phrase is of frequent occurrence in modern writers in the ablative form, *bona fide*, in good faith; in the civil-law writers, the genitive form, *bonæ fidei*, is more common, with the same signification. The English good faith (*q. v.*) is used in the same general sense. Thus, the phrases *bona fide* creditor, *bona fide* purchaser, or the equivalents creditor or purchaser in good faith, signify one who has loaned money or purchased property fairly, in the usual course of business, for an honest price, &c., and without being cognizant of, or implicated in any intent which the borrower or seller may have had to evade claims of his creditors, or defraud some third person interested in the matter. Such a creditor or purchaser is accorded an important immunity against claims unknown to him at the time of his loan or purchase. See PURCHASER.

A *bona fide* purchaser is a purchaser for a valuable consideration paid or parted with in the belief that the vendor had a right to sell, and without any suspicious circumstances to put him on inquiry. Merritt *v.* Northern R. R. Co., 12 *Barb.* 605.

That we say is done *bona fide* which is done really with a good faith, without any fraud or deceit. *Jacob.*

Bona fides non patitur ut bis idem exigatur. Good faith does not allow satisfaction for the same thing to be twice exacted. An obligation once discharged cannot be again enforced.

This principle is illustrated by many cases in which the law gives a plaintiff more than one remedy to enforce the obligation or to redress the injury he alleges, or the same remedy against more than one party; in none of which is he allowed to exact more than one satisfaction for his debt or injury. But two distinct obligations may arise out of the same transaction, as where a wrong-doer is liable civilly and criminally for the same act; in which case the exacting of satisfaction upon the one liability is by no means a discharge of the other.

Bona memoria. Good memory. Generally used in the phrase *sanæ mentis et bonæ memoriæ*, of sound mind and good memory, applied to express testamentary capacity.

BOND. A species of written instrument under seal, embodying an engagement to pay a specified sum unless the person executing it shall pay a sum or perform any act designated.

The person making the bond is

termed the obligor, the one to whom it is given is the obligee. The part or clause of the bond expressing the real obligation to secure which the bond is given, is called the condition, and this must chiefly be looked to for the true obligation and liability created. The clause stating the sum to be paid, in case of a default in performance of the condition, is the penalty; this, by the established practice of modern jurisprudence, is regarded as nominal; is liable to be reduced to correspond with the real indebtedness; thus, on a bond to secure payment of money, while the penalty cannot be exceeded, on the other hand, the collection is limited, generally speaking, to the debt named in the condition, interest, and costs of suit. The instrument was originally framed, doubtless, upon the theory that the obligor or debtor must strictly perform the condition, or, upon his default, the obligee or creditor might exact the full penalty; and it was in early times enforced in this spirit in the courts of law. But soon the courts of equity interfered, and forbade bond-creditors to take more than in conscience they ought; viz., principal, interest, and expenses, in case the forfeiture accrued by non-payment of money borrowed; the damages sustained upon non-performance of covenants, and the like. The courts of law yielded somewhat to this view, and at length the Stat. 4 & 5 Anne, ch. 16, enacted, that, in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due with interest and costs, even though the bond were forfeited and a suit commenced thereon, should be a full satisfaction and discharge. At the present day, bonds are universally held subject to this restriction on their enforcement.

It should be added that there is also known what is termed a single bond, being a sealed engagement to pay a sum named; expressed in absolute terms, and without a privilege of discharging it by compliance with an easier condition; but this kind of bond is of rare use in modern practice.

A bond is that which binds; therefore, any instrument that legally binds a party to do a certain thing may be called a bond. Courand *v.* Vollmer, 31 *Tex.* 397.

The term bond, or obligation, or writing obligatory, *ex vi termini*, imports a sealed instrument. Cantey *v.* Duren, *Harp.* 434; Taylor *v.* Glaser, 2 *Serg. & R.* 502; Denton *v.* Adams, 6 *Vt.* 40; Deming *v.* Bullitt, 1 *Blackf.* 241; Skinner *v.* M'Carty, 2 *Port.* 19; Lane *v.* Morris, 10 *Ga.* 162; Harman *v.* Harman, 1 *Baldw.* 129.

The word bond does not necessarily imply an instrument under seal, or with a penalty or forfeiture. Stone *v.* Bradbury, 14 *Me.* 185.

To constitute a bond at common law, it must be sealed with wax, wafer, or some tenacious substance; but, in this country, except in two or three states, a scroll has been substituted for a seal. United States *v.* Stephenson, 1 *McLean*, 462.

In the Vermont statute (Gen. Stat. ch.114, § 1), prohibiting the forgery of any "bond or writing obligatory," these words are used in their legal sense, as meaning bonds binding some obligor to some obligee, and requiring something to be done, which, if not done, can be compensated by an action on the bond. State *v.* Briggs, 34 *Vt.* 501.

It is not necessary that the name of the obligor should appear in the bond; if it is signed and sealed by him, it binds him. Pequawkett *v.* Mathes, 7 *N. H.* 230.

It is essential to the validity of a bond that an obligee appear on its face; proof of delivery of it to a particular person is not sufficient. Phelps *v.* Call, 7 *Ired. L.* 262.

A writing, purporting to be an obligation for the payment of money, without naming a person as obligee, is not a bond. Pelham *v.* Grigg, 4 *Ark.* 141.

A railway bond payable to bearer is a negotiable instrument, and may be declared on in assumpsit as a bond. Ide *v.* Connecticut, &c. R. R. Co., 32 *Vt.* 297.

BONDSMAN. One who is bound in an obligation for performance of some act by another person; a surety.

As there are many cases in which a person is required by law to procure the bond of other persons, conditioned that he, the first named, will do some act, or perform the duty of some office, or make some payment, the persons who give these bonds on behalf of another are termed his bondsmen. Thus the sureties of public officials, of many corporate officers, of executors, trustees, &c., are called their bondsmen; sureties being, however, the more technical and exact term.

Boni judicis est ampliare jurisdictionem. It is the duty of a judge to amplify his jurisdiction. A judge should use liberally his remedial authority, but without usurping jurisdic-

tion. The remedies provided by the law may be enlarged and their application extended in order to attain justice, according to the nature of the case; but it is not the duty of a judge, even for such purposes, to extend his jurisdiction beyond its limits, as might be inferred from a literal rendering of the maxim. Lord Mansfield, indeed, declared that "the true text is, *boni judicis est ampliare justitiam*, not *jurisdictionem*, as it has been often cited," Rex *v.* Phillipps, 1 *Burr.* 304; but this reading has not been adopted.

The encouragement given by the courts to the action for money had and received is a familiar illustration of this principle; the theory of the action being that the plaintiff is in conscience entitled to the money received by the defendant, and which the defendant ought not in justice to keep. The courts of common law encouraged the bringing of such actions, as very beneficial, and enlarged their jurisdiction or remedial authority, by entertaining this kind of equitable action.

But such remedial extension of authority is permitted only within the limits of the jurisdiction; no usurpation of authority is to be attempted. Fundamental principles of jurisprudence are, that judges are appointed to administer, not to make, the law; and that that system of law is best which confides as little as possible to the discretion of the judge. *Broom Max.* 81, 84. No court "is intrusted with the power of administering justice without restraint. Although instances are constantly occurring where the courts might profitably be employed in doing simple justice between the parties, unrestrained by precedent, or by any technical rule, the law has wisely considered it inconvenient to confer such power upon those whose duty it is to preside in courts of justice. The proceedings of all courts must take a defined course, and be administered according to a certain uniform system of law, which, in the general result, is more satisfactory than if a more arbitrary jurisdiction was given to them. Such restrictions have prevailed in all civilized countries; and it is probably more advantageous that it should be so, though at the expense of some occasional injustice. Freeman *v.* Tranah, 12 *Com. B.* 413.

Bonis non amovendis. That the goods be not removed. A writ issued to the sheriff where a writ of error had been brought, commanding him to take care that the property was not taken away until the error should be tried and determined, was termed from its emphatic words, *bonis non amovendis*.

Bono et malo. For good and bad. A special writ of jail-delivery, issued for each particular prisoner, good and evil, was anciently termed *de bono et malo*, q. v.

BONUS. A bonus is not a gift or gratuity, but a sum paid for services, or upon some other consideration, but in addition to or in excess of that which would ordinarily be given. Kenicott *v.* Supervisors, 16 *Wall.* 452.

Bonus judex secundum æquum et bonum judicat, et æquitatem stricto juri præfert. A good judge decides according to justice and right, and prefers equity to strict law. The doing of substantial justice in the case is the end sought to be attained by the court, rather than the upholding of technical rules of procedure or of decision. But settled rules of law are not to be modified because of the hardship of a particular case; and as to matters of substantial right, the law leaves but little within the discretion of the judge. The limits within which this maxim has application are therefore very narrow; it is restricted by the same considerations as the kindred maxim, *boni judicis est ampliare jurisdictionem*, q. v.

BOOK, in general acceptation, consists of a number of sheets folded uniformly and bound together, containing or adapted to contain and preserve continuous writing or printing. There are, however, some variations from this idea, in the legal uses of the word.

1. The copyright law has long allowed a copyright to be obtained for a book It is held that a book, in this connection, is not necessarily a volume made up of many sheets bound together; it may be printed only on one sheet, as music or a diagram of patterns. The test is not the size, form, or shape, but the subject-matter of the work. Clay-

ton *v.* Stone, 2 *Paine*, 382; Doury *v.* Ewing, 1 *Bond*, 540. So a musical composition published on a single sheet of paper has been held privileged as a book within the English statute, 8 Anne. Clementi, &c. *v.* Golding, &c., 2 *Camp.* 25; 11 *East*, 244. So a sheet of paper containing diagrams representing a system of taking measures for and cutting out ladies' dresses, with instructions for practical use, has been held a book within the copyright law. Doury *v.* Ewing, 1 *Bond*, 540.

But the word has been held not to extend to a mere label, employed to designate an article sold in bottles, Coffeen *v.* Brunton, 4 *McLean*, 516; nor an ephemeral newspaper, called a price-current; on the ground that the copyright laws were not intended for the protection of such publications, and the requirements of the law as to securing a copyright, the depositing the title, &c., are not applicable to them. Clayton *v.* Stone, 2 *Paine*, 382.

And it is held that the word necessarily conveys the idea of thought or conceptions clothed in language, or in characters written, printed, or published; its identity, however, does not consist merely in the ideas, knowledge, or information communicated, but in the same conceptions, clothed in the same words, which make it the same composition. Stowe *v.* Thomas, 2 *Wall. Jr.* 547; 2 *Am. Law Reg.* 229.

Account books. The laws of several of the states provide for a distinct form of action upon book account; or allow a creditor, in an action for matters charged, to produce his books of account in evidence in support of his charges. The rule is not uniform whether an account must be kept in a bound volume, to bring it within these laws. In Colbert *v.* Piercy, 3 *Ired. L.* 77; and Richardson *v.* Wingate, 10 *West. L. J.* 145; 1 *Smith Lead. Cas.*, it was held in substance that the expression book of accounts in this connection means books, as they are well known to be universally kept; a statement in detail of transactions between parties, including prices, made contemporaneously with the transactions, and entered in a book; and that a tally, or a board, or loose sheets of paper, do not constitute a book account. But a notched stick was allowed to be introduced in evidence as a "book of original entries" in Rowland *v.* Burton, 2 *Harr.* (*Del.*) 288; and scraps of paper were admitted as a book of original entries in Smith *v.* Smith, 4 *Harr.* (*Del.*) 532.

The bankrupt act, Rev. Stat. § 5110, authorizes a discharge to be refused to a tradesman who has not kept proper books of account; and some of the insolvent laws of the states have contained like provisions. The cases arising under these enactments turn, mostly, on the sufficiency of the account, and do not involve the meaning of the word books. It has been held, however, that a retail dealer in groceries who keeps no invoice book, but keeps all his invoice bills carefully together, so that a complete account of all goods received by him can be made out from them, the other customary books also being kept, keeps proper books of account. *Re* Reed, 12 *Bankr. Reg.* 390.

Appeal-book; Demurrer-book; or Error-book. These expressions are applied to the papers composing the record upon which an appeal, a demurrer, or a writ of error, is to be argued, when they are collected, arranged, and stitched together, in manner convenient for the use of the court and counsel. They do not imply a bound volume of uniform folded sheets; the manner of preparing the papers is that prescribed by the rule of the court, and not necessarily what would be deduced from the ordinary meaning of book.

BOOT; BOTE. Compensation, satisfaction, recompense. A Saxon word, apparently the origin of our vernacular term boot. Alone, it is said to be equivalent to estovers. It occurs in several compounds.

Cart-bote and plough-bote are respectively an allowance of wood for making carts, ploughs, &c.

Hay-bote and hedge-bote mean wood for repairing hays, hedges, fences, &c.

House-bote is wood to repair or burn in the house.

Man-bote is a compensation or

amends for a man slain. *Jacob; Burrill.*

BORD. The home, or table. It is a Saxon word, the origin and meaning of which is the subject of considerable discussion in books devoted to old English or Saxon law; but may be explained sufficiently to American readers by likening it to our term board, in such phrases as bed and board. It enters into the composition of some old terms and phrases, such as the following: as to which see also *Cowel; Spelman; Burrill.*

Bordage, or bord service, was a species of base tenure by which certain lands were anciently held, in England. The distinguishing peculiarity of it seems to have been that the tenants must supply a certain quantity of provision for the lord's table; or render certain domestic services in his household.

Bordaria. A cottage.

Bordarii, or bordimanni. Bordmen, cottagers, or tenants in bordage. Various accounts are given of them. They seem to have held a condition somewhat above that of villenage; and to have held their lands on condition of supplying the lord with small provisions, or rendering small services in and about the domestic matters of the household.

Bord half-penny. A fee paid in old times, in England, for the privilege of setting up a board or stall for the sale of provisions, goods, or wares, in market.

Bordlands. Lands which the lord gave to tenants on condition of their supplying his table with small provisions, poultry, eggs, &c., or of rendering domestic services about the household.

Bordlode. Service required from bordmen or tenants in bordage, in return for their lands; generally the furnishing of certain provisions for the lord's table, or rendering domestic services in his household.

BOROUGH. The name of a species of municipal corporations. In English law, the term has been much used, and with varying signification; but may be said to denote, in the earlier books, a town which has not been made a city, but is incorporated and sends members to parliament, *Cowel; Whishaw; Co. Litt.* 109 *a*; 1 *Bl. Com.* 114; 1 *Steph. Com.* 116; and in later ones, an incorporated town generally, Stat. 5 & 6 Wm. IV. ch. 76; 1 *Steph. Com.* 116; 3 *Id.* 191. In the United States, it is not extensively used with any precise, distinguishable meaning. In the Pennsylvania statutes, however, it has been systematically employed as including incorporated towns and villages. *Bright Purd. Dig.* 115. Borough is the legal corporate name of these incorporations.

In the borough electors act of 1868, 31 & 32 Vict. ch. 41, the term parliamentary borough is to mean a borough which, prior to the representation of the people act of 1867, returned a member or members to parliament; and municipal borough a place subject to the municipal corporations act, 5 & 6 Wm. IV. ch. 76. (1 *Steph. Com.* 125, note.) But the term borough is used variously in different acts of parliament, according to the exigencies of each case. *Mozley & W.*

Borough and village are duplicate or cumulative names of the same thing; proof of either will sustain a charge in an indictment employing the other term. Brown *v.* State, 18 *Ohio St.* 496.

Borough courts, is applied to a private and limited species of tribunals, held in particular districts for the convenience of the inhabitants, that they may prosecute small suits without leaving home.

Borough sessions, designates courts of limited criminal jurisdiction, established in English boroughs under the municipal corporations act.

BOROUGH ENGLISH. An ancient custom, which prevailed in some parts of England, whereby the youngest son, instead of the eldest, inherited his father's lands.

The reason of this custom seems to be, that in these boroughs people chiefly maintain and support themselves by trade and industry; and the elder children, being provided for out of their father's goods, and introduced into his trade in his lifetime, were able to subsist of themselves without any land provision, and therefore the land descended to the youngest son, he being in most danger of being left destitute. It is called borough English, because, as some hold, it first prevailed in England. *Brown.*

Other authors have given a much stranger reason for this custom; that the lord of the fee had anciently a right of concubinage with his tenant's wife on her wedding night; and, therefore, the youngest son

was most certainly the tenant's offspring. *Jacob.*

BORROW. A New York statute, 1 Rev. Stat. 773, § 8, enables any borrower to sue in equity for a discovery as to usury without tender of principal or interest. The courts of the state have held that the word borrower in this provision is not restricted to the person to whom the loan was originally made. Cole *v.* Savage, 10 *Paige*, 583, 588; see also Livingston *v.* Harris, 3 *Id.* 528; 11 *Wend.* 335; Leavitt *v.* DeLaunay, 4 *Sandf. Ch.* 281. It includes a surety, Post *v.* Boardman, *Clarke*, 523; Morse *v.* Hovey, 9 *Paige*, 197; Perrine *v.* Stryker, 7 *Id.* 598; Hungerford's Bank *v.* Dodge, 30 *Barb.* 626; 10 *Abb. Pr.* 24 (also an accommodation indorser may defend on the ground of usury in the loan between the original parties, *Ib.*); or other representative of original party, Post *v.* Bank of Utica, 7 *Hill*, 391. But it does not include subsequent grantee of premises covered by a usurious mortgage, *Ib.;* Schermerhorn *v.* Talman, 14 *N. Y.* 93; see Post *v.* Bank of Utica, 7 *Hill*, 391; nor a mortgagee of land subject to the lien of a prior judgment confessed on a usurious consideration, Rexford *v.* Widger, 2 *N. Y.* 131; 3 *Barb. Ch.* 640; nor a purchaser from a borrower; and where the borrower assigned in bankruptcy, and himself purchased, he was held not a borrower under the statute, but a purchaser, so that, on coming into equity for relief, he must do equity by tendering the sum loaned with legal interest. Schermerhorn *v.* Talman, 14 *N. Y.* 93.

Receiving deposits is not borrowing money. Leavitt *v.* Yates, 4 *Edw.* 134, 165.

A contract made by a city to pay a sum of money, with interest, to a person who has assumed the payment of interest on some of the city's debt, as well interest to become due, as interest already due, is not a borrowing of money, but is a contract for the payment of a debt; and, as being the latter, will be sustained, when, if it were deemed the former, it might fall within prohibitions in the charter prohibiting the city's borrowing money except on certain terms. Gelpcke *v.* City of Dubuque, 1 *Wall.* 221.

A power given to directors of a corporation to borrow on the security of the funds or property of the society, and to cause the funds or property of the society to be conveyed by way of mortgage, was held not a power to mortgage future calls so as to create a special charge thereon; although they had also power to make calls when necessary. *Re* British Provident Life & Fire Assurance Society, 33 *L. J.* N. S. 535.

BOTTOMRY. A contract or agreement in the nature of a mortgage, entered into between the owner of a ship, or the master as his agent, whereby a loan of money is obtained on the ship alone, or with the accruing freight, at an extraordinary interest, upon maritime risks to be borne by the lender, for a specific voyage or for a definite period. The word bottomry is used to express the loan, from the keel or bottom (*pars pro toto*) of the ship being pledged to secure it. The lender receives back his money with the interest agreed to be paid, if the ship completes her voyage safely, and the ship, either alone, or with her freight, together with the borrower, is bound for the payment thereof; if, however, the ship is lost by a peril of the sea, the lender is not repaid, except to the extent of what remains. If, however, she is lost, or injured, by the fault or misconduct of the master, mariners, or owner, the borrower must return the sum borrowed together with the maritime interest agreed on.

The instrument embodying the agreement is called a bottomry bond, and may be executed by the owner of the ship, or one her lawful master, however appointed. If by the former, it may be in the home port and no necessity need exist; if by the latter, it may be in a port of the same country where the owner resides, in a case of extreme necessity, and when the master has no opportunity or means, or it is extremely difficult to communicate with the owner; otherwise, the master must be in a foreign port, where he and the owner are without credit, and the loan must be made to procure necessary assistance or supplies, which, if not procured thereby, the ship and cargo would necessarily be left to perish.

The true definition of a bottomry bond, in the sense of the general maritime law, and independent of the peculiar regulations of the positive codes of different commercial nations, is, that it is a contract for a loan of money on the bottom of the ship, at an extraordinary interest, upon maritime risks, to be borne by the lender for a voy-

age, or for a definite period. The Draco, 2 *Sumn.* 157.

The contract of bottomry differs essentially from a loan with security, and is inconsistent with the existence of a lien such as is implied by the marine law to secure advances made to a master in a foreign port to enable him to make necessary repairs. The Ann C. Pratt, 1 *Curt. C. Ct.* 340.

A bottomry bond is a bond given for a loan of money upon the security of a vessel and its accruing freight; its payment being dependent upon maritime risks, to be borne by the lender. A mortgage of a vessel for an existing debt, not made dependent upon maritime risks to be borne by the mortgagee, is not a contract of bottomry within 2 Rev. Stat. 136, § 7, by which contracts of bottomry, &c., are excepted from the provisions of the statute requiring delivery of possession in certain cases of sales and mortgages. Cole *v.* White, 26 *Wend.* 511.

BOUGHT NOTE. The practice of brokers in merchandise — better established in England than, probably, in the United States — is, upon effecting a sale of goods, to deliver a memorandum, stating the particulars of the contract, to the parties between whom he acts. These memoranda are called bought and sold notes. Wharton says that the bought note is given to the seller, and the sold note to the buyer; but that this is stated conversely in some of the books. To this effect, also, are the definitions by Brown and Story, cited below. Bouvier says that the bought note is the memorandum delivered to the vendee.

Bought and sold notes are the notes which a broker of stock or goods sends respectively to the vendor and purchaser for whom he has been engaged in the particular sale. They furnish the evidence of the contract, and, if they agree, bind the principals, the broker having authority to sign for both. (3 *Fost. & F.* 477.) *Brown.*

When a broker is employed to buy and sell goods, he is accustomed to give to the buyer a note of the sale, commonly called a sold note, and to the seller a like note, commonly called a bought note, in his own name, as agent of each, and thereby they are respectively bound, if he has not exceeded his authority. *Story, Agency,* § 28.

BOUND. 1. Under the obligations of a bond or covenant. See BIND, also BOND.

Bound bailiff. A bailiff or deputy, authorized in place of the sheriff to serve writs and make arrests, is sometimes termed, in English books, a bound bailiff, in view of his being under bond to the sheriff for faithful discharge of his duties. 1 *Bl. Com.* 345.

2. In contracts relative to shipping, and followed by to or for, bound denotes that the vessel in question is destined or intended to sail to a port mentioned; not, indeed, that she will absolutely arrive there, but that her owners intend and the contract contemplates she will make the voyage thither.

BOUND, or BOUNDARY. These words are often used synonymously, as meaning whatever marks the limits of lands held under one title; the enclosing line of an estate, in either direction. If a distinction can be drawn between them, it is probably that pointed out by Webster, that bound signifies a limit, boundary some visible mark designating a limit.

Boundaries are spoken of as natural, where growing trees, permanent rocks, streams, and the like, are used as means of identifying the line; and artificial, where some thing is erected, such as a stake or a pile of stones, to serve as a mark of the point desired.

Although La. Code, art. 822, says that "by boundary is understood, in general, every separation, natural or artificial, which marks the confines or line of division of two contiguous estates, trees or hedges may be planted, ditches may be dug, walls or enclosures may be erected, to serve as boundaries," yet we must usually understand by boundaries, stones or pieces of wood, inserted in the earth, on the confines of two estates. Drauguet *v.* Prudhomme, 3 *La.* 83.

A deed describing the line as running "to the north bounds of Hudson river, thence along the river so as to include so much of the island as is situate within lot No. 2, which island lies near the north bounds of the river," was held to convey the land to the centre of the river beyond the island, on the ground that the word bounds indicated not the bank, but the centre. Walton *v.* Tifft, 14 *Barb.* 216.

When the sea or a bay is named as a boundary of land, the line of ordinary high-water mark is intended, wherever the common law prevails. And where a decree confirming a Mexican grant mentions a bay as one of the boundaries of the land confirmed, without any further particulars, this rule will be considered as adopted. United States *v.* Pacheco, 2 *Wall.* 587.

BOUNTY. A gratuity or extra compensation, offered, usually by government, to induce numbers of persons to render a service or engage in an enter-

prise deemed of advantage to the public. It is not easy to discriminate between bounty, reward, and bonus. The former is the appropriate term, however, where the services or action of many persons are desired, and each who acts upon the offer may entitle himself to the promised gratuity, without prejudice from or to the claims of others; while reward is more proper in the case of a single service, which can be only once performed, and therefore will be earned only by the person or co-operating persons who succeed while others fail. Thus, bounties are offered to all who will enlist in the army or navy; to all who will engage in certain fisheries which government desire to encourage; to all who kill dangerous beasts or noxious creatures. A reward is offered for rescuing a person from a wreck or fire; for detecting and arresting an offender; for finding a lost chattel.

Bonus, as compared with bounty, suggests the idea of a gratuity to induce a money transaction between individuals; a percentage or gift, upon a loan or transfer of property, or a surrender of a right.

Bounty implies a gratuity, not a compensation. Eichelberger *v.* Lifford, 27 *Md.* 320.

Bounty is money paid or a premium offered to encourage or promote an object, or procure a particular act or thing to be done. Money voted by a town, as a gratuity to a man who has already enlisted in the army of the United States, not being given to procure the enlistment, is not a bounty, within an enabling act ratifying agreements of towns to pay bounties. Fowler *v.* Selectmen, &c. of Danvers, 8 *Allen*, 80.

Bounty is a premium offered or given to induce men to enlist into the public service. The term is applicable only to the payment made to the enlisted man, and not to a premium paid to one through whose intervention the recruit is obtained. Abbe *v.* Allen, 39 *How. Pr.* 481.

Bounty lands; Bounty-land warrant. Bounty is usually offered in money; but not necessarily. Bounties for military services have, in the United States, sometimes been paid in portions of the public lands. Lands thus appropriated are known as bounty lands, while the warrant given to the recipient to entitle him to enter is a bounty-land warrant.

Bounty of Queen Anne, is a name given to a royal charter, which was confirmed by 2 Anne, ch. 11, whereby all the revenue of first-fruits and tenths was vested in trustees, to form a perpetual fund for the augmentation of poor ecclesiastical livings. *Wharton.*

BRANDING. A punishment, anciently quite common, but now almost everywhere disused, except to a limited extent, for military offences; consisting in inflicting some mark upon the person of the offender, by burning with a hot iron.

BRAWL. Is synonymous with tumult. The two words mean the same kind of disturbance to the public peace; produced by the same class of agents, and can well be comprehended to define one and the same offence. State *v.* Perkins, 42 *N. H.* 464.

Brawling is quarrelling or chiding, or creating a disturbance, in a church or churchyard. (4 *Bl. Com.* 146; 4 *Steph. Com.* 253.) *Mozley & W.*

BREACH. 1. A violation of duty or obligation is quite generally termed a breach; particularly in phrases like the following:

Breach of close. Unlawfully entering upon another person's land.

Breach of covenant or of contract. A non-fulfilment of a covenant or contract, whether by commission or omission.

Breach of duty. The not executing an office, employment, or trust, in a lawful manner.

Breach of the peace. A disturbance of the public peace.

Breach of pound, or pound-breach. Taking by force, out of a pound, things lawfully impounded.

Breach of prison, or prison-breach. The escape from arrest of a person lawfully arrested for a crime.

Breach of privilege. An act or default in violation of the privilege of either house of parliament, of congress, or of a state legislature; as, for instance, by false swearing before a committee, or by resisting the officers thereof in the execution of their duty.

Breach of promise. Violation of a promise; a phrase used especially with reference to the non-fulfilment of a promise to marry.

Breach of trust. A violation by a

trustee of the duty imposed upon him by the instrument creating the trust.

2. That part of a declaration in an action for a breach of contract, in which the breach complained of is alleged, is frequently termed the breach.

BREAK. The most important use of this term in jurisprudence is in determining the crime of burglary. As that offence involves the breaking into (or out of) a building, many cases have arisen for a decision of the question what constitutes a breaking, for this purpose.

The breaking which will constitute burglary may be actual or constructive. Clarke *v.* Commonwealth, 25 *Gratt.* 908.

Constructive, as distinguished from actual, breaking, includes an entrance to a house obtained by threats, as if the felon threatens to set fire to the house unless the door is opened, or where a servant removes the fastening by design, or some trick is resorted to by which entrance is effected, or a fraudulent use is made of some process of law. The entry in such cases must be immediate. State *v.* Henry, 9 *Ired. L.* 463.

Breaking necessarily includes force. An entrance may be made by force and not by breaking, but not by breaking without force. To allege a breaking in an indictment for burglary sufficiently shows use of force. Matthews *v.* State, 36 *Tex.* 675.

To constitute burglary, any breaking that enables the prisoner to take the property out through the breach, with his hands, is a breaking sufficient, if the intent was felonious. Fisher *v.* State, 43 *Ala.* 17.

Breaking into a store, with intent to steal and carry away goods, is a sufficient breaking to constitute burglary. That goods should actually be taken and carried off is not essential. Olive *v.* State, 5 *Bush*, 376.

A breaking into a house may be done by fire as well as by other means. The entrance and the intention being shown, the breaking is not lost in the consumption of the building. White *v.* State, 49 *Ala.* 344.

Entering through an open door to commit a felony, and unbolting a door to get out, is not actually or constructively a sufficient breaking and entering into to constitute a burglary. White *v.* State, 51 *Ga.* 285.

Breaking open the shutters of a window, and protruding the hand within them, is not such an entry as will constitute the crime of burglary, in Alabama, the sash and glass not being broken. State *v.* McCall, 4 *Ala.* 643.

Getting into the chimney of a house with intent to steal is a sufficient breaking to constitute burglary, though the party does not enter any of the rooms in the house. Donohoo *v.* State, 36 *Ala.* 281.

The mere raising of a partly opened sash, so as to admit a person, is not a breaking such as constitutes burglary. Commonwealth *v.* Strupney, 105 *Mass.* 588; Rex *v.* Smith, 1 *Moo. Cr. Cas.* 178.

The removal of an iron grating covering an area opposite a cellar-window of a store, is a breaking within the meaning of Mich. Comp. Laws, § 5756, defining burglary. People *v.* Nolan, 22 *Mich.* 229.

An entry into a building by raising a transom window attached by hinges above, and arranged to fall into the frame by its own weight when the window was shut into the frame, so as to require some force to open it, is a sufficient breaking under Michigan statute (Comp. L. 1871, § 7563), punishing the breaking and entering an office, shop, &c., in the night-time, &c. Dennis *v.* People, 27 *Mich.* 151.

Removing a fastening from an inner chamber door, as unlocking it, or turning a button by which the door was fastened, in the night, with a felonious intent, is a sufficient breaking of a house to constitute burglary, though the outer door may not have been fastened. *U. S. Dig.* tit. Burglary.

Where a person, through deception, caused the occupant of a dwelling to come to the door at night and let him in, and when once in knocked the occupant down, and robbed the dwelling, held, that the acts were a sufficient breaking to constitute burglary. State *v.* Mordecai, 68 *N. C.* 207.

Under an indictment for feloniously breaking and entering a dwelling-house, in the daytime, the evidence was that the entry was made through a door without any lock or latch, or any other fastening, but which fitted closely within the casing, so that some force was needed to open it. Held, that this was a breaking within the statute. Finch's Case, 14 *Gratt.* 643.

The getting the head out through a skylight is a sufficient breaking out of a house to constitute burglary. Rex *v.* McKearney, *Jebb Cr. Cas.* 99.

Breaking bulk. A phrase designating the act or offence of a carrier or other bailee, who opens the parcel, box, or trunk in which goods intrusted to him are packed, and feloniously takes out and appropriates the goods. The decisions of the courts drew a distinction between a conversion of an entire thing delivered for carriage, which was a fraudulent breach of trust, yet not a felonious larceny, and a breaking open a package, and taking out things therefrom, which might be larceny. The phrase breaking bulk has been much used in the discussion of this question. The embarrassments surrounding the subject have been relieved, in England, by the larceny act of 1861 (Stat. 24 & 25 Vict. ch. 96, § 3), which provides that a bailee fraudulently converting to his own use goods intrusted to him shall be

guilty of larceny, although he shall not break bulk.

Breaking jail or prison. A vernacular rather than technical term for an escape of a prisoner out of the place of custody. It is of narrower meaning than escape, which may be used to suggest the default of duty by the sheriff or jailer, as well as the offence committed by the prisoner in leaving jail; while "breaking jail" and "prison-breach" carry the second meaning, only. Etymologically it might apply as well to acts of friends or confederates done in breaking into a prison in aid of the inmates' escape; but it is doubtful whether the term is much used in this sense. It does not usually convey the idea of a breaking into a jail from without, but that of breaking out committed by those within; though of course outsiders may be accomplices.

BREHON LAW. The name given to the ancient law of Ireland as it existed at the time of its conquest by King Henry II.; and derived from the judges, who were denominated Brehons.

BRETHREN. In a will, may include brothers and sisters. Terry *v.* Brunson, 1 *Rich. Eq.* 78.

BREVE. Short; a writ. 1. Properly, an original writ, by which all actions in the English courts were anciently commenced.

2. In a later use, any writ or precept under seal, issued out of any court, comprising judicial as well as original writs; *i.e.*, writs issued in the progress of a cause as well as those by which suits were commenced; some of the judicial writs, especially the *capias*, having superseded the original writs previously in use.

The various writs in time came to be distinguished by some characteristic word or phrase of the form used, or by words describing the general subject-matter; and some of these terms were transferred to the forms of action in which the writ was used.

BREVET. 1. In military law, is a commission which advances an officer to a higher rank, but without entitling him to draw the corresponding increase of pay. In the United States military service, the effect of a brevet commission is further restricted by provisions of Rev. Stat. §§ 1209, 1212.

2. In French law, brevet signifies a written authority or privilege conferred by government for the benefit of the grantee; like letters-patent in England and America. Thus, *brevet d'invention* is equivalent to letters-patent for an invention.

BREVIA. Writs.

Several classes are mentioned; particularly:

Brevia anticipantia. Anticipating, *i.e.* preventive, writs. *Termes de la Ley* enumerates six as included: writ of *mesne; warrantia chartæ; monstraverunt; audita querela; curia claudenda;* and *ne injuste vexes.*

Brevia de cursu, or formata. Writs of course, or formal. This expression included a large class of writs which followed prescribed forms and were issued as of course.

Brevia innominata or nominata. The writs which did not, or did, respectively, give details or particulars of the cause of action.

Brevia judicialia or magistralia. Judicial or masters' writs. Those which were especially framed and judicially allowed, adapted to the circumstances of the particular cause.

Brevia testata. The name of the short memoranda early used to show grants of lands, out of which the deeds now in use have grown. *Jacob; Holthouse.*

Brevibus et rotulis liberandis. For delivering the writs and rolls. The name of a writ or mandate directed to a sheriff, commanding him to deliver to his successor in office the county and the appurtenances, with all the writs, records, and other things belonging to his office; the writ being named, as in other instances, from its leading words.

BREVIATE. An epitome. A short statement of contents, accompanying a bill in parliament. *Holthouse.*

BREWER. One who manufactures fermented liquors of any name or description, for sale, from malt, wholly or in part, or from any substitute therefor. Act of July 13, 1866, § 9, 14 *Stat. at L.* 117.

BRIBE, *n.* Something of value or advantage, asked, offered, given, or accepted with a corrupt intent to influence the person to whom it is offered or given

in his exercise of a power, authority, or privilege, in which the public have an interest. Bribe, *v.*: to give a bribe; to influence official action by a corrupt offer of a personal advantage. Bribery: the offence of offering, giving, or accepting bribes.

A high offence, where a person in a judicial place takes any fee, gift, reward, or brocage, for doing his office, or by color of his office, but of the king only. (3 *Inst.* 145; 1 *Hawk. Pl. C.* ch. 67.) Taken more largely, it signifies the receiving or offering any undue reward to or by any person concerned in the administration of public justice, whether judge, officer, &c., to influence his behavior in his office; and sometimes it signifies the taking or giving a reward for appointing another to a public office. (3 *Inst.* 9; 4 *Bl. Com.* 139.) *Jacob.*

The crime of offering any undue reward or remuneration to any public officer of the crown, or other person intrusted with a public duty, with a view to influence his behavior in the discharge of his duty. The taking such reward is as much bribery as the offering it. It also sometimes signifies the taking or giving a reward for public office. The offence is not confined, as some have supposed, to judicial officers. *Brown.*

The word bribe has a legal and statutory signification; hence, an indictment where the offence is only laid that defendant "bribed C to vote," and that C did vote accordingly, sufficiently alleges the crime of bribery. Commonwealth *v.* Stephenson, 3 *Metc.* (*Ky.*) 226.

Bribery may be defined to be the giving, and perhaps the mere offering, to another, any thing of value, or any valuable service, intended to influence him in the discharge of a legal duty. Dishon *v.* Smith, 10 *Iowa*, 212.

Any attempt to influence an officer in his official conduct, whether in the executive, legislative, or judicial department of the government, by the offer of a reward or pecuniary compensation, is indictable as bribery; and the offence is complete when an offer is made, although in a matter not within the jurisdiction of the officer. State *v.* Ellis, 33 *N. J. L.* 102.

To constitute bribery, the gift, advantage, or emolument must be bestowed for the purpose of inducing the officer to do a particular act, in violation of his duty, or as an inducement to favor or in some manner to aid the person offering it, or some other person, in a manner forbidden by law; and the gift, advantage, or emolument must precede the act. The offence does not include an offer (if unaccepted) by an officer that he will accept money for performing an act. Hutchinson *v.* State, 36 *Tex.* 293.

BRIDGE. A building of stone or wood erected across a river, for the common ease and benefit of travellers. *Jacob.*

A building of brick, stone, wood, or iron, erected across a river, ditch, valley, or other place otherwise impassable, for the common ease and benefit of travellers. *Wharton.*

Bridge has always stood for a structure that had a pathway, a horseway, a wagonway, a roadway. In no law paper or document was a structure which had not a footway, as its elemental idea, ever denominated purely and simply a bridge. In every general law respecting highways and bridges, in every provision for their erection or repair, in every charter for particular bridges, in every canal charter, in every railroad charter from the earliest times,— no structure that has not the foot-path for its elemental idea is taken for a bridge. In all it is assumed that there can be no bridge without the footway. A structure sustaining a railway across a river, but impassable by men and horses, is not a bridge. Proprietors of Bridges *v.* Hoboken Land Co., 13 *N. J. Eq.* 503; 1 *Wall.* 147.

To build a structure such as is commonly called a railroad bridge, adapted and intended for the transit of railroad trains across a stream, though not for common vehicles or foot-passengers, is a violation of a charter giving an exclusive right to a corporation to maintain a bridge across the river, and providing that no person shall erect another bridge across it. A bridge is a structure of wood, iron, brick, or stone, ordinarily erected over a river, brook, or lake, for the more convenient passage of persons and beasts, and the transportation of baggage; and whether it is a wide raft of logs floating upon the water, and bound together with withs, or whether it rests on piles of wood, or stone abutments, or arches, it is still a bridge. A railroad bridge is intended to accommodate the safe and expeditious passage of persons over this stream in the cars or carriages provided for that purpose, together with all baggage or freight. It may not, and is not intended to, accomplish all the objects of a common bridge, as it is not adapted to the common vehicles in use. But can that fact change its character as a bridge? A bridge adapted only to foot-passengers would still be a bridge. Enfield Bridge Co. *v.* Hartford, &c. R. R. Co, 17 *Conn.* 40.

The filling up, or that portion of the highway which connects the abutments of a bridge with the main land, and renders the structure of the bridge accessible to travellers, is a part of the bridge within the rule making certain public or other authorities liable for defective repair of the bridge. The term bridge conveys to the mind the idea of a passage-way, by which travellers and others are enabled to pass safely over streams or other obstructions. A structure made of stone or wood which spans the width of a stream, but is wholly inaccessible at either end (whatever it may be in architecture), is not what is meant

in law and common parlance by bridge. Freeholders of Sussex *v.* Strader, 18 *N. J. L.* 108. To the same effect is Tolland *v.* Willington, 26 *Conn.* 578.

A bridge over a canal is not such a bridge as the inhabitants, at common law, were indictable for not repairing. Canals are devices contrived long after this common law was made. A bridge, in the technical meaning of the common law, *ex vi termini*, was a structure for passage over a river, not over a ditch. State *v.* Hudson County, 30 *N. J. L.* 137, 147.

Bridge is not confined to structures erected to cross running streams. Structures for the passage of travellers, erected over a railroad where it crosses an established highway, fall under the designation of bridges, as that term is used in our statutes regulating liability of towns for non-repair of bridges; and for the want of proper repair of such bridges and their abutments, so constructed by a railroad company, being a part of the highway which the town is bound to maintain, they are liable to an indictment. State *v.* Gorham, 37 *Me.* 451.

BRIDLE ROAD. This phrase, as applied to a private way, in the laying out by the selectmen and in the acceptance by the town, does not confine the right of way to a particular class of animals or special mode of use. Flagg *v.* Flagg, 16 *Gray*, 175, 181.

BRIEF. 1. A concise statement of the case proposed to be set up by either party to a cause about to be tried or argued.

In English practice, this memorandum has had a definite importance, in view of the peculiar relations between the attorney or solicitor and the barrister or advocate. As the charge and duty of drawing and serving the pleadings and collecting evidence has long been cast upon the attorney or solicitor, who, however, has no part in presenting them orally to the court, but this task must be confided wholly to the barrister, some complete, reliable, and convenient means of putting the barrister in full possession of all the facts and grounds of the client's case is of the utmost importance; and this office has been performed by the brief. It forms the guide of the barrister in the performance of his duty in presenting the client's case. It usually contains an abbreviated statement of the pleadings, proofs, and affidavits at law, or of the bill, answer, and other proceedings in equity, with a concise narrative of the facts and merits of the plaintiff's case, or the defendant's defence, for the instruction of counsel at the trial or hearing. The entire case of the party is to be briefly but fully stated; the proofs must be placed in due order, and proper answers made to whatever may be objected against the client's cause, by the opposite side; and great care is requisite that nothing be omitted to endanger the cause.

In American practice, where the duties of attorney and advocate are generally combined in one person, the brief is only such memorandum as the individual practitioner may choose to prepare beforehand, to assist on the immediate occasion of the trial. The word is very often used to designate a memorandum which counsel, employed to argue a cause in an appellate court on questions of law, prepares, setting forth the propositions of law he desires to establish, and indicating the reasons and authorities which sustain them; this, however, is quite a different thing from the English brief. In several of the states, however, the rules of the supreme courts require that counsel, in a cause about to be argued, shall file beforehand a brief, for the information of the court and the counsel of the adverse party. The requisites of such a brief are such as are prescribed by the particular rule under which it is supplied.

A brief, within a rule of court requiring counsel to furnish briefs, before argument, implies some kind of statement of the case for the information of the court. Gardner *v.* Stover, 43 *Ind.* 356.

2. Brief is also used in Scotch law, in the sense of writ, in such terms as —

Brief out of chancery: a writ or command from the king to a judge, to examine, by an inquest, whether a man be nearest heir. Brief of distress: a writ out of the chancery, after decree obtained against any landlord to distress his readiest goods, according to an obsolete custom. Brief of mort-ancestry: a writ used for entering of all heirs of defuncts.

Brief of title is sometimes used in a sense equivalent to the more common term, abstract of title, *q. v.*; a concise statement of the conveyances, mortgages, &c., affecting the title to a parcel of real property.

Brief statement, as used in the practice in Maine, allowing the parties to a cause to bring it to trial upon brief statements instead of formal pleas and replications, conveys the idea of a short notice, without formal or full statements of the matters in issue. Such brief statements cannot prevent either party from offering testimony appropriate under the general issue; nor can the omission to deny, in a counter brief statement, some matter alleged in the brief statement, control or destroy the effect of testimony properly received under it. Such brief statements appear to have been considered as amounting to little more than notices of special matter to be given in evidence. 29 *Me.* 499.

BROKER. An agent employed to negotiate sales of property, without being charged with the custody or delivery of it. Brokerage: the function or business of a broker; also, the compensation of a broker for his services; his commission.

Brokers are those who make bargains and contracts between merchants and tradesmen, in matters of money and merchandise, for which they have a fee or reward. *Liv. Ag.* 73.

The law does not seem to have defined what the precise character of a broker is Stat. 1, Jac. 1, ch. 21, speaks of brokers as employed in contriving, making, and concluding bargains between merchant English and merchant strangers and tradesmen concerning their wares and merchandise to be bought and sold, and moneys to be taken up by exchange; and styles it an "ancient trade." Later acts recognize persons making contracts for public or corporate stocks as brokers. Accordingly one who for hire concludes or bargains in government or South Sea stocks is deemed a broker, but not so are commission merchants generally. (4 *Burr.* 2104; 2 *H. Bl.* 556.) One definition which has been given is: a person who privately makes a bargain between other persons; not publicly, as is donc in the vocation of auctioneers. *Pal. Ag.* 13, note.

The engagement, says Domat (book 1, tit. 17, § 1, art. 1), of a broker is like to that of a proxy, a factor, and other agent; but with this difference, that the broker being employed by persons who have opposite interests to manage, he is, as it were, agent both for the one and the other, to negotiate the commerce or affair in which he concerns himself. Thus his engagement is twofold, and consists in being faithful to all the parties, in the execution of what every one of them intrusts him with. And his power is not a trust, but to explain the intentions of both parties, and to negotiate in such a manner as to put those who employ him in a condition to treat together personally. *Wharton.*

A broker or intermediary is he who is employed to negotiate a matter between two parties, and for that reason is considered the mandatary of both. His obligations are similar to those of an ordinary mandatary, with this difference, that his engagement is double, and requires that he should observe the same fidelity to all parties, and not favor one more than the other. He is not responsible for the events which arise in the affairs in which he is employed; he is only, as other agents, answerable for fraud or faults. Except in case of fraud, he is not answerable for the insolvency of those to whom he procures sales or loans, although he receives a reward for his agency and speaks in favor of him who buys or borrows. Commercial and money brokers, besides the obligations which they incur in common with other agents, have special duties prescribed by the law regulating commerce. Per Howell, J., in dissenting opinion. Todd *v.* Bourke, 27 *La. Ann.* 385.

A broker is a mere negotiator between other parties, never acting in his own name, but in the names of those who employ him. He is strictly a middle-man, and, for some purposes, the agent of both parties. Henderson *v.* State, 50 *Ind.* 234, 239.

As a general principle, the same individual cannot be the agent of both parties. But persons who have undertaken certain duties of a particular character are treated as the agents of both parties; such are brokers. Strictly, therefore, a broker is a middle-man, or intermediate negotiator between principal parties. Hinckley *v.* Arey, 27 *Me.* 362.

A broker's business is to bring buyer and seller together; he need not have any thing to do with negotiating the bargain. Keys *v.* Johnson, 68 *Pa. St.* 42.

An agent employed to sell goods on commission is a mere broker. As such he is authorized to make contracts for the sale and delivery of the goods, but is not authorized to make such contracts in his own name, nor to receive payment for the property so sold. Dunn *v.* Wright, 51 *Barb.* 244.

A broker is a mere go-between, and is not liable for a premium of insurance, unless he acts under a *del credere* commission. Touro *v.* Cassin, 1 *Nott & M.* 173.

Every person, firm, or company whose business it is to negotiate purchases or sales of stocks, bonds, exchange, bullion, coined money, bank-notes, promissory notes, or other securities, for themselves or others, declared a broker. Act of July 13, 1866, § 9, 14 *Stat. at L.* 116; Warren *v.* Shook, 91 *U. S.* 704.

The original of the word is from the Saxon *broc*, misfortune, which is often the reason of a man's breaking; it implies a broken trader by misfortune, and none but such were formerly admitted to the employment. *Jacob.* But see *Termes de la Ley;* and *Burrill.*

While the sale, by a person doing a banking business only, of a security received by him for the repayment of a legitimate loan,

does not make him a broker, and subject him to taxation as such, yet, when it is his business, the statute holds all such acts, whether in the name of himself ostensibly or in the name of others, to be those of a broker. Warren *v.* Shook, 91 *U. S.* 704.

One whose occupation is to sell agricultural produce in public market is not exempted from the tax imposed by the internal revenue law of 1866 upon produce brokers, by the fact that the produce sold is not purchased by him for sale, nor sold as agent for another, but is raised by himself upon his farm. United States *v.* Simons, 1 *Abb. U. S.* 470.

A salaried agent, who does not act for a fee or rate per cent, is not a broker. Portland *v.* O'Neill, 1 *Oreg.* 218.

The difference between a factor or commission merchant and a broker is this: a factor may buy and sell in his own name, and he has the goods in his possession; while a broker, as such, cannot ordinarily buy or sell in his own name, and has no possession of the goods sold. Slack *v.* Tucker, 23 *Wall.* 321, 330.

The legal distinction between a broker and a factor is, that the factor is intrusted with the property the subject of the agency; the broker is only employed to make a bargain in relation to it. Perkins *v.* State, 50 *Ala.* 154, 156.

BROTHER. A male person who is the child of the same parents with another person; also, one who is a child of either the same father or mother with another. But, if one parent only is common, the term half-brother is a more accurate designation.

Brothers and sisters. This phrase, as used in the Indiana statute of descents of 1831, included as well brothers and sisters of the half as of the whole blood. Clark *v.* Sprague, 5 *Blackf.* 412. S. P. as to the act of 1818. Doe *d.* Moore *v.* Abernethy, 7 *Blackf.* 442.

So the words brothers and sisters of such ancestor, in section 1, subd. 4, of the Ohio statute of descents, include half-brothers and half-sisters. Cliver *v.* Sanders, 8 *Ohio St.* 501.

A statute which declares the act of a brother marrying his sister to be incest, is not confined to children of parents lawfully married. The terms brother and sister mean offspring of the same parents. They do not imply legitimacy of birth. It would be quite proper to use these words in reference to those born out of wedlock. The statute then forbids, and declares criminal, the marriage of illegitimate offspring of the same parents. State *v.* Schaunhurst, 34 *Iowa*, 547.

BUBBLE. A chimerical or visionary scheme for business or trade has been called, particularly in England, a bubble; and corporations formed to prosecute such are stigmatized as bubble companies. The Stat. 6 Geo. I. ch. 18, was enacted to prevent the organization of companies founded without real capital or business, and for the purpose of deceiving the public into a purchase of shares, by high-colored statements of the condition and prospects of an imaginary concern. The reign of Queen Anne, and early years of George I. were very prolific in combinations of this description; so much so, that in 1720 it was found necessary to formally abolish, by an order in council, a large number of companies, organized for a great variety of fanciful purposes, — *e.g.* for building and rebuilding houses throughout all England; for effectually settling the islands of Blanco and Sal Tortugas; for carrying on "an undertaking of great advantage, nobody to know what it is;" for improving the art of making soap; for a settlement on the island of Santa Cruz; for a wheel for perpetual motion, capital one million; for insuring and increasing children's fortunes; for carrying on a trade in the river Oronooka; for insuring to all masters and mistresses the losses they may sustain by servants; for extracting silver from lead; for the transmutation of quicksilver into a malleable fine metal. Several subsequent periods have witnessed the birth of schemes less numerous and more plausibly disguised, but perhaps not less mischievous.

The bubble act, 6 Geo. I. ch. 18, was repealed by Stat. 6 Geo. IV.; but it gave rise to much litigation while it continued in force; and the terms bubble act and bubble company are of frequent occurrence in decisions of American courts, involving the rights of persons who have been defrauded by the organization of such companies, and the liabilities of promoters and directors concerned in them.

BUDGET. The name applied in England to the financial statement of the national revenue and expenditure for each year, submitted to parliament by the chancellor of the exchequer; somewhat analogous to the estimates for appropriations, usually submitted by heads of departments in the government of the United States to congress, at its annual sessions.

The chancellor of the exchequer makes one general statement every year to the house of commons, which is intended to present a comprehensive view of the financial condition of the country. Sometimes there are preliminary, or supplemental, or occasional speeches; but the great general statement of the year has, for a long time past, been quaintly called "the budget," from the French *bougette*, by a common figure of speech, putting the name of that which contains, to signify the thing contained. The annual speech known by that appellation embraces a review of the income and expenditure of the last, as compared with those of preceding, years; remarks upon the financial prospects of the country; an exposition of the intended repeal, modifications, or imposition of taxes during the season; and a detail of the public expenditure during the current period, with its grounds of justification. *Dod's Parl. Comp.*

BUGGERY. A carnal copulation against nature; and this is either by the confusion of species, — that is to say, a man or a woman with a brute beast; or of sexes, as a man with a man, or man unnaturally with a woman. (3 *Inst.* 58; 12 *Co. Rep.* 36.) It is felony both in the agent and patient consenting, except the person on whom it is committed be a boy under the age of discretion (which is generally reckoned at fourteen), when it is felony only in the agent; all persons present, aiding and abetting to this crime, are all principals, and the statutes make it felony generally.

In every indictment for this offence there must be the words *rem habuit veneream et carnaliter cognovit*, &c., and of consequence some kind of penetration and emission must be proved; but any the least degree is sufficient. (1 *Hawk. P. C.* ch. 4.) *Jacob.* See SODOMY.

Penetration of a beast by a man, against the order of nature, although without emission, constitutes the crime of buggery. Commonwealth *v.* Thomas, 1 *Va. Cas.* 307.

BUILD. To erect or construct. Building, *n.:* an edifice erected upon foundations in the soil, composed of materials such as wood, stone, brick, or iron, and designed for use in the position in which it is fixed, as a habitation or shelter.

The verb is used in a larger extension than the noun; thus, a vessel is not *a* building, yet it is proper to say build a ship.

A canal company authorized to make a canal and take tolls, on condition that they will build suitable bridges, is bound, by implication, to keep such bridges in repair. Commissioners of Franklin County *v.* White Water Valley Canal Co., 2 *Ind.* 162.

Under a general power vested in the common council of a city to build markets, it was held that the council had authority to employ an architect. Peterson *v.* Mayor, &c. of New York, 17 *N. Y.* 449.

A builder or contractor, within the internal revenue law, is one whose business it is to construct buildings, or vessels, or bridges, or railroads, by contract. Act of July 13, 1866, § 9, 14 *Stat. at L.* 121.

Builder, as used in a statute giving any builder of a vessel a lien for his pay, does not embrace one who furnishes the steam-engines for a steamer, under a contract with the owners distinct from that made with the general contractor for the construction of the vessel. Calkin *v.* United States, 3 *Ct. of Cl.* 297.

Building, as used in a mechanic's lien law, cannot be held to include every species of erection on land, such as fences, gates, or other like structures. Taken in its broadest sense, it can mean only an erection intended for use and occupation as a habitation or for some purpose of trade, manufacture, ornament, or use, constituting a fabric or edifice, such as a house, a store, a church, a shed. It does not include a wall built near and surrounding a structure, for the purpose of protecting it from earth slides from an adjoining hill. Truesdell *v.* Gay, 13 *Gray*, 311.

An act giving a lien for work performed in the "erection, construction, or finishing" of buildings, does not give a lien for flagging of sidewalks, yards, and areas of buildings in the process of erection. McDermott *v.* Palmer, 8 *N. Y.* 383.

Building, as used in the mechanic's lien law of New Jersey, *Nix. Dig.* 487, does not include a floating dock. The act only intends to create liens on land, or what in construction of law is land, and not on merely movable property. Building is not used in the act in its broadest signification. Ships are not included; yet ships are built. By the term building, the legislature meant something in the nature of houses, as houses, mills, manufactories; buildings attached to and becoming part of the dry land itself; edifices constructed for use or convenience, such as houses, churches, shops, &c. Coddington *v.* Beebe, 31 *N. J. L.* 477, 484.

A railroad bridge or track is not a dwelling-house or other building within the lien law. La Crosse, &c. R. R. Co. *v.* Vanderpool, 11 *Wis.* 119.

A railroad depot is within the lien law. Hill *v.* La Crosse, &c. R. R. Co., 11 *Wis.* 214.

A ditch is not embraced in the phrase, a "building, wharf, or other superstructure." Ellison *v.* Jackson, &c. Co., 12 *Cal.* 542.

In order that alterations in an edifice should entitle the mechanic to acquire a lien, under a statute giving a lien for the construction of "a building," the repairs must be so extensive as fairly to change the exterior of the edifice into a new structure. There must be, substantially, a rebuilding. The idea which runs throughout all the cases is newness of structure in the

main mass of the building, — that entire change of external appearance which denotes a different building from that which gave place to it, though into the composition of the new structure some of the old parts may have entered. The reason for this is not only in the fact that the external walls of a building constitute the strongest mark of its identity, and are its main part, but also in the notice that the external change furnishes to purchasers and lien creditors. Miller *v.* Hershey, 59 *Pa. St.* 64.

Where a building was removed and extensively repaired, and an addition made, of the same width, height, and slope of roof, it was held that these acts did not constitute an erection of a building, within a mechanic's lien law. But an addition to a building, constructed by erecting a wooden frame, and then placing a wall of brick and mortar four inches thick around the frame, with piers and layers of brick and mortar, by which the wall was strengthened and the roof supported, was held within the statute. Tuttle *v.* State, 4 *Conn.* 68.

A saw-mill is not necessarily a building within a statute which prohibits the burning of any building other than a dwelling-house. State *v.* Livermore, 44 *N. H.* 386.

A lease of "a building" conveys the land under the eaves and projections, if that land is owned by the lessor. Sherman *v.* Williams, 113 *Mass.* 481.

A covenant not to erect a building within a certain distance from a boundary line may be held, on evidence of the circumstances under which the covenant was made, to preclude the covenantor from erecting a fence, which would have the same effect in respect to shutting off light and air; and an injunction may be granted to restrain the covenantor from erecting such a fence. Thus a wooden fence, twenty feet high, extending from the defendant's wall to the rear of his lot, was held a building within the meaning of a covenant against the erection of buildings. Wright *v.* Evans, 2 *Abb. Pr.* N. S. 308.

Where a deed gave the grantee the privilege of cutting timber for building on the premises, from the woods of the grantor, the word building was held, upon evidence of usage, known to the grantor and his heirs, to cut timber for fencing, to include making of fences. Livingston *v.* Ten Broeck, 16 *Johns.* 14.

A building partly of wood and partly of brick held not within the prohibition of an ordinance against wooden buildings. See Stewart *v.* Commonwealth, 10 *Watts*, 307.

Built, in an agreement under which a tax was voted in aid of a railroad, was held applicable to a road so far progressed as to be in a condition to be operated, although not completed. Muscatine Western R. R. Co. *v.* Horton, 38 *Iowa*, 33.

A proviso in a stock subscription that the "road shall be built" in a specified locality, is, by the permanent location of the road there, sufficiently complied with to render the subscriber liable for calls, though the road is not completed. Warner *v.* Callender, 20 *Ohio St.* 190.

A mill which had been built, and had gone down prior to the act of 1819 (1 Rev. Code, ch. 235, § 10), and which was rebuilt after the passing of that act, was held not a mill "thereafter built," within the meaning of the statute. Webb's Case, 2 *Leigh*, 721.

BULL. 1. An instrument granted by the pope of Rome, and sealed with a seal of lead, containing some decree, commandment, or other public act, emanating from the pontiff. Bull in this sense corresponds with edict or letters-patent from other governments. *Cowel*; 4 *Bl. Com.* 110; 4 *Steph. Com.* 177, 179; *Bouvier*.

2. A bull, in the parlance of the stock exchange, is one who buys stock for settlement at a future date, with a view to gain by a rise in price in the interval. A bear is one who sells stock, with a view to buy shares for the fulfilment of his contract, when they can be had at a lower price. Hence the phrase, bull and bear transactions, is used to signify speculations for the rise and fall of stock. The speculations of the bulls are founded on an expectation of a rise in prices; those of the bears on a belief in a fall. *Fenn's Comp.*; *Mozley & W.*

BULLION. Gold or silver, uncoined, or in mass. The term has reference to material for coinage, and, as ordinarily used, suggests the idea of bars or ingots of either of the precious metals, whether only smelted or perfectly refined, such being the form in which, when designed for the mint, they are usually prepared. But plate, ornaments, or even foreign uncurrent coin, may be spoken of as bullion, when the notion to be expressed is not that of distinct articles or coins, usable as such, but as a mass of metal, intended for coinage.

Bullion fund. A fund of public money maintained in connection with the mints, for the purpose of purchasing precious metals for coinage. By the original theory, the owner of bullion deposits it with the mint for coinage, waits till the process is completed, and receives the coin which is made. But, by aid of the bullion fund, he sells the metal to the government, is paid its value at once from the fund, and the

coin, when made, is the property of the government.

BUOY. A signal of shallow water; constructed by anchoring some conspicuous object which will float at the spot where difficulty of navigation is to be apprehended.

BURDEN OF PROOF. A phrase used to designate the obligation imposed on a party who alleges a fact necessary in the prosecution or defence of an action, to establish it by evidence. This obligation may fall either upon the plaintiff or defendant, according to the nature of the issue. Whoever seeks to be benefited by any fact is bound to establish it, and the burden of proof is accordingly said to be upon him.

The rule is one of convenience, adopted not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable. 1 *Greenl. Ev.* § 74.

It is a familiar and well-settled rule of pleading, as of logic, that he who affirms the existence of a given state of facts must prove it. There may be different modes and instrumentalities of proof; but the burden is on him who affirms, and not on him who denies. Crowninshield *v.* Crowninshield, 2 *Gray*, 524.

The burden of proof devolved upon the plaintiff is coextensive only with the legal proposition upon which his case rests. It applies to every fact which is essential, or necessarily involved in that proposition. It does not apply to facts relied upon in defence to establish an independent proposition, however inconsistent it may be with that upon which the plaintiff's case depends. It is for the defendant to furnish the proof of such facts; and, when he has done so, the burden is upon the plaintiff not to disprove those particular facts, nor the proposition which they tend to establish, but to maintain the proposition upon which his own case rests, notwithstanding such controlling testimony, and upon the whole evidence in the case. Wilder *v.* Cowles, 100 *Mass.* 487.

BUREAU. An office for the transaction of business. In the organization of the executive business of the government, the great divisions are termed departments; then each department has offices or bureaus subordinate to it, to which the more important heads of its business are assigned.

In American usage there is no obvious distinction between bureau and office, in the names employed. The business of the departments of state and of the navy is systematically divided among bureaus, so called. In the war department the subordinate divisions are termed, in the statutes, offices. So there are the register's office, the land office, and the patent office; and also the bureau of statistics, and the bureau of the mint.

BURGAGE. One of the ancient English tenures is designated as burgage tenure. It is described as having been one of the three species of free socage holdings; and the name applied where houses, or lands which were formerly the site of houses, in an ancient borough, were held of the lord by a certain rent. Burgage tenure was subject to several peculiar customs, the most remarkable of which is borough English, *q. v.*

Tenure in burgage is where the king or other person is lord of an ancient borough, in which the tenements are held by a rent certain. It is, indeed, only a kind of town socage; as common socage, by which other lands are holden, is usually of a rural nature. *Jacob.*

BURGESS. Originally, a freeman or corporate member of a borough, corresponding in modern usage with citizen in a city, though anciently citizen and burgess seem to have been distinct classes in England. Also, more especially magistrates or chief officers of boroughs are styled burgesses; and the name has been applied to representatives of boroughs in parliament. In Pennsylvania, the title burgess has been applied by the general laws governing incorporation of towns and villages, to the chief administrative officer of those corporations.

Generally, the inhabitants of a borough or walled town; men of trade; sometimes restricted to the magistrates, &c., of corporate towns, and sometimes to the representatives of such borough in the commons' house of parliament. *Wharton.*

BURGH, or BURG. An old term signifying a small walled town or place of privilege. Some authorities make it also equivalent to borough, *q. v.* The word appears as an affix in the names of some cities and towns, as Edinburgh, Pittsburg; also in a few compound words; such as:

Burgbote. A tribute or contribution towards the building or repairing of castles or walls of a borough or city.

Burgmote. A court of a borough. *Jacob; Wharton.*

BURGLARY. The name of a crime, which consisted, at the common law, in breaking and entering into the dwelling-house of another, in the night, with intent to commit some felony within the same, whether the felonious intent was executed or not. It originally included the breaking and entering the walls or gates of a town or city, or of a church; and, although doubt was formerly expressed whether a church could be the subject of burglary, 1 *Hawk.* ch. 38, § 17, the better opinion now is that it may be, 3 *Inst.* 64; 1 *Hale* 556; 3 *Cox C. C.* 581; see 2 *Ben. & H. Lead. Cas.* 54; 1 *Greav. Russ. Cr.* 826.

The question being disputed whether, when a person got into a house without breaking, his breaking out was burglary, the Stat. 12 Anne, ch. 1, § 7, was passed, making such breaking out, where all the other elements were comprised, burglary. This was supplemented by Stat. 7 & 8 Geo. IV. and 24 & 25 Victoria, making a more extended application of the provisions of the former, and more fully defining what should constitute a breaking.

In order to constitute the offence, there must be both a breaking, actual or constructive, and an entry, or an exit. What will be a sufficient breaking or entry will depend on the *animus* of the person and the particular facts of the case. See BREAK.

The breaking and entry must also be in the night, though they need not be both in the same night; for if a person breaks a hole in the house one night, with the intent to enter another night, and commit felony, and he accordingly does so, through the hole he made the night before, this is burglary. 1 *Hale*, 551. Originally, it was not considered necessary that the breaking should be by night, but this requisite of the offence was introduced during the reign of Edward VI.

The breaking and entering must also be in a dwelling-house, and that one belonging to another; that is to say, a house in which the occupier and his family usually reside. 60 *Pa. St.* 103; 34 *Cal.* 242. What constitutes a dwelling-house, so as to make it the subject of burglary, depends on the state of the neighborhood, the settled condition of the country, the business, and where carried on, of the occupant, his habits and manner of living, &c., and particularly with reference to what outbuildings compose a part thereof. It may be generally stated, however, that no matter to what use an outbuilding may be put, to break and enter it is burglary, if it is appurtenant or ancillary to the dwelling-house, and is within such convenient distance from the same as to make passing and repassing an ordinary household occurrence, and especially if it is within the same enclosure. And breaking into a house which is unqualifiedly one's own, although done with violence, is not burglary. Clarke *v.* Commonwealth, 25 *Gratt.* 908.

The offence is not complete without the felonious intent. A breaking and entry without this is only a trespass. The intent, however, need not be carried into execution. And whether the felony intended is one by common law or statute is immaterial.

Burglary, as defined by the common law and the English statutes, has been modified by enactment in nearly all of the United States, and different degrees of the crime established, thereby providing for offences committed by day as well as by night.

Burglary is the breaking and entering the dwelling-house of another, in the night-time, with intent to commit a felony. Hunter *v.* State, 29 *Ind.* 80; State *v.* Wilson, 1 *N. J. L.* 441; State *v.* Henry, 9 *Ired. L.* 463; State *v.* Langford, 1 *Dev.* 253; Commonwealth *v.* Newell, 7 *Mass.* 247.

Burglary, by the laws of Ga. in 1821, might be a breaking *or* entering in the night *or* day, with intent, &c. State *v.* Thompson, *R. M. Charlt.* 80.

Larceny is not included in burglary, as manslaughter is in murder, within the meaning of Cal. Crim. Pract. Act, § 424, which provides that a defendant may be convicted of an offence included in that with which he is charged. People *v.* Garnett, 29 *Cal.* 622.

To constitute burglary, where there is no actual, but a constructive, breaking, the entry must be simultaneous with the opening of the door, or follow it so immediately as to preclude the owner from the power of shutting or refastening the door before the entry. State *v.* Henry, 9 *Ired. L.* 463.

Unlatching a door which is only latched,

though it is burglary at the common law (1 *Hale*, 552; 2 *East Pl. C.* 487; 3 *Chitt. Cr. L.* 1093; 1 *Hill*, 238), is not burglary in the second degree, within the statute definition of 2 N. Y. Rev. Stat. 668, § 11. People *v.* Bush, 3 *Park. Cr.* 552.

Unlatching the door of a sleeping apartment, and entering, with intent to kill, has been held burglary. United States *v.* Bowen, 4 *Cranch C. Ct.* 604.

The prisoner entered a flouring-mill through an open window without sash, crossed a floor, went up a ladder, and raised a trap-door not fastened, and stole flour. This was held not burglary, either at common law or under the revised statutes, but merely a larceny, on the ground that breaking in from the outside is essential to burglary in the case of a building other than a dwelling. People *v.* Fralick, *Hill & D. Supp.* 63.

That it is burglary for the thief to break out of a house, into which he entered in the night, with an intent to steal, though he did not break in entering, see Guche's Case, 6 *City H. Rec.* 1.

One who has lawfully entered one part of a house may be convicted of burglary in breaking into another part, into which he has not the right to enter. Thus a guest at a hotel, who feloniously breaks into the room allotted to another guest, is guilty of burglary. State *v.* Clark, 42 *Vt.* 629.

Breaking into a dwelling, the front and door of which are in the yard of a dwelling-house, although the rear is not within the yard, and the breaking was in that part of the building, is within the meaning of a statute, Ala. Rev. Code, § 3695, defining burglary as breaking and entering "into a dwelling-house or any building within the curtilage of a dwelling-house," &c. Fisher *v.* State, 43 *Ala.* 17.

A banking-house is a store, shop, or warehouse, within the meaning of Conn. Rev. Stat. tit. 4, ch. 4, § 39, defining the crime of burglary. Wilson *v.* State, 24 *Conn.* 57.

In Georgia, burglary may be committed in a house which is "the place of business of another, where valuable goods, wares, or produce, or other articles of value, are contained or stored;" and this is so although the business may not be of the kind which is carried on in conducting a store-house. Nor is it necessary to prove the house broken into and entered was the "place of business," &c., used for the purpose of containing or storing the goods alleged to have been stolen. Bethune *v.* State, 48 *Ga.* 505.

Breaking open, in the night-time, a store, at the distance of twenty feet from a dwelling-house, but not within the same enclosure, no person sleeping in the store, is not burglary. People *v.* Parker, 4 *Johns.* 424.

The breaking and entering a store-house, not part of a dwelling-house, is not burglary by the common law, nor by any statute of Pennsylvania. Hollister *v.* Commonwealth, 60 *Pa. St.* 103.

It is not burglary to break and enter a smoke-house, thirty-five steps from a dwelling-house, the latter having no enclosure around it. State *v.* Jake, 1 *Wins. L. & Eq.* 80.

BURN. The burning of another's property, and even, under certain circumstances, of one's own, was an offence under the common law, and is also punishable by various statutes in England and in this country additional to the law of arson. Hence decisions have arisen turning upon what is a sufficient burning, to constitute the crime of arson, or to expose the perpetrator to punishment under the statutes against felonious burnings *eo nomine*.

Burning and *setting fire to* are not legal synonymes. Howel *v.* Commonwealth, 5 *Gratt.* 664.

Burn is a sufficient term in an indictment for arson. Hester *v.* State, 17 *Ga.* 130.

Where the floor near the hearth was scorched and slightly charred, but had been at a red heat, although not in a blaze, held, that there was a sufficient burning to support an indictment for arson. Reg. *v.* Parker, 9 *Carr. & P.* 45.

To constitute burning within the law of arson, the house need not be absolutely consumed or burned. If the fire is applied so as to take effect, this is enough, though only a part is consumed. People *v.* Butler, 16 *Johns.* 203.

To constitute burning within a statute punishing the maliciously burning a building, there is no necessity that any integral part of the building should be consumed, or that the fire should have any long continuance. Mere scorching is not enough. But if any part, however small, of the wood of the building has been ignited and consumed, this is sufficient. Commonwealth *v.* Belton, 5 *Cush.* 427.

The statute of 22 & 23 Car. II. ch. 7,— providing that "if any person shall, in the night-time, maliciously, unlawfully, and willingly burn, or cause to be burned or destroyed, any ricks, &c., barns, or other houses or buildings,"— does not apply, unless injury to a building is done, sufficient to unfit it for the purpose for which it was erected. State *v.* De Bruhl, 10 *Rich.* 23.

To warrant a conviction under Vt. Comp. Stat. 545, ch. 104, § 4, it is not necessary that any portion of the building should be actually burned. If fire was applied to, or in immediate contact with, the building, with intent to burn it, this is enough, though such intent was not carried out. State *v.* Dennin, 32 *Vt.* 158.

BUSHEL. A measure of quantity for dry substances, such as grain. The exact dimensions differ somewhat in different jurisdictions under the various enactments. The bushel established by

the 5 Geo. IV. ch. 74, § 7, and 6 Geo. IV. ch. 12, has not been uniformly, though quite generally, adopted in this country.

In estimating duties on grain, bushels are ascertained by weight instead of by measuring. See U. S. Rev. Stat. § 2919, for the weights allowed to a bushel, in respect to the various species of grain.

Bushel, in general, means eight gallons; but in respect to wheat, rye, and Indian corn, it means a quantity *in weight*, according to 1 Rev. Stat. 608, § 14; Id. 611, § 36. An agreement to furnish one thousand bushels of good, merchantable wheat is satisfied by tendering one thousand bushels of statute weight, though it may not fill the statute measure of eight gallons to the bushel. Milk v. Christie, 1 *Hill*, (*N. Y.*) 102.

Under the Vermont statute of 1824, fifty-six pounds of corn is equivalent to one bushel, and a contract for bushels of corn is satisfied by as many times fifty-six pounds, whether it measures the specified number of bushels or not. Richardson *v.* Spafford, 13 *Vt.* 245.

According to the standard in use in the United States custom-house, and adopted by the law of Kentucky, the bushel contains 2150.42 cubic inches. Caldwell *v.* Dawson, 4 *Metc.* (*Ky.*) 121.

BUSINESS. This word embraces every thing about which a person can be employed. People *v.* Commissioners of Taxes, 23 *N. Y.* 242, 244.

Business is a word of large signification, and denotes the employment or occupation in which a person is engaged to procure a living. It includes the vocation of playing upon musical instruments, pursued as a means of livelihood. A violin of a musician, who supports himself by playing it, is an implement necessary for carrying on his business, within a statute exempting such implements from execution. Goddard *v.* Chaffee, 2 *Allen*, 395.

"Business" and "employment," as used in the statute of Alabama, 1848, requiring every person engaged in any business or employment to take out a license, are synonymous terms, signifying that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit. Business is there understood in the sense of a calling for the purpose of a livelihood. Moore *v.* State, 16 *Ala.* 411.

The carrying on of a school, to which the public at large are invited to send their children, may be included in the word business. Doe *d.* Bish *v.* Keeling, 1 *Man. & S.* 95.

The defendant having established a route which he travelled for the sale of the tobacco manufactured by G, and having secured a large number of regular customers, sold the route and good-will, with his stock, tools, &c., to the plaintiff, and agreed that he would not hinder or obstruct him in the business within that district. It was held that his subsequently entering into the business of selling tobacco as agent for other manufacturers within the same district was a breach of the contract, which might be forbidden by injunction. Ewing *v.* Johnson, 34 *How. Pr.* 202.

Labor, business, and work are not synonymes. Labor may be business, but it is not necessarily so; and business is not always labor. Making an agreement for the sale of a chattel is not within a prohibition of labor upon Sunday, though it is (if by a merchant in his calling) within a prohibition upon business. Bloom *v.* Richards, 2 *Ohio St.* 387.

The execution of a bond is within a statute prohibiting "labor, business, or work" upon the Lord's day. Pattee *v.* Greely, 13 *Metc.* (*Mass.*) 284.

A judicial sale is not void because made upon election day; for such sale is not business of a court, within the statute prohibiting such business on election days. King *v.* Platt, 37 *N. Y.* 155.

An insurance company is not exempt from a tax imposed on corporations "doing business" in this state, on the ground they are no longer doing business, because they have discontinued issuing new policies, and are only engaged in collecting premiums and paying losses on old policies. Collecting premiums and paying losses is "doing business" within the meaning of the tax-laws. Smyth *v.* International Life Ass. Co. of London, 4 *Abb. Pr.* N. S. 11, 35 *How. Pr.* 126.

Power "to do a general insurance agency, commission, and brokerage business, and such other things as are incidental to and necessary in the management of that business," does not give power to subscribe to the stock of a savings bank and building association; and such a subscription, if made by the directors, is not binding on the corporation. Mechanics', &c. Savings Bank *v.* Meriden Agency Co., 24 *Conn.* 159; and see Sumner *v.* Marcy, 3 *Woodb. & M.* 105.

Business corporation, as used in section 37 of the bankruptcy act of congress of 1867, is not merely synonymous with trading corporations, but has a broader meaning. It includes a railroad corporation. Adams *v.* Boston, &c. R. R. Co., 1 *Holmes*, 30. See also Winter *v.* Iowa, &c. R. R. Co., 2 *Dill.* 487, and cases cited 5 *Abb. Nat. Dig.* 71, ¶ 431.

It includes an insurance corporation. *Re* Independent Ins. Co., 1 *Holmes*, 103.

A mutual life insurance company. Matter of the Hercules Mut. Life Ass. Soc., 5 *Am. L. T. R.* 400; 16 *Int. Rev. Rec.* 148.

Business hours. This phrase is declared to mean not the time during which a principal requires an employe's services, but the business hours of the community generally. Derosia *v.* Winona, &c. R. R. Co., 18 *Minn.* 133.

BUTTALS. Same as ABUTTALS, *q.v.*

BY. See ALONG.

When descriptively used in a grant, by does not mean in immediate contact with,

but near to, the object to which it relates; and near is a relative term, meaning, when used in land patents, very unequal and different distances. Wilson *v.* Inloes, 6 *Gill*, 121.

The words by land of S, in a description in a deed, have a known and definite meaning. They bound the grantee by the line of S's land. The word by does not mean over or across, but along the line of S's land; and such is both its legal and common acceptation. Peaslee *v.* Gee, 19 *N. H.* 273.

A boundary "on a stream," or "by a stream," or "to a stream," includes the flats, at least to low-water mark, and in many cases to the middle thread of the river. It may be different where the boundary is "on the bank" of a river. Thomas *v.* Hatch, 3 *Sumn.* 170.

A grant of land, bounded "by" or "on" a fresh-water stream, whether in fact capable of navigation or not, conveys the soil *usque ad medium filum aquæ*, and of course conveys to the grantee the shore between high and low water mark. The Magnolia *v.* Marshall, 39 *Miss.* 109.

The rights of a proprietor, bounded by a navigable river, extend to high-water mark; but, if the river be unnavigable, to the middle of the stream. Bowman *v.* Wathen, 2 *McLean*, 376.

A contract to deliver by a certain day, means not on, but on or before, the day. Coonley *v.* Anderson, 1 *Hill*, (*N. Y.*) 519.

A contract to complete a work by a particular time, means that it shall be done before that time. Rankin *v.* Woodworth, 3 *Pa.* 48.

In an agreement to stay proceedings in one case, until an issue be determined by final judgment in another, the word by means according to. Haubert *v.* Haworth, 78 *Pa. St.* 78.

By may be used instead of to in the sentence, "a person whose name is not known to the complainant." Commonwealth *v.* Griffin, 105 *Mass.* 175.

BY-BIDDING. A fraudulent practice of making fictitious offers for property at auction; a device sometimes employed on behalf of the owner or auctioneer, for the purpose of raising the price of the property, by leading bidders in good faith to make higher offers than otherwise they would.

BY-LAW. Originally, by-laws were local laws or regulations made by persons or corporations duly authorized thereunto by charter, prescription, or custom, for the government of the inhabitants or a portion thereof, within some particular place or jurisdiction. They are distinguished from the rules of the common law (where that was not, by custom, limited to a particular district or section), and from statute law, when general in its nature and operation, in that the two former were attributable to the sovereign power, and furnished a rule for the government of the people at large, while by-laws were regulations for the government of the inhabitants of a particular locality, emanating from local authority only.

In the earlier cases, the term by-law is used indifferently with reference to the regulations adopted by private corporations, and to the enactments made by public and municipal corporations. In the more recent adjudications, the word ordinance is more frequently used for the laws of municipal corporations, and the term by-law employed with more especial reference to private companies. In this sense, the office of the by-law is to regulate the conduct and define the duties of the members towards the corporation and between themselves. For the definition of ordinance, as above used, see ORDINANCE.

By-laws, or bye-laws, are laws made *obiter*, or by-the-by, such as are made in court-leets or court-barons, for the peculiar good of those who make them, farther than the common or statute law doth bind. The like are generally allowed by letters-patent of incorporation to any guild or fraternity, for the better regulation of trade among themselves, or with others. (*Termes de la Ley; Cowel.*). At the present day, we apply the expression to laws made by local boards, corporations, and companies, under powers conferred by acts of parliament: thus we speak of the by-laws of a borough; of a railway company, &c. And, independently of statutory powers, by-laws made by a corporation aggregate are binding on its members, unless contrary to the laws of the land, or contrary to and inconsistent with their charter, or manifestly unreasonable. (1 *Bl. Com.* 475, 476; 3 *Steph. Com.* 12, 13; *Grant Corp.*) *Mozley & W.*

The term by-law has a limited and peculiar meaning, and is used to designate such ordinances or regulations which a corporation, as one of its legal incidents, has power to make with respect to its own members and its own concerns. This meaning has been somewhat extended in the case of municipal and other *quasi* corporations; but even here the word is used to designate such ordinances and regulations as have reference to legitimate and proper municipal or corporate purposes. Commonwealth *v.* Turner, 1 *Cush.* 493.

A municipal by-law is a rule obligatory

over a particular district, not being at variance with the general laws of the realm, and being reasonable and adapted to the purposes of the corporation; and any rule or ordinance of a permanent character which a corporation is empowered to make, either by the common or statute law, is a by-law. Gosling *v.* Veley, 19 *L. J.* N. S. *Q. B.* 135.

A by-law is a rule or law of a corporation, for its government, and is a legislative act, and the solemnities and sanction required by the charter must be observed. A resolution is not necessarily a by-law, though a by-law may be in the form of a resolution. Drake *v.* Hudson River R. R. Co., 7 *Barb.* 508.

A by-law of an incorporated company differs from a regulation in this, that the validity of the former is a judicial question, while that of the latter is matter *in pais*. Compton *v.* Van Volkenburgh, 34 *N. J. L.* 134.

A by-law has the same effect within its limits, and with respect to the persons upon whom it lawfully operates, as an act of parliament has upon the subjects at large. Hopkins *v.* Mayor, 4 *Mee. & W.* 621, 640.

BY-ROAD. The statute law of New Jersey recognizes three different kinds of roads: a public road, a private road, and a by-road. A by-road is a road used by the inhabitants, and recognized by statute, but not laid out. Such roads are often called drift-ways. They are roads of necessity in newly settled countries. Van Blarcom *v.* Frike, 29 *N. J. L.* 516; see also Stevens *v.* Allen, *Id.* 68.

C.

C, the third letter of the alphabet, is sometimes used in a manner analogous to the use of A and B (*q. v.*), to distinguish the third folio of a book or subdivision of a topic.

It is also employed, and differently in different works, as an abbreviation, particularly of such words as cases, civil, circuit, code, courts, criminal, and others; thus C. C. may stand for circuit court, or civil code, or criminal cases. It is often put in abbreviations of law-books, as an initial for the name of a reporter.

It is said to have been customarily inscribed on a ballot of condemnation in the Roman courts; standing then for *condemno*.

C. O. D. These letters are not cabalistic, but have a determinate meaning. They import the carrier's liability to return to the consignor either the goods or the charges. United States Exp. Co. *v.* Keefer, 59 *Ind.* 263.

CABALLERIA. A portion of lands granted to a Spanish horse soldier; it was one hundred by two hundred feet. 12 *Pet.* 444, note.

CABINET. Designates an advisory council of a sovereign or chief executive officer of a nation.

In the organization of the United States government there is a cabinet, whose action and influence are of great practical importance; yet it exists, as a collective body, by custom and the will of the president merely. The constitution, taking it for granted that the business of the government would be distributed in executive departments, provides that the president may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices, but leaves it wholly to congress to say what executive departments shall be created; and it places the responsibility of official action upon the president, or upon the heads of departments as individual officers; nowhere presenting them as a body authorized to decide questions by a vote of a majority of a quorum. From time to time, congress has created executive departments, until there are now seven, — the state, war, treasury, justice, post-office, navy, and interior. Rev. Stat. 158. And a practice has grown up, commencing from the time of Washington's administration, of the heads of these departments meeting in cabinet council, to confer upon the public business, and advise the president on questions of state. But neither the organization of this body, nor any action it may take, is obligatory upon him. He has unquestionable power to ask the counsel of other advisers; or to overrule the opinion of the cabinet upon any

subject within his sphere and duties as fixed by the constitution and laws.

There is also the department of agriculture, which is so called in the laws, it is understood, in order that its head may have the appointment of the subordinate officers in it, under Const. art. 2, § 2, subd. 2; but is not by law one of the executive departments, Rev. Stat. §§ 158, 159; and its head is not by custom a member of the cabinet.

In England, there is a similar council of high officers of state, advisory to the king or queen, in theory; though, practically, these officers in their several functions administer the government, and hold the responsible charge.

The composition of the English cabinet has varied from time to time. For as in the United States, so in England, the cabinet has no legal existence as a body, and its composition depends on the will of the crown, — that is, practically, of the prime minister, — and the exercise of the power under different ministries has varied. It is said to have been the invariable practice that the following ministers should be members: The prime minister, as first lord of the treasury; the lord chancellor; lord president of the council; lord privy seal; and chancellor of the exchequer; and the secretaries of state, of late, five, for the home department, foreign affairs, war, colonies, and India. In addition to these, from five to eight of the other ministers are usually admitted.

CADET. A youth pursuing a course of study and drill, under official appointment, to become an officer in the army, or sometimes the navy.

In the United States laws, students in the military academy at West Point are styled cadets; students in the naval academy at Annapolis, cadet midshipmen. *Rev. Stat.* § 1309; *Id.* § 1512.

CADUCA. A civil-law term, designating property of such kinds as descend; an inheritance. It is also said to include escheats; but this is probably because inheritable property escheats, where there are no heirs, and is not really a different meaning of the word.

CÆTERARUM. Of the rest. Administration granted as to the residue of an estate, after a limited administration of a portion of it, is termed *administration ceterarum*. It differs from *administration de bonis non* (q. v.), in which full power to administer has been granted, but for some cause not exercised.

CALENDAR. 1. The order and series of years, months, and days, by which the course of time is conventionally marked; also, a formal exhibit or table, marking the course of time by years, months, days, &c.

The chief calendars of the solar year, now in use, are the following:

The Julian year, so called because Julius Cæsar introduced into the Roman empire the solar or Egyptian year, instead of the lunar year. The Russians and Greeks are the only nations that now use the Julian year. The common Julian year consists of three hundred and sixty-five days, and the bissextile, which returns every four years, of three hundred and sixty-six days. This computation is faulty, inasmuch as it allows three hundred and sixty-five days and six entire hours for the annual revolution of the sun, being an excess every year of $11'$, $14''$, $30'''$, beyond the true time. This, in a course of ages, had amounted to several days, and began at length to derange the order of the seasons.

Gregory XIII. caused a new calendar to be drawn up, which is called the Gregorian year; and because the civil year had gained ten days, he ordered, by a bull published in 1581, that these days should be expunged, so that instead of the 5th of October, 1582, it should be reckoned the 15th. The Catholic states adopted this new calendar, but the Protestants and the rest of Europe adhered to the Julian; and hence the distinction between the old and new style, to which it is necessary to attend in public acts and writings following 1582. The difference until 1699 was ten days, and eleven from 1700, and twelve days must be reckoned during 1800. The January 1st of the old style answers to the 13th of the new.

The reformed calendar differs from the Gregorian as to the method of calculating the time of Easter, and the other movable feasts. The Protestants of Germany, Holland, Denmark, and Switzerland adopted this in 1700, Great Britain in 1752, Sweden in 1753; but, since 1776, the Protestants of Germany, Switzerland, and Holland have adopted the Gregorian. In England, the year used to commence on the 25th of March, until 1753, when, by the 24 Geo. II. ch. 23, the beginning of the year was transferred to the 1st of January, and the 3d of September, 1752, was reckoned the 14th of the same month, in order to accommodate the English chronology to the new style. *Wharton.*

2. A list; a written enumeration by

names. In the practice of most courts, the clerk prepares, before the session, a list or written statement of the causes awaiting trial or argument, as made known to him by memoranda furnished by the attorneys, arranging them in the order in which they will have priority. This list is furnished to the presiding judge, and at the opening of the court each day he calls the causes, as they appear on it, for such disposition as may be proper. This list is called, in the parlance of some jurisdictions, the calendar; in others, the docket. Some other lists, used in the administration of judicial business, are known as calendars.

Calendar month. A phrase designating the months as known by distinctive names, January, February, &c., as distinguished from lunar month, which is one periodical revolution of the moon, being twenty-eight days.

CALENDS. Among the Romans, was the first day of every month, being spoken of by itself, or the very day of the new moon, which usually happen together; and if *pridie*, the day before, be added to it, then it is the last day of the foregoing month; thus *pridie calend. Septemb.* is the last day of August. If any number be placed with it, it signifies that day in the former month which comes so much before the month named; as the tenth calends of October is the twentieth day of September; for if one reckons backwards, begining at October, the twentieth day of September makes the tenth day before October. In March, May, July, and October, the calends begin at the sixteenth day, but in other months at the fourteenth; which calends must ever bear the name of the month following, and be numbered backwards from the first day of the said following months. (*Hopton's Concord,* 69.) *Jacob.*

CALL. 1. In the language of conveyancing, particularly in the United States, the requirements of a deed, mortgage, &c., for various natural objects or landmarks, by which the description may be applied or traced out, are termed the calls.

2. In the management of stock corporations, payment of subscriptions for shares is usually made in successive instalments, upon notice issued by the directors requiring the payments to be made. These notices or demands, emanating from the board to the subscribers, and requiring payments on account of shares, are termed calls; particularly in English usage. In American books, assessment (*q. v.*) is more commonly used to express nearly the same idea.

That a circular letter sent to every shareholder in a railway company, informing him that the directors have resolved on making a call, constitutes the call, see Shaw *v.* Rowley, 16 *Mee. & W.* 810, 5 *Eng. Railw. Cas.* 47; Newry & Enniskillen Railway Co. *v.* Edmunds, 5 *Eng. Railw. Cas.* 275.

That a resolution of the board of directors of a railway company that a call be made, is the call, see *Exp.* Tooke *in re* Londonderry & Coleraine Railway Co., 6 *Eng. Railw. Cas.* 1.

That a call may mean either the resolution or its notification, or the time when it is payable, see Ambergate, &c. Railway Co. *v.* Mitchell, 6 *Eng. Railw. Cas.* 235, 4 *Exch.* 540.

Call of the house. The proceeding of calling over the names of members in a house of a legislative body, pursuant to a resolution of the house ordering the attendance of the members thereof, after which attendance may be enforced, or non-attendance punished.

Calling the jury. In the ordinary practice of courts employing jury trial, when a cause is ready, the first step is to call a jury; which proceeding consists in successively drawing out of a box, into which they have been previously put, the names of the jurors summoned for that session of the court, and calling them over in the order in which they are so drawn; and the twelve persons whose names are first called, and who appear, are sworn as the jury; unless some just cause of challenge or excuse, with respect to any of them, is shown.

Calling the plaintiff, is a phrase synonymous with granting a nonsuit. It is the privilege of a plaintiff, when he, that is to say, his counsel, apprehends that the evidence given on his part is insufficient to establish a case, and prefers not to risk the event of an adverse verdict which would determine the issue finally against him, to decline to proceed; and this has been done by the form of a fictitious withdrawal. Under this practice, the crier is directed by the presiding judge to "call the plaintiff." No answer being made, the trial is at an end; the jurors are discharged, the defendant enters judgment of nonsuit and for his

costs. 3 *Bl. Com.* 376. This judgment, however, does not prevent bringing a second action, if plaintiff can gather more satisfactory evidence. The formality of a call upon the plaintiff before entering a nonsuit is disused in some jurisdictions; New York, for instance.

Calling to the bar. A phrase more common in England than in this country, equivalent to admitting to practice. It is the act of investing a student of law with the office of barrister or counsellor. The day in each term set apart for the ceremony of calling students to the bar is known as call-day.

CALUMNIA. Calumny. 1. In the civil law, a false accusation; a malicious prosecution. The phrase *calumniæ jus-jurandum*, the oath of calumny, was frequently used to denote an oath imposed upon the parties to a suit, that they did not sue or defend *calumniando animo*, i.e., with a malicious design, but in the belief that they had a good cause. A similar oath in the canon law was termed *calumniæ juramentum*.

2. In the old common law, a claim, demand, challenge to jurors.

CAMPERS. A share. Used in old English statutes in the sense of a participation in the division of any property, especially land, in consideration of maintaining a suit for such property. See CHAMPERTY.

CANCEL. To obliterate, nullify, strike out of existence; to efface, erase, or expunge. When used of instruments, it presents the idea of signifying, by lines or marks upon the face of the document, that it is no longer operative, without, however, destroying the substance of the paper; but is not always confined to this sense. Cancelling: the act of obliterating, or striking out. Cancellation is used as a synonyme of cancelling; also, to signify the condition of any thing which has been obliterated.

Cancel means doing away with. Winton *v.* Spring, 18 *Cal.* 451.

Whether striking a mere cross upon an internal revenue stamp, omitting to write initials and date, is a sufficient way to cancel the stamp, see Ballard *v.* Burnside, 49 *Barb.* 102.

An agreement to cancel the indebtedness of another implies an undertaking to pay it; for the agreement to cancel must be held to include a promise to do whatever shall be necessary to affect the cancellation. Auburn City Bank *v.* Leonard, 40 *Barb.* 119.

CANON. 1. A law, rule, or ordinance, used in a general sense; also, particularly, a rule or precept of ecclesiastical law.

2. One of the dignitaries of the English church; a prebendary or member of a chapter.

Canon law. A body of ecclesiastical law derived from ordinances and decrees of Roman Catholic councils and popes; depending in Catholic countries on the authority of the church, and in England on a qualified statutory adoption; as to which see Stat. 25 Hen. VIII. ch. 19; 1 Eliz. ch. 1.

The canon law consists partly of certain rules taken out of the Scripture, partly of the writings of the ancient fathers of the church, partly of the ordinances of general and provincial councils, and partly of the decrees of the popes in former ages; and it is contained in two principal parts,—the decrees and the decretals. The decrees are ecclesiastical constitutions made by the popes and cardinals. The decretals are canonical epistles written by the pope, or by the pope and cardinals, at the suit of one or more persons, for the ordering and determining of some matter of controversy, and have the authority of a law. As the decrees set out the origin of the canon law, and the rights, dignities, and decrees of ecclesiastical persons, with their manner of election, ordination, &c., so the decretals contain the law to be used in the ecclesiastical courts. *Jacob.*

The canon law is a body of Roman ecclesiastical law, compiled in the twelfth, thirteenth, and fourteenth centuries, from the opinions of the ancient Latin fathers, the decrees of general councils, and the decretal epistles and bulls of the Holy See. (1 *Bl. Com.* 82; 1 *Steph. Com.* 64.) In the year 1603, certain canons were enacted by the clergy under James I. But, as they were never confirmed in parliament, it has been held that, where they are not merely declaratory of the ancient canon law, but are introductory of new regulations, they do not bind the laity, whatever regard the clergy may think proper to pay them. (1 *Bl. Com.* 83; 1 *Steph. Com.* 66, 67.) *Mozley & W.*

Canons of descent, or of inheritance. The legal rules by which inheritances are regulated, and according to which estates are transmitted by descent from the ancestor to the heir; the rules for determining descents.

CANT, or licitation, is a mode of di-

viding property held in common by two or more persons; and may be avoided by the consent of all those who are interested, in the same manner that any other contract or agreement may be avoided, which is entered into by consent of parties. Hayes *v.* Cuny, 9 *Mart.* (*La.*) 87.

CAPACITY. Power; competency; qualification. In strictness, power or ability, in law, to take; but used more extensively to signify a qualification or power to do various acts. Thus, testamentary capacity (*q. v.*), and capacity to contract, are common phrases for the mental ability required by law for the making of a will or contract. And when a person does an act in virtue of some particular office, function, or character, with which he has been invested by law, as that of sheriff, executor, director, or the like, he is said to do it in the capacity of sheriff, executor, &c.

Capax doli. Capable of wrongful intent. Having capacity to commit crime. Any person who has sufficient mind and understanding to be held criminally responsible for offences is termed *capax doli*. The question arises most frequently in regard to children, and their ability to distinguish between what is lawful and what is unlawful.

CAPIAS. That you take. The name of a writ directed to the sheriff in actions at common law, commanding him to take the defendant named in it into custody; so termed from the emphatic word in the Latin form of the writ. The different kinds of writs for arrest were distinguished by the terms *capias ad respondendum*, *capias ad satisfaciendum*, &c.; but the *capias ad respondendum* (q. v.) is frequently termed simply a *capias*.

Capias ad respondendum. That you take to answer. The name of a writ directed to the sheriff in actions at common law, commanding him to take the defendant, and him safely keep, so that he may have his body before the court on a certain day, to answer the plaintiff in the action; so termed from the emphatic words in the Latin form of the writ. Actions at law were commenced by the issue of this writ. Its effect, originally, was to detain the defendant in custody, according to its terms; and this practice continued until the taking of bail was introduced, for the purpose of mitigating the hardships of confinement. Later, the cases in which arrests should be actually made were defined and restricted by various statutes; and in other cases the writ was of effect only to bring the defendant into court. The abbreviation *ca. resp.* is sometimes used to designate the writ.

Capias ad satisfaciendum. That you take to satisfy. The name of a writ directed to the sheriff in actions at common law, commanding him to take the party named, and him safely keep, so that he may have his body before the court on a certain day, to satisfy the damages awarded to the adverse party by a judgment; it was so termed from the emphatic words in the Latin form of the writ. It is a writ of execution, issued after judgment; and was formerly allowed in all cases where a *capias ad respondendum* had been issued. Its effect was to detain the party against whom it issued (who might be either the plaintiff or defendant in the action) in custody, until he made the satisfaction awarded; and no other process against his lands or goods could issue after his arrest under this writ. But the use and effect of the writ have been much restricted and modified by statutes abolishing imprisonment for debt, or facilitating the discharge of debtors from custody. The abbreviation *ca. sa.* is very commonly used to designate the writ.

Capias in withernam. That you take in reprisal. The name of a writ directed to the sheriff, commanding him to take other goods of a distrainor, equal in value to the distress formerly taken by such distrainor and withheld by him; so termed from the emphatic words of the Latin form of the writ, *withernam*, signifying another taking; a distress in reprisal. The writ issued when chattels distrained were alleged to have been wrongfully taken, and were by the distrainor taken out of the county, or concealed, so that the sheriff could not take them in replevin. Upon the sheriff's return to the writ of replevin, this writ issued to take other goods of the distrainor, thus putting distress against distress; and chattels taken *in wither-*

nam were irrepleviable until the original distress was forthcoming.

The writ also issued where, after judgment for the defendant in replevin, the sheriff made return to the usual writ of execution, *de retorno habendo*, that the goods were eloigned, so that he could not execute the writ. In such cases a *capias in withernam* issued, commanding the sheriff to take other goods of the plaintiff to the value of the goods eloigned, and deliver them to the defendant, to be kept by him until the plaintiff deliver the goods originally replevied.

Capias pro fine. That you take for the fine. The name of a writ directed to the sheriff, commanding him to take a party upon whom a fine had been imposed by a judgment, and keep him in custody until he discharged the fine according to the judgment. Such a fine was imposed upon a party in many cases, — such as forcible torts, unjustly claiming property in replevin, denial of one's own deed, &c., — which were deemed to partake of the nature of a public misdemeanor as well as of a private injury. In such cases the words *capiatur pro fine*, — let him be taken for the fine, — were inserted at the end of the judgment record; and this writ issued to enforce payment of the fine by arrest and imprisonment.

Capias utlagatum. That you take the outlaw. The name of a writ directed to the sheriff in an action at common law, commanding him to take a party who had been outlawed in the action, and him safely keep until the return-day, and then to have him before the court, there to be dealt with for his contempt. The writ issued after the *capias ad respondendum*, to compel an appearance by a defendant who had absconded, so that the service of the previous writ could not be made. The outlawry was readily reversed upon the appearance of the party. The writ issued after an outlawry in a criminal as well as a civil case. It sometimes contained a clause commanding the sheriff to take possession of the goods and chattels of the outlaw, and to summon a jury to determine their value.

CAPITA. See CAPUT.

CAPITAL. 1. As applied to offences, capital signifies those punishable by death. That punishment itself is also termed capital. The use of the term may probably have arisen, it is said, from the decapitation which, in former times, was a common mode of executing the sentence of death, and which is prescribed in some English statutes against traitors even now remaining in force. The extreme sentence of the law, however, has for many years been carried into effect against all offenders by hanging them by the neck. The offences which are still capital offences have, by the humane spirit of modern legislation, been recently much diminished in England. Quite lately the list included high treason, murder, rape, and unnatural offences; setting fire to any king's ship or stores; the causing injury to life, with intent to commit murder; burglary, accompanied with an attempt at murder; robbery, accompanied with stabbing or wounding; setting fire to a dwelling-house, any person being therein; setting fire to or otherwise destroying ships, with intent to murder any person; exhibiting false lights, with intent to bring ships into danger; piracy, accompanied by stabbing; and riotous destruction of buildings. But, at the present day, the only offences punishable with death are treason and murder; all other offences formerly capital being now punishable with penal servitude for life or years, or some term of imprisonment.

In the several States, the death penalty is confined, as a general rule, to treason, murder, arson, and rape.

2. In reference to property, capital signifies the money, property, or stock invested in any business, or in the enterprise of any corporation or institution. Different statutes of the federal and state governments require licenses to be obtained for the carrying on of certain branches of business, impose taxes on the capital employed, limit the amount of the capital stock, and subject the latter to certain liabilities; hence, various decisions have arisen as to what constitutes such capital, or capital stock.

Capital, in political economy, signifies that portion of the produce of industry ex-

isting in a country, which may be made directly available either for the support of human existence, or the facilitating of production. In commerce, and as applied to individuals, it is understood to mean the sum of money which a merchant, banker, or trader adventures in any undertaking, or which he contributes to the common stock of a partnership; also, the fund of a trading company or corporation. (*McCulloch.*) *Wharton.*

Capital signifies the actual estate, whether in money or property, which is owned by an individual or corporation. When used with reference to a corporation, it means the aggregate of the sum subscribed and paid in, or secured to be paid in by the shareholders, with the addition of profits on the residue after the deduction of losses. The terms capital and capital stock, as used in provisions of N. Y. Rev. Stat., regulating taxation of corporations, are synonymous. People *v.* Commissioners of Taxes, 23 *N. Y.* 192.

The capital of a corporation which is subject to taxation is the fund upon which it transacts its business, which would be liable to its creditors, and, in case of insolvency, pass to a receiver. International Life Assurance Society *v.* Commissioners of Taxes, 28 *Barb.* 318; and see *Abb. Dig. Corp.* tit. Capital.

The term capital of a banker does not include money borrowed temporarily in the course of business, but only the property or funds of the banker set apart from other uses. Bailey *v.* Clark, 21 *Wall.* 284.

The capital of a bank embraces all its property, real and personal. New Haven *v.* City Bank, 31 *Conn.* 106; State Bank *v.* Brackenridge, 7 *Blackf.* 395.

Capital, as used in the act of congress of June 30, 1864, subd. 1, § 79, relating to the licenses of bankers whose capital exceeds certain sums, means the amount of capital fixed by charter, when they have one, and cannot be construed to cover surplus earnings. Mechanics', &c. Bank *v.* Townsend, 5 *Blatchf.* 315.

A statute declaring money or stock corporations, deriving any income or profit from their capital, liable to taxation upon their capital, was held to mean not net profits, but any income, even if less than the expenses. People *v.* Supervisors of N. Y., 18 *Wend.* 605.

Capital stock, as employed in acts of incorporation, is never used to indicate the value of the property of the company. It is very generally, if not universally, used to designate the amount of capital prescribed to be contributed at the outset by the stockholders, for the purposes of the corporation. The value of the corporate assets may be greatly increased by surplus profits, or be diminished by losses, but the amount of the capital stock remains the same. The funds of the company may fluctuate; its capital stock remains invariable, unless changed by legislative authority. State *v.* Morristown Fire Assoc., 23 *N. J. L.* 195.

It is the amount of shares subscribed, and not the sums actually paid in, which constitutes the capital stock of a company. Hightower *v.* Thornton, 8 *Ga.* 486.

The capital stock of a bank, upon which, under the banking law of Wisconsin, a certain per cent is to be paid annually in lieu of all other taxation, is the amount of funds paid in by the stockholders to be used by the banking association for banking purposes. The accumulated profits of a bank, which have never been divided among the stockholders, but have been retained for banking purposes, are not a part of its capital stock in such a sense as to be exempt from the general rules of taxation applicable to other taxable property. State Bank of Wisconsin *v.* City of Milwaukee, 18 *Wis.* 281.

Under an act imposing a tax on certain dividends, whenever such "dividends shall exceed six per cent per annum on the capital stock," the capital stock is that paid in, and not the full amount of its authorized capital. Philadelphia *v.* Gray's Ferry, &c. R. R. Co., 52 *Pa. St.* 177.

A limit imposed upon the capital stock of the corporation does not operate as a limitation of the amount of property which it may own, either real or personal, or of the amount of its liabilities or outstanding obligations, but is rather regarded as the sum upon which calls may be made upon subscribers, and dividends are to be paid to stockholders. Barry *v.* Merchants' Exchange Co., 1 *Sandf.* 280.

The capital stock of a corporation, which is deemed a trust fund for the payment of corporate debts, includes the entire sum agreed to be contributed towards the enterprise by the shareholders, whether actually paid in or not. But it does not include additions made from profits realized from the business. Reid *v.* Eatonton Manuf. Co., 40 *Ga.* 98.

Capital stock, as used in Illinois revenue law, with respect to the assessment of corporations, means all the property belonging to a corporation, whether tangible or intangible, and of whatever nature or kind, and it must be valued under this designation for the purpose of taxation. Pacific Hotel Co. *v.* Lieb, 83 *Ill.* 602.

A statute exempting the capital stock of a railroad company from taxation was held to mean the capital to be raised by subscriptions to the stock, and not to include lands granted by congress to aid the road. St. Louis, &c. Railway *v.* Loftin, 30 Ark. 693.

3. Capital also signifies the chief city, in the political sense, of the state; the seat of government; the place where the public business of a sovereignty is carried on; and is to be distinguished from capitol, which signifies the particular building at the capital, devoted to the governmental business.

CAPITALIS JUSTICIARIUS. Chief justice. There were the chief justice of England, who presided in the court of *curia regis*, was an officer of great dignity, and used, in the king's absence, to govern the kingdom; also the following:

Capitalis justiciarius ad placita coram rege tenenda. This title was substituted, during the latter part of the reign of Henry III., for the above title of *capitalis justiciarius* (*totius Anglræ*), and its possessor was the chief justice of the king's bench.

Capitalis justiciarius banci. The old title of the chief justice of the bench, subsequently the court of common pleas.

CAPITATION. A tax laid upon persons as individuals, irrespective of property; a poll tax, or direct tax. Thus the constitution of the United States provides, art. 1, § 9, cl. 4, that "no capitation or other direct tax shall be laid, unless in proportion to the census, or enumeration," &c.

CAPITULA (*plu.*). A term of the civil and the old English law, corresponding nearly to our "schedules."

Capitula itineris. Schedules delivered to the justices, setting out the crimes which were to be the subject of their inquiry on their circuits.

CAPTAIN. In military usage, the commander of a company of soldiers.

In maritime usage, properly an officer of the navy, ranking, in the United States service, between a commander below and a commodore above. The popular use of the term for the officer first in command of a merchant vessel is not approved in law, but the name master is preferable.

CAPTION. 1. A taking or seizure; an arrest.

2. The formal heading of a legal document, in which the circumstances of its origin are set forth. This use of the word has been disapproved by literary critics as not warranted by the derivation (which is not from *caput*, a head, but from *captio*, a taking); but it is very common in law-books.

When used with reference to an indictment, caption signifies the style or preamble or commencement of the indictment; when used with reference to a commission, it signifies the certificate to which the commissioners' names are subscribed, declaring when and where it was executed. *Brown.*

In Scotch law, caption is an order to incarcerate a debtor who has disobeyed an order, given to him by what are called "letters of horning," to pay a debt or to perform some act enjoined thereby. *Bell.*

CAPTOR. One who seizes or takes property from an enemy in time of war, particularly at sea; also, one who takes an enemy.

CAPTURE. A taking by one belligerent of the property of another. More particularly, the taking of a vessel or property of an enemy, at sea, as a prize.

Capture may be with intent to possess both ship and cargo, or only to seize the goods of the enemy, or contraband goods, which are on board. The former is the capture of the ship in the proper sense of the word; the latter is only an arrest and detention, without any design to deprive the owner of it. Capture is deemed lawful when made by a declared enemy lawfully commissioned and according to the laws of war; and unlawful, when it is against the rules established by the law of nations. *Marsh. Ins.* book 1, ch. 12, § 4.

Capture, in technical language, is a taking by military power; a seizure is a taking by civil authority. United States *v.* Athens Armory, 35 *Ga.* 344.

In order to constitute a capture, some act must be done indicative of an intention to seize and to retain as prize; it is sufficient if such intention is fairly to be inferred from the conduct of the captor. The Grotius, 9 *Cranch*, 368.

It is not strictly necessary to a complete capture that the prize should be carried within the territory of the captors, and there condemned. Moxon *v.* The Fanny, 2 *Pet. Adm.* 309.

Boarding and destroying a frigate under peremptory orders to set her on fire, and after blowing out her bottom to abandon her, was held not a capture. The duty performed was that of destruction, not of capture. Decatur *v.* United States, *Dev.* 33; *Id.* 201.

Capture, as used in a policy of marine insurance, means a seizure as prize, with the intent or expectation of obtaining a condemnation. Richardson *v.* Maine Ins. Co., 6 *Mass.* 102.

The taking of a ship with intention to make prize of her, as is proved by her being libelled as prize, is a capture, within the principles laid down by eminent writers. Lee *v.* Boardman, 3 *Mass.* 238.

The words capture, detention, &c., in the memorandum in a policy, mean illegal seizure, arrest, &c. Archibald *v.* Mercantile Ins. Co., 3 *Pick.* 70.

Capture, as used in contracts of marine insurance, embraces a taking by pirates. Dole *v.* Merchants' Mut., &c. Ins. Co., 51 *Me.* 465.

Capture includes every species of taking by force and violence from without, to which a vessel may be exposed during a voyage; whether by a lawful government in the exercise of belligerent rights or the enforcement of municipal laws, or by mere pirates, or by vessels sailing under a pretended but illegitimate authority, such as cruisers of the so-called confederate states, during the civil war. Dole *v.* New England Mut. Mar. Ins. Co., 6 *Allen*, 373.

CAPUT. This Latin word, meaning head, is used in old law language much as head in its figurative sense is used at the present day, to signify a chief, or one occupying the first place in affairs; also, in the civil law, it stood for the person, and for the status of a person enjoying full civil rights.

Caput lupinum. Was anciently applied to an outlawed felon, in that he might be knocked on the head like a wolf. 4 *Bl. Com.* 320.

Capitis diminutio. Loss of personal condition. Reduction to a lower civil rank.

Capite. By the head. Tenure in *capite* was an ancient feudal tenure, whereby a man held lands of the king immediately. It was of two sorts, the one, principal and general, or of the king as the source of all tenure; the other, special and subaltern; or of a particular subject. It is now abolished. *Jacob. Cab. Lawyer.*

Per capita. By heads; that is, as individuals. This phrase is most frequently used in reference to the distribution of estates. When all the persons interested stand in equal degree of kindred, and take equal shares, they are said to take *per capita*. If some, being children of a deceased heir or distributee, are entitled only to take the share of their parent, to be divided amongst them, they are said to take *per stirpem;* or, if several families so situated are involved in the thought, *per stirpes.*

In the distribution of the personal estate of a person dying intestate, the claimants, or the persons who by law are entitled to such personal estate, are said to take *per capita* when they claim in their own rights as in equal degree of kindred, in contradistinction to claiming by right of representation, or *per stirpes*, as it is termed. Thus, if the next of kin are the intestate's three brothers, A, B, and C, his effects are divided into three equal portions, and distributed *per capita*, one to each; but if A (one of these brothers) is deceased, and has left three children, and B (another of these brothers) is dead, and has left two, then the distribution will be by representation, or *per stirpes*, as it is termed, and one-third of the property will go to A's three children, another third to B's two children, and the remaining third to C, the surviving brother. *Brown.*

CARE. This word is generally used in jurisprudence in the sense of attention, heed, vigilance, watchfulness: its opposites being carelessness, heedlessness, negligence, rashness. The decisions defining its meaning have arisen mainly in cases involving the duties and liabilities of carriers, bailees, professional persons, &c., and turn almost uniformly on the question of negligence, for the definition of which, and decisions thereon, see NEGLIGENCE. There are different degrees of care, the several meanings of which, as defined by various courts in this country, seem to be as follows:

Slight care is such as is usually exercised by persons of common sense, but careless habits, under circumstances similar to those of the particular case in which the question arises, and where their own interests are to be protected from a similar injury. 20 *N. Y.* 65; 6 *Duer*, 633; 3 *E. D. Smith*, 98; 8 *Ohio St.* 1; *Id.* 570, 581; 3 *Allen*, 38; 1 *Id.* 9, 15; 8 *Gray*, 123, 131; 17 *Cal.* 97.

Ordinary care is such as is usually exercised in the like circumstances by the majority of the community, or by persons of careful and prudent habits. 35 *N. Y.* 9, 27; 11 *Ired. L.* 640.

Great care is such as is exercised under such circumstances by persons of unusually careful and prudent habits. 8 *Barb.* 368, 379; 31 *Pa. St.* 512; 20 *N. Y.* 65; 6 *Duer*, 633. See DILIGENCE.

Ordinary care is not only such care as people in general would exercise, but such as they would exercise under the circumstances of each particular case. State *v.* Railroad, 52 *N. H.* 528.

The phrase, utmost care and diligence, means all the care and diligence possible in the nature of the case. Baltimore & Ohio R. R. Co. *v.* Worthington, 21 *Md.* 275.

Want of care, when used in instructions to a jury, means want of reasonable and proper care. Warner *v.* Dunnavan, 23 *Ill.* 380.

CARGO. Merchandise laden on a vessel for transportation by water.

Cargo means goods on board of a vessel. Seamans *v.* Loring, 1 *Mas.* 127, 142.

A cargo is the loading of a ship or other vessel, the bulk of which is to be ascertained from the capacity of the ship or vessel. The word embraces all that the vessel is capable of carrying. Flanagan *v.* Demarest, 3 *Robt.* 173.

Live animals, their provender, their freight, and goods laden on deck, are not covered; but coin, to be invested by the master for the owner, its freight, and the safe transportation of the insured's own goods in his own vessel, are covered under the general terms cargo and freight. Wolcott *v.* Eagle Ins. Co., 4 *Pick.* 429.

Cargo, in a policy of insurance, does not ordinarily cover live-stock; but if live-stock constitute the only article of exportation from the port from which the vessel is to sail, to the port to which she is destined, or if, according to the mercantile usage of the place of effecting the insurance, the word is understood to cover live-stock, then an insurance under that general denomination will cover it. Allegre *v.* Ins. Co., 2 *Gill & J.* 136. See Chesapeake Ins. Co. *v.* Allegre, *Id.* 164.

Cargo covers oil and other products of a whaling voyage. Paddock *v.* Franklin Ins. Co., 11 *Pick.* 227.

Cargo is not of such common occurrence in English policies of insurance as with us. They use, in lieu thereof, the words "goods and merchandise." But it is a word of a large import, and means the lading of the ship, of whatever it consists. In a policy on a whaling vessel, cargo might, upon proof of usage so to understand it, be held to cover outfits as well as catchings. Macy *v.* Whaling Ins. Co., 9 *Metc.* (*Mass.*) 354, 367.

CARNAL KNOWLEDGE. The technical term for the act of the man in sexual intercourse; but generally used of unlawful intercourse.

Carnal knowledge and sexual intercourse held equivalent expressions. Noble *v.* State, 22 *Ohio St.* 541.

That carnal knowledge or carnally knew is a proper and necessary term in an indictment for rape, see Commonwealth *v.* Squires, 97 *Mass.* 59.

CARRIAGE. In the sense of a vehicle, is not always confined to any one class or description of vehicles: it is often used as a generic term, for that which carries.

As used in N. H. Rev. Stat. ch. 57, relative to damages against towns for defective highways, carriage is evidently intended to include whatever carries the load, whether upon wheels or runners, and also that which is carried, whether on wheels or runners, or on horseback. Conway *v.* Jefferson, 46 *N. H.* 521.

By statute, in New York, carriage, as used in Rev. Stat. pt. 1, ch. 20, tit. 13, relative to the law of the road, &c., includes stage-coaches, wagons, carts, sleighs, sleds, and every other carriage or vehicle used for transportation of persons or goods. 1 *Rev. Stat.* 696, § 7.

CARRIER. One who undertakes the transportation of persons or movable property.

Carriers are called common or private; the latter being persons who undertake for the transportation in a particular instance only, not making it their vocation, nor holding themselves out to the public ready to act for all who desire their services. As to common carriers, see COMMON CARRIER.

Carrier of the mail. This term, in U. S. Rev. Stat. § 3980, — directing any carrier of the mail to receive any mail matter presented to him, &c., — includes a city letter-carrier employed under § 3865. Wynen *v.* Schappert, 6 *Daly* (*N. Y.*) 558.

CARRY. In a statute punishing the carrying concealed weapons, is equivalent to bear. Locomotion is not essential to constitute a carrying under such a statute. Owen *v.* State, 31 *Ala.* 387.

Carrying away. A phrase used in criminal law to denote such a taking or removal of personal property as is required to constitute larceny; for carry, in the sense of bear, is not enough to complete the offence. There must be a removal; and this is expressed by the addition of away.

The words "did take and carry away" are a translation of the words *cepit et asportavit*, which were used in an indictment while legal processes and records were in the Latin language. But no single word in our language expresses the meaning of *asportavit;* hence the word away, or some other word, must be subjoined to the word carry, to modify its general signification and give it a special and distinctive meaning. Commonwealth *v.* Adams, 7 *Gray*, 443.

Carrying costs. When a party in whose favor a verdict is given becomes entitled to the payment of his costs as incident to such verdict, the verdict is said to carry costs.

Carrying on. Under the Alabama revenue law of 1868, requiring a person "engaging in or carrying on business" to obtain a license therefor, a single act pertaining to a particular business will not constitute the "engaging in or carrying on" the business. Weil *v.* State, 52 *Ala.* 19.

Selling an occasional drink out of a bottle is not carrying on the business of a retail liquor-dealer. United States *v.* Jackson, 1 *Hugh.* 331.

CART. A vehicle with four wheels, drawn by oxen, suited to the ordinary purposes of husbandry, and employed in the

same uses to which carts, in the common acceptation of the term, are appropriated, is protected from levy and sale by the statute which exempts "one horse or ox cart" from execution. Favers *v.* Glass, 22 *Ala.* 621; S. P. Webb *v.* Brandon, 4 *Heisk.* 285.

Though lexicographers define "cart" to be a vehicle with two wheels, and "wagon" one with four, yet an exemption of one ox-cart from execution is not necessarily limited to a two-wheeled vehicle; even though the same statute exempts a horse wagon. A four-wheeled vehicle drawn by oxen may be allowed. Webb *v.* Brandon, 4 *Heisk.* 285.

CARTA. See CHARTA.

CARTE BLANCHE. White paper. From a practice of giving an agent of absolute powers a sheet of blank paper, having the principal's signature at the foot, over which the agent may write any engagement he thinks fit, any person having full authority to act for another in any matter is said to have *carte blanche* as to such matter.

CARTEL. An agreement between hostile states relating to exchange of prisoners.

Cartel ship. A vessel employed in making exchanges of prisoners, or other negotiations, in war.

CASE. 1. An action, suit, or cause. A state of facts involving the decision of a question of law or fact. In this sense, the word frequently occurs in such phrases as civil and criminal cases; cases at law or in equity; capital cases; trying the case; submitting the case; and the like. Compare CAUSE.

The primary meaning of case is cause. When applied to legal proceedings, it imports a state of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice. In its generic sense, the word includes all cases, special or otherwise. Kundolf *v.* Thalheimer, 12 *N. Y.* 592, 596.

Cases includes causes and special proceedings, and is more commonly used as including equity as well as common-law actions than causes is. Benson *v.* Cromwell, 26 *Barb.* 218, 6 *Abb. Pr.* 83. See also SPECIAL CASE.

An affidavit of merits which avers that the affiant has fully, &c., stated "the facts of this case," is sufficient; for it implies that he has stated all the facts which make the whole case. Jordan *v.* Garrison, 6 *How. Pr.* 6.

But one which only avers that he has fully, &c., stated "the facts of his case," or his case in this cause, is insufficient; for this means no more than a statement of the facts of his side of the cause, or, in other words, his defence. Fitzhugh *v.* Truax, 1 *Hill*, 644; Ellis *v.* Jones, 6 *How. Pr.* 296.

Cases, as used in article 3, section 2, of the United States constitution, — extending the judicial power of the United States to cases in law and equity, cases affecting ambassadors, and cases of admiralty jurisdiction, — means contested questions before courts of justice; suits or actions. It means that the judicial power shall extend to certain actions, wherein, according to the forms of law, the rights of parties are presented for adjudication. The word controversies, used in another part of the section, is broader in its meaning. To create a case in the legal sense expressed by the term, *proceedings* are necessary. When we speak of a case at law, in chancery, or in admiralty, we mean a judicial question submitted to a court of one jurisdiction or another, according to the form of procedure prescribed by law. Home Ins. Co. *v.* Northwestern Packet Co., 32 *Iowa*, 223.

The terms "cases in law, equity, and of admiralty jurisdiction," are used in the constitution, the judiciary, and process acts, according to the jurisprudence of England; defining them, in contradistinction to each other, by the rules and principles of the common law, as adopted and in force in the several states at the revolution, or the adoption of the constitution, and passage of the acts of congress of 1798. Baker *v.* Biddle, *Baldw.* 394; Bains *v.* The James & Catharine, *Id.* 544.

The word case, as used in the provisions of the constitution, art. 3, § 2, embraces the rights of one party as well as of the other. Cohens *v.* Virginia, 6 *Wheat.* 264, 379.

A power conferred on a mayor of a city to exercise the powers of a justice of the peace, in civil and criminal cases, does not authorize him to take acknowledgments of deeds. The phrase, civil and criminal cases, means suits. Shultz *v.* More, *Wright*, 280.

Case, as used in Iowa Code, § 2529, providing for the time in which to bring actions "for relief on the grounds of fraud in cases heretofore solely cognizable in a court of chancery," means a contested question in a court of justice. It does not refer to the action or to the form thereof, but to the questions and rights involved. Gebhard *v.* Sattler, 40 *Iowa*, 152, 156.

The word cases, in the Indiana constitutional provision excepting "capital cases" from the jurisdiction of a circuit court held by the two associate judges alone, should not be deemed synonymous with prosecution, so as to exclude the proceedings prior to the indictment, but was designed to embrace all the stages of criminal proceedings, from the empanelling of the grand jury to the execution of the final sentence. Cook *v.* State, 7 *Blackf.* 165.

2. Case is used as a brief name for action on the case, or, more fully, special action of trespass on the case, one of the common-law forms of action. This

action is of an origin less ancient than others derived from the common law. It appears to have first come into use in the reign of Edward III. It was invented under the authority of the statute of Westminster 2, ch. 24, in order to supply a defect in the original scheme of personal actions, which comprised no forms adapted to the redress of many injuries. This statute gave power to the clerks of the chancery to frame new writs *in consimili casu*, upon the analogy of writs already known. Under this power they constructed many writs for different injuries, which were considered as *in consimili casu* with, that is, to bear a certain analogy to, a trespass. The new writs invented for the cases supposed to bear such analogy, received, accordingly, the appellation of writs of trespass on the case (*brevia de transgressione super casum*), as being founded on and setting forth the particular circumstances of the case thus requiring a remedy; and to distinguish them from the old writ of trespass, and the injuries themselves, which are the subjects of such writs, were not called trespasses, but had the general name of torts, wrongs, or grievances. The writs of trespass on the case, though invented thus, *pro re nata*, in various forms, according to the nature of the different wrongs which respectively called them forth, began, nevertheless, to be deemed as constituting, collectively, a new individual form of action; and this new genus took its place by the name of trespass on the case, among the more ancient actions of debt, covenant, trespass, &c. *Steph. Plead.* 17. It includes, in its most comprehensive signification, assumpsit, as well as an action in form *ex delicto*, but is usually understood in the sense of the latter.

The action, besides being founded on the common law, is also, both in England and in this country, allowed by statutes.

It lies generally to recover damages for torts not committed with force, actual or implied; or, having been occasioned by force, where the matter affected was not tangible, or the injury was not immediate, but consequential; or where the interest in the property was only in reversion,—in all which cases trespass is not sustainable. Torts of this nature are to the absolute or relative rights of persons, or to personal property in possession or reversion, or to real property, corporeal or incorporeal, in possession or reversion. These injuries may be either by nonfeasance, or the omission of some act which the defendant ought to perform; or by misfeasance, being the improper performance of some act which might lawfully be done; or by malfeasance, the doing what the defendant ought not to do: and these respective torts are commonly the performance or omission of some act contrary to the general obligation of the law, or the particular rights or duties of the parties, or of some express or implied contract between them. 1 *Chitty Plead.* 148. In short, this form of action may be said to lie in every case where damages are claimed for an injury, either to person or property, not falling within the compass of the other forms.

Case agreed on; case stated. In England, and in most, if not all, of the states of this country, some provision is made to enable parties to an action, who agree upon the facts, to submit a statement thereof in writing to the court, without a trial, in order to obtain a decision upon the points of law arising on such facts. This statement is in several jurisdictions called a case agreed on, or case stated.

A counsel who opens a case before a jury is also said to state the case to the jury.

Case on appeal. A document prepared by counsel of an appellant, particularly in those states following reformed codes of procedure, exhibiting the proceedings on the trial to be reviewed, for the information of the appellate court. Errors of law are reviewable upon a bill of exceptions; but such bill only exhibits the evidence or offers of evidence necessary to enable the appellate court to say whether error of law has been committed in the particular rulings made. There are two objections to a verdict often important, which, therefore, cannot be raised upon a bill of exceptions: one is, that the verdict is against evidence; the other, that

the damages found are excessive. The discussion of these requires a presentation of the entire evidence; to make this is the office of a case. A bill of exceptions sets forth particular rulings, objected to as erroneous, with the evidence or offer on which they were made. A case shows, in substance, the whole evidence, enabling the court above to review the finding of the jury, as well as the rulings of the judge. In New York, it is common to combine both documents in one: a case is made upon leave granted at the trial, with a privilege of turning it into a bill of exceptions. It shows the evidence and rulings completely; and is first used as a case, as a basis of a motion to set aside the verdict; and afterwards is treated as a bill of exceptions, when the rulings of law come to be argued upon an appeal.

The case is ordinarily drafted by the counsel of appellant, and either consented to by the adverse counsel, or submitted to the judge who tried the cause for settlement.

Case reserved; case made. When, during the progress of a trial, points of law arise which cannot then be satisfactorily decided, then, in order to have them determined upon argument before the court *in banc*, a statement in writing of the facts proved is drawn up and settled by counsel, under the supervision of the judge, and this is called a case reserved, or case made. Where the law of a case is doubtful, it is customary for counsel to agree that a general verdict shall be found most usually for plaintiff, subject to the opinion of the court upon such a case to be made; the jury then find a general verdict, which is subject to the decision of the court upon the law questions involved. This is also called a case reserved, or case made.

CASH. A sale for cash, by a commission merchant, means for money, to be paid on delivery of the property. Bliss *v.* Arnold, 8 *Vt.* 255.

In the terms of a commissioner's notice of sale, cash does not necessarily mean coin, but ready money, in contradistinction to credit. Meng *v.* Houser, 13 *Rich. Eq.* 210.

The condition that competitors for a contract should send in a certificate of deposit of $4,000 in cash, is fulfilled by sending in a certificate of deposit of $4,000. People *v.* Contracting Board, 27 *N. Y.* 378.

Gold-dust is not cash, within the meaning of a contract specifying that payment shall be made in cash. Gunter *v.* Sanchez, 1 *Cal.* 45.

That a note payable in bank-bills is not regarded as a cash note, in Massachusetts, and is not negotiable, see Jones *v.* Fales, 4 *Mass.* 245; but otherwise in New York, Judah *v.* Harris, 19 *Johns.* 144; Keith *v.* Jones, 9 *Id.* 120; see also Morris *v.* Edwards, 1 *Ohio*, 189.

Cash payment means the opposite of credit. Foley *v.* Mason, 6 *Md.* 37; and see Steward *v.* Scudder, 24 *N. J. L.* 96.

To receive a check as cash is to receive it as ready money; and imports payment, satisfaction, of the demand for which it was given. Blair *v.* Wilson, 28 *Gratt.* (*Va.*) 165.

Cash-book. One of the account-books ordinarily kept by merchants, being the one appropriated for entering all receipts or payments of money.

Cash-price. A price paid or payable at the time of sale or delivery of property, in opposition to a barter or a sale on credit.

CASHIER. An officer of a moneyed institution, or of a private person or firm, who is intrusted with, and whose duty it is to take care of, the cash or money of such institution, person, or firm.

The cashier of a bank is the regularly authorized organ thereof, and whatever is done by him in that capacity is the act of the bank. Burnham *v.* Webster, 19 *Me.* 232.

CASSATION. The act of annulling. It corresponds, in French law, to reversal in American practice.

Cassetur billa, or breve. That the bill or writ be quashed. In the common-law practice, judgment for the defendant on a plea in abatement in an action commenced by bill was in form *cassetur billa*. Such a judgment was also sometimes entered by the consent of a plaintiff, who found that he could not successfully prosecute his suit; and such entry amounted to a discontinuance of the action. In actions commenced by original writ, the form substituted for *cassetur billa* was *cassetur breve*, that the writ be quashed.

Castellarum operatio. Service or labor done, under the old English and Saxon laws, by inferior tenants, for the

assistance of their feudal lords in building or repairing their castles. *Holthouse.*

CASTIGATORY. The name of an English contrivance, now obsolete, for punishment of scolding or vicious women; otherwise called, according to Jacob, trebucket, tumbrel, or cucking or ducking stool.

CASTING. Casting an essoin was alleging an excuse for not appearing in court to answer an action. *Holthouse.* See ESSOIN.

CASTING-VOTE. The vote of a presiding officer, at an assembly or meeting, given to decide the question when the votes of the assembly or meeting are equally divided between the affirmative and negative.

Casting-vote, as used in the New York statute relative to religious corporations (1 Rev. Stat. 4th ed. 1179, § 1; 2 *Id.* 5th ed. 604), means a double vote of the chairman, who first votes with the rest, and then, in case of a tie, creates a majority by casting a second vote. People, *ex rel.* Remington, *v.* Rector, &c. of Church of the Atonement, 48 *Barb.* 603.

CASUAL. That which happens accidentally; or is brought about by causes unknown or as to which nothing is suggested; without reason, in a legal point of view. Casualty: an accident; an event which could not be foreseen or avoided.

Casual ejector. The nominal defendant in the common-law action of ejectment; so called because, by the fiction underlying that action, he was represented as having, by accident or without any legal cause necessary to be considered, entered on the premises and ejected the lawful occupant.

This, with other fictions of the action of ejectment, has been abolished in England, and in almost, if not all, of the states of this country.

Casual pauper. An expression common in England for a person who applies for relief under the poor-laws in a parish where he has not a lawful settlement, — where he is by accident, as it were. This class of persons are often briefly spoken of as casuals; and the ward in the workhouse, hospital, &c., appropriated to them is called the casual ward.

Casualties of superiority, in the feudal language of the Scotch law, are payments from an inferior to a superior, that is, from a tenant to his lord, which arise upon uncertain events, as opposed to the payment of rent at fixed and stated times. *Bell.*

CASUS. A case, in the sense of occurrence; occasion; event; combination of circumstances: also, in the sense of a judicial presentation of a cause. Its use in the first-mentioned sense is the only one of much importance in modern jurisprudence. It occurs in the following phrases, which recur frequently:

Casus fœderis. The case of the treaty. The case contemplated by or within the stipulations of a compact. The term is sometimes applied to an ordinary contract, as well as to public treaties and conventions.

Casus fortuitus. A fortuitous event; an inevitable accident; an event occurring without the intervention of human agency, and producing a loss, in spite of all human effort and sagacity. Such are the effects of strokes of lightning, or other causes above human control. But an event which, though unforeseen, was not inevitable, is not within the meaning of the term. See ACCIDENT; ACT OF GOD.

Casus omissus. A case omitted. This term is frequently applied to an omission in a statute to provide for a particular case, which has either been overlooked by the legislature or left unprovided for as unimportant. Such cases must be disposed of according to the law as it existed prior to such statute. Provisions cannot be supplied by the courts.

The term is sometimes used of a contingency left unprovided for in a contract, as well as in a statute.

Casus omissus et oblivioni datus dispositioni communis juris relinquitur. A case omitted and given to oblivion is left to the disposal of the common law. A case unprovided for by a statute, and forgotten, must be disposed of according to the rules of the common law.

Casu consimili. The name of an old English writ of entry granted where tenant by the curtesy, or tenant for life, aliens in fee, or in tail, or for an-

other's life; then this writ might be brought by the reversioner against the party to whom the tenant had aliened to his prejudice, and in the tenant's lifetime. The name is said to have been derived from the fact that the clerks of chancery framed it in the likeness of the writ called *in casu proviso*.

Casu proviso. The name of an old writ of entry, given by the Stat. of Gloucester, ch. 7. It would lie where a tenant in dower aliened in fee, or for life, &c., and might be brought by the reversioner against the alienee. Both this writ and the preceding one are abolished by Stat. 3 & 4 Wm. IV. ch. 27, § 36. *Jacob; Mozley & W.*

CATALLA. Chattels. This term includes all property, movable and immovable, except fees and freeholds. It occurs most frequently in the phrase *bona et catalla*, corresponding to goods and chattels; also, in the names of writs now obsolete:

Catallis captis nomine districtionis, a writ that lay for rent, and warranted the taking of doors, windows, &c., by way of distress; also,

Catallis reddendis, a writ which lay where goods, being delivered to any man to keep till a certain day, were not, upon demand, delivered; like the writ of detinue, or the *actio depositi* of the civil law.

Catalla otiosa. Idle chattels. Originally, this term was used to distinguish idle cattle — such as were not used for working — from working cattle and sheep. Later, it was used in the sense of goods or chattels without life, as distinguished from animals.

CATCHINGS. Things caught, and in the possession, custody, power, and dominion of the party, with a present capacity to use them for his own purposes. The term includes blubber, or pieces of whale flesh cut from the whale, and stowed on or under the deck of a ship. A policy of insurance upon outfits, and catchings, substituted for the outfits, in a whaling voyage, protects the blubber. Rogers *v.* Mechanics' Ins. Co., 1 *Story C. Ct.* 603; 4 *Law Rep.* 297.

CATCHPOLE. An English name for a deputy sheriff or bailiff authorized to make arrests; employed, Wharton suggests, probably because he catches by the poll, or head, the person arrested. It is now a term of contempt or derision; but originally does not seem to have had any such quality.

CATHEDRAL. In English ecclesiastical law, the church of the bishop and head of the diocese, in which is his seat of dignity, and in that respect the principal church of the diocese.

CATTLE. In its primary sense, includes the domestic animals generally; all the animals used by man for labor or food. Thus, a statute which punishes driving any stock of cattle to feed upon lands without the consent of the land-owner, includes sheep. United States *v.* Mattock, 2 *Sawyer*, 148.

Cattle includes horses and asses, as well as domesticated horned animals. Ohio, &c. R. R. Co. *v.* Brubaker, 47 *Ill.* 462.

That cattle may be read as including sheep and swine, see Decatur Bank *v.* St. Louis Bank, 21 *Wall.* 294; United States *v.* Mattock, 2 *Sawyer*, 148; Rex *v.* Chapple, 1 *Russ. & R.* 77; Act of congress of July 13, 1866, § 9, 14 *Stat. at L.* 117.

The generic term cattle, used in the estray laws, includes oxen, though "working oxen" are mentioned specifically in the statute. State *v.* Moreland, 27 *Tex.* 726.

Under the statute exempting "one pair of working cattle," a bull used for work is exempt, although the owner has no other cattle. Bowzey *v.* Newbegin, 48 *Me.* 410.

It is not improper, in an indictment, to use the word steer instead of cattle or neat cattle. State *v.* Lange, 22 *Tex.* 591; S. P. State *v.* Abbott, 20 *Vt.* 537.

Cattle has been held to include:

Asses, within the meaning of the act of 9 Geo. I. ch. 22 (*b*), Rex *v.* Whitney, 1 *Moody*, 3.

Geldings, Rex *v.* Clarke, 1 *Lewin*, 229.

Horses, Rex *v.* Paty, 2 *W. Bl.* 721.

Mares and colts, *Ib.*; Moyle's Case, 2 *East Pl. Cr.* 1076.

Pigs, Rex *v.* Chapple, *Russ. & R.* 77.

But not buffaloes, State *v.* Crenshaw, 22 *Mo.* 458.

CAUSA. A cause, in the sense of that which supplies a motive, or constitutes a reason; hence it sometimes means the consideration for a contract. Also, a cause in the sense of a judicial proceeding, or the right or claim upon which a judicial proceeding may be founded. See CAUSE.

The first-mentioned sense is the one of most importance at the present day, as the word with that meaning enters into several phrases of frequent recurrence. Thus divorces are said, in books employing the phraseology of the civil law, to be grantable, *causa affinitatis*, on the ground of affinity; *causa consanguinitatis*, for cause of consanguinity;

causa frigiditatis, for coldness; *causa impotentiæ*, for impotence; *causa metus*, because the marriage was induced by fear; *causa præ contractus*, upon the ground of a prior marriage.

Causa causans. The immediate cause. A cause which directly produces the effect is termed *causa causans*, as distinguished from *causa causæ causantis*, which denotes a proximate but not an immediate cause.

Causa mortis. On account of death: In view of death. Commonly occurring in the phrase *donatio causa mortis*, q. v.

Causa proxima, non remota, spectatur. The near, not the remote, cause is regarded. The law considers only the direct, not the remote, causes of events. This maxim is of frequent application in cases of insurance, and of claims for damages for injuries sustained by the wrongful act or neglect of the defendant. It is most frequently cited with reference to questions arising out of marine insurance. In such cases, a policy-holder, in order to recover, must show that the loss for which he claims was a direct and not a remote consequence of some of the perils insured against; and if this is shown, his claim is not rendered less valid if that particular peril was encountered in the endeavor to escape another not covered by the policy. Thus, if a vessel insured under a policy which does not cover war risks, in endeavoring to escape capture by an enemy, runs ashore and becomes a wreck, the owners may recover the insurance if the policy covers the loss by stranding, that being the direct cause of loss, although the remote cause was the endeavor to escape capture, which was not covered. On the other hand, if the ship was driven by stress of weather into a hostile port, and there seized and condemned as a prize, the owners could not recover for their loss, the proximate cause being the condemnation, which was not insured against, although the remote cause was one of those covered by the policy. So where a vessel has been compelled to put into port to repair damage caused by perils of the sea covered by a policy of insurance, and the master, in order to pay for the repairs, has sold part of his cargo, and applied the proceeds in paying for such repairs, the insurer of the cargo will not be liable, for the direct cause of the sale was the necessity the master was under of providing funds for payment of the expenses of repairing, and not the perils which had rendered the repairs necessary. But, on the other hand, if a vessel is damaged by perils of the sea, and on putting into port for repairs it is found that the cargo has also been damaged, and the cargo is sold, as unfit for further transit, for the benefit of all concerned, the insurer of the cargo is liable for the loss, as one arising directly from the perils of the sea insured against. *Trayn. Max.; Broom Max.* In the case of Ionides *v.* Universal Marine Ins. Co., 14 *C. B.* N. S. 259, the application of the maxim to this class of cases is very fully explained, and many illustrations of its meaning given, among them the following, referring to an exception in a policy of insurance, extending to loss from all the consequences of hostilities. "Assume that the vessel is about to enter a port having two channels, in one of which torpedoes are sunk in order to protect the port from hostile aggression, and the master of the vessel, in ignorance of the fact, enters this channel, and his ship is blown up: in that case the proximate cause of the loss would clearly be the consequences of the hostilities, and so within the exception. But suppose the master, being aware of the danger presented in the one channel, and in order to avoid it attempts to make the port by the other, and by unskilful navigation runs aground and is lost, that would not be a loss within the exception, not being a loss proximately connected with the consequences of hostilities, but a loss by a peril of the sea, and covered by the policy."

In actions to recover damages on account of injury, the principle of this maxim is applicable, although not with so much strictness as in cases of insurance. Whenever the alleged cause of damage appears to be the remote rather than the proximate cause, no action can be sustained. Upon the same principle rests the rule excluding consequential damages, whenever the alleged cause of

the damage is too remote from the consequences for which damages are sought. This application of the principle extends to actions for breach of contract, as well to actions founded upon tort; but the measure of damages is much more strictly confined in cases of contract. As stated in the leading case of Hadley *v.* Baxendale, 9 *Exch.* 341, which is regarded as settling the law, the rule is: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

In criminal prosecutions, the application of the maxim is somewhat modified by the consideration that in crimes the intention is matter of substance, and the first motive, as showing the intention, must therefore be principally regarded. Hence the remote cause of the offence will be considered for the purpose of deciding upon the intention of the accused. In other respects, the maxim applies in criminal cases. Thus, where a person commits upon another an assault which results in the death of the latter, it would not be a valid defence that the person assaulted was at the time laboring under a fatal disease, which was only aggravated by the assault with the result of accelerating the death. The assault is the direct cause of the death at the time it occurred, and that, not the more remote cause of the existing disease, will be regarded. Again, an indictment for manslaughter was not sustained in a case where fireworks kept by the prisoner contrary to statute exploded through accident or the negligence of his servants, setting fire to an adjoining house, and thereby occasioning a person's death. His illegal act in keeping the fireworks was held to be too remotely connected with the death, to support the indictment.

CAUSE. 1. That which supplies a motive, decides action, or constitutes the reason for any thing done. Hence it is used particularly by writers following the civil law, also in Scotch law, for the consideration of a contract.

2. A judicial proceeding; an action or suit, including all its steps. Also, the right, claim, or demand which may be the foundation of a judicial proceeding; but for this, cause of action is the fuller and better phrase. See also CASE.

The civilians use the term cause in relation to obligations, in the same sense as the word consideration is used in the jurisprudence of England and the United States. It means the motive, the inducement to the agreement, — *id quod inducet ad contrahendum.* In contracts of mutual interest, the cause of the engagement is the thing given or done, or engaged to be given or done, or the risk incurred by one of the parties. Mouton *v.* Noble, 1 *La. Ann.* 192.

Cause imports a judicial proceeding entire, and is nearly synonymous with *lis* in Latin, or suit in English. Although allied to the word case, it differs from it in the application of its meaning. A cause is pending, postponed, appealed, gained, lost, &c.; whereas a case is made, rested, argued, decided, &c. Case is of a more limited signification, importing a collection of facts, with the conclusion of law thereon. Both terms may be used with propriety in the same sentence; *e.g.*, on the trial of the *cause*, the plaintiff introduced certain evidence, and there rested his *case*. 18 *Conn. App.* 10.

The phrase causes, civil and criminal, in a statutory provision giving to the national courts jurisdiction "of all causes, civil and criminal," affecting persons who are denied any of the rights secured by the act, must be understood in the sense of causes of civil action and causes of criminal prosecution. United States *v.* Rhodes, 1 *Abb. U. S.* 28, 33; *Am. L. T. U. S. Cts.* 22.

Cause list. An English name for a list of causes analogous to the calendar (*q. v.*) or docket, so called, in American courts, made out for each day during the sittings of the courts, and exhibited in a conspicuous place in each court. The list is generally made out at the close of the previous day's sitting, and appears in the newspapers on the following morning.

Cause of action, is synonymous with right of action, right of recovery. Graham *v.* Scripture, 26 *How. Pr.* 501.

Cause of action is not synonymous with chose in action; the latter includes debts, &c., not due, and even stocks. Bank of Commerce *v.* Rutland & Washington R. R. Co., 10 *How. Pr.* 1.

Cause of action, in a statute defining jurisdiction of a local court, was held to include personal actions only, and not to embrace an action to set aside a deed of lands lying in another state. Bennett *v.* Erving, 4 *Robt.* 671.

The provision of Ill. Rev. Stat. 785, § 85, that "the cause shall be considered as abandoned" if transcript be not filed in two years, means the particular suit, and not the cause of action. Koon *v.* Nichols, 85 *Ill.* 155.

Cause of action is properly the ground on which an action can be maintained; as when we say that such a person has no cause of action. But the phrase is often used to signify the matter of the complaint or claim on which a given action is in fact grounded, whether or not legally maintainable. *Mozley & W.*

CAUSES CÉLÈBRES. Celebrated trials. The title of some collections of reports of decisions of marked interest and importance; a prominent one being a French collection of causes in the 17th and 18th centuries. The first series, in 22 volumes, is by Gayot de Pitival; the second, called Nouvelles Causes Célèbres, in 15, is by Des Essarts. *Wharton.* Thus the term in French jurisprudence resembles State Trials in English.

Secondarily a single trial or decision of remarkable character and interest is often called a *cause célèbre.* The idea is somewhat different from that conveyed by "Leading Case." A leading case is one which is of eminent importance for settling the law; *cause célèbre,* among English and American writers, is oftener applied to a trial remarkable for the parties and facts involved.

CAVEAT. Let him take heed. This word is used to designate a formal caution or notice to a court or officer, either judicial or ministerial, not to do a certain act, given by a party interested in the matter. The *caveat* is employed to prevent the admission to probate of wills, the granting of letters of administration, the issue of letters-patent for inventions, and, in the United States, the issue of letters-patent for lands. Filing the *caveat* protects the rights of the person interposing it against any new rights or claims which, without it, might arise out of the progress of the proceeding to which it relates.

Caveat, as used in the Pa. act of 1856, limiting to five years from the date of probate a contest of the validity of the will as to specific realty, "by *caveat* and action at law duly pursued," does not mean, as usually, to stop the proof of the will, but a testing, &c. Stewart *v.* Austin, 9 *Phila.* 141.

Caveat is a process formerly used in the spiritual court, and now used in the court of probate, to prevent or stay the proving of a will, or the granting of administration. A *caveat* may also be lodged in the court of chancery against enrolling a decree which it is intended to appeal to the lords justices in full court, inasmuch as after enrolment the only appeal is to the house of lords. But since the judicature act, 1873, this distinction is probably of less importance. *Brown.*

Caveat emptor. Let the buyer take heed. The purchaser must examine for himself and exercise his own judgment.

When sales of real property are in question the maxim applies, within limits, both to the title and quality of the land sold. As respects the title, it applies equally whether the vendor is in or out of possession; he cannot hold the land without some title; and the purchaser is bound to see to it, and to read the title-deeds, at his peril. He does not use common prudence if he relies on any other security. As respects the quality or condition of premises sold or leased, the purchaser or lessee must see for himself: no warranty will be implied on the part of the vendor or lessor that the land is suitable for any particular purpose, as for pasturage, or that a house on it is fit for habitation; except, perhaps, that in letting a house ready furnished there is an implied obligation that the house is in a fit state to be inhabited. There is an exception from the rule of cases of fraudulent representation on the part of the vendor, including cases of fraudulent concealment, but it does not extend to mere ignorance, on the part of the vendor, of defects in the property. And cases where the vendor is cognizant of any defect, and does not acquaint the purchaser with the facts of its existence, and where the defect is a latent one, of such a nature that the purchaser could not by the greatest attention discover it, are not within the meaning of the maxim.

When sales of personal property are in question, the maxim also applies, with like exceptions of the cases of express warranty or fraud, both to the title and the quality of the property.

No warranty by the seller of either title or quality will be implied, unless from circumstances beyond the mere fact of a sale. But very slight circumstances will be sufficient to sustain an implied warranty of title. The rule of the civil law, expressed by the maxim *caveat venditor*, by which a warranty of title was implied on every sale of a chattel, was not adopted by the common law, and the rule *caveat emptor* was formerly of extensive application as to questions of title, but has been gradually restricted. As respects quality, the general rule is that the maxim applies to an agreement for a specific article in its then state, no warranty of its fitness or merchantable quality being implied; but if a person is employed to make a specific chattel, a contract is implied on his part that it shall be fit for the purpose for which it is ordinarily used. And upon a sale of merchandise not by sample and without warranty, and where no opportunity of inspection is given to the buyer, a condition that it shall fairly and reasonably answer the description in the contract is implied. The various circumstances under which the maxim does or does not apply in regard to the quality of goods sold are fully considered and classified in the case of Jones *v.* Just, *L. R.* 3 *Q. B.* 197. *Broom Max.* 777.

The full form of the maxim shortly stated as *caveat emptor*, is, *caveat emptor; qui ignorare non debuit quod jus alienum emit;* let the buyer beware, who ought not to be ignorant that he is buying the right of a third person.

The maxim shortly stated as *caveat emptor* — let the buyer beware — applies to purchasers of all descriptions of property; and in the case of real estate and chattels real is applied in the following manner: A. sells to B. land with a defective title, A. not knowing of the defect; B., though evicted, has no remedy against A.; nor does it make any difference, though the defect were known to A., if it were a patent defect, and might, by reasonable diligence, have been also known to B.; and this, though A. had, in the course of the negotiations for sale, made misrepresentations respecting the alleged defect. If, however, the defect be a latent one, known to the vendor, but not disclosed to the purchaser, and which by proper diligence the purchaser could not possibly have discovered, in this case *caveat emptor* does not apply, and the purchaser is not bound to the contract, either in law or in equity. If the case be one of misdescription only, in the particulars of the property contracted to be sold, and does not go to the whole subject of the contract, this will be set right by a court of equity, and an equivalent will be ordered to be given by way of compensation. The same rule applies to the purchase of specific chattels personal; where the purchaser has an opportunity of judging of the quality of the goods purchased, he takes them, in the absence of express warranty, with all their defects. Where, however, he confides in the judgment of the seller, the law implies a warranty that they will be suitable for the particular purpose designed. On the whole, it appears that the law requires the purchaser, in all cases, to use the utmost diligence in the investigation of the right and title to, and nature, estate, and quality of, the thing to be purchased; and if he do not, then, in the absence of positive fraud on the part of the vendor, he (the purchaser) must take the thing purchased as he finds it, with all faults. *Wharton Leg. Max.*

Caveat emptor is an ancient rule of the common law, and stands in contradistinction to the rule of *caveat venditor* of the civil law. An implied warranty of title on a sale of chattels is common to both the common and civil law. But in regard to the responsibility of the seller to answer for the quality or goodness of the articles sold, there exists between these two systems of jurisprudence an irreconcilable disagreement. According to the civil law, a sound price implies a warranty of the soundness of the article sold. By the common law, the vendor is not bound to answer to the vendee for the quality or goodness of the articles sold, unless he expressly warrants them to be sound and good, or unless he knew them to be otherwise, and used some art to disguise them, or unless they turn out to be different from what he represented them to the buyer; in other words, there must be either an express warranty or fraud to make the vendor answerable for the quality or goodness of the articles sold. But in many cases the English common-law courts have so far departed from the common-law rule as to hold that in every sale without any express warranty there is an implied warranty that the goods are merchantable, and, if sold for a particular purpose, that they are reasonably fit and proper for such purpose. New York courts have in several cases applied the civil-law rule of *caveat venditor* to sales by sample. This is the only inroad they have made upon the common-law rule of *caveat emptor;* and the application of the doctrine is limited to sales where the purchaser has no opportunity of inspecting the article purchased. Hargous *v.* Stone, 5 *N. Y.* 73.

Caveat venditor. Let the seller take heed. A maxim of the civil law,

the exact opposite of the rule of the common law upon the same subject, expressed by the maxim *caveat emptor*. According to the civil law, the seller was held responsible both for the validity of the title to the property sold and for its quality or goodness, in all cases, at least, where a sound price was paid. The contrary rule having been adopted as a general principle by the common law, the cases to which that rule is deemed not applicable are frequently said to be governed by the maxim *caveat venditor*. Such cases are executory sales, agreements for the sale of goods to be subsequently manufactured or produced, and sales where the buyer has no opportunity to inspect the article purchased.

The rule of the civil law is *caveat venditor*, and, therefore, if the seller wishes to secure himself from future responsibility, in case the article sold should afterwards be found to be different in kind or quality from what the parties supposed it to be, he must *take care* or *provide against* such a responsibility, by a particular agreement with the purchaser. The rule of the common law, on the other hand, is *caveat emptor*, which implies that the purchaser must *take care* to examine and ascertain the kind or quality of the article he is purchasing, or *provide against* any loss he may sustain from his ignorance of the kind or quality of the article sold, or from his inability to examine it fully, by an express agreement of warranty that the article purchased is of the particular kind or quality which the parties supposed it to be. It will be seen, therefore, that the principal difference between the rules of the civil law and the common law is as to the party upon whom the responsibility is thrown of securing himself, either by a full examination of the article, or by an express stipulation against future liability or loss; and it is not so material which way the law is established, as that the rule should be uniform, and perfectly understood, so that both buyer and seller may know with certainty what the law is, and each be enabled to protect his own rights by the form of the contract. Wright *v.* Hart, 18 *Wend.* 449.

Caveat viator. Let the traveller beware. This phrase has been used as a concise expression of the duty of a traveller on the highway to use due care to detect and avoid defects in the way. Cornwall *v.* Metropolitan Commissioners of Sewers, 10 *Exch.* 771, 774.

CEDE. To transfer; used particularly of a transfer of territory from one government to another.

To cede is not a technical word. In a direction in a will, to cede specified lands, on the death of testator's widow, to another person, the word cede may be taken as the testator is most likely to have understood it. To cede is to yield up. The probable meaning of the direction is that the lands are to be yielded up. Den *v.* Pierson, 16 *N. J. L.* 181.

CEDO. I grant. The word ordinarily used in Mexican conveyances to pass title to lands. Mulford *v.* Le Franc, 26 *Cal.* 88, 108.

CEDULE. In French law, is the technical name of an act under private signature. Campbell *v.* Nicholson, 3 *La. Ann.* 458.

CENSUS. An official enumeration of the persons inhabiting a state or country, with other statistical information, showing the numbers and condition of the people. Such an enumeration is made for the United States in every tenth year, in obedience to a constitutional provision.

CENTRAL CRIMINAL COURT. A court for trial of offences committed in London, Middlesex, and certain suburban parts of Essex, Kent, and Surrey, and said to be the most important of English criminal courts. This court was erected in 1834, by Stat. 4 & 5 Wm. IV. ch. 36, which, reciting that it was expedient for the more effective and uniform administration of justice in criminal cases that offences committed in the metropolis, and certain parts adjoining thereto, should be tried by justices and judges of oyer and terminer, and gaol delivery, in the city of London, proceeded to constitute this new tribunal. The judges or commissioners of the court are the lord mayor of London; the lord chancellor, or lord keeper; the judges of the courts at Westminster; the judge of the admiralty; the dean of the arches; the aldermen of London; the recorder and common sergeant of London; the judge of the city of London court; any person who has been lord chancellor or lord keeper, or a judge of any of the courts at Westminster; and such others as the crown shall from time to time appoint.

To this court her majesty may issue commissions of oyer and terminer, and gaol delivery, for the trial of all cases of treasons, murders, felonies, and misdemeanors committed within the city of London and county of Middlesex, and in certain specified parts in the counties

of Essex, Kent, and Surrey, all of which constitute a district which is to be, for the purposes of that act, deemed and taken to be one country. Subsequent statutes have enabled the court to try for offences punishable in admiralty, and for offences committed outside the territory above described, when sent there for trial by order of the queen's bench.

The court sits at least twelve times in the year. Practically, those who preside in it for the trial of offences are, one or more judges of the superior courts of law at Westminster, the recorder of London, the common sergeant of the city of London, and the judge of the city of London court. *Mozley & W.; Wharton.*

CENTUMVIRI. A hundred men. The name of a body of Roman judges, consisting properly of one hundred and five men, selected three from each of the thirty-five tribes. Ordinarily, they constituted four tribunals; but the judgment of the entire body was required for the decision of the most important questions of law, which were hence called *causæ centumvirales.*

CEPI. I have taken. Was of frequent use in the old Latin forms of returns of a sheriff, upon process, as follows:

Cepi corpus. I have taken the body. This was used as the technical name of the return made by a sheriff to a *capias*, that he had taken the body of the party; and is derived from the two emphatic words of the return. The form was varied according to circumstances, *cepi corpus* merely being the proper return where the party had been released on bail; *cepi corpus et est in custodia*, — I have taken the body and it is in custody, — where he was in actual custody; *cepi corpus et paratum habeo*, — I have taken the body and have it ready, — originally implied that the party was in actual custody, but afterward became the usual return where he had been arrested and discharged on bail.

CEPIT. He took. This was the emphatic word formerly used in the Latin form of writs of trespass for taking personal property, and in declarations in trespass and replevin. Where living chattels had been taken, the form was *cepit et abduxit*, he took and led away; where other goods, *cepit et asportavit*, he took and carried away. The word *cepit* is still used as descriptive of the action in certain cases; as in replevin, when the action is for the taking only, it is said to be "in the *cepit.*" *Cepit in alio loco* — he took in another place — were the distinctive words of a plea in replevin, by which the defendant alleged that he took the property in another place than that mentioned in the declaration. It was the usual plea where the defendant intended to justify the taking and claim a return.

CERTAINTY. Is sometimes used in jurisprudence in its familiar sense of assurance; confident belief. But in its more frequent employment as a technical term it means clearness, accuracy, lucidity in written statement; a plain, clear, and distinct setting down of things so that they may be understood; and is the opposite of ambiguity and indistinctness. Thus, the statements made in a written instrument are said to be certain, not when they are known to be true, but when they are couched in such language that no doubt can arise of the meaning intended.

The older law-books distinguish three kinds of certainties: 1. Certainty to a common intent. This describes a mode of statement in which words are used in their ordinary meaning, though by argument or inference they may be made to bear a different one. 2. Certainty to a certain intent. This is when the meaning may be understood upon a fair and reasonable construction, without recurrence to possible facts which do not appear. 3. Certainty to a certain intent in particular. This is that technical accuracy of statement which precludes all question, inference, or presumption against the party pleading. The last degree of certainty has long been deemed unnecessary, except when an estoppel is to be created, or in some pleas, such as are not favored. The second is required in an indictment or accusation, also, in a declaration, except as the strict rule of pleading has been relaxed by statutes allowing amendments. The first is sufficient in a defence, and, of course, in all

ordinary instruments such as are construed according to the intent of the party. See *Co. Litt.* 303 *a*; *Com. Dig. tit. Pleader*, ch. 17; *Steph. Pl.* 380; Mosely *v.* White, 1 *Port.* 410; United States *v.* Forrest, 3 *Cranch C. Ct.* 56; Spencer *v.* Southwick, 9 *Johns.* 314; Fuller *v.* Hampton, 5 *Conn.* 416, 423.

CERTIFICATE. A writing, properly authenticated, made by a court, or a judge or officer thereof, to give notice to another court of any thing done in the former. A writing giving assurance that a fact has or has not taken place; made, generally, for the use of a court, judge, or officer.

The return of a constable of the service of a summons is a certificate, in the technical as well as the liberal sense of the term. Miller *v.* Larmon, 38 *How. Pr.* 417.

A clause in a will to the effect that "my certificates that are in the hands of my brother I desire may be given to my husband, to dispose of as he may think proper," held, under the circumstances, not to include warrants for bounty lands, the brother of the testatrix having had at that time some other instruments in his possession more properly called "certificates." Edmondson *v.* Bloomshire, 11 *Wall.* 382.

Certificate for costs. A memorandum signed by the judge before whom a cause has been tried, declaring some fact required by law to entitle the party to whom it is given, to costs.

Certificate, or certification, of assize of novel disseisin. An obsolete English writ, which lay to obtain a second trial of an assise where there was surprise or mistrial on the first trial.

Certificate of check. By custom of bankers, recently established, the cashier or teller may certify a check, which is usually done by writing or stamping "good" upon the face of it. That this binds the bank to pay any buyer for value on faith of it, see GOOD.

Certificate of deposit. A writing, customarily issued by banks or bankers, giving assurance that a certain person named has deposited money with the bank, which is payable to a person named as payee, or to the order of the depositor.

A certificate of deposit is a negotiable security, and, as far as negotiability is concerned, is placed on the same footing as promissory notes. Welton *v.* Adams, 4 *Cal.* 37.

Certificate of registry. A custom-house document, certifying that a vessel has been registered in accordance with the requirements of the registry law. The object of the registry is to give the vessel a national character.

CERTIFIED CHECK. A check with an indorsement across its face that it is good. When made by one properly authorized, it is an admission that the drawee has funds of the drawer, wherewith to pay the check. It imports, by the decisions of several of the leading commercial states, an undertaking on the part of the drawee to pay it; and is equivalent to an acceptance.

CERTIORARI. Originally, and in English practice, a *certiorari* is an original writ, issuing out of the court of chancery or the king's bench, and directed in the king's name to the judges or officers of inferior courts, commanding them to certify or to return the records or proceedings in a cause depending before them, for the purpose of a judicial review of their action. *Jacob;* 1 *Bac. Abr.; Com. Dig.* It derives its name from the emphatic word in the old Latin form of the writ, which ran as follows: *quia certis de causis certiorari volumus*, because we wish to be certified concerning certain causes; and the operation of it is to require the court below to certify the record of its proceedings for transmission to the superior court. Formerly, the writ would lie, very generally, in both civil and criminal cases; but its use is understood to have been, of late, considerably restricted by statute.

In the United States, the use of the *certiorari* has been extended or regulated, in the various states, by statute; and the jurisdiction to review by this writ varies accordingly. It has, however, been extensively used in aid of a writ of error, where either party alleges a diminution or deficiency of the record, and desires a *certiorari* to bring up a complete return; also, to review the proceedings and judgments of, and correct errors committed by, inferior courts and judges, in their exercise of an authority conferred by statute, and not pursuing the course of the common law; also, to review the determinations of special tri-

bunals, commissioners, magistrates, and officers exercising judicial powers affecting the property or rights of the citizen, when they act in a summary way, or in a new course, different from that of the common law; also, in aid of the writ of *habeas corpus*, in a class of cases where the return to the writ will disclose an imprisonment resulting from legal proceedings, and it is necessary for the petitioner to bring up the proceedings for review, in order to present the merits of his case.

There is a difference between a *certiorari* in the king's bench and chancery. In the king's bench, the very record itself is removed, and that which remains in the court below is but a scroll. But usually, in chancery, if the *certiorari* be returnable there, they remove but the tenor of the record. 2 *Hale Pl. Cr.* 215.

Bill of certiorari, is an original bill, filed for the purpose of removing a suit pending in some inferior court of equity into the court of chancery, on account of some alleged incompetency of the inferior court, or some hardship in its proceedings. Such bill states the proceedings, so far as they have gone; the cause of the incompetency of the inferior court, by suggesting that the cause is out of its jurisdiction; or that the witnesses live beyond it; or that the defendant lives beyond it, and is not able, from age, infirmity, or distance, to follow the suit there; or that for some other cause substantial justice is not likely to be done to him; and then prays the writ to certify and remove the record and cause into the superior court. Upon filing the bill, and some auxiliary proceedings prescribed by the practice, a writ of *certiorari* is obtained; being usually addressed to the judge of the inferior court, requiring him to certify, or send to the court, the tenor of the bill or plaint there, with the process and proceedings thereupon.

Upon the writ of *certiorari* being served and returned, and filed, and on a further order, on motion or petition, necessary in some cases, to retain the bill removed, the cause is deemed removed from the inferior court; and the bill exhibited in such court is considered as an original bill in the court of chancery, and is proceeded upon as such.

Certum est quod certum reddi potest. That is certain which can be made certain; that is sufficiently certain which can be reduced to certainty. This maxim is to be understood as peculiarly applicable to the construction of written instruments; which are never to be held void for any uncertainty which may be reduced to a certainty. Thus, in a lease for years, there must be a certainty as to the commencement and duration of the term; but that need not be ascertained at the time, if a day will arrive which will make it certain. So the subject-matter of any agreement, although not described with sufficient certainty for identification, may be made certain by words which may by reference be reduced to a certainty. In a variety of cases of contracts for the sale of goods, the quantity is indefinite at the time the contract is made, and can only be considered certain by the application of this maxim. Again, where by law a particular thing is required to be done, but no period is limited within which it must be done, the act must be done within a reasonable time; and what is a reasonable time may be ascertained by evidence, and, when so ascertained, is declared by Lord Ellenborough to be as fixed and certain as if specified by act of parliament.

Cessante ratione legis, cessat ipsa lex. The reason of the law ceasing, the law itself ceases. When the reason for any particular law ceases to exist, the law itself is no longer operative. This maxim is founded upon the principle that reason is the soul of the law. When the reason for the existence of any rule of law ceases to have force, the rule itself should cease to have effect. The maxim is not, however, to be read literally, and in its widest sense, but as a guide in the application of rules of law to cases in which the reason for the particular rule does not exist. Thus, in the law of principal and agent, it is an established rule, that where a contract not under seal is made with an agent in his own name, for an undisclosed principal, and on which, therefore, either the agent or principal may sue, the defendant, as against the latter, is entitled to be placed in the same situ-

ation at the time of the disclosure of the real principal, as if the agent dealing in his own name had been in reality the principal; and this rule is to prevent the hardship under which a purchaser would labor, if, after having been induced by peculiar considerations — such, for instance, as the consciousness of possessing a set-off — to deal with one man, he could be turned over and made liable to another, to which those considerations would not apply, and with whom he would not willingly have contracted. When, however, the party contracting either knew, or had the means of knowing, or must, from the circumstances of the case, be presumed to have known, that he was dealing not with a principal, but with an agent, the reason of the rule ceases, and there the right of set-off cannot be maintained. *Broom Max.* 161. So the privilege from arrest of a member of parliament or a member of congress ceases at a certain time after the termination of the legislative session, because the public has then no longer that immediate interest in the personal freedom of the individuals composing the representative body which is the reason of the rule.

CESSIO; CESSION. 1. A transfer, or assignment; particularly a transfer of territory from one government to another.

2. In ecclesiastical law, when an ecclesiastical person is created bishop, or a parson of a parsonage takes another benefice, without dispensation, or if otherwise not qualified, &c., their first benefices are said to become void by cession.

Cessio bonorum. Surrender of goods. This phrase designated, in the civil law, an assignment of his property by a debtor for the benefit of his creditors. It is sometimes used in a similar sense in modern law to describe the surrender of an insolvent's estate and effects to his creditors. Jacob defines it as a process in the law of Scotland, similar in effect to bankruptcy.

Cession des biens, in French law, is the surrender which a debtor makes of all his property to his creditors, either voluntarily or by compulsory proceedings analogous to bankruptcy.

CESTUI; CESTUY. He. Used only in law French phrases, the three following being the most common:

Cestui que trust. He in trust for whom another is seised of lands or tenements, or is possessed of personal property; he who has a right to a beneficial interest in an estate the legal title to which is vested in a trustee. A *cestui que trust* is the real, substantial, and beneficial owner of lands held in trust, as distinguished from the trustee. He is the owner of the equitable estate, as the trustee is of the legal estate. The term beneficiary (*q. v.*) has been suggested, and is often used, as an English equivalent for *cestui que trust*, the latter being a barbarous Norman law French phrase, and ill-adapted to the English idiom.

Cestui que use. He to whose use another is enfeoffed of lands or tenements; he who has a right to the profits of lands the legal title to which is vested in a feoffee to uses. A *cestui que use* was the substantial and beneficial owner, as distinguished from the feoffee to uses, who had the legal title and possession, with the duty of defending the same, and the right to direct the making of estates thereof. By the statute of uses (27 Hen. VIII. ch. 10), the intervening estate of the feoffee to uses was extinguished, and thereafter the *cestui que use* became the legal owner, to all intents and purposes, the use being executed in him.

Cestui que vie. He for whose life lands or tenements are granted; he whose life is the measure of the duration of an estate. Thus, if A grant lands to B during the life of C, C is the *cestui que vie*, and B is termed a tenant *pur autre vie*.

CHALLENGE. 1. An exception to jurors who are returned to pass upon a cause on its trial.

A challenge in this sense is of two kinds: to the array, and to the polls.

A challenge to the array is an objection to all the jurors returned, collectively; not for any defect in them, but for some partiality or default in the officer who selected, summoned, or arrayed the panel. It is either a principal challenge, or a challenge to the favor.

The following are common grounds of principal challenge to the array; viz., that a juror summoned was nominated by either party; that the officer making the array is of kindred or affinity to either party, within the ninth degree; that such officer is liable to have his goods levied on by either party, or is his servant, counsellor, or attorney, or acts as his advocate; that he is in some way interested (against the party challenging) in the question to be tried, either in the same cause, or in another cause, or matter, depending on the same point of controversy; that he has been godfather to a party's child, or the party to his; or that either party has brought an action against the officer; or that there is an action depending between the latter and the party, which implies malice, such as slander, battery, and the like.

A challenge to the array for favor is for any causes which are not deemed in themselves conclusive evidence of partiality, but which imply at least a probability of bias or partiality in the officer; as if there is a relation by marriage between the cousin or son of the officer, and the party; that the party is subject to have his property levied on by the officer; or that the latter hath an action of debt, or the like, against the party; that the officer and party are fellow-servants; or the party servant to the officer; and so of any cause from which it may be inferred that the officer is not entirely indifferent between the parties. By statute, in some of the states of this country, restrictions have been placed upon this species of challenge, so that it has almost, if not entirely, gone out of use in civil actions.

A challenge to the polls is an objection to particular jurors, and may be made for any matter tending to disqualify them from serving; and this is either a principal challenge, or a challenge to the favor of the juror. The same causes, whether principal or to the favor, which will set aside the array are equally valid against the individual juror, so far as they apply.

The following are some of the causes of principal challenge to the polls; viz., that the juror does not possess the necessary qualifications prescribed by statute, as that he has not a sufficient freehold or other property, &c.; that he is an alien; that he is within the age of twenty-one years, or above a certain age; or that he is an idiot or lunatic. The above is called a challenge *propter defectum*. There is another kind of principal challenge to the polls, called challenge *propter affectum*, by reason of some supposed bias or partiality. Thus it is principal cause of challenge that the juror has before given an opinion on the subject in controversy; that he has even formed an opinion on the guilt or innocence of one on trial for a felony; that, in a case involving capital punishment, he has conscientious scruples against the latter; that he is of kin by blood or marriage to either party within the ninth degree; that he is godfather to the party's child, or the party godfather to the juror's child; that the juror has land which depends upon the same title as the land in question; and so in all other cases where the juror has an interest in the action, direct or collateral; that he has before given a verdict in the same cause, or upon the same title or matter, though between other parties; that he was chosen arbitrator in the same cause, by one of the parties, and had entered upon an examination of it; that he is counsellor, tenant, or servant of either party; that he is of the same society or corporation with either party; although it was held in Purple *v.* Horton, 13 *Wend.* 9, to be no ground of challenge to a juror that he was a freemason, where one of the parties to the suit was a freemason, and the other not. So, also, it is principal cause of challenge to a juror, that, since he has been returned, he has eaten or drank at the expense of one of the parties; that he has been labored with by one of the parties, and money or other thing given him for his verdict; or that an action implying malice or displeasure is pending between the juror and one of the parties. Another kind of principal challenge to the polls is called *propter delictum;* which is an objection that the juror has been convicted of a crime which affects his credit and renders him infamous, as a conviction of treason, felony, perjury, forgery, or

other offence punishable with death or imprisonment in a state prison, or other infamous corporal punishment; but in this case his competency is generally restored by a free pardon.

Challenge *propter honoris respectum* has been denominated another kind of this challenge; as, if a lord of parliament is called as a juror, he may challenge himself, or have his writ of privilege; but it does not appear that either party can challenge him.

The challenge to the polls for favor is of the same nature with the principal challenge *propter affectum*, but of an inferior degree. The general rule is, that the juror must be indifferent; and, if it appears that he is not, this may be made the subject of challenge, either principal or to the favor, according to the degree of probability of his being biased. The causes of the latter are infinite; and it may be generally stated that when, from circumstances, it appears probable that a jury may be biased in favor of or against either party, and yet such circumstances do not amount to matter for a principal challenge, it may then be made a challenge to the favor. The effect of these two species of challenge is the same.

A challenge was given by the common law to persons on trial for felonies, which is called a peremptory challenge, because made by the party without assigning any reason, and which the court is bound to allow. The number of these was limited to thirty-five, but has been reduced by statute in most of the states. In some it is allowed only in criminal cases, in others only in such cases when the offence is capital, while in a few it has been extended in a modified degree to civil cases.

2. An exception taken against things; as a writ, count, or declaration. It is seldom if ever used in this sense now, but is confined to exceptions to jurors returned for the trial of a cause.

3. An exception or objection to a particular judge hearing or presiding at the trial of a cause, for bias, prejudice, interest, &c., used in some of the states.

4. An invitation or request, either verbally or in writing, given or made by one person to another, to fight; used chiefly of an invitation to fight a duel.

In most of the United States, as well as in England, sending a challenge is a punishable offence; and, under this rule, any words spoken or written, or any signs uttered or made to any person, expressing or implying, or intended to express or imply, a desire, request, invitation, or demand to fight a duel, or to meet for that purpose, are deemed a challenge. *Report of a Penal Code, N. Y.* § 298; State *v.* Perkins, 6 *Blackf.* 20; Commonwealth *v.* Tibbs, 1 *Dana*, 524.

CHAMBER. Has a secondary meaning in jurisprudence, apparently derived from its original one of apartment or room; that of a public body, or court. Thus we speak of the star chamber, or exchequer chamber; of the chamber of deputies, or of peers; of a chamber of commerce. As such body can only act in sessions, that is, in its apartment, the name of the apartment is put for the association.

Chambers. The office or private rooms of a judge, in which he transacts business, makes orders, approves securities, &c., which do not require to be done in open court. Besides his powers when holding his court, there are many acts of subordinate importance which a judge may perform as an individual officer, and anywhere where he may be. These acts, usually transacted in a side room or office allotted to the judge for his use, are said to be done in chambers.

So, in London, the offices of barristers are commonly called chambers.

The phrase at chambers is a technical one. The jurisdiction of a judge at chambers is incidental to, and grows out of, the jurisdiction of the court itself. It is the power to hear and determine, out of court, such questions arising between the parties to a controversy as might well be determined by the court itself, but which the legislature has seen fit to instruct to the judgment of a single judge, out of court, without requiring them to be brought before the court in actual session. It follows that the jurisdiction of a judge at chambers cannot go beyond the jurisdiction of the court to which he belongs, or extend to matters with which his court has nothing to do. And the constitution, in granting such jurisdiction at chambers to the judges of the several courts of the state, as may be directed by law, is to be understood as lim-

iting the jurisdiction of each to such subject-matters as are within the jurisdiction of his proper court, and to which it is, *ex vi termini*, limited.

Thus, under a constitutional provision that the judges of the various courts may have such jurisdiction at chambers as the legislature shall prescribe, the legislature cannot go so far as to confer authority to the judge of one court, sitting at chambers, to act in a cause pending in another court. Pittsburg, &c. Railway Co. *v.* Hurd, 17 *Ohio St.* 144.

CHAMBERLAIN. Originally a person who has the management and direction of a chamber. Hence the word has come, in England, to be the title of several offices of high dignity, such as the lord chamberlain, to whom belongs the government of the palace at Westminster, and who attends the queen in opening parliament; the lord chamberlain of the household, who has the oversight of officers pertaining to the royal residence; and the chamberlain of London, who keeps the city moneys, &c.

Chamberlain is also used in some American cities as the title of an officer corresponding to treasurer.

CHAMPERTY. The offence of prosecuting or defending (or, by many authorities, of agreeing to prosecute or defend), whether by personal services or furnishing funds, a suit in which one has no legitimate interest, upon a corrupt bargain with the real party that the two shall divide the land (*campum partire*) or other subject-matter realized, in the event of success. Champertor: a purchaser or promoter of another person's suit; one chargeable with champerty.

Champerty is a species of maintenance. Such bargaining has been from early times forbidden and punishable by both the civil, common, and statute law, by fine and imprisonment and forfeiture of goods, and the contract itself is void. It was so strongly disapproved by the common law, that the main reason (Blackstone gives) why a chose in action was not assignable was because no man should purchase any pretence to sue in another's right. But modern legislation, in many of the United States, has much relaxed the stringency of the old law upon this subject.

Every champerty implies maintenance, but every maintenance is not champerty. 2 *Inst.* 208. The distinction between them is, that, where there is no agreement to divide the thing in suit, the party intermeddling is guilty of maintenance only; but where he stipulates to receive part of the thing in suit, he is guilty of champerty. See MAINTENANCE.

Several of the definitions given seem to make champerty consist in the agreement to prosecute or defend for a share in the result; and not in acts of prosecuting or defending done in pursuance of such an agreement. 4 *Bl. Com.* 135; Martin *v.* Amos, 13 *Ired. L.* 198; Weakly *v.* Hall, 13 *Ohio*, 167. The mere agreement, not yet carried into effect by any acts of maintenance, is doubtless rendered void by the law against champerty, and may be punishable by statute; but the authorities do not all treat it as embraced by the word. In the stricter use of the term, in American decisions, it seems to mean the prosecution or defence of the suit, for a share agreed upon; not the mere agreement for a share.

Transactions nearly akin to champerty, and often classed under that term, but better designated as buying demands for suit, and buying pretended titles, consist in the purchase outright of an evidence of debt or right in action, which the purchaser knows cannot be collected except by suit, or of lands of which possession cannot be obtained from the vendor, but only by action against a third person holding them under claim of title. Bargains of these classes, as well as bargains between attorneys or counsel and their clients for contingent compensation, or a share in the success of the suit, have been so extensively regulated by the statute, that no sound judgment can be formed of the application of the law of champerty to any particular case, without an examination of the statute of the state; and many decisions, using the expression that a contract is or is not champertous, mean no more than that it is or is not invalid by the local law.

Champerty is the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute, or

some profit out of it. The term covers all transactions and contracts, whether by counsel or others, to have the whole or part of the thing or damages recovered. Holloway *v.* Lowe, 7 *Port.* 488; Poe *v.* Davis, 29 *Ala.* 676; Thurston *v.* Percival, 1 *Pick.* 416; Key *v.* Vattier, 1 *Ohio*, 132; Rust *v.* Larue, 4 *Litt.* 417; Brown *v.* Beauchamp, 5 *T. B. Mon.* 416.

Champerty is the carrying on a suit in the name of another, but at one's own expense, with the view of receiving as compensation a certain share of the avails of the suit. Ogden *v.* Des Arts, 4 *Duer*, 275, 283; Hovey *v.* Hobson, 51 *Me.* 62.

Champerty is defined in the old books to be the unlawful maintenance of a suit, in consideration of some bargain to have a part of the thing in dispute, or some profit out of it. Stanley *v.* Jones, 7 *Bing.* 369.

A promise, after a suit is determined, to pay an attorney a sum of money out of the moneys collected in that suit, is not champertous. Walker *v.* Cuthbert, 10 *Ala.* 213.

It is not essential to the offence of champerty that there be a suit commenced at the time the agreement is made. Rust *v.* Larue, 4 *Litt.* 417.

An agreement to pay an attorney, for his services in conducting a slander suit, and, in the event of success, a sum "equal to one-tenth" of the damages recovered, was held not champertous, on the ground that it did not import an undertaking to give any part of the damages recovered, but an obligation to pay a contingent fee, dependent in amount on the sum recovered. Evans *v.* Bell, 6 *Dana*, 479.

An agreement to pay counsel a fee equal to one-fourth of the value of the land that might be recovered, less the costs, was held not champertous, on the ground that the agreement was not to give a part of the thing in contest; the reference to one-fourth the value of the land, was only for the purpose of measuring or ascertaining the fee. Ramsey *v.* Trent, 10 *B. Mon.* 336.

A, holding a judgment against B, agreed with D, if he, D, would search out property of B, on which execution could be levied, he should receive as a compensation for his services one-third of the amount by this means collected. Held, that there was in this contract nothing in the nature of champerty, neither would there have been, had D agreed to pay his part of the expenses. Hickey *v.* Baird, 9 *Mich.* 32.

It is not champerty for a man to advance money to carry on a suit for lands for a share in them, if it may be that his wife will inherit the lands; the potential interest of the wife is a sufficient reason that the husband should join in measures to recover the lands. Thallhimer *v.* Brinckerhoff, 3 *Cow.* 623; Gilleland *v.* Failing, 5 *Den.* 308.

A sale of land by one who purchased the same on an execution sale, but never obtained possession, is not within the laws against champerty. Snowden *v.* McKinney, 7 *B. Mon.* 525; Little *v.* Bishop, 9 *Id.* 240.

Where there is an enforceable judgment for the recovery of lands, these lands, though held adversely, may be sold without violating the laws against champerty. Batterton *v.* Chiles, 12 *B. Mon.* 348.

The assignment of an entry, in Kentucky, does not come within the statute against champerty and maintenance. Oldham *v.* Rowan, 4 *Bibb*, 545; see Denn *v.* Pissant, 1 *N. J. L.* 220.

A judicial sale of lands, made by order of a court of competent jurisdiction, is not to be deemed void for champerty or maintenance. The principles of the common law and the statutes, in relation to champerty, do not apply to judicial sales, or to sales made under a judgment, order, or decree of a court having competent jurisdiction to order the sale. Hoyt *v.* Thompson, 5 *N. Y.* 320.

A purchase made without knowledge of the pendency of the suit is not an act of champerty. Clowes *v.* Hawley, 12 *Johns.* 484.

Where a person holding lands adversely assents to the purchase thereof by a third person, such purchase is not champertous. McIntire *v.* Patton, 9 *Humph.* 447.

The *bona fide* purchaser of a mere right of action is not guilty of maintenance or champerty. Danforth *v.* Streeter, 28 *Vt.* 490; s. p. Verdier *v.* Simmons, 2 *McCord, Ch.* 385.

A guaranty by an attorney of a claim left with him for collection is not champertous. Gregory *v.* Gleed, 33 *Vt.* 405.

CHANCE-MEDLEY. An old term for a casual encounter or unpremeditated affray.

CHANCELLOR. There are many officers in England bearing this title, with different affixes, but those which especially claim notice are as follows:

1. The lord chancellor, who is the presiding judge in the court of chancery; he is created by the mere delivery of the king's great seal into his custody, whereby he becomes, without writ or patent, an officer of the greatest weight and power, and superior in point of precedency to every temporal lord. He is a privy councillor by his office, and prolocutor of the house of lords by prescription. To him belongs the appointment of all justices of the peace throughout the kingdom. Formerly, as he was usually an ecclesiastic, and presided over the royal chapel, he became keeper of the king's conscience, visitor in right of the king of all hospitals and colleges of the king's foundation, and patron of all the king's livings under a certain value. He is the general guar-

dian of all infants, idiots, and lunatics; and has the general superintendence of all charitable uses in the kingdom. All this is over and above the vast and extensive jurisdiction which he exercises in his judicial capacity as the presiding judge in the court of chancery.

2. The chancellor of the duchy of Lancaster is the chief judge of the duchy court, who, in difficult points of law, used to be assisted by two judges of the common law, to decide the matter in question. This court used to be held in Westminster Hall, and was, formerly, much used in relation to suits between tenants of duchy lands, and against accountants and others, for the rents and profits thereof. 3 *Bl. Com.* 78; 3 *Steph. Com.* 347, note. It is now held in Manchester and Liverpool, the chief cities of the duchy, and is presided over by a vice-chancellor, who decides all judicial questions.

3. The chancellor of the exchequer is an officer who used to sit sometimes in court and sometimes in the exchequer chamber, and, together with the other judges of the court, saw that things were conducted to the king's benefit. His principal duties, however, are not of a judicial character, but concern the management of the royal revenue, 2 *Steph. Com.* 458; and, under the judicature act of 1873, he is deprived altogether of his strictly judicial functions.

4. The chancellor of a diocese is an officer appointed to assist a bishop in matters of ecclesiastical law, and to hold his consistory courts for him. 2 *Steph. Com.* 672.

5. As a judicial title the term chancellor has not been employed in the federal judiciary, nor in that of many of the states. It was used in New York prior to the constitution of 1846; and is, now, (1878) in Alabama, Delaware, Kentucky, Mississippi and New Jersey. How far the powers and jurisdiction of a chancellor are commensurate with those known in England is differently regulated by the statutes.

Chancellor's courts in the universities, are courts of the universities of Cambridge and Oxford, in England, of local jurisdiction. They had sole jurisdiction over all civil actions and suits, except where a right of freehold is concerned, and of all injuries and trespasses against the peace, mayhem and felony excepted, Brown *v.* Renouard, 12 *East*, 13; Thornton *v.* Ford, 13 *Id.* 635, when a scholar or privileged person was one of the parties. These, by the university charter, they were at liberty to try and determine, either according to the common law, or according to local customs: 3 *Bl. Com.* 83, note; but modern statutes require them to proceed according to the general law.

CHANCERY. In England, the old court of chancery was the highest court of judicature next to the parliament, and is of very ancient institution. The ancient jurisdiction was of two kinds: ordinary, and extraordinary. The ordinary jurisdiction was that wherein the lord chancellor, in his proceedings and judgments, was bound to observe the order and method of the common law; and the extraordinary jurisdiction was that which the court exercised in cases of equity.

The ordinary court held plea of recognizances acknowledged in the chancery, writs of *scire facias* for repeal of letters-patent, &c., and also of all personal actions by or against any officer of the court; and, by acts of parliament, of several other offences and causes. All original writs, commissions of bankruptcy, of charitable uses, and other commissions, as idiocy, lunacy, &c., used to issue out of this court, for which purposes the chancery was said to be always open; and sometimes a *supersedeas* or writ of privilege was granted here to discharge a person out of prison. A *habeas corpus*, writ of prohibition, &c., might be had from this court in vacation, and a subpœna might issue to force witnesses to appear in other courts, where the latter had no power to call them. 4 *Inst.* 79; 1 *Danv. Abr.* 776.

The extraordinary court, or court of equity, proceeded by the rules of equity and conscience, and moderated the rigor of the common law, considering the intention rather than the words of the law, equity being the correction of that wherein the law, by reason of its universalities, is deficient. On this ground, therefore, to maintain a suit in

chaucery, it is ordinarily alleged that the plaintiff is incapable of obtaining relief at common law; and this must be without any fault of his own, as by having lost his bond, &c., chancery never acting against, but in assistance of, the common law, supplying its deficiencies, not contradicting its rules. But what was termed the extraordinary jurisdiction of the court became its usual jurisdiction, and the so-called ordinary jurisdiction was occasionally brought into exercise; the chief province of the court being to administer that large portion of the law which is distinguished from the common law, and which is termed equity.

Under the judicature act of 1873 (36 & 37 Vict. ch. 66), the court of chancery is now known as the chancery division of the high court of justice, and retains all its extraordinary jurisdiction as above defined, but no part of its ordinary jurisdiction, which latter is transferred, part of it (*e.g.*, idiocy, lunacy, patents, &c.) to the court of appeal, and the other part of it to the other divisions of the high court of justice, which represent respectively the courts at present known as the courts of common law. See COURT.

In the United States, the terms chancery and court of chancery have been adopted to some extent, though the corresponding terms equity and court of equity are more frequently used. In some of the states, distinct and separate courts of chancery are established, presided over by a chancellor, and to these the appellation of courts of chancery is usually given. The English court of chancery is the model of these courts, and equity is administered in them in nearly the same manner in which it is administered in England. Other states have no separate courts of chancery; but the common-law judges are authorized to administer the rules of equity in cases properly brought before them, according to their several statutes in that respect. In the remainder of the states, the forms of actions, writs, and bills in equity have been abolished, and codes of practice have been established, which obliterate all the distinctions between actions at law and bills in equity. In these latter states, the courts apply the rules of equity or of the common law, as the justice of the case seems to require. The constitution of the United States confers, in one clause, on the federal judiciary cognizance of cases in equity as well as in law; and the uniform interpretation of that clause has been, that by cases in equity are meant cases which in the jurisprudence of England are so called, as contradistinguished from the common law. So that in the courts of the United States equity jurisdiction generally embraces the same matters of jurisdiction and modes of remedy as exist in England; and such courts exercise their jurisdiction as courts of law or courts of equity, as the subject of adjudication may require. Robinson *v.* Campbell, 3 *Wheat.* 212, 223; Parsons *v.* Bedford, 3 *Pet.* 433, 447; 3 *Story Com. on Const.* 506, 507, 644, 645; United States *v.* Howland, 4 *Wheat.* 115; 7 *Dane Abr.* art. 1, ch. 225; Foster *v.* Swasey, 2 *Woodb. & M.* 219.

CHANGE. In the sense of alteration, change imports alteration merely, without signifying whether it is for the better or worse. If a change for the better, an improvement is intended, amendment (*q. v.*) is, in jurisprudence, the proper word.

'Change is sometimes used as an abbreviation for exchange, as in the citations from 4 Abb. Pr. N. S. and 3 Sneed, below.

'Change signifies a fixed place where merchants meet, at certain hours, for the transaction of business with each other; subject to such general rules or understanding as they think proper to be governed by. White *v.* Brownell, 4 *Abb. Pr.* N. S. 162, 190.

The issuance of a dray ticket, bearing these words, "Dray ticket for fifty cents. Knoxville Iron Co.," is merely a method of keeping accounts with the draymen. Such ticket is not a 'change bill or ticket, the issuance of which is prohibited by statute, in Tennessee. State *v.* Fisk, 3 *Sneed*, 695.

Change of grade, is not predicable of macadamizing a highway, even though the surface be elevated thereby. Warren *v.* Henly, 31 *Iowa*, 31.

Change of title. Where an insurance policy provides that in case of any change of title, &c., in the property insured the insurance shall become void, there must be more than a merely nominal change to

avoid the insurance. Ayres *v.* Hartford, &c. Ins. Co., 17 *Iowa*, 176.

Thus an assignment of insured property as collateral security is not a sale, transfer, or change of title, within the meaning of such a clause in a policy. Ayres *v.* Hartford Ins. Co., 21 *Iowa*, 193.

A mere agreement between the owner of property insured and another person to represent to the creditors of the owner, in order to prevent attachments, that it had been sold to such other person, does not avoid the policy, although the policy is upon condition that the insurance shall be void in case of any sale, transfer, or change of title. Orrell *v.* Hampden, &c. Ins. Co., 13 *Gray*, 431.

But a transfer by one partner of his interest in the property insured to a copartner, will, under such a condition, avoid the policy, though made without the consent of the other members of the firm. Hartford, &c. Ins. Co. *v.* Ross, 23 *Ind.* 179; s. p. Dreher *v.* Ætna Ins. Co., 18 *Mo.* 128; Tillon *v.* Kingston, &c. Ins. Co., 5 *N. Y.* 405; and see Keeler *v.* Niagara, &c. Ins. Co., 16 *Wis.* 523.

So the expression change of title, in such a condition, does not include a mortgage. Hartford, &c. Ins. Co. *v.* Walsh, 54 *Ill.* 164.

CHARACTER. 1. The qualities which distinguish a person; the sum or result of the attributes of an individual.

2. Reputation; what persons generally believe about the qualities of an individual.

It would be well if character and reputation were used distinctively. In truth, character is what a person is; reputation is what he is supposed to be. Character is in himself, reputation is in the minds of others. Character is injured by temptations, and by wrongdoing; reputation, by slanders and libels. Character endures throughout defamation in every form, but perishes when there is a voluntary transgression; reputation may last through numerous transgressions, but be destroyed by a single, and even an unfounded, accusation or aspersion. But character has been used, again and again, in statutes and in the adjudications, in the sense of reputation: thus a libel is said to be an injury to character; the character of a witness for veracity is said to be impeached; evidence is offered of a prisoner's good character.

The word character, in the New York act of March 20, 1848, punishing abduction of a woman of previously chaste character, for purposes of prostitution, means, not mere reputation, but actual qualities. To sustain a prosecution, the woman must have been actually chaste and pure, in conduct and principle, at the time of the commission of the offence, or the commencement of the acts on the part of the accused which resulted in the abduction. But although she had previously fallen from virtue, yet if she has subsequently reformed and become chaste, she may be the subject of the offence declared in the statute. Carpenter *v.* People, 8 *Barb.* 603.

The expression chaste character, in the New York act of 1848, confining the punishment of seduction to cases of seducing females of previous chaste character, means actual personal virtue, — that the female was actually chaste and pure in conduct and principle, — not mere reputation. Crozier *v.* People, 1 *Park. Cr.* 453; Safford *v.* People, *Id.* 474; People *v.* Kenyon, 5 *Id.* 254.

Character, in section 2586 of the Iowa code, — which provides that if any person seduce and debauch any unmarried woman, of previously chaste character, &c., — signifies that which the person really is, in contradistinction to that which she may be reputed to be. Andre *v.* State, 5 *Iowa*, 389; Boak *v.* State, *Id.* 430.

An unmarried woman who has been unchaste may reform and acquire a chaste character, so that her subsequent seduction will be a crime within the Iowa Rev. Code, § 4209. State *v.* Carron, 18 *Iowa*, 372.

Character is the slow-spreading influence of opinion arising from the deportment of a man in society; as a man's deportment, good or bad, necessarily produces one circle without another, and so extends itself till it unites in one general opinion. That general opinion is allowed to be given in evidence. Lord Erskine, *arg.*, in King *v.* Hardy, 24 *St. Tr.* 1079.

Evidence as to a man's general character means evidence as to his reputation among those to whom his conduct and position are known. His disposition or tendency to commit the particular offence with which he is charged cannot be inquired into, nor will the individual opinion of a witness be received as testimony from which to form an estimate of the character of the accused; but the testimony must be as to his general standing and conduct in the neighborhood where he lives. Good character, in brief, consists, in its legal sense, in having an unblemished reputation up to the time of the particular transaction in question. Queen *v.* Rowton, 34 *L. J. Mag. Cas.* 57.

Where the purpose of testimony is to impeach a witness for want of veracity, it is not improper to ask the person on the stand, what is the general reputation for truth of the witness sought to be impeached. This is even more proper than to ask what is his general character for truth; though the question is sometimes asked in the latter form, the word character then being synonymous with reputation. Knode *v.* Williamson, 17 *Wall.* 586.

CHARCOAL. The exception, in the internal revenue laws of congress, of charcoal does not exempt bone-black from taxation. Bone-black and bone-dust are manufactures of bone, and as such are taxable. Neither the lexicographical, legal, commercial, nor popular meaning of charcoal includes bone-black or "animal charcoal." Schriefer *v.* Wood, 5 *Blatchf.* 215.

CHARGE, *v.* 1. To impose an obligation or duty, particularly one for the payment of money, upon a person; or upon some specific property, as on an estate devised. 2. To accuse of a wrong or offence. 3. To instruct a jury as to the principles of law applicable to cases before them for examination. Charge, *n.*: 1. A duty of paying money imposed, as by a devise, upon some person, or as a condition of taking some specific property. 2. An accusation of a wrong or offence. 3. A series of instructions to a jury, explaining the law applicable to cases pending before them. Chargeable: liable to or already affected by an obligation or liability, particularly of making payment. Charged: subject to an obligation or liability; also, affected by entries in account, showing a payment due or expected. Charges: entries, in account, of moneys due; also, obligations imposed upon a person to pay money, or discharge other duties.

Chargeable signifies capable of being or becoming charged, as well as already subject to charge. A statute requiring kindred of any poor person who shall become chargeable to any town to provide for his support, attaches when the necessity of providing for such person by the town in default of other means arises; it is not delayed until the town has actually furnished necessaries. Walbridge *v.* Walbridge, 43 *Vt.* 617, 625.

An instrument containing an accusation of crime is not objectionable because it purports to be or is styled an information, whereas the statute designates the statement to be made as a complaint. The books define information to be a charge, accusation, or complaint. It is wholly immaterial which term is adopted. To change the name cannot change the legal effect. If the complaint filed be a substantial compliance with the statute which governs the case, it is sufficient. Lindville *v.* State, 3 *Ind.* 580. Compare Gardner *v.* State, 4 *Ind.* 632.

The phrase, charged with crime, in Gen. Sts. ch. 170, § 1, — authorizing selectmen to offer a reward to any person who in consequence of such offer secures any person charged with a crime, — construed according to the natural import of the words used, as well as with reference to the connection in which it stands, embraces only cases where there has been a charge of crime duly made by a complaint before a magistrate, or indictment by the grand jury, and the person so charged eludes arrest, so that he cannot be apprehended on a warrant by the use of ordinary vigilance and care. The phrase means something more than suspected or accused of crime by popular opinion or rumor, and implies that the offence has been alleged against a party according to the forms of law. Such is the sense in which it is manifestly used in Gen. Sts. ch. 170, § 9, where judges of courts and justices of the peace are authorized to issue warrants for the apprehension of persons "charged with offences;" and in section 11, where an officer to whom a warrant is issued is authorized to pursue into any county and apprehend the party charged; and in section 12, where it is provided that in certain cases a person against whom an offence is "charged in a warrant" may be admitted to bail. That it was not intended to have a different meaning in the section under consideration is clearly indicated by the fact that the offer of reward therein authorized is in terms confined to those who may "secure" the person "charged" with offences; which manifestly implies that it was intended to apply only in cases where legal process had been previously issued, by which a person might be lawfully arrested; and by the language of section 6, which authorizes the governor of the commonwealth to offer rewards to those who may apprehend, bring back, and secure "any person convicted of or charged with" certain offences, and which clearly can apply only to cases where persons have been duly charged on legal process, and have escaped from actual custody thereon, or have avoided arrest. Day *v.* Inhabitants of Otis, 8 *Allen*, 477.

Charge, as used in Wis. Laws 1868, ch. 101, — requiring a judge's charge to be reduced to writing at request, &c., — does not apply to a mere direction to the jury to find for the plaintiff. Grant *v.* Conn. Mut. L. Ins. Co., 29 *Wis.* 125.

Charge and discharge. A phrase descriptive of the mode formerly pursued in taking an account before a master in chancery, in which, usually, the complainant first exhibited the items of his claim, in a form called a charge; after which the defendant submitted his discharge, setting forth any contrary claims; and, upon an examination of both these, a report was made. See *Dan. Ch. Pr.* 1173; *Smith Ch. Pr.* 569.

Charging order. The name bestowed, in English practice, upon an order allowed

by Stat. 1 & 2 Vict. ch. 110, § 14, and 3 & 4 Vict. ch. 82, to be granted to a judgment creditor, that the property of the judgment debtor in government stock, or in the stock of any public company in England, corporate or otherwise, shall (whether standing in his own name or in the name of any person in trust for him) stand charged with the payment of the amount for which judgment shall have been recovered, with interest. (3 *Steph. Com.* 587, 588.) *Mozley & W.*

CHARGE DES AFFAIRES, or CHARGE D'AFFAIRES. The title of a diplomatic minister of a subordinate rank. He has not the title of minister, though he has charge of the presentation to the government abroad of affairs of his nation. His authority to act is usually made known by letters addressed to the minister of his nation; or the title is sometimes bestowed on a temporary substitute of a minister, during the latter's absence.

CHARITABLE USES; CHARITIES. Many of the rules upon which ordinary devises or gifts of property will be held void, such as the rule against perpetuities, or the suspension of power of alienation, the rule requiring a certain and competent devisee, &c., are, in England, and in some of the United States, relaxed, when the object and purpose of devise, gift, or trust is of recognized benevolent character and public utility; and devises and trusts may be sustained, upon the ground that the purpose to be accomplished by them is charitable, when, if such were not its character, they would be held void. Uses, which are in that degree benevolent, or conducive to the public welfare, that the courts (where the doctrine of charitable uses prevails), will sustain a gift to promote them, notwithstanding it would be held void if made for private benefit merely, are, in the technical language of the subject, called charitable uses; and gifts, devises, and trusts to promote such uses are called charities; though the two words are often used as convertible.

The terms are generally understood in a very enlarged sense, as comprising not only gifts for the benefit of the poor, but endowments for the advancement of learning, and to institutions for the encouragement of the arts and sciences, and for any other useful and public purpose, as well as donations for pious or religious objects. In order, however, to arrive at their more definite and specific meaning, resort must be had to the statute laws of England and of this country, defining what are charitable uses. Such uses were not unknown to the common law, but, in course of time, it became necessary for parliament to limit the extent and operation of the doctrine, and enumerate the uses which should be sustained as charitable. This was done by the Stat. 43 Eliz. ch. 4, which has since furnished the leading standard for determining what are valid charities. Those objects and purposes are considered charitable which are expressly enumerated in this statute, and also those which, by analogy, are deemed within its spirit and intendment.

The charitable objects enumerated are as follows: relief of aged, impotent, and poor people; maintenance of sick and maimed soldiers and mariners; schools of learning, free schools, and scholars in universities; repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; education and preferment of orphans; relief, stock, or maintenance for houses of correction; marriages of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes.

Those gifts which, although not expressly enumerated in the statute, have been held to be within its spirit and intendment, are principally as follows:

Gifts for the advancement of religion, or connected with religious services or places, *e.g.*, bequests for the ornaments of a parish church, for the stipend of a minister or curate, or for the augmentation thereof, for the distribution of bibles, for keeping in repair the church chimes; also, in assistance of the poor, as of unsuccessful literary men; and, generally, all purposes which are of a public and legal nature. And since the toleration act (1 Wm. & M. ch. 18), a gift of any of these sorts in favor of dis-

senters or non-conformists is equally legal, provided it is not for a purpose deemed superstitious; and Roman Catholics have been put upon the same footing as Protestant dissenters, by Stat. 2 & 3 Wm. IV. ch. 115.

In the United States, the law of charitable uses has been recognized as part of the common law of the land. But it has been a subject of discussion in the courts, whether the law of charitable uses as it existed here and in England derived its origin from the statute of 43 Eliz. ch. 4, or from the civil law; upon this point conflicting opinions have been expressed, and contradictory conclusions have been reached.

The question has also been discussed whether the law of charitable uses as it existed in England at the time of the American revolution, and the jurisdiction of the court of chancery over the subject, became, upon the adoption of state constitutions by the colonies, the law of their respective states; and conflicting opinions and decisions have been evolved from this discussion. In the celebrated Girard case, in which all the leading authorities were examined and criticised, the supreme court of the United States held that there was a jurisdiction in chancery over charitable trusts antecedent to the statute of Elizabeth, and that although the statute was never in force in Pennsylvania, yet that the common law of that state had always recognized the chancery jurisdiction in cases of charities. Vidal *v.* Girard, 2 *How.* 155. The same rule is now recognized in most of the American states; and courts of equity, in most of them, take jurisdiction in carrying into effect charitable bequests, however general are the purposes and objects intended, if sufficiently certain to be intelligible, and without regard to the fact of the existence of a trustee capable of holding the legal estate. In some of the states this is done upon the theory of the common-law jurisdiction of courts of equity over the subject; and in others, upon the ground that the provisions of the statute of 43 Eliz. have been adopted as a portion of the common law in those states. The provisions of the statute of Elizabeth have been substantially adopted by enactment in some of the states, while in others its provisions have, in a like manner, been abrogated, and new and different purposes enumerated, to which charitable uses shall be limited.

The definition of a charity is, a gift to a general public use which extends to the poor as well as the rich. Jones *v.* Williams, 2 *Amb.* 651.

The Stat. 43 Eliz. ch. 4, defining charitable uses, is part of the common law of Massachusetts; and, in determining what uses are charitable within the statute, the courts are to be guided not by its letter, but by its manifest spirit and reason, and are to consider not what uses are within its words, but what are embraced in its meaning and purpose. Many gifts, which were not within the instances enumerated in the statute, have been sustained as charities, by English authorities, on the ground that they were within its spirit; and this liberal application of the statute is sustained in this state by the colonial statute of 1671, and the state Const. ch. 5, § 1, art. 1; § 2. Drury *v.* Inhabitants of Natick, 10 *Allen*, 169, 177.

The Stat. 43 Eliz. ch. 4, is the chief guide (in Massachusetts) in determining what uses are charitable. It distinguishes three classes, giving instances or specimens under each. 1. For the relief and assistance of the poor and needy. 2. For the promoting of education. 3. For the repair and maintenance of public buildings and works, particularly including churches. And gifts which are within the principle and reason of this statute are sustained by our law, although not included in the express enumeration of instances; for charities are not confined at the present day to such as were known and in vogue in the time of Elizabeth. But valid charities, by our law, are such as can be attributed to one of the three classes of uses above mentioned. A charity, by our law, may be defined as a gift, to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds and hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. And whether the purpose is termed charitable, in the instrument making the gift, is immaterial: the question is whether it is charitable in its nature. Jackson *v.* Phillips, 14 *Allen*, 539.

But gifts for purposes prohibited by or opposed to the existing laws cannot be upheld as charitable, even if for objects which would otherwise be deemed such. Under this principle, trusts whose expressed purpose is to bring about changes in the laws or the political institutions of the country, although by lawful publications and efforts, are not "charitable" in such a sense as to

be entitled to peculiar favor, protection, and perpetuation from the courts; whose duty it is to expound and administer the laws as they exist. Thus a bequest in trust to be expended "to secure the passage of laws granting women, whether married or unmarried, the right to vote, to hold office, to hold, manage, and devise property, and all other civil rights enjoyed by men," cannot be sustained as a charity; for such a bequest aims directly and exclusively to change the laws, and its object cannot be accomplished without changing the constitution also. The courts are limited to expounding the laws as they stand. And those laws do not recognize the purpose of overthrowing or changing the existing laws, in whole or in part, as a charitable use. *Ib.*

A gift "to the poor" generally, or to the poor of a particular town, parish, age, sex, or condition, is a good charitable gift; for it is the number and indefiniteness of the objects, and not the mode of relieving them, which is the essential element of a charity. It makes little difference to the contributors, the poor, or the public, and none in the nature of the charity, what is the mode of distributing relief. In the eye of the law, as of Christianity, almsgiving in secret is not less meritorious or charitable than the more open assistance of the poor in almshouses and hospitals. In every act of relieving the poor, by whatever means, the immediate benefit is to the individual. Hunger, nakedness, disease, are personal, and the relief is also personal, and, in one sense, private. A good charitable use is public, not in the sense that it must be executed openly and in public, but in the sense of being so general and indefinite in its objects as to be deemed of common and public benefit. Each individual immediately benefited may be private; and the charity may be distributed in private, and by a private hand. It is public and general in its scope and purpose, and becomes definite and private only after the individual objects have been selected. Hence, where a testator bequeathed in trust, for the furtherance and promotion of the cause of piety and good morals, or in aid of objects and purposes of benevolence or charity, &c., and gave the trustees full discretion in expenditure, it was held that, by "objects and purposes of benevolence or charity, public or private," the testator intended general relief of the poor, either through public institutions or almsgiving by the agency of individuals; and that this was a good charitable bequest. Saltonstall *v.* Sanders, 11 *Allen*, 446.

The same principle was applied where the fund was given to trustees "to be by them applied for the promotion of agricultural or horticultural improvements, or other philosophical or philanthropic purposes, at their discretion." Rotch *v.* Emerson, 105 *Mass.* 431.

In a legal sense, a charity includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, without any particular reference to the poor. Gerke *v.* Purcell, 25 *Ohio St.* 229.

Nothing is "a charity" in a legal sense except that which is limited to some charitable use. An absolute gift or bequest, although to a benevolent society, is not a charity. In legal contemplation, charity and charitable use are convertible terms; and there can be no charitable use without a trust. The term charitable uses was first used in contradistinction to superstitions, and employed to designate a class of uses which were deemed exceptions from the sweeping prohibitions of Stat. 23 Hen. VIII. ch. 10, against gifts to use of churches, &c., without any corporation. As used at the present day, it must be distinguished from mere liberality or benevolence. To constitute "a charity," the use must be public in its nature. Owens *v.* Missionary Soc. of M. E. Church, 14 *N. Y.* 380.

CHARITY. The sentiment of benevolence, or willingness to give relief to persons in need; also, acts of benevolence, relief, services, or assistance rendered gratuitously to some one in need of them.

A prominent instance of use of the term in law is its occurrence in statutes prohibiting labor upon the Lord's day: these very generally except works of charity.

Charity, in its widest sense, denotes all the good affections men ought to bear towards each other: in a restricted and common sense, relief of the poor. Morice *v.* Bishop of Durham, 9 *Ves.* 399.

Charity, as used in the Massachusetts Sunday law, includes whatever proceeds from a sense of moral duty or a feeling of kindness and humanity, and is intended wholly for the purpose of the relief or comfort of another, and not for one's own benefit or pleasure. Doyle *v.* Lynn, &c. R. R. Co., 118 *Mass.* 195, 197.

CHARTA; CARTA. A charter or deed; such as *carta de foresta;* Magna Charta. Also, sometimes, a statute.

CHARTER. Originally this word seems to have been used as including all sealed instruments, or solemn acts in writing. It is not unfrequently met in old English books, in a sense equivalent to deed. But this broad and general use of the word is now practically obsolete. It is retained to denote writings emanating from government, chiefly the following:

1. A written instrument setting forth privileges or an assurance of rights,

granted by the sovereign power to the people, or to some large class of them; such as Magna Charta, *q. v.*, or the great charter. A charter is granted by the sovereign, a constitution established by the people.

2. An act of parliament, of congress, or of a state legislature, creating a corporation, is called the charter of the corporation.

Charter is taken in our law for written evidence of things done between man and man. There are charters of the king, and those of private persons. Charters of the king are those whereby the king passeth any grant to any person or body politic; as a charter of exemption, of privilege, &c.; a charter of pardon, whereby a man is forgiven an offence. Charters of private persons are deeds and instruments for the conveyance of lands, &c. *Jacob.*

CHARTER-PARTY. A lease of a vessel; a species of contract by which the owners of a vessel let her to another person, to be used by the latter in transportation for his own account. The term is an Anglicized form of the Latin *charta parti*, or French *chartre parti;* and originated in a custom, long disused, that the writing embodying this description of contract was cut in two, and one part delivered to each of the parties, to be produced when required. Neither one could then well make any fraudulent alterations or substitute a counterfeit, as the new matter would not correspond with the portion in custody of the other party.

The person who hires a vessel under a charter-party is termed the charterer, and the money agreed to be paid for the use of her is called charter-money.

Charter-parties are of two kinds: one, in which the owner retains the charge of navigating the ship, but the hirer takes her whole capacity for his use; the other, in which the vessel is surrendered to the hirer, who not only puts on board his cargo, but also finds master and crew, victuals the ship, and directs as to sailing her.

A charter-party is not usually under seal. It should name the vessel and her master, also the immediate parties to the contract; state the tonnage the vessel will carry, specify the places and times agreed upon for loading and discharge, and stipulate the amount of charter-money to be paid, and any allowance agreed on for delay. It is construed, like other commercial contracts, according to the intent of the parties.

A charter-party is a mercantile instrument, by which one who would export or import goods engages for the hire of an entire vessel for the purpose, at a freight or reward thereby agreed for. Upon the execution of such an instrument, the ship is said to be chartered or freighted, and the party by whom she is engaged is called the charterer or freighter. But where, instead of taking the entire vessel, the owner of goods merely bargains for their conveyance, on board of her, for freight (other goods being at the same time conveyed for other proprietors), she is described not as a chartered, but as a general, ship, and in this case no charter-party is usually executed, but merely a bill of lading. (*Cowel;* 2 *Steph. Com.* 140.) *Mozley & W.*

CHASE. In English law, chase signifies a tract of land appropriated for keeping and hunting deer, foxes, &c. Some authorities distinguish a chase from a forest, and from a park, by saying that it is smaller than the first, and has fewer privileges incident to it; while it is of larger extent than a park, and stored with a greater diversity of game, and has more keepers to superintend it. Others say that a forest is no sooner in the hands of a subject than it loses its name, and at once becomes a chase: so that a chase is distinguished from a forest on the one hand, in this respect, that the latter cannot be in the hands of a subject, and the former may be so; and from a park, on the other hand, in this respect, that the chase is not enclosed, and has not only a larger compass and more game, but also a greater number of keepers and officers. (See 4 *Co. Inst.* 314; *Manw. For. Laws*, 49; *Crompt. Jurisd.* 148; 2 *Bl. Com.* 38.) *Jacob.*

Also, chase is used to mean the privilege or right, independent of ownership of the land, of keeping beasts of chase, and hunting them, within a certain tract.

CHATTEL. Strictly, the term chattels embraces every species of property less than a freehold in lands, and, when used to signify movable things only, should be qualified by prefixing "personal;" while interests in land (less than freehold) are properly designated chattels real. But chattels alone is

often, though loosely, used to signify movable articles, in distinction from all interests in lands, and from rights in action.

The name given to things which in law are deemed personal property. Chattels are divided into chattels real and chattels personal; chattels real being interests in land which devolve after the manner of personal estate, as leaseholds. As opposed to freeholds, they are regarded as personal estate. But, as being interests in real estate, they are called chattels real, to distinguish them from movables, which are called chattels personal. (*Cowel;* 2 *Bl. Com.* 385–387; 2 *Steph. Com.* 2; *Wms. R. P. & P. P.*) *Mozley & W.*

The difference between freeholds and non-freeholds, or chattel interests, consists, for the most part, in the fixity or non-fixity of their duration. It is the latter property, viz., uncertainty, that characterizes a freehold; it is the former, viz., certainty, that characterizes a non-freehold. Hence every tendency of a definite duration is a term; *i.e.*, a period accurately ascertained during which the interest or estate is to endure. The non-freeholds are deemed merely chattel interests, and differ from freeholds not only in quantity, but in order and kind; for freeholds are considered of greater interest than non-freeholds, and, therefore, if a term of one thousand years and an estate for life vest in the same person, in the same right, the term will merge in the life-estate, unless an intervening estate prevent such a union of interests. Chattel interests devolve upon the personal representatives of the owner. Five species of estates rank as chattel interests: estates for years, from year to year, at will, by *elegit*, and on sufferance. *Wharton.*

Chattels are divided into real and personal. Chattels real are such as concern real estates, or landed property, and are so called because they are interests issuing out of such kind of property; as the next presentation to a church, terms for years, estates by statute merchant, statute staple, *elegit*, &c. Chattels personal are generally such as are movable, and may be carried about the person of the owner wherever he pleases to go; such as money, jewels, garments, animals, household furniture, and almost every description of property of a movable nature. Things personal, however, are not confined to movables; for as things real comprise not only the land itself, but such incorporeal rights as issue out of it, so things personal include not only those tangible subjects of property which are capable of locomotion, but also the incorporeal rights or interests which may grow out of or be incident to them; to which class may be assigned the term incorporeal chattels. *Brown.*

Chattels personal are movables only; chattels real are such as savor only of the realty. Putnam *v.* Westcott, 19 *Johns.* 73.

Chattels includes a term for years in lands. Barr *v.* Doe *d.* Binford, 6 *Blackf.* 335.

A lease for ninety-nine years, renewable for ever, by the common law, is only a chattel interest; but, by the statutes of Ohio, is made real property. McLean *v.* Rockey, 3 *McLean*, 235.

A title-deed is a personal chattel; though it is so connected with and essential to the ownership of real estate, that it descends with it to the heir. Wilson *v.* Rybolt, 17 *Ind.* 391.

Chattels embraces living things: slaves, horses, cattle, hogs, &c. Pippin *v.* Ellison, 12 *Ired. L.* 61.

Notes are chattels; and the word chattels implies property or ownership. To aver, in an indictment for stealing securities, that they were the goods and chattels of the owner, naming him, is a sufficient averment of ownership. People *v.* Holbrook, 13 *Johns.* 90; People *v.* Frost, 1 *Dougl.* 42; State *v.* Bartlett, 55 *Me.* 200.

That the rolling-stock of a railroad is not chattel property, see Bement *v.* Plattsburgh, &c. Co., 47 *Barb.* 104.

That the phrase goods and chattels includes coin, see Hall *v.* State, 3 *Ohio St.* 575.

It includes choses in action as well as those in possession. King *v.* Ford, 12 *Coke*, 1; Ryall *v.* Rolle, 1 *Atk.* 182.

CHATTEL MORTGAGE. A mortgage upon chattel property; usually, in practice, upon personal chattels, or movable articles; for, when chattel interests in real property, or rights in action, are to be used as security, an assignment, either expressed to be conditional and for the payment of the debt, or absolute in form, but accompanied by some counter-engagement for a return upon payment, is ordinarily employed; and is spoken of as an assignment as collateral security. There may, however, undoubtedly be a mortgage of a chattel real; of a lease for years, for example.

The term chattel mortgage does not necessarily imply a sealed instrument. A bill of sale or other writing, intended as a security, though not under seal, is covered by the term. Ranch *v.* Oil Co., 8 *W. Va.* 36, 40.

A chattel mortgage is a conditional transfer or conveyance of the property itself. The chief distinctions between it and a pledge are, that in the latter the title, even after condition broken, does not pass to the pledgee, who has only a lien on the property, but remains in the pledgor, who has the right to redeem the property at any time before its sale; besides, the possession of the property must, in all cases, accompany the pledge, and, at a sale thereof by the pledgee to satisfy his demand, he cannot become the purchaser; whilst by a chattel mortgage the title of the

mortgagee becomes absolute at law, on the default of the mortgagor, and it is not essential to the validity of the instrument that possession of the property should be delivered, and, on the foreclosure of the mortgage, the mortgagee is at liberty to become the purchaser. Wright *v.* Ross, 36 *Cal.* 414, 428, 441.

The material distinction between a pledge and a mortgage of chattels is, that a mortgage is a conveyance of the legal title upon condition, and it becomes absolute in law if not redeemed by a given time; a pledge is a deposit of goods, redeemable on certain terms, either with or without a fixed period for redemption. In pledge, the general property does not pass, as in the case of mortgage, and the pawnee has only a special property in the thing deposited. The pawnee must choose between two remedies: a bill in chancery for a judicial sale under a decree of foreclosure, or a sale without judicial process, on the refusal of the debtor to redeem, after reasonable notice to do so. Evans *v.* Darlington, 5 *Blackf.* 320; see also Jordan *v.* Turner, 3 *Id.* 309.

CHAUD-MEDLEY. In the heat of an affray. An old term applied to describe a homicide, the guilt of which is deemed extenuated by its having occurred in heat of passion aroused by an unpremeditated fight. Compare CHANCE-MEDLEY.

CHEAT, *v.* To defraud; to swindle. Cheat, *n.* An act of defrauding or swindling; also, a person who has perpetrated such act.

To render cheating criminally punishable, it must, as a general rule, be perpetrated by means of some false pretence, or by using some false token; and the offence thus committed bears the name, in most of the United States, of false pretences, or, more fully, obtaining money (or property) by false pretences.

Many acts which would be denounced as cheats by the principles of morality are not legally cheats; as, where a person got possession of a promissory note by pretending that he wished to look at it and then refused to return it to the holder, it was held a mere private fraud, not punishable criminally. People *v.* Miller, 14 *Johns.* 371; and see Lambert *v.* People, 5 *Cow.* 578.

A cheat or fraud, indictable at common law, must be such as would affect the public, such as common prudence cannot guard against; as by using false weights and measures, or false tokens, or where there is a conspiracy to cheat. People *v.* Babcock, 7 *Johns.* 201; People *v.* Johnson, 12 *Id.* 292; People *v.* Miller, 14 *Id.* 371.

CHECK; CHEQUE. A written order or request, addressed to a bank or banker, directing the drawee to pay a specified sum, either to the bearer or to a payee named or his order.

Some of the definitions say that it is drawn by a person having money on deposit in the bank; but we think this is not a necessary element in the definition. An order to pay money made by one who has no account with the bank designated is not the less within the word check, on that account. Such orders are sometimes drawn and passed, in good faith, between merchants, as memoranda of indebtedness merely, the word memorandum being indorsed on the face to signify they are not to be presented, and these are called memorandum checks; also, they are drawn and passed by mistake, or for purpose of fraud, and are then styled bogus or flash checks. See CERTIFIED CHECK; CROSSED CHECK.

A check is an order for payment of money. Smith *v.* Branch Bank, &c., 7 *Ala.* 800; State *v.* Crawford, 13 *La. Ann.* 300; People *v.* Howell, 4 *Johns.* 296.

Checks, like bills, are negotiable instruments, generally payable to bearer, but sometimes to order, requiring, as essential, a drawer, drawee, and payee. Hewitt *v.* Goodrich, 10 *Ala.* 340.

A draft drawn on a firm who do not appear to be bankers is not to be deemed a check, but an inland bill of exchange. One thing which distinguishes a check is, that it is always drawn on a bank or banker. Harris *v.* Clark, 3 *N. Y.* 93.

A check is an order to pay the holder a sum of money at the bank, on presentment of the check and demand of the money. No notice to the bank or acceptance by it is required, nor is it entitled to grace. It is payable on presentment, and not before. Bullard *v.* Randall, 1 *Gray*, 605; Bowen *v.* Newell, 5 *Sandf.* 326.

A check upon a bank, until accepted, is merely an order upon the bank. The bank is not liable upon it; and it may be revoked. Schneider *v.* Irving Bank, 1 *Daly*, 500.

A bank-check is substantially the same as an inland bill of exchange; and, in general, is governed by the law applicable to bills of exchange and promissory notes. Minturn *v.* Fisher, 4 *Cal.* 35; Succession of Kercheval, 14 *La. Ann.* 457; Barnet *v.* Smith, 30 *N. H.* 256; Cruger *v.* Armstrong, 3 *Johns. Cas.* 5; Harker *v.* Anderson, 21 *Wend.* 372; Woodruff *v.* Merchants' Bank, 25 *Id.* 673; Murray *v.* Judah, 6 *Cow.* 484.

That a check is not a bill of exchange, see Conroy *v.* Warren, 3 *Johns. Cas.* 259.

A bank-check is the appropriation of a

specific sum, and differs from an ordinary bill of exchange. Stewart *v.* Smith, 17 *Ohio St.* 82; Anderton *v.* Shoup, *Id.* 125.

A check is an order to the bank to pay the money of the drawer to the payee; an appropriation of money; of cash. A bill of exchange is a matter of credit. Ga. National Bank *v.* Henderson, 46 *Ga.* 487; see also Champion *v.* Gordon, 70 *Pa. St.* 474.

A check differs from an ordinary bill of exchange in the following particulars:

1. It is drawn on a bank or bankers, and is payable immediately on presentment, without any days of grace.

2. It is payable immediately on presentment, and no acceptance as distinct from payment is required.

3. By its terms it is supposed to be drawn upon a previous deposit of funds, and is an absolute appropriation of so much money in the hands of the bankers to the holder of the check, to remain there until called for, and cannot after notice be withdrawn by the drawer. Matter of Brown, 2 *Story*, 502; Lester *v.* Given, 8 *Bush*, 357.

CHIEF. Principal; one eminent in power or importance; the most prominent or valuable of several.

The word is most used in jurisprudence, in phrases such as the following:

Chief baron. The title of the chief judge in the English court of exchequer.

Chief clerk. The clerk in a bureau, office, or establishment who has the first place, and usually the charge and oversight of the course of business, subject to the general direction of the head.

In the organization of the public business of the United States government at Washington, there is in each department and each of the larger bureaus and offices a chief clerk; and the statutes provide that each chief clerk shall supervise, under the direction of his immediate supervisor, the duties of the other clerks, and see that they are faithfully performed; also, that he shall take care that the duties of the other clerks are distributed with equality and uniformity; and shall make certain reports to his superior.

The Stat. 15 & 16 Vict. ch. 80, § 6, authorized the appointment of chief clerks of judges in equity, to act in the place of the abolished masters in ordinary.

Chief justice. The title very generally given to the principal judicial officer of any superior court of justice in Great Britain or throughout the United States. The title imports the powers and duties of a presiding officer, and a certain general charge and care of the routine and course of business of the court; but not, usually, any greater powers, or more authoritative vote in the decision of causes. See ASSOCIATE.

Chief justiciar. Under the early Norman kings, the highest officer in the kingdom next to the king.

Chief rents, were the annual payments of freeholders of manors; and were also called quit-rents, because by paying them the tenant was freed from all other rents or services. 2 *Bl. Com.* 42.

Examination in chief. The first or principal examination of a witness by the counsel of the party for whom he is called; more commonly called the direct examination.

Tenants in chief. In feudal language, tenants who hold immediately under the king; otherwise called tenants *in capite*. *Jacob; Mozley & W.*

CHILD. Is used, irrespective of parentage, to denote a young person of either sex; and in this sense signifies, strictly, one who has not reached puberty, though often used without any very distinct implication as to years, other than that it means youthfulness, tender age, early years. Chitty, indeed, says (Med. Jur. ch. xii. p. 437), that medical authorities arrange the subject of age under six principal periods; as infancy, childhood, boyhood or girlhood, adolescence, adult age, and old age, and consider childhood as extending from the completion of the first to the completion of the second dentition; but this complex division and precise nomenclature is not to any extent regarded in jurisprudence, where it is not uncommon to speak of the rights of and protection extended to a child before birth, and, on the other hand, to apply the term to those who have nearly reached legal majority. On account of this vagueness of the term, statutes particularly relating to the control of children very usually specify the ages intended. Thus, the Stat. 36 & 37 Vict., to regulate employment of children in agriculture, declares that child in the

act means a child under twelve years. The New York act of 1853, ch. 185, relative to idle and truant children, speaks of "any child between the ages of five and fourteen years;" and the act of 1874, ch. 116, speaks of "any child under the age of sixteen years."

Child is also used, irrespective of age, to denote parentage or descent, or as equivalent to offspring; and in this sense signifies, strictly, lawful issue begotten or born of one's body, and in the first degree of descent; though often used, and not improperly, especially when accompanied by qualifying words, in a broader sense.

The two senses of the term are quite distinct. Thus, when it is used in a statute chartering an asylum or hospital for children, authorizing apprenticeship of children, regulating attendance or instruction of children at schools, or punishing child-stealing, or abuse of a female child, or in decisions upon the competency of a child to testify, no suggestion is involved as to parentage; the distinguishing element which constitutes the child is youthfulness. Upon the other hand, when it is used in a statute regulating the descent or distribution of property, or in deeds or wills giving property to a grantor's or a testator's children, age must be laid wholly out of view; a man of sixty will inherit or take under the designation of a child, as surely as an infant will, if proper proof of parentage is made.

The following are representative decisions upon the different distinctions and refinements in the use of the word in the law:

A female ceases to be a child, within a statute defining classes of females on whom rape may be committed, and becomes a woman, at the age of puberty, and not at the age of majority. Blackburn *v.* State, 22 *Ohio St.* 102.

Whether child is a word of purchase or of limitation, &c.

In the construction of devises, child or children is naturally and primarily a word of purchase; and this effect will be given to it in the absence of any thing to show that a different meaning was intended, or must be attributed in order to carry into effect the purpose of the testator. *Re* Sanders, 4 *Paige*, 293; Murphy *v.* Harvey, 4 *Edw.* 131; Armstrong *v.* Moran, 1 *Bradf.* 314; Rogers *v.* Rogers, 3 *Wend.* 503; Chrystie *v.* Phyfe, 19 *N. Y.* 344; Stokes *v.* Tilly, 9 *N. J. Eq.* 130; Bowers *v.* Bowers, 4 *Heisk.* 293; Stubbs *v.* Stubbs, 11 *Humph.* 43; Dewitt *v.* Dewitt, 11 *Sim.* 41; Doe *v.* Perryn, 3 *Durnf. & E.* 484; Carne *v.* Roch, 7 *Bing.* 226.

In the natural and primary sense of the word children, it implies immediate offspring, and, in its legal acceptation, is not a word of limitation, unless it is absolutely necessary so to construe it in order to give effect to the testator's intention. Echols *v.* Jordon, 39 *Ala.* 24.

When an intention appears on the part of a testator to use child or children as a word of limitation, that construction will be placed upon it, in order to give effect to the intent. Stokes *v.* Tilly, 9 *N. J. Eq.* 130.

In a devise or conveyance to a person and the children of his body, the word children is not one of limitation, but of purchase, and creates a remainder. Beacroft *v.* Strawn, 67 *Ill.* 28.

In a conveyance to an unmarried woman and her children, children is a word of purchase, and she takes a life-estate, with remainder to her children. Fales *v.* Currier, 55 *N. H.* 392.

In a devise of lands to a woman and her children, she having children living at the time, the word children must be taken as a word of purchase, and the children will take a joint estate with the mother. Jones *v.* Jones, 13 *N. J. Eq.* 236.

The testator devised to his daughter "J, and such her child or children as shall, at her decease, be living, and shall have attained, or shall thereafter attain, the age of twenty-one," all the residue of his estate, and the reversion, remainder, rents, &c., "to her sole and separate use," as though she were unmarried. It was held that J took an estate for life. The words "child or children" in such a provision are words of purchase, and the remainder is contingent. Tayloe *v.* Gould, 10 *Barb.* 388.

A deed was made "to A and B during their lives to hold in moieties, and at their death one moiety to the children of A and their heirs, and the other moiety to the children of B and their heirs." It was held that "children" and "their heirs" were words of purchase, not of limitation. Perry *v.* Calhoun, 8 *Humph.* 551.

The words "children for ever," occurring in a devise of real estate, were held to be, when construed with the context, words of inheritance only, and to have been used in the sense of heirs, or heirs of the body. Moran *v.* Dillehay, 8 *Bush*, 434.

"Children, issue of their or either of their bodies," are necessarily words of purchase in a deed. Melsheimer *v.* Gross, 58 *Pa. St.* 412.

How compared with "heirs" and "issue."

Children is ordinarily a word of description, limited to persons standing in the same relation, and has the same effect as if all the names were given; but heirs, in the absence of controlling or explanatory words, in-

cludes more remote descendants, and is to be applied *per stirpes*. Balcom *v.* Haynes, 14 *Allen*, 204.

The word children, in a will, should not be construed as synonymous with heirs, when to do so would conflict with testator's intention. That intention will be effected by applying the word children to the personal property, and the word heirs to the lands. Akers *v.* Akers, 23 *N. J. Eq.* 26.

The word heirs, in its natural signification, is a word of limitation; and it is presumed to be used in that sense, unless a contrary intention appears. But the term children, in its natural sense, is a word of purchase, and is to be taken to have been used as such, unless there are other expressions in the will showing that the testator intended to use it as a word of limitation only. *Re* Sanders, 4 *Paige*, 293; Rogers *v.* Rogers, 3 *Wend.* 503.

Children, in a will, has not ordinarily the technical force of issue in a limitation over. Sherman *v.* Sherman, 3 *Barb.* 385.

Children, in a devise, may be construed issue, when necessary to effectuate the manifest intention of the testator; as in a devise to a married woman, "to her and her children for ever." Merryman *v.* Merryman, 5 *Munf.* 440.

It may be construed issue, or heirs of the body. Parkman *v.* Bowdoin, 1 *Sumn.* 359.

There is a well-settled distinction between the import and technical effect of children, and of heirs of the body, as these expressions are used in wills. Johnson *v.* Johnson, 2 *Metc.* 331.

The natural and proper meaning of child or children, in a will, is issue in the first degree, immediate lineal descendants. That meaning should be assigned, unless there is something in the context to show a different intent. Wharton *v.* Silliman, 22 *La. Ann.* 343; Sherman *v.* Sherman, 3 *Barb.* 385; Moon *v.* Stone, 19 *Gratt.* 130, 328; Hussey *v.* Berkeley, 2 *Eden*, 194.

Children, in a will, may include issue, however remote, and will be held to include such issue whenever the reason of the case demands it. Prowitt *v.* Rodman, 37 *N. Y.* 42.

Are grandchildren included?

The words "child" and "children" do not, in natural and proper signification, nor as ordinarily used in wills, deeds, &c., include a grandchild or grandchildren. They should be construed, in absence of something to show a different intent, as meaning descendants in the first degree; the first generation of offspring. Ingraham *v.* Meade, 3 *Wall. Jr* 32; Feit *v.* Vanatta, 21 *N. J. Eq.* 84; Willis *v.* Jenkins, 30 *Ga.* 167; Mowatt *v.* Carow, 7 *Paige*, 328; Marsh *v.* Hague, 1 *Edw.* 174; Stires *v.* Van Rensselaer, 2 *Bradf.* 172; Tillinghast *v.* D'Wolf, 8 *R. I.* 69.

Children, in a will, may be read as including grandchildren, in two classes of cases only: Where the bequest or devise must be inoperative, unless the word is thus extended; and where the context clearly shows that the testator intended to embrace grandchildren. Brokaw *v.* Peterson, 15 *N. J. Eq.* 194; Churchill *v.* Churchill, 2 *Metc.* (*Ky.*) 466; Mowatt *v.* Carow, 7 *Paige*, 328; Cromer *v.* Pinckney, 3 *Barb. Ch.* 466, 475; Phillips *v.* Beal, 9 *Dana*, 1; Marsh *v.* Hague, 1 *Edw.* 174; Tier *v.* Pennell, *Id.* 354; s. p. Walker *v.* Williamson, 25 *Ga.* 549; Willis *v.* Jenkins, 30 *Id.* 167; Denny *v.* Closse, 4 *Ired. Eq.* 102; Ward *v.* Sutton, 5 *Id.* 421; Mordecai *v.* Boylan, 6 *Jones Eq.* 365; Jarden's Estate, 3 *Phila.* 438; Tipton *v.* Tipton, 1 *Coldw.* 252.

Children can be extended to include grandchildren, only from the context in which it occurs, or from its use in a case where the person using it must know that there neither then is, nor can afterwards be, any person within the first generation to whom it can be applied. Willis *v.* Jenkins, 30 *Ga.* 167.

Only where there can be no other construction. Reeves *v.* Brymer, 4 *Ves.* 698.

The word children sometimes embraces grandchildren; but this is only under particular circumstances, as where there are no persons to answer the description of children in the primary sense; or where there could not be any such at the time or in the event contemplated; or where the testator has clearly shown, by the use of other words, that he used the word children or grandchildren as synonymous with issue or descendants generally. Heyward *v.* Hasell, 2 *S. C.* 510.

Where a testator gave certain estate to his children, to be equally divided between them, such as have received advancements to account therefor, and, among them, naming T as having, "in his lifetime," received a specified amount, it was held that the word children included his grandson, T. D., the son of T. Scott *v.* Nelson, 3 *Port.* 452.

Children, in a deed of gift conveying slaves to be held in trust for a married woman, so long as her marriage relation should subsist, and, upon its dissolution, to go absolutely "to the present and future children, the offspring of said marriage, that may be living at the time of the happening of such dissolution of marriage," was held to be used in its ordinary sense, and not to include grandchildren. McGuire *v.* Westmoreland, 36 *Ala.* 594.

Where a testator provided in his will that the balance of his estate, after paying his debts, should be equally divided among his children, it was held that grandchildren living at the time of his death took no part of the estate under the will. Hopson *v.* Commonwealth, &c., 7 *Bush*, 644.

A devise to the children of the testator's sister, one of whom was dead at the time of the execution of the will, passes nothing to the descendants of such decedent. Sheets *v.* Grubbs, 4 *Metc.* (*Ky.*) 339.

In a codicil authorizing executors to appropriate a certain fund to the widow of the testator's deceased son, "for the benefit of her children until the estate shall be finally settled," the word children does not

embrace grandchildren. Tayloe *v.* Mosher, 29 Md. 443.

The words "such of my children as shall then be living," were held not to include a child living at the time named, of a child who was dead. Thompson *v.* Ludington, 104 *Mass.* 193.

Where it appeared from the will that the testator understood the distinction between children and issue more remote, the court held that the latter could not be included in a division directed to be made among children. Boylan *v.* Boylan, *Phill. Eq.* 160.

A remainder "to children and their heirs," includes the testator's granddaughter. Neave *v.* Jenkins, 2 *Yeates*, 414.

Under Stat. 43 Eliz. ch. 2, § 7, requiring the father and grandfather, &c., or the children of any poor person, to maintain him, it has been held that the word children does not include grandchildren, and that a grandchild is not liable for the maintenance of his grandfather. Maund *v.* Mason, *L. R.* 9 *Q. B.* 254.

The word children, in the act of congress of June 4, 1852, for the relief of surviving soldiers of the revolution, and the acts in addition thereto, embraces the grandchildren of the deceased pensioner, whether their parents died before or after his decease; and the grandchildren are entitled, *per stirpes*, to a distributive share of the pension. Walton *v.* Cotton, 19 *How.* 355.

Are illegitimates included?

The general rule is that children, in a bequest or devise, means legitimate children. Under a devise or bequest to children, as a class, natural children are not included, unless the testator's intention to include them is manifest, either by express designation or necessary implication. Heater *v.* Van Auken, 14 *N. J. Eq.* 159; Gardner *v.* Heyer, 2 *Paige*, 11.

When legitimate children exist at the time of making the will, so as to satisfy the words of the devise or bequest in their primary sense, an illegitimate child cannot take under a general devise or bequest to children, as a class, unless something appears on the face of the will to show an intention to include others besides legitimate children. Collins *v.* Hoxie, 9 *Paige*, 81; S. P. Cromer *v.* Pinckney, 3 *Barb. Ch.* 466; Cartwright *v.* Vawdry, 5 *Ves.* 530; Gardner *v.* Heyer, 2 *Paige*, 11; Radcliffe *v.* Buckley, 10 *Ves.* 195; Harris *v.* Lloyd, *Turn. & Russ.* 310; Swaine *v.* Kennerly, 1 *Ves. & Bea.* 469.

If there are no legitimate children, it is allowable to prove the situation of the testator's family, to enable the court to ascertain that, in a devise to children, he intended natural children. Gardner *v.* Heyer, 2 *Paige*, 11.

An allegation that certain named persons "are his only legitimate children," is not a sufficient averment that they are the only heirs-at-law of the decedent. Martin *v.* Martin, 22 *Ala.* 86.

A testator, who was one of two illegitimate children of the same parents, devised certain land to his "mother," naming her, and to "her children for ever." By a subsequent clause, he made certain bequests to his "sister," the other illegitimate child, by name. Held, that the term children, in the devise, did not include the illegitimate daughter. Shearman *v.* Angel, 1 *Bailey Ch.* 351.

The rule that a limitation over, in a will, upon the death of a legatee leaving no children living at his death, has reference to legitimate children only, is not affected by a statute enabling illegitimate children to inherit. Thompson *v.* McDonald, 2 *Dev. & B. L.* 463.

By the common law, "child" and "children," when used in statutes, wills, and legal instruments generally, meant legitimate child, &c. But, as used in the early Connecticut statutes of distributions, it includes illegitimates as well as legitimates. So held in a case where the right to take through the mother, not the father, was involved. Dickinson's Appeal, 42 *Conn.* 491.

Children, as used in the Illinois statute of wills, concerning illegitimates, is used in the sense of offspring of the mother, and is not confined to children born in lawful wedlock. Rogers *v.* Weller, 5 *Biss.* 166.

Children, as used in Mass. Rev. Stat. ch. 62, § 21, relating to wills, does not include an illegitimate child; and unless such child is provided for *eo nomine*, he cannot share in the testator's estate. Kent *v.* Barker, 2 *Gray*, 535.

Bastards are not comprehended under the word children, in the Mississippi statute of descents and distribution of estates. Porter *v.* Porter, 8 *Miss.* 107.

Are step-children included?

The word children, in a will, should be construed as meaning full, lineal descendants only, and not as embracing step-children, unless a different intention is clearly shown. Barnes *v.* Greenzebach, 1 *Edw.* 41; Matter of Hallet, 8 *Paige*, 375; Cutter *v.* Doughty, 23 *Wend.* 513.

Especially and where the testator has, in other parts of his will, spoken of a step-child in distinction from children, this will afford a strong presumption that he did not intend to include such step-child or his issue in a devise to children and grandchildren. Barnes *v.* Greenzebach, 1 *Edw.* 41; Lawrence *v.* Hebbard, 1 *Bradf.* 252.

Under a devise to "my wife and children," the children of the wife only are not entitled, but the children of the husband, whether born before or after the marriage of the surviving, or of a prior deceased, wife, will take. Carroll *v.* Carroll, 20 *Tex.* 731.

A step-child has been deemed a child within the rules that where a child resides in his father's household, receiving support and rendering services, neither party can afterwards sustain a claim against the other for compensation. Sharp *v.* Cropsey, 11 *Barb.* 224; Williams *v.* Hutchnison, 5 *Barb.* 122, 3 *N. Y.* 312.

A step-child has been deemed a child within the rule giving a father an action for seduction of his daughter. Bartley *v.* Richtmeyer, 4 *N. Y.* 38; Bracy *v.* Kibbe, 31 *Barb.* 273; Fernslee *v.* Moyer, 3 *Watts & S.* 416; Edmonson *v.* Machell, 2 *Durnf. & E.* 4; Irwin *v.* Dearman, 11 *East*, 23.

Under the New York statute, 1 Rev. Stat. 614, §§ 1, 2, — that the father, mother, and children of any person unable to support himself must maintain him, — a husband is not obligable to maintain his wife's child by a former husband; for the statute extends only to natural relatives. Gay *v.* Ballou, 4 *Wend.* 403; Williams *v.* Hutchinson, 5 *Barb.* 122, 3 *N. Y.* 312; Bartley *v.* Richtmyer, 3 *N. Y.* 38; Elliott *v.* Lewis, 3 *Edw.* 40.

Adopting such child takes authority and liability of father. Gorman *v.* State, 42 *Tex.* 221; Mowbry *v.* Mowbry, 64 *Ill.* 383.

Are after-born children included?

A general bequest, by a testator, to his children, will, in general, be construed to embrace all his children at the time of his death, as well those born after the making of the will as those born before. Chase *v.* Lockerman, 11 *Gill & J.* 185; Walker *v.* Williamson, 25 *Ga.* 549.

A bequest to children as a class, to take effect after the termination of an intervening estate, will include after-born children. Bowers *v.* Bowers, 4 *Heisk.* 293.

A devise to "all the children" of a person, as a class, will include those only who are living at the time of the testator's death. Lorillard *v.* Coster, 5 *Paige*, 172.

Under a devise to "my children," it has been held that only those living at the death of the testator can take; and the grandchildren take nothing. Jackson *v.* Staats, 11 *Johns.* 337.

A posthumous child is entitled to a distributive share under the statute of distributions. Hill *v.* Moore, 1 *Murph.* 233.

A devise to the children of the testator, in general terms, does not include a posthumous child; and he may claim, under the statute of Virginia, as pretermitted by the will. Armstead *v.* Dangerfield, 3 *Munf* 20.

Childish, implies a degree of reason or intelligence. Mulloy *v.* Ingalls, 4 *Neb.* 115.

Child's part, *ex vi termini*, imports as large a share as any child has. Davis *v.* Duke, *Cam. & N.* 361.

CHILTERN HUNDREDS. The Chiltern Hundreds are three tracts, Stoke, Desborough, and Bonenham, which were, in former years, it is said, much infested by robbers, to repress whom the office of steward was created. His duties long ago ceased; and the office is now a fiction, used by members of parliament who wish to resign. By English law, one who has been elected member of parliament is under obligation to serve, and cannot resign; but, by statute, if he takes office under the crown, his seat is thereby vacated. Therefore, a member desiring to return to private life suggests to the lords of the treasury that he should be appointed steward of one of the Chiltern Hundreds. The appointment is made, as a matter of course; and, being announced, the seat of the member becomes vacant, and may be filled by a new election. The steward then resigns his stewardship. (*May's Parl. Prac.* 576; 2 *Hatsell*, 41; *Rogers Elect.*) *Bouvier.*

CHIROGRAPH. An instrument of gift or conveyance attested by the subscription and crosses of the witnesses, and which was in the Saxon times called *chirographum*, and which, being somewhat changed in form and manner by the Normans, was by them styled *charta*. Anciently, when they made a chirograph or deed which required what is now called a counterpart, they engrossed it twice upon one piece of parchment contrariwise, leaving a space between, in which they wrote in great letters the word chirograph, and then cut the parchment in two through the middle of the word, concluding the deed with *In cujus rei testimonium utraque pars mutuo scriptis presentibus fide media sigillum suum fecit apponi.* This was afterwards called *dividenda*, because the parchment was so divided or cut. And the first use of these chirographs was in Henry III.'s time. Chirographs were also of old used for a fine. (*Cowel.*) *Brown.*

Chirographer of fines. The title of the officer of the common pleas who engrossed fines in that court so as to be acknowledged into a perpetual record. *Cowel.* Chlorodyne - 8th N 178

CHOSE. Thing; any matter of personal property. The word is little used alone; but the phrase chose in action recurs frequently.

Chose is used in the common law with divers epithets; as chose local, chose transitory, and chose in action. Chose local is such a thing as is annexed to a place, as a mill, and the like; and chose transitory is that thing which is movable, and may be taken away, or carried from place to place. Chose in action is a thing incorporeal, and only a right; as an annuity, obligation for debt, &c.; and generally any cause of suit for any debt, duty, or wrong. *Jacob.*

Chose in action is any right to damages, whether arising from the commission of a tort, the omission of a duty, or the breach of a contract. Pitts *v.* Curtis, 4 *Ala.* 350; Magee *v.* Toland, 8 *Port.* 36.

The phrase chose in action is now not confined to demands upon which there is a present, complete right of action. A note, bond, or other promise not negotiable, is a chose in action, before the promisor or

obligor is liable to an action on it, as well as after. A note for money, payable on time, is a chose in action as soon as it is made, and is immediately assignable. So a note payable in work, after a certain day, to the promisee or bearer, on demand, is a chose in action, and assignable before or after that day, and before demand, though no action could be maintained on it till after maturity and demand. Haskell *v.* Blair, 3 *Cush.* 534.

Chose in action includes all rights to personal property, not in possession, which may be enforced by action; demands arising ont of torts as well as contracts. Gillet *v.* Fairchild, 4 *Den.* 80.

As used in the United States bankrupt law of 1867, § 14, specifying what rights of action pass to the general assignee, the phrase does not include an action for malicious prosecution. Noonan *v.* Orton, 34 *Wis.* 259.

Chose in action is a phrase which is sometimes used to signify a right of bringing an action, and, at others, the thing itself which forms the subject-matter of that right, or with regard to which that right is exercised; but it more properly includes the idea both of the thing itself and of the right of action as annexed to it. Thus, when it is said that a debt is a chose in action, the phrase conveys the idea, not only of the thing itself, *i.e.*, the debt, but also of the right of action or of recovery possessed by the person to whom the debt is due. When it is said that a chose in action cannot be assigned, it means that a thing to which a right of action is annexed cannot be transferred to another together with such right. *Brown.*

Chose in possession is where a person has not only the right to enjoy, but also the actual enjoyment of, the thing. *Wharton.*

CHRISTIAN, *adj.* Pertaining to Christ or his religion; professing Christianity. *Webster.* It is also used in the sense of ecclesiastical, as a Christian court; and to denote the name given in baptism to a person, or the first name by which he is called, as distinguished from the family name, or surname. Christian, *n.:* One who believes in, or is supposed to assent to, the doctrine and precepts taught by Christ.

Christian is used in the New Hampshire constitution, in its ordinary sense, to designate one who believes or assents to the truth of the doctrines of Christianity, as taught by Jesus Christ in the New Testament, or who, being born of Christian parents or in a Christian country, does not profess any other religion, or belong to any of the other religious divisions of men. This is the sense in which the word is ordinarily used in constitutions and statutes and legal documents, and refers to persons commonly known as nominally Christians, rather than to those who, professing the faith of some particular church, are termed Christians, in the theological or sacred sense of the term. Hale *v.* Everett, 53 *N. H.* 9.

CHRISTIANITY. The system of doctrine and precepts taught by Christ; the religion of Christ. Christianity is part of the common law, both in England and in this country, though in a somewhat more restricted sense in parts of the latter; and to maliciously revile it is an indictable offence. Commonwealth *v.* Kneeland, 20 *Pick.* 206; People *v.* Ruggles, 8 *Johns.* 290; Chapman *v.* Gillett, 2 *Conn.* 41; Updegraff *v.* Commonwealth, 11 *Serg. & R.* 394; State *v.* Chandler, 2 *Harr.* (*Del.*) 553; 4 *Bl. Com.* 60; Smith *v.* Sparrows, 4 *Bing.* 84; Lindenmuller *v.* People, 33 *Barb.* 548; Rex *v.* Carlile, 3 *Barn. & Ald.* 161; Rex *v.* Waddington, 1 *Barn. & C.* 26; Vidal *v.* Girard, 2 *How.* 103; see Cincinnati Board of Education *v.* Minor, 23 *Ohio St.* 211.

CHURCH. 1. A building consecrated to Christian worship. In English ecclesiastical law, it is sometimes called a benefice, and includes the glebe, parsonage, and tithes. 1 *Crabb's Real Prop.* 77, § 90. The fabric of the church consists of the nave or body of the church, with the aisles, the chancel, and the steeple. Administration of the sacraments and sepulture must be annexed to a place of worship before it is entitled in law to be adjudged a church.

2. The word is also applied to a body of persons united under one form of government by the profession of the same Christian faith and the observance of the same ritual and ceremonies; in this sense, it may mean either a single body of worshippers, or that large mass of believers of a common system of tenets, who, scattered throughout the country, and meeting in many separate bodies, are yet united in general faith and denominational organization.

Church may mean either the building consecrated to the worship of God, or an assembly of persons united by the profession of the same Christian faith, met for religious worship. Robertson *v.* Bullions, 9 *Barb.* 64, 95.

Church and society are popularly used to denote the same thing; namely, a religious body organized to sustain public worship. Society *v.* Hatch, 48 *N. H.* 393.

Church applies to the communicants and

baptized persons rather than to the society at large. Ayres *v.* Weed, 16 *Conn.* 291.

The body of communicants gathered into church order, according to established usage, in any town, parish, precinct, or religious society, established according to law, and actually connected and associated therewith for religious purposes, for the time being, is to be regarded as the church of such society, as to all questions of property depending upon that relation. Stebbins *v.* Jennings, 10 *Pick.* 193; see also Anderson *v.* Brock, 3 *Me.* 247.

A congregational church is a voluntary association of Christians united for discipline and worship, connected with, and forming a part of, some religious society, having a legal existence. Anderson *v.* Brock, 3 *Me.* 248.

Church of England is that ecclesiastical organization recognized and endowed by the government of England, and comprising in its doctrine and discipline the national faith. No person can succeed to the British crown who shall not join in communion with it, as by law established; and by the coronation oath the sovereign is bound to maintain the Protestant or reformed church established by law, and to preserve to its bishops and clergy all rights and privileges as by law do or shall pertain to them.

Church rate. A sum assessed (by English law) for the repair of parochial churches by the parishioners in vestry assembled. In England, the reparation of the body of the church belongs to the parishioners, and the power of taxing themselves for that purpose is vested solely in them. The church-wardens, as such, have no power to impose a church rate; but if they give notice of a vestry for that purpose, and if no other parishioners attend, they may alone make and assess the rate. It has been decided that it is incumbent on a parish to impose a rate for the maintenance of the church; but, as the payment can only be enforced by ecclesiastical censures, it may be resisted with impunity; and this has recently been the result in many parishes.

Church-warden. The name of office of the guardians or keepers of the church building and property; the representatives of the body of the parish. In some ecclesiastical corporations, they are created by charter, and their rights and duties definitely explained. In England, they are sometimes appointed by the minister, sometimes by the parish in vestry assembled, and sometimes by both together, as the custom of the place directs. In general, the minister chooses one, and the parishioners another. They are chosen yearly in Easter week, and have the care and management of the church or building, the utensils and furniture, the church-yard, certain matters of good order concerning the church and church-yard, the endowments of the church, &c. *Bacon Abr.* Their capacity to hold property for the church is, by the common law, limited to personal property. 9 *Cranch*, 43.

In the United States, the term is used, we believe, only in churches of the Episcopalian form of government; and the wardens are chosen by the attendants upon or members of the various societies.

CIRCUIT. Originally, one of several parts or divisions of the territory over which a court has jurisdiction, through which one of the judges of the court travels, by appointment, for the purpose of holding court, chiefly for jury trials.

For a long, intermediate period in English and American jurisprudence, the type of organization of a court of principal and general jurisdiction was, that the territory should be divided into circuits, corresponding in number with the judges of the court; that one judge should be assigned to each circuit, and make a periodical journey through it, holding court at each shire, town, or other designated place, for the trial, in the first instance, of causes arisen and ready there, which arrangement promoted the convenience of jurors and witnesses, who were not required to go far from their homes in order to attend the various trials; and that afterwards the several judges should hold a session together, — at the capital, usually, — for a review of the decisions made upon the circuits, and for hearing arguments upon questions of law which arose, but were not finally decided, on the circuit trials. Under these usages, circuit came to be used with several shades of meaning; for example, rulings at circuit is a phrase often used for rulings upon the jury trial, irrespective of whether that trial was had in a court travelling

through a circuit, or perhaps in one held only at one place.

In recent years, the organization of courts in circuits has not been closely maintained: many local courts have been created, holding sessions for jury trials steadily in one place; and several appellate courts have come into existence, not composed of judges who have travelled circuit, and sit together afterwards in full bench, but of judges appointed or elected for appellate jurisdiction only.

Circuit court is, in many of the states, a name for a court of general original jurisdiction, clothed with power to try, by judge and jury, the issues of fact in ordinary actions, but subject to a review of its determinations in the supreme court of the state, or other appellate tribunal.

Circuit court of the United States. From a very early period in the judicial history of the United States, circuit courts were held by the judges of the supreme court in the intermissions of that tribunal, each judge sitting in his circuit, usually together with the judge of the district court for the district in which the circuit court was held. From this it resulted that the determinations of the circuit courts were generally made by the concurrence of one member of the supreme court, which tribunal has an appellate jurisdiction over the decisions of all the circuits. The act of congress of April 10, 1869 (Rev. Stat. § 607), modified this system. This enactment provides that for each circuit there shall be appointed a circuit judge, who shall have the same power and jurisdiction therein as the justice of the supreme court allotted to the circuit. But the system of allotting the justices of the supreme court among the circuits is continued, and the authority and duty of each of those justices to attend at least one term of the circuit court in each district of his circuit, during every period of two years, is expressly declared. Rev. Stat. § 710. Thus this statute, while increasing the judicial force of the circuit courts, preserves the same general connection between these courts and the supreme court. The district judge of each district, usually, or often, sits with the circuit judge or the judge of the supreme court, in holding the circuit court within his district; but, in case of a difference between them, the opinion of the circuit judge prevails (except to authorize imprisonment or punishment), unless either party to the controversy obtains, as he may, the opinion of the supreme court upon the point, by causing the question on which the judges are opposed to be certified to that court for determination.

The circuit courts are not created by the constitution, but by congress; and their jurisdiction is such as congress confers from time to time. A general description of the original jurisdiction under existing laws is, that it extends (subject to some limitations founded on residence) to civil suits involving more than $500, and arising under the constitution, laws, or treaties of the United States, or in which the United States are plaintiffs, or in which the controversy is between citizens of different states, or citizens of the same state claiming lands under grants of different states, or between citizens of a state and foreign states, citizens, and subjects; also of crimes under the laws of the United States. They have also an appellate jurisdiction over the district courts.

The jurisdiction of the circuit courts was the subject of numerous enactments, from the judiciary act of 1789, down to the revision of the statutes, in 1873; the substance of which was set forth in sections 629 and 630 of the revision. By act of March 3, 1875, § 1 (18 Stat. at L. 470), a new definition was given of the jurisdiction, which is certainly very comprehensive, and has been held by some of the cases (see Osgood *v.* Chicago, &c. R. R. Co., 6 *Biss.* 330) to be a substitute for and implied repeal of the provisions of the revision on the subject, and from which the above sketch is condensed.

Circuitus est evitandus. Circuity is to be avoided; the courts seek to avoid circuity in legal proceedings. Upon this principle, set-off of cross-demands is allowed, thus disposing in one action of what might become the subject of two or more suits. Upon

the same ground, counter-claims are by statute permitted to be set up in defence, even such as were not strictly proper to be set off. So, where two parties have judgments against each other, they will be ordered to be set off, for the purpose of avoiding circuity, vexation, and expense.

CIRCUITY OF ACTION. A more complex course of proceeding to recover a demand than is needful; a roundabout mode of suing. If A has a right of action against B, under circumstances such that B, if he were compelled to pay, could immediately sue C to be reimbursed, A is allowed, in some cases, to sue C directly, in order to avoid circuity of action.

CIRCUMSTANTIAL EVIDENCE. This phrase describes that mode of proving an allegation which consists in proving circumstances which would naturally attend the fact alleged, and from them arguing its existence; or, in reasoning from facts which are known or proved, to establish such as are alleged to exist. It is opposed to direct or positive evidence, which consists in testimony or documents substantiating the matter alleged by word of persons actually cognizant of it.

When the existence of any fact is attested by witnesses, as having come under the cognizance of their senses, or is stated in documents, the genuineness and veracity of which there seems no reason to question, the evidence of that fact is said to be direct or positive. When, on the contrary, the existence of the principal fact is only inferred from one or more circumstances which have been established directly, the evidence is said to be circumstantial. And when the existence of the principal fact does not follow from the evidentiary facts as a necessary consequence of the law of nature, but is deduced from them by a process or probable reasoning, the evidence and proof are said to be presumptive. *Best on Presumptions*, 246; *Id.* 12.

CITE. To call or summon. Therefore, 1, to notify a party of a proceeding against him, or call him to appear and defend; and, 2, to quote or refer to authorities in support of a proposition in jurisprudence. Citation: a species of summons or notice to a party to appear and answer a proceeding; also, the act of quoting authorities, and sometimes an authority quoted.

Citation, in the sense of a summons, is particularly used in the practice upon writs of error from the United States supreme court, and in the proceedings of courts of probate or surrogates' jurisdiction, in many of the states.

CITIZEN. A person who owes allegiance to, and may claim reciprocal protection from, a government; one who is a member of a nation, or of the body politic of a sovereign state. Citizenship: the status of a member of the state or nation; the relation of allegiance and protection between individuals and their country.

The terms appear drawn from the political condition in ancient times, when the *city* was the leading type of governmental organization; when the free inhabitant or corporate member of a powerful and wealthy municipality enjoyed a status at home to which power, influence, and privilege were attached; and received, when travelling abroad, a protection and respect, which were accorded to him in view of his membership in the city of his birth or acquired residence, and were proportioned to the rank and power of that city among the cities of the world. Citizen was the natural expression in which to couch one's claim of immunity or favor abroad, or of authority or privilege at home, when it was founded upon membership in a city. Hence also come some secondary uses of the term; for in the vernacular it has been used as meaning resident of a city, in contrast with countryman; and so it is not deemed amiss to say, with reference to quelling a riot, that the military fired upon the citizens, meaning upon civilians, persons who were not soldiers.

In American constitutional jurisprudence, however, the use of the two words is frequent and peculiar. The definitions given above are submitted as stating the inherent meanings of the terms, the original and necessary notions which they involve, though they have been used in so many different connections, and for purposes so various, that they have acquired associations and collateral significations which are inconsistent and perplexing. Several ideas

are often associated with them, which ought to be discriminated.

1. *Descent* or *inheritance* is not an element in these terms. Birth, indeed, is the prime avenue to the status; but this is not upon any view that it is a rank or degree which the child inherits from the father. If the child is born a citizen, that condition originates from the circumstances attending his birth; it is not derived by descent, but arises from the principle, fundamental to national government, that the people born within a country are the primary members of the body politic, and constitute the natural members of the nation. 10 *Op. Att.-Gen.* 382. Apparent exceptions, as where the citizenship of a father is imputed to a child born abroad, are not real ones; the status is not acquired upon any theory of descent (although the act of 1855 does use, inadvertently, we think, the word descent in this connection): it is impressed upon the child directly, by the law, in view of political considerations which incline government to recognize citizenship, notwithstanding foreign birth, and without prescribing such conditions as are imposed on naturalization. Just as government does give citizenship to those who will apply for it under naturalization laws, it might give it to all who remove within its territory, and no idea of descent would arise in either case; and so the gift does not involve that idea in the cases of children of American parentage but of foreign birth.

2. *Age*, or *majority*, is not involved. The most important political rights are not, indeed, acquired, until the age of twenty-one; but it is not the possession of these which constitutes citizenship, nor is citizenship in abeyance, while they are. The child is, from his birth at least (whether also during the months of his recognized legal existence before birth is a minute question upon which we have not space to enter), a citizen, invested with the relation of allegiance and protection, though postponed, during minority, from exercise of powers which the law reserves for adults.

3. *Sex*, again, does not enter into these terms. Women are citizens as fully and truly as men. If the conditions on which citizenship is acquired by foreign-born women are, in some cases of detail, different from those which apply to men, this makes no difference in the meaning of the term when it applies to them; nor does a recognition of woman's citizenship involve a grant of political rights, such as are, indeed, usually conferred only upon citizens, but do not inhere in that status. See United States *v.* Anthony, 11 *Blatchf.* 200; Minor *v.* Happersett, 21 *Wall.* 162; United States *v.* Reese, 92 *Id.* 214; Spencer *v.* Board of Registration, 1 *McArthur*, 169.

4. *Race*, again, seems not an element. The course of decisions prior to the abolition of slavery did discern in negro parentage, independent of enslavement, a disqualification from citizenship, Dred Scott *v.* Sandford, 19 *How.* 393; State *v.* Ambrose, 1 *Meigs*, 331; 1 *Op. Att.-Gen.* 506; Marshall *v.* Donovan, 10 *Bush*, 681; but this position was nearly abandoned before the fourteenth amendment to the constitution, and is wholly untenable since. The decisions adverse to the citizenship of Indians (McKay *v.* Campbell, 5 *Am. L. T. Rep.* 407; Kawahoo *v.* Adams, 1 *Dill.* 344; 7 *Op. Att.-Gen.* 746) appear founded on the peculiarities of the tribal condition, and to rest upon the fact that children born to members of Indian tribes, though born within territory over which the United States government holds sway, are not born within the allegiance of the United States; or (to accommodate the phraseology to the language of the fourteenth amendment), though born within the United States, they are not born subject to the jurisdiction thereof. We do not find any explicit authority that a child born, within the settled regions of the United States, to Indian parents who have previously abandoned the tribal relation, and are dwelling under and as ordinary subjects of the government, may not, since the amendment, claim the status of a native-born citizen.

5. *Right to co-operate in government* is not a constituent. The right to vote, indeed, is not generally conferred upon persons who are not citizens; upon the other hand, it is not extended to all who are. It may be, and is, restricted by

many conditions founded on age and sex, on length of residence in a state or district, on compliance with registration laws, and others, which are wholly aside from citizenship. Eligibility to office is not in any respect a test; many offices are not open to all citizens, but qualifications of age, local residence, and sometimes of special learning, are superadded; and many offices may be held by those who are not citizens. See Van Valkenburg *v.* Brown, 43 *Cal.* 43; 10 *Op. Att.-Gen.* 382, 387; and, *contra*, White *v.* Clements, 39 *Ga.* 282; Amy *v.* Smith, 1 *Litt.* 326.

6. *Rights of property* are not involved. From the earliest times, in England, indeed, alienage, if unrelieved by statute, has involved the disability to inherit or hold lands; and this doctrine has prevailed in the states, in virtue of their general adherence to the common law. But legislative interference to relieve the disability has not been uncommon, and has been exercised, both by special acts and general laws, without the idea that citizenship was thereby given. Acts enabling aliens to hold lands do not involve citizenship. And the doctrine, when accurately stated, is a doctrine of disability of aliens; not of a privilege or capacity of citizens.

These negative explanations will somewhat exhibit the true sense of the terms in question. They present simply and purely the idea of a relation between an individual and a government, constituted either by birth under conditions defined by law, or by naturalization, and involving the right of government to claim allegiance and political support from the individual, and the right of the individual to receive governmental protection from the sovereign power. This protection, be it added, is not limited to the protection of the person and property, which the municipal law endeavors to secure to all dwellers in the territory, but national protection, recognition of the individual, in the face of foreign nations, as a member of the state, and assertion of his security and rights abroad as well as at home.

Another aspect is not less important: that which regards the rules for determining what persons are citizens. In one sense, the answer to this question constitutes a definition of citizen. Prominent among the authorities on this point is the fourteenth amendment to the national constitution, declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside." This appears, at first sight, as if it were intended as an exhaustive delineation of the persons who are citizens, so that no person not included in the description can be deemed to be one. And this effect has sometimes been imputed to it. We think, however, it ought not to be so understood. The language does not imply this. All persons born, &c., are citizens: this does not logically import that there may not be other persons who are also citizens. The purposes of the amendment do not indicate an intention to limit the term or exclude any class of persons. The results of the war had developed a general desire to protect, by national authority, the newly emancipated negroes in some just and uniform measure of civil rights. The thirteenth amendment had secured their liberty; but its effect was impaired in several of the former slave states by enactments restricting the rights and capacities of negroes on the mere ground of their race; and it was to meet a wide-spread evil of this nature that the fourteenth amendment was agitated and adopted. That provision sought to *enlarge* the class of citizens; to make citizenship distinctly national, and bring it under the protection of national law; to establish that negro parentage should be no bar to the citizenship of a person of American birth. Van Valkenburg *v.* Brown, 43 *Cal.* 43; see also McKay *v.* Campbell, 5 *Am. L. T. Rep.* 407, 414. There had long been rules and statutes which accorded citizenship to some persons not born within the United States, and not naturalized; but to abrogate these was no part of the national purpose in the amendment; nor was the attention of the people drawn to them as an abuse to be abolished. Again, the subsequent legislation of congress is not consistent with the idea that the amendment is a definition of who are citizens. Since its

adoption, congress has re-enacted (Rev. Stat. §§ 1992, 1995) provisions of former laws asserting citizenship; and these, so far as they are broader than the amendment, should be taken into view as still operative. The important provisions are, that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed (act of April 9, 1866); all children heretofore born, or hereafter born, out of the United States, whose fathers were, or may be at the time of their birth, citizens thereof, except children of fathers who never resided in the United States (acts of April 14, 1802, and Feb. 10, 1855); and any woman married to a citizen (act of Feb. 10, 1855), — are declared citizens. These persons must be, we think, still included in the term. Nor do we find any reason to consider that any rule of common law which may have been before the amendment operative as establishing citizenship without the condition of native birth is abrogated by that enactment.

There is a distinction between citizens under the state and under the national governments. The American people have organized a dual government, — a government of independent states for domestic affairs, a government of the Union for national concerns; and the idea of citizenship under these two governments is as distinct as are the governments themselves. United States *v.* Cruikshank, 92 *U. S.* 542. There may well be a citizen of the United States who is not a citizen of any state. Inhabitants of the District of Columbia, or of the territories, and some cases of persons born abroad, but within the allegiance of the federal government, may be particularized. The fourteenth amendment seems not to abolish this distinction: it declares that persons shall be citizens of the state where they reside; but if one has no legal residence in any state, this clause can have no operation; yet his citizenship of the United States must be deemed unaffected.

It is not so easy to state any case of a person who would be deemed a citizen of a state, yet not of the Union. But if citizenship can, since the fourteenth amendment, be forfeited, as unquestionably it might be before, if a loss of citizenship may be imposed by statute as a penalty for an offence (Gotcheus *v.* Matheson, 58 *Barb.* 152; 40 *How. Pr.* 97; *Rev. Stat.* § 1996), it would seem that, under possible legislation, a person convicted under an act of congress imposing disfranchisement might cease to be a citizen of the Union; yet, because the offence was against the United States alone, or because there was no corresponding penal law in his state, he might be deemed to continue a citizen of the state. These suggestions explain that the two citizenships are distinct; in nature, though, generally and presumably, they are united in each individual.

The apparent recognition of corporations as being citizens within the constitutional grant, which extends the judicial power to controversies between citizens of different states, deserves a mention. A corporation is not within the term citizen, in its ordinary acceptation; yet a suit to which a corporation is a party has been brought, by repeated and settled decisions, within this clause; and this has given rise to loose expressions in the books, to the effect that a corporation is a citizen within the constitutional clause. Yet we do not understand that the cases deliberately take this ground. The doctrine, when carefully examined, is, that an action in which the corporation appears by its corporate name is to be regarded as brought by or against citizens of the state which created it. Where a corporation is created by the laws of a state, the legal presumption is that its members are citizens of the state in which alone the corporate body has a legal existence; and hence a suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the state which created the corporate body; and no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of the United States. Ohio, &c. R. R. Co. *v.* Wheeler, 1 *Black*, 296. The suit in the corporate name is, in the contemplation of the law, the suit of the individuals who by legal presumption are considered as composing it; that is to say, the suit of citizens of the state by whose law it is created. Earlier decisions went upon

the ground of looking to the actual citizenship of members of the corporation; but the later cases have overruled that doctrine, and established the jurisdiction on the ground of a conclusive presumption. But the point is, not that corporations are citizens, but that when a corporation is plaintiff or defendant in a *suit*, the *controversy* — this is the controlling word in the constitution — is with its members; and these are presumed to be citizens of the state of its creation. Muller *v.* Dows, 94 *U. S.* 444.

Citizen and inhabitant are not synonymous. One may be a citizen of a state without being an inhabitant, or an inhabitant without being a citizen. Quimby *v.* Duncan, 4 *Harr.* (*Del.*) 383.

Citizens, in Ind. Const. art. 1, § 23, — declaring that privileges which shall not equally belong to all citizens shall not be granted, — includes only white male citizens of the United States, of the age of twenty-one years, and white males of foreign birth, of the like age, who have declared their intention, under the act of congress, to become citizens of the United States, and have resided in this state six months. Thomason *v.* State, 15 *Ind.* 449.

Citizen, as used in the homestead law, means a resident of a town or county, and carries no implication of political or civil privileges. McKenzie *v.* Murphy, 24 *Ark.* 155.

Citizen is sometimes used as synonymous with resident; as in a statute authorizing funds to be distributed among the religious societies of a township, proportionably to the number of their members who are citizens of the township. State *v.* Trustees of Section 29, 11 *Ohio*, 24.

The Texas act, exempting certain property of every citizen from execution, is not confined to native-born and naturalized citizens, but extends to all inhabitants of the state, married or single. Cobbs *v.* Coleman, 14 *Tex.* 594.

In my opinion, the constitution uses the word citizen only to express the political quality of the individual in his relations to the nation; to declare that he is a member of the body politic, and bound to it by the reciprocal obligation of allegiance on one side, and protection on the other. And I have no knowledge of any other kind of political citizenship, higher or lower, statal or national, or of any other sense in which the word has been used in the constitution, or can be used properly in the laws of the United States. The phrase "a citizen of the United States," without addition or qualification, means neither more nor less than a member of the nation. Opin. of Atty.-Gen. Bates, on Citizenship, 10 *Op. Att.-Gen.* 382, 388.

Every person born in the country is, at the moment of birth, *prima facie* a citizen; and he who would deny it must take upon himself the burden of proving some great disfranchisement strong enough to override the "natural-born" right, as recognized by the constitution in terms the most simple and comprehensive, and without any reference to race or color, or any other accidental circumstance. That *nativity* furnishes the rule, both of duty and of right, as between the individual and the government, is a historical and a political truth, universally accepted. So strongly was congress impressed with the fact that the child takes its political status in the nation where it is born, that it was found necessary to pass a law to prevent the *alienage* of children of our known fellow-citizens who happen to be born in foreign countries; viz., the act of Feb. 10, 1855 (10 Stat. at L. 604). *Ib.*, 394, 396.

The word citizens is not used of the subjects of a monarchical government. The term involves an idea not enjoyed by subjects, — the inherent right to partake in the government. The republics of the old world were cities, and citizens anciently signified inhabitants of cities. The people of modern republics were, in course of time, called citizens, for the simple and obvious reason that their relation to the state was like the relation of citizens to the city; they were a part of its sovereignty; were entitled to its privileges, its rights, immunities, and franchises. In its ancient use, relating to municipal corporations, citizen meant strictly one who possessed *inalienably* all the rights, civil, political, and religious, enjoyed by any one in the city; for the city itself, being only a corporation, could not by its by-laws infringe or qualify those rights, since they were given by the charter. When, however, the word came to be used of the people of a state, who were themselves the sovereign, this inalienable equality in the rights of citizens ceased; for the people themselves, being bound by no charter, may, by affirmative enactment, qualify, restrain, and restrict the rights of citizens. The word citizen, then, means, presumptively, a person in the enjoyment of all political rights; but it does not so necessarily import this, that the employment of it in a constitutional description debars the legislature from restricting the political rights of any of the persons embraced by the description. White *v.* Clements, 39 *Ga.* 232, 260; see also Amy *v.* Smith, 1 *Litt.* 326; Thomasson *v.* State, 15 *Ind.* 449.

Domicile in a foreign country does not affect the fact of citizenship, nor work a forfeiture of political rights. When the territory and government of a kingdom pass to and become merged in the territory and government of another nation, all of its subjects pass also. The tie which binds them is not bodily presence, but allegiance. Brown *v.* United States, 5 *Ct. of Cl.* 571.

Inasmuch as the Indian tribes within the territory of the United States are independent political communities, a child born in

one of such tribes is not a citizen of the United States, although born within its territories. McKay *v.* Campbell, 5 *Am. L. T. Rep.* 407; Kawahoo *v.* Adams, 1 *Dill.* 344.

He is not a citizen, but a domestic subject. Opin. of Atty.-Gen. Cushing, on Relation of Indians, 7 *Op. Att.-Gen.* 746.

The words "citizens" and "people of the United States" are synonymous terms. But a free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a citizen within the original meaning of the constitution of the United States. Dred Scott *v.* Sandford, 19 *How.* 393.

Persons, although of African descent, born free within the jurisdiction and allegiance of the United States, are citizens of the United States. They may, indeed, not be privileged to vote or hold office, by the laws of the states where they reside; but these privileges are not essential to the character of a citizen. Allegiance on the part of the individual, and the duty of protection on the part of the government, constitute citizenship under the constitution. Smith *v.* Moody, 26 *Ind.* 299.

All persons born in the allegiance of the United States are natural-born citizens. Birth and allegiance go together. Such is the rule of the common law. There are two exceptions, and only two, to the universality of its application. The children of ambassadors are, in theory, born in the allegiance of the powers the ambassadors represent; and slaves, in legal contemplation, are property, and not persons. The common law has made no distinction on account of race or color. Free persons of color, born within the allegiance of the United States are citizens, and have always been entitled to be so regarded. United States *v.* Rhodes, 1 *Abb. U. S.* 28, 40; 1 *Am. L. T. U. S. Cts.* 22.

Free men of color born within the United States are citizens of the United States, and are not disqualified, by negro blood, from becoming masters of vessels engaged in the coasting trade, although the acts of congress confine that privilege to citizens. Opin. of Atty.-Gen. Bates, on Citizenship, 10 *Op. Att.-Gen.* 382; and see Opin. of Atty.-Gen. Legaré, 4 *Op. Att.-Gen.* 147.

Negroes born within the United States are, by the amendments to the constitution, citizens. United States *v.* Canter, 2 *Bond*, 389.

Prior to the adoption of the fourteenth amendment, negroes were not, and could not become, citizens. The primary object of that amendment was to elevate the negro to citizenship, and without affecting the rights of the whites, secured by the then existing constitutions and laws. Marshall *v.* Donovan, 10 *Bush*, 681.

Citizen has relative applications, which modify its sense in given cases. In its highest political sense, it signifies the persons who constitute the political society. It is not confined to persons enjoying the right of suffrage; and, on the other hand, a person may be an elector without being a citizen. And the mere fact of birth within the territorial limits of the United States does not constitute one a citizen. Opin. of Atty.-Gen. Cushing, on Relation of Indians, 7 *Op. Att.-Gen.* 746.

American citizenship does not necessarily depend upon nor co-exist with the legal capacity to hold office, or the right of suffrage. The several states, in exercising the power to define who may vote or hold office, act independently, and their power is only limited by their own prudence and discretion. Hence these faculties of voting and holding office are not uniform in the different states, but are made to depend on a variety of facts, purely discretionary; such as age, sex, race, color, property, residence. No person in the United States did ever exercise the right of suffrage in virtue of the naked, unassisted fact of citizenship. In every instance the right depends upon some additional fact and cumulative qualification. Opin. of Atty.-Gen. Bates, on Citizenship, 10 *Op. Att.-Gen.* 382, 387.

Citizenship does not involve the right to vote and hold office. All the States have withheld suffrage from some classes of citizens, and some have granted it to persons who were not citizens. An error on this subject has arisen from confounding political with civil rights. The latter constitute the citizen, while the former are not necessary ingredients. A citizen is one who owes the government allegiance, service, and money by way of taxation, and to whom the government in turn guarantees liberty and personal rights. Van Valkenburg *v.* Brown, 43 *Cal.* 43. Compare Live-Stock, &c. Assoc. *v.* Crescent City, &c. Co., 1 *Abb. U. S.* 388.

White persons born within the limits and jurisdiction of the United States, or naturalized, do not owe their citizenship to the recent constitutional amendments. The purpose of the fourteenth amendment was chiefly to confer citizenship upon the negroes, they having been adjudged (19 *How.* 393) not citizens, though natives and free born. Van Valkenburg *v.* Brown, 43 *Cal.* 43.

The meaning of the fourteenth amendment, all persons born in the United States and subject to the jurisdiction thereof, is, born *both* in the United States and subject to the jurisdiction; born in the United States, and born subject or not; born in the United States, and *afterwards becoming* subject. One born within the territory, but not within the allegiance, is not a citizen, because he is afterwards brougbt within the jurisdiction. McKay *v.* Campbell, 5 *Am. L. T. Rep.* 407.

By the common law, a subject travelling abroad on public or private business, with the express or implied license of his sovereign, is under that sovereign's protection; and, consequently, both he and his children born while so travelling owe allegiance

to and are citizens of the native country of their father. The length of the father's residence abroad is not material, so that it was, in intention and in fact, temporary, not perpetual. And whether the mother was a citizen or not is unimportant: the status of the child is determined by that of the father. Ludlam *v.* Ludlam, 31 *Barb.* 486; Davis *v.* Hall, 1 *Nott & M.* 292; Lasportas *v.* De la Motta, 10 *Rich. Eq.* 38.

An individual whose father appears to have been a resident in this country, and to have married, and had children born here, is presumed to be a citizen, although he himself was born subsequently to his father's removal to a foreign country, there being nothing else to show his father to have been an alien. Campbell *v.* Wallace, 12 *N. H.* 362; S. P. Shanks *v.* Dupont, 3 *Pet.* 242.

Under the act of April 14, 1802, ch. 288, § 4, the children of persons duly naturalized under any of the laws of the United States, being under the age of twenty-one years at the time of their parents being so naturalized, are, if dwelling within the United States, to be considered as citizens of the United States. Campbell *v.* Gordon, 6 *Cranch*, 176.

Although a state, by its laws, passed since the adoption of the constitution, may put a foreigner, or any other description of persons, upon a footing with its own citizens as to all the rights and privileges enjoyed by them within its dominion and by its laws, that will not make him a citizen of the United States, nor entitle him to sue in its courts, nor to any of the privileges and immunities of a citizen in another state. Dred Scott *v.* Sandford, 19 *How.* 393.

There is in our political system a government of each of the several states, and a government of the United States. Each is distinct from the others, and has citizens of its own, who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a state; but his rights of citizenship under one of these governments will be different from those he has under the other. The government of the United States, although it is, within the scope of its powers, supreme and beyond the states, can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction. All that cannot be so granted or secured are left to the exclusive protection of the states. United States *v.* Cruikshank, 92 *U. S.* (2 *Otto*) 542.

A citizen of the United States owes his first and highest allegiance to the general government, and not to the state of which he may be a citizen. A declaration of war, or the commencement of actual hostilities, between two States, *ipso facto* dissolves the partnership relation existing between citizens of the hostile states. Planters' Bank *v.* St. John, 1 *Woods*, 585.

Within the acts of congress relating to suits between citizens of different states in the circuit courts, and removal of causes, a man is in general deemed to be a citizen of the state of his domicile. Gassies *v.* Ballou, 6 *Pet.* 761; Case *v.* Clarke, 5 *Mas.* 70; Fisk *v.* Chicago, &c. R. R. Co., 53 *Barb.* 472; 3 *Abb. Pr.* N. S. 453.

But one may be a citizen of one state, within the meaning of the act providing for the removal of a cause, and yet be a resident of another state. Darst *v.* Bates, 51 *Ill.* 430.

Corporations are citizens, within the meaning of the clause of the constitution of the United States which extends the judicial power of the courts of the United States to controversies between the citizens of different states; and they are citizens only of the state or sovereignty that created them. Western Union Telegraph Co. *v.* Dickinson, 40 *Ind.* 444.

A corporation aggregate is not considered as a citizen, or entitled to the privileges of a citizen, except, perhaps, for the purpose of giving jurisdiction to the federal courts, for which a corporation may be considered a citizen of the state by which it is incorporated. Tatem *v.* Wright, 23 *N. J. L.* 429.

A corporation is not *per se* a citizen within the meaning of section 3 of the constitution of the United States. Wheeden *v.* R. R. Co., 2 *Phila.* 23.

An incorporated company is not within the meaning of that clause of the constitution of the United States which secures to the citizens of each state all the privileges and immunities of citizens of the several states. People *v.* Imlay, 20 *Barb.* 68; Paul *v.* Virginia, 8 *Wall.* 168; Ducat *v.* Chicago, 48 *Ill.* 172.

The term citizens of a state, as used in the constitution, applies only to natural persons, members of the body politic, owing allegiance to the state, and not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed. Paul *v.* Virginia, 8 *Wall.* 168.

An incorporated company is not a citizen of the United States, nor is it a person within the meaning of section 1 of the fourteenth amendment to the constitution. Ins. Co. *v.* New Orleans, 1 *Woods*, 85.

CITY. As used throughout the United States, imports a municipal corporation of the larger and more important class, incorporated under an organization a distinguishing peculiarity of which is that the general deliberative assembly, open to all the citizens, known in towns as town-meeting, is abandoned; and all direct exercise of powers of government is confided to officers, — a mayor, aldermen, and others, — usually elected by popular vote in wards or dis-

tricts, into which the city is territorially divided.

City may be construed as including incorporated towns, where the context favors. Burke *v.* Monroe Co., 77 *Ill.* 610.

An instruction to the jury, in an action for a defective street, that different degrees of highway repair were required in a city and in a country place, — sustained, upon the view that the judge did not mean to make a distinction between the corporate duties of cities and townships, but used the word city to designate a thickly settled place, with houses and stores contiguous or near to each other, with a great amount and variety of travel, as contradistinguished from places thinly settled, and houses remotely scattered, through which there is little amount and variety of travelling. Fitz *v.* City of Boston, 4 *Cush.* 366.

In Spanish jurisprudence, a city was understood to be a place surrounded by walls. Villars *v.* Kennedy, 5 *La. Ann.* 724.

CIVIL. Originally, that which pertains to the citizen (Lat. *civis*) or free inhabitant of an independent city; in distinction from the government, or from persons of other classes, such as the soldier, or subject of purely military law; the countryman or peasant; the priest or ecclesiastic, &c.

The word has a variety of applications; but in almost all one may readily trace the idea of the character, privileges, or peculiarities of the ancient citizen. Thus it is now used in opposition to that which is military; again, in contrast with barbarous, uncivilized, or rustic; and, in turn, as the opposite of that which is ecclesiastical or priestly; and it may designate that which is for the individual in distinction from the government. But in all these uses it presents the citizen as the standard with which the others are compared. See CITIZEN.

Civil action, case, cause, remedy, suit, or proceeding. These phrases embrace judicial proceedings designed to enforce the rights and redress the wrongs of individuals as between themselves, in distinction from criminal proceedings, which are instituted to vindicate public justice, by infliction of punishment in the name of the sovereign power, and for the protection of the whole people.

A civil action is a demand of a civil right by a person in a court of justice. State *v.* Bottle of Brandy, 43 *Vt.* 297.

The descriptive term "civil actions" embraces cases at law and in equity, and may be fairly construed as used in contradistinction to criminal causes. Livingston *v.* Story, 9 *Pet.* 632, 656.

Civil actions (13 Stat. at L. 51), as used in the act of congress enlarging competency of witnesses, includes actions at law, suits in chancery, proceedings in admiralty, and all other judicial controversies in which rights of property are involved, whether between private parties or such parties and the government. It is used in contradistinction to prosecutions for crime. United States *v.* Cigars, 1 *Woolw.* 123; Rison *v.* Cribbs, 1 *Dill.* 181.

Habeas corpus is not a civil action within the meaning of an act authorizing a change of venue of any civil action. Garner *v.* Gordon, 41 *Ind.* 92.

Civil action, in a statute allowing costs, does not include arbitrations. Bond *v.* Fay, 1 *Allen*, 211.

Civil action includes a petition impeaching a decree for fraud practised by the successful party. Coates *v.* Chillicothe Branch of State Bank, 23 *Ohio St.* 415.

Civil cases are essentially those in which the defendant, or party against whom relief is sought, is a natural person or corporation other than the state. State *v.* Judge, &c., 15 *La.* 192.

Civil cases are those which involve disputes or contests between man and man, and which only terminate in the adjustment of the rights of plaintiffs and defendants. They include all cases which cannot legally be denominated criminal cases. Grimball *v.* Ross, *T. U. P. Charlt.* 175.

The constitutional provision, that "in all civil cases the right of trial by jury shall remain inviolate," does not mean that every case which is not a criminal, is a civil one. The phrase civil case had a definition, a meaning, at common law, when the early constitutions of this country were formed; and was used in those constitutions in the common-law sense, but does not embrace all legal proceedings, except criminal; nor does the provision render chancery causes, assessment of damages in the laying out of highways, by jury, nor contests of elections, triable by jury. But proceedings for the assessment of damages to real estate taken for public works may legitimately be ranked as civil, and hence held to be within the constitutional provision. Lake Erie, &c. R. R. Co. *v.* Heath, 9 *Ind.* 558; see also Norristown, &c. Turnp. Co. *v.* Burket, 26 *Id.* 53.

A statute, giving jurisdiction "in all civil cases, both in law and in equity," covers cases for divorce. Ellis *v.* Hatfield, 20 *Ind.* 101; Herron *v.* Herron, 16 *Id.* 126; Ewing *v.* Ewing, 24 *Id.* 468.

An action of trespass *qu. cl. fr.* is included in a constitutional provision that "all civil cases shall be tried in the county where the defendant resides." Osmond *v.* Flournoy, 34 *Ga.* 509.

That the term civil causes does not in-

clude equity cases, see Gilbert *v.* Thomas, 3 *Ga.* 575.

Nor a proceeding in bastardy. See Mann *v.* People, 35 *Ill.* 467; Maloney *v.* People, 38 *Id.* 62; Allison *v.* People, 45 *Id.* 37; Walker *v.* State, 6 *Blackf.* 1; Sweet *v.* Sherman, 21 *Vt.* 23.

A prosecution under the Massachusetts bastardy act, though criminal in form, is, in substance, a civil proceeding. Wilbur *v.* Crane, 13 *Pick.* 284.

It partakes of the nature of both civil and criminal suits. Hill *v.* Wells, 6 *Pick.* 104.

It is a *quasi* civil proceeding. Chapel *v.* White, 3 *Cush.* 577.

It is not a criminal one. Young *v.* Makepeace, 103 *Mass.* 50.

Where separate terms of court are established for civil and criminal business, a prosecution for the maintenance of bastard children belongs properly to the latter. Hyde *v.* Chapin, 2 *Cush.* 77; S. P. Cummings *v.* Hodgson, 13 *Metc.* 246.

The original proceedings in a bastardy case are properly had before a civil magistrate. Hawes *v.* Gustin, 2 *Allen*, 402.

Civil suits relate to and affect, as to the parties against whom they are brought, only individual rights which are within their individual control, and which they may part with at their pleasure. The design of such suits is the enforcement of merely private obligations and duties. Criminal prosecutions, on the other hand, involve public wrongs, or a breach and violation of public rights and duties, which affect the whole community, considered as such in its social and aggregate capacity. The end they have in view is the prevention of similar offences, not atonement or expiation for crime committed. Cancemi *v.* People, 18 *N. Y.* 128.

The true test whether a prosecution under the internal revenue law is civil or criminal is whether the judgment is one of punishment against the person, or of forfeiture against the *res*. United States *v.* Three Tons of Coal, 6 *Biss.* 379.

Civil commotion. An extended and serious disturbance, with violence, among the masses of the people, not amounting to war or even to armed rebellion; not involving the soldiery as an active party, but only the civilians.

An insurrection of the people for general purposes, though it may not amount to rebellion, where there is an usurped power. Per Lord Mansfield, cited 2 *Marsh. Ins.* 793.

Civil corporation, is a term used in former years, in England, to designate corporations not characteristically eleemosynary or charitable; corporations organized to promote or care for the interests and affairs of members; chiefly business and municipal corporations.

Civil death. The legal privation or extinction of a person's rights and capacities among his fellow-members of society. It was the legal consequence of becoming a monk, abjuring the realm, outlawry, banishment, &c., and is now, in some of the states at least, recognized as the result of a sentence to imprisonment for life.

Civil injury. An injury regarded in the aspect of its effects upon the individual sufferer only, and as giving him a personal right to damages or other redress, is called a civil injury, in distinction from a public offence. The same act may involve a civil injury and an offence.

Civil law. Primarily, that body of law which a community has established for the regulation of the affairs of its ordinary subjects, as distinguished from the law of nations, the law-merchant, the military law, &c. But, because while the nomenclature of this subject was becoming settled in England, the Roman civil law was prominent among all foreign systems of municipal law, and the indigenous law of England was easily and naturally termed the common law, the phrase the civil law has become attached, *par excellence*, to the body of the Roman law, comprised in the Code, Pandects, Institutes, and Novels of Justinian and his successors, originally named *Corpus Juris Civilis*, q. v.

Thus Ridley, in his View of the Ciuile and Ecclesiastical Law (p. 2), published in 1607, says:

"The law Ciuile, being largely taken, is the law that euery particuler Nation frameth to it selfe, as the Athenians laws, and the lawes of Lacedemon, in which sense also, the law of England may be called the Ciuile law, for that it is the proper and priuat law of this Nation: but in more sort, the Ciuile law is the law, which the old Romans used, and is for the great wisdom & equitie thereof at this day, as it were, the Common law of all weel gouerned Nations, a very few only excepted."

And the Institutes of Justinian contain the declaration:

The law which a people enacts is called the civil law of that people, but that law which natural reason appoints for all mankind is called the law of nations, because all nations use it. *Bowyer, Mod. Civ. Law*, 19.

The civil law, or the law of citizens, is that which the people of a state set up for themselves, and which applies to citizens alone. Amongst all civilized nations, *jus*

privatum consists of two parts: rights are claimed under the one, both by citizens and strangers; under the other, by citizens only. This second part is the *jus civile*. *Cumin, Mar. Civ. Law*, 33.

The word civil, as applied to the laws in force in Louisiana, before the adoption of the civil code, is not used in contradistinction to the word criminal, but must be restricted to the Roman law. It is used in contradistinction to the laws of England and those of the respective states. Jennison *v.* Warmack, 5 *La.* 493.

Civil liberty. That measure of liberty which man may enjoy when he enters into a state of society, or becomes associated with his fellows in institutions of government and policy; under which conditions some portion of the natural liberty which he might exercise in a wild or savage state must be surrendered, in order to the more secure possession of the residue. Blackstone defines it as the power of doing whatever the laws permit. 1 *Bl. Com.* 6.

Civil list. A list or estimate of the expenses of officers of government; also, sometimes, the officers employed and paid according to an annual, official list. In early times, in England, it was customary for parliament to make grants to the king of revenues estimated to be sufficient to defray the expenses of the executive government and of the royal household, no marked distinction being made between these heads of expenditure; and, upon any extraordinary military emergency, a special grant appropriate to the occasion was made. Through many reigns the civil list embraced both the support of the royal person and dignity, and the salaries of civil officers, and pensions. By subsequent legislation it is restricted to the support of the person and dignity of the sovereign, and includes salaries of persons attached to the royal household; but the salaries of the general officers of government, and the pensions, are separately met. The civil list is now understood to be the official estimates for an annual sum granted by parliament at the commencement of each reign, for the expense of the royal household and establishment, as distinguished from the general exigencies of the state.

Civil officer. This phrase is generally used to distinguish officers charged with the ordinary administration of government over citizens, from officers of the army and navy. In special connections it may have a somewhat narrower meaning.

Offices are divided into civil and military; and civil offices are political, judicial, or ministerial. Waldo *v.* Wallace, 12 *Ind.* 569.

Civil officer, in the constitutional provision authorizing impeachment, means officers not military. All officers who hold their appointments under the national government, with the exception of officers in the army and navy, are liable to impeachment. A senator or representative is not, because he does not derive his appointment from the United States. *Story Const.* §§ 791–793.

Civil officers, as used in the organic act creating the territory of Wisconsin, embraces only those officers in whom a portion of the sovereignty is vested, or to whom the enforcement of municipal regulations or the control of the general interests of society is confided; and does not include such officers as canal commissioners. United States *v.* Hatches, *Burn*, 22, 1 *Pinn.* 182.

Civil responsibility. This designates amenability for any act or omission enforceable in an action or other proceeding at the suit of a private person or corporation, or (in certain cases) at the suit of the sovereign power suing as for a private wrong, and is opposed to criminal responsibility, which means liability to answer in a criminal court.

Civil rights. Rights accorded to a person simply as a member of the community or nation. Civil Service 1871

Civil side. When the same court has jurisdiction of both civil and criminal matters, proceedings of the first class are often said to be on the civil side; those of the second, on the criminal side. The phrase apparently originates from an allotment of distinct rooms on opposite sides of a building or hall to the two kinds of business respectively.

In the county hall, or court in which the trials (in the English assizes) take place, it is very usual for one side or portion of the building to be appropriated to the hearing of cases of civil character, and the other side or portion to the hearing of those of criminal nature. And hence the phrase has become common, that the judge is either sitting "on the civil side" or "on the criminal side," meaning thereby that he is either presiding at *nisi prius*, or trying a prisoner, as the case may be. *Brown.*

Civil war. A war prosecuted be-

tween opposing masses of citizens of the same country or nation.

Before the declaration of independence, the war between Great Britain and the United Colonies was a civil war; but instantly on that event the war changed its nature, and became a public war between independent governments. Ware *v.* Hylton, 3 *Dall.* 199, 224.

A civil war is a war between one portion of the citizens of a state with another portion, as was the case in the war begun in England in 1642, and during the continuance of which Charles I. was bebeaded. The war existing in this country from April, 1861, to April, 1865, was not a civil war, but a war between states. Mayer *v.* Reed, 37 *Ga.* 482.

That it was a civil war, after the president's proclamation of Aug. 16, 1861, see Prize Cases, 2 *Black*, 635, as explained 35 *Ind.* 134; Perkins *v.* Rogers, 35 *Ind.* 125.

CIVILIAN. A practitioner, or writer in or teacher or student of the civil law; also, a person not a member of the army or navy, or, in England, of the church.

CIVILITER. Civilly. This term is used in distinction or opposition to the word *criminaliter*,— criminally,— to distinguish civil actions from criminal prosecutions. Thus it is said that one having suffered an injury may proceed either *civiliter* or *criminaliter*.

Civiliter mortuus. Civilly dead; dead in the view of the law. The condition of one who has lost his civil rights and capacities, and is accounted dead in law. See CIVIL DEATH.

CLAIM, *v.* To assert one's alleged right; to demand the possession or enjoyment of something rightfully one's own, and wrongfully withheld. Claimant: one who makes such a demand. Claim, *n.*: an assertion of one's right or demand to possess or enjoy something as one's own.

Claim is a challenge of interest in any thing that is in the possession of another, or, at least, out of a man's own possession. It is either verbal, where one doth by words claim and challenge the thing that is so out of his possession; or by an action brought. Sometimes it relates to lands, and sometimes to goods and chattels. *Jacob.*

A claim is a right or title, actual or supposed, to a debt, privilege, or other thing in the possession of another; not the possession, but the means by or through which the claimant obtains the possession or enjoyment. Lawrence *v.* Miller, 2 *N. Y.* 245, 254.

It is a challenge, by a man, of the property or ownership of a thing, which he has not in possession, but which is wrongfully detained from him. Jackson *v.* Losee, 4 *Sandf. Ch.* 381; Kneedler *v.* Sternbergh, 10 *How. Pr.* 67, 72.

In its ordinary sense, claim imports the assertion, demand, or challenge of something as a right; or it means the thing thus demanded or challenged. In a constitutional provision restricting, in general terms, the payment of public money "on any claim," it should be understood as including all demands for money against the state, on whatever grounds founded; whether of a legal or equitable character, whether they arise under existing laws, or originate in circumstances supposed to cast upon the state a duty, even of imperfect obligation only, to make payment. Fordyce *v.* Godman, 13 *Ohio St.* 1, 14.

The word claim, standing by itself, and unrestricted by the use of other language, would embrace a claim for bounty land, as well as a claim for money. United States *v.* Wilcox, 4 *Blatchf.* 385.

In the California statute regulating the settlement of the estates of deceased persons, the words "claimant" and "claim" are used as synonymous with "creditor" and "legal demand for money," to be paid out of the estate. Gray *v.* Palmer, 9 *Cal.* 616.

A covenant against claims must be understood only of lawful claims, unless wrongful claims are expressly included. Folliard *v.* Wallace, 2 *Johns.* 395.

It does not extend to tortious acts. Luddington *v.* Pulver, 6 *Wend.* 404.

Nor to a claim which has been sued to judgment, but which the covenantee has not yet been compelled to pay. Aberdeen *v.* Blackmar, 6 *Hill*, 324.

Claims, in a statute authorizing submission of certain claims to arbitration, was held to mean the allegation upon which issue is taken; the fact or matter put in issue to be tried, and which must be determined before an award can be made. Olcott *v.* Wood, 14 *N. Y.* 32.

The phrase, the plaintiff claims, means that he seeks to recover; that he demands. Douglas *v.* Beasley, 40 *Ala.* 142.

Claimant is in some cases restricted to mean one who has filed a claim as the law requires. Adams *v.* Warrill, 46 *Ga.* 295.

CLAUSUM. That which is close or closed; also, a piece of land enclosed. Little used, except in the name of one of the forms of the action of trespass,— trespass *quare clausum fregit*, because he broke the close.

CLEAR. In a devise of money for the purchase of an annuity, means free from taxes. Hodgworth *v.* Crawley, 2 *Atk.* 376.

In the phrase clear yearly value, clear means free from all outgoings like a rent-charge, as losses by tenants and management, to which a rent-charge is not liable. Tyrconnel *v.* Ancaster, 2 *Ves.* 499.

To clear, when used with reference to lands, means, in the absence of any words of limitation, taking off all timber of every size, but does not include taking out the stumps. Harper *v.* Pound, 10 *Ind.* 32.

To clear out a highway, means to clear it so far as the uses of a highway require. The public have the right to remove obstructions to their easement; beyond this, the rights of the land-owner must be left unimpaired. Winter *v.* Peterson, 24 *N. J. L.* 524.

CLEARANCE. A document given by the collector of customs to the master of a vessel about to sail, in the nature of a certificate that the vessel has complied with the laws governing exportations, and is entitled, and at liberty, to depart on her voyage. It is the formal permission of the custom-house authorities, to a vessel, to sail.

CLEARING. 1. The departure of a vessel from port, considered with reference to the customs and health laws and like local regulations.

2. A method adopted among bankers for a common exchange of drafts held by each house against the others, and settlement of differences; designed to relieve the labor involved in each house sending to all the others to make presentment of the paper it may hold. The general nature of the system is that clerks from the several banking houses in the association, generally all the recognized banks of the city, attend at a fixed hour towards the close of each business day, each bringing with him all drafts which his house has received during the day, payable by any other house. These are then exchanged and balances struck; and each house pays or receives only the balance shown due, instead of having to pay all checks upon it and take payment of all it holds.

Clearing-house. An office organized by the banks of a city, where their representatives may meet daily, adjust balances of accounts, and receive and pay differences.

CLERGY. 1. Persons in holy orders; ecclesiastics.

2. An abbreviated form of the phrase benefit of clergy, *q. v.* Clergyable: applies to a felony to which benefit of clergy was accorded.

The word clergy comprehends all persons in holy orders and in ecclesiastical offices; viz., archbishops, bishops, deans and chapters; archdeacons, rural deans, parsons (who are either rectors or vicars), and curates; to which may be added parish clerks, who formerly frequently were, and yet sometimes are, in orders. *Jacob.*

CLERICAL. 1. That which pertains to the clergy.

2. That which pertains to the office or duty of a clerk in the modern sense. See CLERK.

Clerical error. A mistake, omission, &c., in a manuscript, such as is attributable to the carelessness or miswriting of the scrivener by whom it was drafted, rather than to negligence of the parties; a failure in reducing the intent to writing, which does not affect or impair the intent itself.

Clerical tonsure. A shaving of the head, formerly peculiar to ecclesiastics.

CLERK. Originally, a learned man, or man of letters; whence the term was appropriated to churchmen, who were called clerks, and afterwards clergymen.

In modern usage, the word means a writer; one who is employed in the use of the pen, in an office, public or private, either for keeping accounts or entering minutes; a secretary. A clerk is generally an officer subordinate to a higher officer, board, corporation, or private individual.

Clerk is the law term for a clergyman, and by it all of them who have not taken a degree are designated in deeds, &c.

In another sense, it denotes a person who practises his pen in any court, or otherwise; of which clerks there are various kinds, in several offices, &c. The clergy, in the early ages, as they engrossed almost every other branch of learning, so were they peculiarly remarkable for their proficiency in the study of the law. The judges, therefore, were usually created out of the sacred order; and all the inferior offices were supplied by the lower clergy, which has occasioned their successors to be denominated clerks to this day. (1 *Bl. Com.* 17.) *Jacob.*

A man about a factory, who attends to sales no farther than the mere delivery of the goods, and noting the fact on a slate, from which the manufacturer transcribes them in his books, is not a clerk within the rule; and the employer's books are admissible, upon proof that he kept honest and fair books. Sickles *v.* Mather, 20 *Wend.* 72.

CLIENT. The person who employs an attorney, barrister, counsellor, proctor, solicitor, or other member of the legal profession. It is sometimes used

with reference to persons in other vocations.

CLOSE. The noun close, in its legal sense, imports a portion of land enclosed, but not necessarily enclosed by actual or visible barriers. The invisible, ideal boundary, founded on limit of title, which surrounds every man's land, constitutes it his close, irrespective of walls, fences, ditches, or the like.

The verb to close is used substantially in its vernacular senses, to shut up; to bound or enclose; to terminate or complete.

A plea in an action of trespass, setting up a right to impound the cattle mentioned in the declaration, because they were found doing damage in the defendant's close, is insufficient, under Vt. Gen. Stat. 617, § 4; for that act only gives such right when beasts are found in an enclosure, which means occupied land, while close is of broader signification. Porter *v.* Aldrich, 39 *Vt.* 326.

A statute that all saloons for the sale of liquor shall be closed on Sunday, means that sales of liquor shall be entirely stopped, and the traffic shut off effectually, so that drinking, and the conveniences for drinking, shall be no longer accessible. Kurtz *v.* People, 33 *Mich.* 279.

A broker employed "to close a bargain" for the sale of real property is not authorized to sign the name of his principal to a contract of sale. Coleman *v.* Garrigues, 18 *Barb.* 60; and see Roach *v.* Coe, 1 *E. D. Smith*, 175.

Close rolls; Close writs. Certain letters of the king, sealed with his great seal, and directed to particular persons and for particular purposes, not being proper for public inspection, are closed up and sealed on the outside, and are thence called writs close (*literæ clausæ*), and are recorded in the close rolls in the same manner as others are in the patent rolls (*literæ patentes*), or open letters.

CLOUD ON TITLE. This expression, chiefly used in equity jurisprudence, designates some instrument or proceeding, some deed, mortgage, judgment, decree, assessment, tax, or the like, which, apparently, and upon its face, assuming it to be valid, impairs the title of a party to real property, but which, upon extrinsic facts, is void, and ought equitably to be annulled or removed.

The party affected is interested to have his title freed and discharged from an incumbrance or defect of this kind, while evidence to prove it null is within his power; for if he should be postponed in seeking a remedy until some one asserted claims founded upon the matter constituting the cloud, perhaps by death of witnesses or loss of papers, he would be prevented from proving the real equities. Therefore, without requiring that he should wait till some one seeks to dispossess him, equity will entertain a suit by one who discovers a muniment of title adverse to his, which is apparently good and valid, but, in truth, void, seeking to have it adjudged void, and the true title established. To constitute a cloud on title, such as warrants this equitable interference, the matter complained of must be good and valid on its face, or to appearance; for, if the invalidity of the adverse claim will of necessity appear by the very paper which must be put forth as the foundation of it, there is no need of equitable interference in advance. Upon the other hand, the real invalidity, the fraud, irregularity, want of power, or the like, extrinsic to it, upon which plaintiff founds his prayer for relief, must be clearly established by proof; for it is not reasonable that equity should interfere to foreclose in advance claims that may have a just foundation. See *U. S. Digest*, tit. Cloud on title; Equity.

COACH. Is a generic term; means a kind of carriage, distinguished from other vehicles chiefly as being a covered box hung on leathers, with four wheels, and includes omnibuses, mail-coaches, and stage-coaches. A power to a bridge company to collect tolls from coaches extends to an ordinary stage-coach carrying mails and passengers. Cincinnati, &c. Turnp. Co. *v.* Neil, 9 *Ohio*, 11.

COAST. That portion of the land which adjoins the sea. It imports somewhat greater breadth than shore, while shore is appropriate to rivers and inland waters, which coast is not.

Coasting trade. Commerce and navigation, or communication by vessels, between different places along the shore of the United States, as distinguished from commerce with ports in foreign countries. Vessels engaged in the coasting trade and in foreign commerce are the subject of distinct systems of regulations, under the acts of congress.

As defined by act of congress of Feb. 18, 1793, the term coasting trade means commercial intercourse carried on between different districts in the same state, and between different places in the same district, on the sea-coast or on a navigable river. Steamboat Co. *v.* Livingston, 3 *Cow.* 713.

The business of a ferry-boat is not included in the coasting trade; the words mean the trade along the shore. United States *v.* The William Pope, 1 *Newb.* 256, 259; United States *v.* The James Morrison, *Id.* 241, 252.

Coast-guard. A body of officers and men raised and equipped by the commissioners of the admiralty, for the defence of the coasts of the realm, and for the more ready manning of the navy in case of war or sudden emergency, as well as for the protection of the revenue against smugglers. (Stat. 19 & 20 *Vict.* c. 83). *Mozley & W.*

Coastwise. Vessels "plying coastwise" are those which are engaged in the domestic trade, or plying between port and port in the United States, as contradistinguished from those engaged in the foreign trade, or plying between a port of the United States and a port of a foreign country. San Francisco *v.* Steam Navigation Co., 10 *Cal.* 504. Coble, 6 W.N 30.

CODE. A body of law established by the legislative authority, and intended to set forth, in generalized and systematic form, the principles of the entire law, whether written or unwritten, positive or customary, derived from enactment or from precedent. Codification; or codifying: draughting in one system the whole law, expressed in general principles.

In explaining the modern American usage of the term, the point chiefly noticeable is the distinction between a code and any system of re-compiling or revising the statutes. Compilations of the latter sort embrace only the enactments of legislation, most of which are innovations on the previous unwritten law. By a code, in the strict sense, is understood a concise, comprehensive, systematic re-enactment of the law, deduced from both its principal sources, the pre-existing statutes, and the adjudications of courts. A revision of the statutes is a less extensive undertaking, aiming only to present in one arrangement the existing statute law. A code, if perfect and unambiguous, would be, at its first enactment, a substitute for both statutes and reports previously in use; while a revision, however complete, would supersede only previous acts of the legislature. But this distinction is not very nicely regarded in the nomenclature of American books of legislation. Statute books have, in several instances, been labelled codes, which are not of the nature of a true code, but are only consolidations of the previous statute law.

Cinq codes. A system of five codes, operative in France; the origin of which dates from the empire of Napoleon I.

They are: *Code civil*, sometimes entitled *Code Napoléon;* it embodies the law of rights of persons and of property, generally. *Code de Commerce;* this contains the law of mercantile rights and subjects. *Code de procédure civil*, and *code d'instruction criminelle;* these regulate civil and criminal proceedings in the courts. *Code pénal;* this defines crimes and prescribes punishments.

Code Justinian. This name is often met in a connection indicating that the *pandects* are meant; but, in strictness, it may well be confined to the *codex*. See CORPUS JURIS CIVILIS; PANDECTS.

Commercial codes. Several ancient compilations of commercial law, more or less of the nature of codes, have been influential in moulding our law. The leading ones are mentioned under appropriate titles: thus, for the *Consolato del mare*, see CONSOLATO; for the laws of the *Hanse towns*, see HANSE; and for the laws of *Oleron*, and of *Wisbuy*, see OLERON; WISBUY, respectively. In addition may be named a French compilation, promulgated in 1681, under Louis XIV., and known as the *Ordonnance de la marine;* a translation of which appears in 2 *Pet. Adm. Dec.* appx.

New York codes. An extended and important codification which has steadily proceeded in the State of New York through a generation has attained wide-spread influence and produced important results. It was initiated under directions given in the constitution of 1846. Two boards of commissioners co-operated in this task. One of these is known as the commissioners of practice and pleading (Messrs. Arphaxad Loomis, David Graham, and David Dudley Field); it was charged with the duty of revising the rules and practice,

the pleadings, forms, and proceedings of courts of record. To the other, known as the commissioners of the code (Messrs. David Dudley Field, William Curtis Noyes, and Alexander W. Bradford), was assigned the task of framing three codes, of political, civil, and penal law.

The leading works of these two commissions — the volumes embodying the ultimate results of their labors — are:

Code of Civil Procedure. Reported complete. Albany, 1850.

Code of Criminal Procedure. Reported complete. Albany, 1850.

Political Code. Reported complete. Albany, 1859. This embodies the political law of the state, citizenship, boundaries and divisions of the state, public officers, general rights of the state, public ways, general police of the state, &c., laws for the government of counties, towns, and villages.

Civil Code. Reported complete. Albany, 1865. Contains a full system of provisions regulating persons, property, and obligations, including contracts, trusts, agency, partnership, insurance, &c.

Penal Code. Reported complete. Albany, 1864. This presents a system of criminal law; including the principles which determine amenability to punishment, the definitions of crimes, and measure of punishment for each, and the subject of prison discipline.

From so much of the code of civil procedure as related to actions, that is, leaving the practice in *certiorari*, *habeas corpus*, *mandamus*, &c., to be governed by the former law, the legislature of New York enacted the statute which has been so widely known as the New York code. It remodelled practice in the civil courts extensively: uniting the jurisdictions of law and equity in the same courts, abolishing the differences in the two methods of proceeding; abrogating forms of action, and enabling all causes to be prosecuted under one form, that of a civil action; authorizing a liberal allowance of amendments, and disregard of technical and formal errors; and assimilating civil procedure very much to that of equity courts in many matters of detail, though retaining trial by jury, and several "provisional remedies" drawn from common-law procedure. The principles of this measure have been extensively adopted in other states, nearly two-thirds of which have enacted codes founded upon this, and reproducing its substantial features.

According to an account given in the Albany Law Journal (March 8, 1879), this code has been adopted, with greater or less completeness, in Missouri, Ohio, Kentucky, Indiana, Wisconsin, Iowa, Minnesota, Kansas, Nebraska, Nevada, California, Oregon, Mississippi, North Carolina, South Carolina, Arkansas, Washington, Arizona, Utah, Idaho, Montana, Wyoming, and Dakota, to which list we believe Colorado and Connecticut may since be added. Mention may also well be made that the state codes of procedure were in some instances adopted by rule of the United States courts, to govern their practice, though such adoptions have now lost importance since the general adoption of state practice laws, for the federal courts, declared by Congress in the act of June 1, 1872, Rev. Stat. § 914. The principles of this reformed procedure are, moreover, understood to have been largely influential in framing the system recently adopted in England, see JUDICATURE ACTS, and in moulding the practice now pursued in most of the British colonies.

The code of criminal procedure is said to have been adopted by Indiana, Wisconsin, Iowa, Minnesota, Kansas, Nebraska, Nevada, California, Oregon, Kentucky, Arkansas, Washington, Arizona, Utah, Idaho, Montana, Wyoming, and Dakota. California and Dakota have also adopted (in substance) the other three of the five codes: have, in short, accepted the system as an entirety.

CODICIL. A supplement or addition to a will. It may change the dispositions of the will, or even revoke some of them, but does not revoke the entire will. The term codicil implies that the will, as modified by the codicil, stands.

Cogitationis pœnam nemo patitur. No one suffers punishment for a thought.

In order to incur punishment, the criminal purpose must have resulted in a criminal act. Under the English act

36 Geo. III. ch. 7, — declaring it to be treason "to compass, imagine, invent, devise, or intend death or destruction, maim or wounding, imprisonment or restraint, of the person of the sovereign," — the crime of treason is held not to be committed by a mere intention or device not accompanied or followed by some overt act. In principle, this maxim is similar to *actus non facit reum nisi mens sit rea*, q. v.

COGNATES; COGNATI. Relatives whose relationship can be traced exclusively through females. See AGNATES. *Cognatio:* relationship through females.

Burrill explains that civil-law writers sometimes use the term for relatives generally, as including relatives by both father and mother; and this even in the same paragraph where it is used in its technical sense of relatives by the mother; which may seriously embarrass the task of translating.

COGNIZANCE. Is used in American law-books, chiefly in the sense of jurisdiction, or the exercise of jurisdiction; the making judicial examination of a matter, or the power to do so.

In England, the word has been used not only in the sense above given, but also, in older books, as signifying a badge on a serving-man's sleeve, whereby he is discerned to belong to this or that master; also, as an acknowledgment of a fine or confession of a thing done (*Cowel*); also, as the name of a form of defence in the action of replevin, by which the defendant insists that the goods were lawfully taken, as a distress, by defendant, acting as servant for another. 3 *Bl. Com.* 150; 3 *Steph. Com.* 614. It is also spelled Conusance.

Cognizance, as used in a statute conferring "full cognizance" of certain cases, is a word of the largest import, embracing all power, authority, and jurisdiction. Webster *v.* Commonwealth, 5 *Cush.* 386.

Cognizor; Cognizee. In so far as cognizance (*q. v.*) was used to mean a fine, the former of these words denoted one who passed or acknowledged a fine of lands or tenements to another; the latter the person to whom the fine, &c., was acknowledged.

COGNOMEN. A family name. 1. In Roman law, the last of the three names by which all Romans, at least those of good family, were designated. The first, or *prænomen*, served to denote the individual; the second, or *nomen*, the class or *gens;* and the third, or *cognomen*, the house or *familia* to which he belonged. There was sometimes a fourth name, termed *agnomen*, q. v.

2. In English law, a surname.

Cognovit actionem. He has confessed the action. This term was used in the common-law practice to designate a written confession of an action at law, signed by the defendant, or his attorney, given to the plaintiff after receiving his declaration, and before plea. In substance, it acknowledged the demand to be just, and authorized the plaintiff to enter judgment for a sum named, either absolutely or upon specified conditions. It was often termed, briefly, a *cognovit.* Where given after plea pleaded, it was usually termed a *relicta* (q. v.), or *relicta* and *cognovit.* As it was given only after the action was brought, it differed from a warrant, or attorney, or confession of judgment, which are given before the commencement of any action.

COHABIT. Originally, to dwell with; but is usually used of two persons of opposite sex, and as implying the practice, or at least the opportunity, of sexual intercourse. Cohabitation: a dwelling together of, usually, a man and woman.

The primary meaning of cohabit is to dwell with some one; not merely to visit or see them. Calef *v.* Calef, 54 *Me.* 365; Commonwealth *v.* Calef, 10 *Mass.* 153.

Cohabitation means having the same habitation; not a sojourn; a habit of visiting; or a remaining for a time: there must be something more than mere meretricious intercourse. Yardley's Estate, 75 *Pa. St.* 207.

COIF. A title given to sergeants-at-law, who are called sergeants of the coif, from the coif they wear on their heads. The use of this coif at first was to cover the clerical tonsure, many of the practising sergeants being clergymen who had abandoned their profession. It was a thin linen cover, gathered together in the form of a skull or helmet; the material being afterwards changed into white silk, and the form eventually into the black patch at the top of the forensic wig, which is now the distinguishing mark of the degree of ser-

geant-at-law. (*Cowel; Foss' Judges of England;* 3 *Steph. Com.* 272, note.) *Brown.*

COIN, *v.* To fit metal to circulate as money, by dividing it in pieces of exact fineness and weight, and stamping with devices adapted to prevent counterfeiting or abstraction of any part. Coin, *n.*: Pieces of metal made fit to circulate as money. Coinage, also coining: the act of making metal into money; process of the mint in preparing metal for circulation. Coinage: the business or function of manufacturing money; also, the great mass of metallic money in circulation.

The constitution (art. 1, § 8, cl. 5) gives congress the power to coin money, regulate the value thereof and of foreign coin. The question has been much discussed whether this clause enables congress to issue paper money. The result of the decisions appears to be that "coin" does not include paper money; the power to issue that must be sustained by other provisions of the constitution. See Knox *v.* Lee, 12 *Wall.* 457; also numerous cases collected *U. S. Digest*, tit. Tender.

Coin seems to come from the French *coign*, i.e. *angulus*, a corner; whence it has been held that the ancientest sort of coin was square, with corners, and not round, as it now is. It is any sort of money coined. (*Crompt. Jurisd.* 220.) Coin is a word collective, which contains in it all manner of the several stamps and species of money in any kingdom. *Jacob.*

The power to coin money does not involve a power to issue treasury notes, and declare them to be money. "To coin money" clearly means to mould into form a metallic substance of intrinsic value, and stamp on it its legal value, so as to encourage and facilitate its free circulation, and assure stability in the currency. The thing so coined is itself money, *ipse loquitur;* but a treasury note is only a promise to pay money, only a representative of money. This literal import of the words "to coin money" is persuasively fortified by the accompanying power to regulate the value "of foreign coin." Griswold *v.* Hepburn, 2 *Duv.* 20; 8 *Wall.* 603.

The phrase, to coin money, as employed in the constitutional provision, means to make money out of bullion, and does not include making paper money. Thayer *v.* Hedges, 22 *Ind.* 282, 306.

Strictly speaking, coin differs from money, as the species differs from the genus. Money is any matter, whether metal, paper, beads, shells, &c., which have currency, as a medium in commerce. Coin is a particular species, always made of metal, and struck according to a certain process called coining. *Wharton.*

COLLATERAL. Literally, attached at the side. Is applied to that which assists, co-operates with, is made or given in addition to, some other thing which is presented as the principal. The word occurs in several phrases.

Collateral ancestors, is sometimes used to designate uncles and aunts, and other collateral antecessors, who are not strictly ancestors. Banks *v.* Walker, 3 *Barb. Ch.* 438, 446.

Collateral assurance. That which is made over and above the deed itself. Thus, if a man covenant with another, and enter into a bond for the performance of his covenant, the bond is called a collateral assurance.

Collateral consanguinity, or **kindred.** The relation of those who descend from the same stock or ancestor as the lineal relatives, but do not descend from each other; as the issues of two sons.

Collateral issue. Where a criminal convict pleads any matter allowed by law, in bar of execution, as pregnancy, pardon, an act of grace, or diversity of person, viz., that he or she is not the same that was attainted, &c.; whereon collateral issue is taken, and tried by a jury *instanter.*

Collateral security. Where a deed is made of other property besides that already mortgaged, for the better safety of the mortgagee; or stocks, evidences of debt, or other property, are placed in a creditor's hands, as an additional security for his demand.

Collateral security imports a security additional to the personal obligation of the borrower. Shoemaker *v.* National Mechanics' Bank, 2 *Abb. U. S.* 416.

The provision of Iowa Rev. § 1845, precluding one from a mechanic's lien who takes collateral security on the same contract, does not apply to a mortgage thereon. Gilcrest *v.* Gottschalk, 39 *Iowa*, 311.

Collateral undertaking, obligation, or promise. Collateral and original have become the technical terms whereby to distinguish promises that are within, and such as are not within, the statute of frauds. Elder *v.* Warfield, 7 *Har. & J.* 391.

Collateral warranty, was where the heir's title to the land neither was, nor could have been, derived from the warranting ancestor. Thus, where a younger bro-

ther released to his father's disseisor, with warranty, this was collateral to the elder brother. The whole doctrine of collateral warranty seems repugnant to plain and unsophisticated reason and justice; and even its technical grounds are so obscure that the ablest legal writers are not agreed upon the subject. *Wharton.*

COLLATIO; COLLATION. Bringing together.

1. It is a bringing together of assets into a common fund; and is particularly used of property received from a testator in his lifetime by way of advancement, and returned for the purpose of a more equitable division among the heirs. It is the supposed return to the mass of the succession, which an heir makes of property which he receives in advance of his share or otherwise, in order that such property may be divided together with the other effects of the succession. Succession of Cucullu, 9 *La. Ann.* 96. The term is also used in common-law jurisdictions, to some extent, and in substantially the same sense. It is nearly equivalent to hotchpot, *q. v.*

2. In English ecclesiastical law, collation is applied to the mode of presenting to a benefice which is in the gift of the bishop himself. In these cases, the bishop and patron being one and the same person, the bishop cannot present to himself; but in the one act of collation, or conferring of the benefice, he does all that is usually done in presentative advowsons by both presentation and institution. Advowsons thus filled are termed collative.

COLLECT. This verb is used of demands for money, in the sense of to obtain payment, either by a simple presentation or by judicial proceedings. Collecting agent, sometimes also collector: a private person employed to present demands for payment, and receive the money. His functions do not usually extend to prosecuting the demand in the courts. Collector: a public officer, charged with the business and duty of exacting and receiving payment of a class of public dues; as a collector of customs or duties; a collector of taxes. His functions usually extend to exercise of official powers, and to institution of *quasi* judicial proceedings, such as levy and sale, to compel payment, when not made on demand; but not to prosecution of ordinary suits; this, however, depends on the positive law of his office. Also, collector is applied to a person appointed (pending a long controversy, whether a will shall be admitted to probate and an executor qualified, or shall be rejected and an administrator appointed) to gather in assets of a decedent's estate, receive rents, &c., demand bills payable as they mature, and keep the proceeds, until the question, who is to administer, is decided. Collection: the fact of claiming and receiving payment, whether the payment is voluntarily made or obtained by legal proceedings. Thus it is held in New York that a guaranty of the collection of a demand, or that it may be collected, or is collectible, means that payment can be obtained either by demand or by resort to proper legal remedies. The guarantor cannot be charged, except on proof that the appropriate legal proceedings have been taken against the principal without success. Taylor *v.* Bullen, 6 *Cow.* 624; Cumpston *v.* McNair, 1 *Wend.* 457; Loveland *v.* Shepard, 2 *Hill*, 139; Moakely *v.* Riggs, 19 *Johns.* 69; Backus *v.* Shipherd, 11 *Wend.* 629.

The direction to collect school moneys, or cause them to be collected, found in a law defining duties of the county clerk, means merely to look sharply after the school funds, and see that no indebtedness suffers from delay. The county clerk is not thereby made a collector. State *v.* Moeller, 48 *Mo.* 331.

A tax can be said to be collected only when it has been paid by those on whose property it has been levied. Fitzpatrick *v.* Flagg, 5 *Abbotts' Pr.* 213.

COLLEGE. 1. An assemblage of persons for some public purpose; as the electoral college, *q. v.*

2. An institution, usually incorporated and endowed, for the instruction of young persons in the higher branches of learning, not immediately connected with admission to the learned professions.

College, in a statute exempting "all colleges and academies," &c., from taxation, is to be taken only in its usual sense of a seminary of learning. And it does not mean the assemblage of the professors and students; nor yet the trustees in their corporate capacity; but certain property belonging to them, edifices, and the lands whereon the same are erected. The exemption in-

cludes the property necessary to the proper management of the institution. State *v.* Ross, 24 *N. J. L.* 479.

COLLISION. 1. As most commonly employed, implies the impact of vessels together while they are in course of being navigated. But the term is not inapplicable to cases where a stationary vessel is struck by one under way, strictly termed allision; or where one vessel is brought into contact with another by swinging at anchor. And even an injury received by a vessel at her moorings, in consequence of being violently rubbed or pressed against by a second vessel lying alongside of her, in consequence of a collision against such second vessel by a third one under way, may be compensated for, under the general head of collision, as well as an injury which is the direct result of a blow, properly so called. The Moxey, *Abb. Adm.* 73.

Collision, in this sense, is deemed a maritime tort; and, on proof of which vessel was in fault, she may be by a suit in admiralty charged with damages for the injury done by her to the other ship; or, if both vessels were in fault, the damages may be divided. Collision thus becomes the title of an important head of admiralty jurisdiction.

Injuries to one vessel, occasioned by waves created by another while running wrongfully too near the former, may be compensated in damages under the head of collision. Wright *v.* Brown, 4 *Ind.* 95. Compare, as to running against a stationary object: here, a seine, The City of Baltimore, 5 *Ben.* 474; 5 *Am. Law T.* 25.

2. Collision is sometimes used with reference to vehicles meeting upon the highway; but where this is the sense, there is usually something in the context to indicate it.

COLLOQUIUM. A speaking together; conversation; discourse. This term is applied to a particular part of the declaration in actions for slander, in which it is alleged that the defendant spoke the words in a certain conversation or discourse, — in the Latin form, the phrase was *in quodam colloquio*, — which he had with others, with an averment that the words were spoken of and concerning the plaintiff. The whole of this portion of the declaration is termed the *colloquium*.

When the words alleged to have been spoken were actionable in themselves, a *colloquium*, averring that they were spoken of or concerning the plaintiff, was sufficient. When the words alleged had no slanderous meaning by their own intrinsic force, but only by reason of the existence of some extraneous fact, this fact was first averred in a traversable form, this averment being termed the inducement. Then followed the *colloquium*, averring that the slanderous words were spoken of or concerning this fact. Finally, the word "meaning" — or, in the Latin form, *innuendo*, whence this clause is termed the *innuendo* (q. v.) — is used to explain and connect the matters set forth in the inducement and *colloquium* with the particular defamatory meaning attached to the words alleged, thus drawing the legal inference from the whole declaration that such was the meaning of the words set forth.

COLLUSION. An agreement between two or more persons to defraud a person of his rights, by the forms of law, or to obtain an object forbidden by law.

This, which is Bouvier's definition, better represents the use of the term at the present day than the one on which several of the older dictionaries agree: a deceitful agreement or contract between two or more persons, for the one to bring an action against the other for some evil purpose; as to defraud a third person of his right. *Jacob; Cowel; Termes de la Ley.*

COLOR. 1. Darkness of the skin derived from negro blood; hence the word is equivalent to African descent or parentage. See BLACK.

Person of color means a person of African descent. Heirn *v.* Bridault, 37 *Miss.* 209.

It means a person descended from a negro within the fourth degree inclusive, though an ancestor in the intervening generation was white. State *v.* Dempsey, 9 *Ired. L.* 384.

A quadroon, or person having one-fourth negro blood, is a person of color, within the meaning of Conn. Rev. Stat. tit. 55, § 6, which exempts from taxation the property of such persons. Johnson *v.* Norwich, 29 *Conn.* 407.

The phrase colored men has no legal technical signification which the courts are bound judicially to know. Pauska *v.* Daus, 31 *Tex.* 67.

2. Appearance; fictitious aspect; ap-

parent effect or operation, which may not be real or valid. Used in the following phrases:

Giving color. This term, used in the science of special pleading, means the admission that the adverse party has an apparent right. This is called implied color, when there is merely a compliance with the rule that a plea seeking to set up matter in avoidance involves a confession of the matter alleged; or express color, which is a direct and positive assertion of an apparent title in the adverse party. These distinctions are seldom adverted to in discussions of pleading in the numerous states which have adopted codes of reformed procedure; and are said to be abolished in England by sections 49 and 64 of the common-law procedure act of 1852.

Color of office. An act which is done by an officer under the pretence or semblance that it is within his authority, when in truth it is not, is said to be done by color of office, or, in the Latin form, *colore officii*. The phrase implies, we think, some official power vested in the actor, — he must be at least officer *de facto;* we do not understand that an act of a mere pretender to an office, or false personator of an officer, is said to be done by color of office. And it implies an illegal claim of authority, by virtue of the office, to do the act or thing in question. Burrall *v.* Acker, 23 *Wend.* 606; Winter *v.* Kinney, 1 *N. Y.* 365; Decker *v.* Judson, 16 *Id.* 439, 442; Griffiths *v.* Hardenbergh, 41 *Id.* 464. It imports a design to do an act in excess of authority, Kelly *v.* McCormick, 28 *N. Y.* 318; but not necessarily an evil or corrupt intent on the officer's part, Richardson *v.* Crandall, 48 *Id.* 348.

A statute making the sureties upon an administrator's bond liable for moneys received by him under color of office does not render sureties liable for rents of land which has descended to the heirs, which rents the administrator has collected; for these are not received under color of his office of administrator. Wilson *v.* Unselt, 12 *Bush*, 215.

Color of title. That which purports to be, but is not evidence of, ownership of property; an instrument which in form purports to, but in effect does not, pass title.

The benefit of the doctrine of adverse possession is not extended to mere intruders and trespassers. To set the statute of limitations running against an ejectment, or to bar an entry, as it is termed, the party must enter into possession under color of title; that is, under some deed in form, or some apparent muniments of ownership. The title need not be, in truth, valid, but must purport and appear to be so.

Color of title is that which the law considers *prima facie* a good title, but which, by reason of some defect, not appearing on its face, does not in fact amount to title. An absolute nullity, as a void deed, judgment, &c., will not constitute color of title. Bernal *v.* Gleim, 33 *Cal.* 668.

Color of title is that which in appearance is title, but in reality is no title. The ground of the invalidity is not important. Wright *v.* Mattison, 18 *How.* 50; Beverly *v.* Burke, 9 *Ga.* 440; Edgerton *v.* Bird, 6 *Wis.* 527.

Color of title is any thing in writing connected with the title which serves to define the extent of the claim. It is wholly immaterial how imperfect or defective the writing may be, considered as a deed: if it is in writing, and defines the extent of the claim, it is a sign, semblance, or color of title. Field *v.* Boynton, 33 *Ga.* 239; s. p. Walls *v.* Smith, 19 *Id.* 8.

Claim and color of title, within the meaning of general statutes of limitation, is the same as fixed by the courts as sufficient to support an adverse possession. Such color may be given for title without any writing; may commence even in trespass; and, when founded on writing, it is not essential that the paper should show on its face a *prima facie* title: it may be good as a foundation for color, however defective. McClellan *v.* Kellogg, 17 *Ill.* 498.

A written instrument is not essential to constitute color of title; but there must be some visible acts or *indicia* which are apparent to all, showing the extent of the boundaries of the land claimed to amount to color of title. Cooper *v.* Ord, 60 *Mo.* 420; and see Sumner *v.* Stevens, 6 *Metc.* (Mass.) 337.

To constitute color of title, some act must have been done conferring some title, good or bad, to a parcel of land of definite extent; a mere disseisor cannot resort to the metes and bounds of the tract upon which he wrongfully enters. St. Louis *v.* Gorman, 29 *Mo.* 593.

It is not synonymous with claim of title. To the former, a paper title is requisite; but the latter may exist wholly in parol. Hamilton *v.* Wright, 30 *Iowa*, 480.

Any instrument having a grantor and grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title. Brooks *v.* Bruyn, 35 *Ill.* 392; Dick-

enson *v.* Breeden, 30 *Id.* 279; Cook *v.* Norton, 43 *Id.* 391.

To constitute color of title, the instrument relied upon must purport to give a title. A bond to give a deed on the payment of a price, does not purport to convey title, and cannot constitute color. Rigor *v.* Frye, 62 *Ill.* 507; s. p. Osterman *v.* Baldwin, 6 *Wall.* 116; Kilburn *v.* Ritchie, 2 *Cal.* 145.

A bond signed by "A, as agent," shows no color of title in A or his grantees, as he disclaims title on the face of it. Simmons *v.* Lane, 25 *Ga.* 178.

The deed of an attorney, who has no authority to sell the land conveyed, is color of title, and seven years' possession under it will bar the right of entry of the principal. Hill *v.* Wilton, 2 *Murph.* 14.

A deed made by a clerk or master in equity, after he goes out of office, on a sale made by him while in office, is color of title, though not otherwise operative. Williams *v.* Council, 4 *Jones L.* 206.

An unregistered deed is color of title, under which a possession for seven years will bar the entry of the owner. Hardin *v.* Barrett, 6 *Jones L.* 159.

A deed cannot operate as color of title, so as to have effect, beyond the estate which it professes to pass. McRae *v.* Williams, 7 *Jones L.* 430.

Deeds, though fraudulent on the part of the grantor, if accepted *bona fide* by the grantee, and without knowledge of the fraud, give a color of title, under the statute of limitations. Gregg *v.* Sayre, 8 *Pet.* 244; Griffin *v.* Stamper, 17 *Ga.* 108.

The deed relied upon to give color of title must have been obtained *bona fide;* if procured by fraud, or if the grantee, who relies upon it to sustain his adverse possession, is aware that his grantor had no title to convey, the deed will avail him nothing. Saxton *v.* Hunt, 20 *N. J. L.* 487.

One cannot claim to hold under color of title, by virtue of a deed which he knows to be of no value. Waterhouse *v.* Martin, *Peck*, 392.

A deed purporting to convey title is color of title, without regard to the good or bad faith of the holder. What is color of title is a question of law; while good faith is one of fact, to be determined by the jury. Hardin *v.* Gouverneur, 69 *Ill.* 140.

A will may constitute color of title. Trustees, &c. *v.* Blount, 2 *Tayl.* 13; Evans *v.* Satterfield, 1 *Murph.* 413; Stanley *v.* Turner, *Id.* 14.

But not so a paper purporting to be a will of lands, which has but one subscribing witness, and which has never been proved as a will. Callender *v.* Sherman, 5 *Ired. L.* 711.

Possession of land, under a grant from the state, is possession under color of title, and consequently is adverse possession; even where the grant is void for irregularity, if the tenant enters under it *bona fide.* Moody *v.* Fleming, 4 *Ga.* 115.

A patent for lands is a sufficient color of title. Gregg *v.* Tesson, 1 *Black*, 150.

COMITATUS. A county or shire. It is little used in American jurisprudence, except in the phrase *posse comitatus*, power of the county. The sheriff may, when necessary to the execution of process, call upon the power of the county; the general assistance of citizens at hand.

COMITY. Respect, regard, or deference, extended from good-will, not in obedience to authority.

Comity of nations, is a phrase employed to denote the ground on which courts of one independent sovereignty often accept and apply the laws of another, where transactions occurring within the territory of that other, or affecting its subjects, are concerned.

COMMANDERY. A manor or chief messuage with lands and tenements thereto appertaining, which belonged to the priory of St. John of Jerusalem; he who had the government of such a manor was styled commander. At the present day the name has some adoption for a division or body of a large organization, such as that of the freemasons, but commanderies, as they anciently existed, are extinct.

COMMANDER-IN-CHIEF. The title of the political or executive head controlling and directing military operations, not in their military aspects only, but with reference to the political causes and objects of the war. By the constitution of the United States, the president is commander-in-chief of the army and navy. The function is, in respect to all the public questions involved in a war, superior to that of a general highest in command.

COMMANDITÉ. The French term corresponding to limited, or special, partnership.

COMMENCEMENT. This vernacular term has been drawn into legal discussion in cases which may be arranged under phrases.

Commencement of action, prosecution, or suit. This has reference to several distinct questions: whether an action is deemed commenced so that the several defendants are affected by the proceedings in it, directly; whether it

was commenced in season to escape the bar of the statute of limitations; whether it was commenced so as to assure the jurisdiction of the court when collaterally questioned; and there are some other like distinctions. The decisions on the subject vary somewhat, in the various states, but appear, on the whole, to sustain the following rules:

1. In respect to civil actions prosecuted according to the common-law practice, the cases in Connecticut and Vermont have regarded the service of the writ as the commencement of the action. In other states, the suing out of the writ, or, as many of the cases have expressed it, the issuing or suing out of the writ, has been held the commencement of the action.

2. In respect to suits in equity, the suing out (Pindell *v.* Maydell, 7 *B. Mon.* 314), or the issuing and attempting to serve, the subpœna, and not the filing the bill, is, in general, the commencement of the suit.

3. In respect to civil actions under codes of procedure, the service of the summons is ordinarily the commencement of the action; if, however, publication is the mode of service adopted, the service is complete at the expiration of the time prescribed for publication. And if the case is one involving a necessity for filing, before service can be made, a notice of pendency of action to affect persons who may become purchasers with notice of the suit, the action is deemed pending, for the purposes of such notice, from the time of filing it, if followed by personal service or commencement of publication within sixty days. If a provisional remedy is granted, the time of allowing it may be taken to give the court jurisdiction of the action as fully commenced. And an attempt to commence an action is equivalent to commencement, for the purposes of the statute of limitations, when the summons is delivered, with intent that it shall be actually served, to the proper sheriff. These, at least, are substantially the provisions of the New York code, and are believed to have been extensively re-enacted in other code states.

Questions of nicety, have, however, often arisen. The general mode of disposing of them is indicated by representative cases given below.

In respect to the statute of limitations, an action is to be deemed as commenced when the writ is issued, and not by the filing of a declaration before the writ is issued. State Bank *v.* Bates, 10 *Ark.* 120; State Bank *v.* Cason, *Id.* 479; State Bank *v.* Brown, 12 *Id.* 94; Johnson *v.* Farwell, 7 *Me.* 370; Hail *v.* Spencer, 1 *R. I.* 17.

The filing of a declaration alone is not the commencement of an action. State Bank *v.* Cason, 10 *Ark.* 479.

The issuing of the writ, not the filing of the declaration, is, as to every material purpose, the commencement of the suit. Clark *v.* Redman, 1 *Blackf.* 379.

Filling up a writ with a view of its being immediately served, may amount to the commencement of an action. Parker *v.* Colcord, 2 *N. H.* 36, 227; Johnson *v.* Farwal, 7 *Me.* 370.

A suit is to be considered as commenced when the writ is sued out and completed in order to have it served on the defendant; but if retained by the attorney for the want of a revenue stamp, and a revenue stamp is then affixed, the writ is not completed until the stamp is affixed. Mason *v.* Cheney, 47 *N. H.* 24.

The delivery of the writ to the sheriff has been held the commencement of the suit. Underwood *v.* Tatham, 1 *Ind.* 276.

But where a writ is filled up provisionally, and delivered to the officer with instructions not to serve it until after a certain time or the happening of a certain event, the action will not be deemed to have been commenced until after the service of the writ. Seaver *v.* Lincoln, 12 *Pick.* 267.

Delivery of the writ to an officer, or leaving it at his house, for the purpose of being executed, is a commencement of suit. Brondson *v.* Earl, 17 *Johns.* 65; Ross *v.* Luther, 4 *Cow.* 158.

The delivery of summons and complaint to the sheriff to be served, with an honest intent to have them served, is a commencement of the action, so as to save the case from the statute of limitations, in a case not governed by New York code. Davis *v.* Duffie, 18 *Abb. Pr.* 360; Lamkin *v.* Nye, 42 *Miss.* 241.

When a writ is made, in a case where a demand and refusal are necessary to give a right of action, and the demand is subsequently made, and the writ then served, the action is commenced when the plaintiff elected to use his writ, and directed the officer to serve it. Robinson *v.* Burleigh, 5 *N. H.* 225; Graves *v.* Ticknor, 6 *Id.* 537.

Where a writ bears *teste* of the day when it was actually made, the day of the *teste* must be considered as the day of the commencement of the action. But the time of the day of the *teste* when the writ is actually made, is not always deemed the true

time of the commencement of the action. Robinson *v.* Burleigh, 5 *N. H.* 225.

A *capias ad respondendum*, to save the statute of limitations, delivered to the sheriff with directions not to execute it, but return it *non est*, is a good commencement of the suit for the purpose of defeating the operation of the statute of limitations. Beekman *v.* Scatterlee, 5 *Cow.* 519.

But it is not enough that process was sued out, without being delivered to the sheriff or returned. Baskins *v.* Wilson, 6 *Cow.* 471.

Except for the purpose of avoiding the statute of limitations, service of the writ is deemed the commencement of an action. To render the action "commenced" there must be service of the writ sufficiently completed to call upon the defendant to answer. Kirby *v.* Jackson, 42 *Vt.* 552.

The service of notice is the commencement of an action of ejectment. Taylor *v.* Taylor, 3 *A. K. Marsh.* 18.

When plaintiff in ejectment amends his declaration by inserting a new demise, the action upon such demise is to be regarded as commencing when the amendment is made; not at commencement of the suit. Roe *v.* Doe, 30 *Ga.* 873.

The filing of a claim with the commissioners of an insolvent estate is tantamount to the commencing of an action, within the Mass. Stat. 1793, ch. 75, § 3, which limits such actions, in certain cases, to two years after letters testamentary or of administration are granted. Guild *v.* Hale, 15 *Mass.* 455.

In New York, the exhibition of the claim of a creditor against an absent or absconding debtor, to his trustees, is equivalent to the commencement of a suit against the debtor, to prevent the statute of limitations from attaching. Peck *v.* Randall, 1 *Johns.* 165.

The filing of the bill, and not the issuance of the process, is so far the commencement of a suit in the chancery court, as to stop the running of the statute of limitations. Bacon *v.* Gardner, 23 *Miss.* 60; Dilworth *v.* Mayfield, 36 *Id.* 40.

The time when a defendant is brought in by amendment, not the time of filing the original bill, is the commencement of the suit as to him. Brown *v.* Goolsby, 34 *Miss.* 437.

The service of notice of an intended motion is the commencement of a suit, and if the time required to perfect the bar of the statute of limitations is not complete before service, it arrests its operation. Young *v.* Hare, 11 *Humph.* 303.

For all purposes, except to prevent the bar of the statute of limitations, a suit is begun only by the filing the complaint and issuing a summons. Sharp *v.* Maguire, 19 *Cal.* 577.

With respect to the statute of limitations, it is deemed commenced by the filing of the complaint. Sharp *v.* Maguire, 19 *Cal.* 577; Pimental *v.* San Francisco, 21 *Id.* 351.

A delivery of the writ to the sheriff, or some equivalent act, marks the commencement of suit. Hancock *v.* Ritchie, 11 *Ind.* 48; Randolph *v.* Hill, *Id.* 354.

When a petition is filed, an action is so far commenced that a writ of attachment may issue before the original notice is placed in the hands of the sheriff for service. Hogan *v.* Burch, 8 *Iowa*, 309.

A suit is deemed for some purposes commenced by filing of the petition in the district court; strictly it is commenced by delivery of the original notice to the sheriff or by actual service thereof by some other person. Reed *v.* Chubb, 9 *Iowa*, 178; Elliott *v.* Stevens, 10 *Id.* 418.

The issue of the summons is the commencement of the action. Butts *v.* Turner, 5 *Bush*, 435; Hart *v.* Baltimore, &c. R. R. Co., 6 *W. Va.* 336.

The filing of a summons and complaint is the commencement of an action in relation to real estate, only for the purpose of operating as constructive notice to purchasers, &c., from the defendant, and for no other purpose. Haynes *v.* Onderdonk, 5 *Thomp. & C.* 176, 2 *Hun*, 619.

For the purposes of the statute of limitations the action is commenced by filing the petition. Kinney *v.* Lee, 10 *Tex.* 155.

The filing of the petition with the clerk of the court, with instructions not to issue process upon it until further orders, is not such a commencement of suit as will interpose a bar to the running of the statute of limitations from that date. Maddox *v.* Humphries, 30 *Tex.* 494.

Where there is both an original and an amended complaint, the question whether the action has been commenced in time is determined by the date of filing the original complaint. Lovenjana *v.* Camarillo, 45 *Cal.* 125.

A new action is not commenced by the filing of an amended petition, when it appears from the face of such petition that it is but a different statement of the same cause of action that is stated in the original petition. Mather *v.* Butler, 16 *Iowa*, 59; Scoby *v.* Sweatt, 28 *Tex.* 713.

The presentment on which an indictment is founded is the commencement of a prosecution, and prevents the statute from attaching. State *v.* Cox, 6 *Ired. L.* 440.

The complaint made to a magistrate is a commencement of a prosecution sufficient to arrest the act of limitations. State *v.* Howard, 15 *Rich.* 274; State *v.* May, 1 *Brev.* 160.

So is an information filed, with an arrest and recognizance of the offender. State *v.* Groome, 10 *Iowa*, 308.

The issuing of a warrant in good faith and delivery to an officer to execute, upon which the defendant is afterwards arrested and bound over for trial, is a sufficient commencement of the prosecution to satisfy the requirement of the statute of limitations. People *v.* Clark, 33 *Mich.* 112.

Commencement of building, as

used in the mechanic's lien law of Maryland, means the commencement of some work or labor on the ground, — such as beginning to dig the foundation, or the like, — the effects of which are apparent, and which every one can readily recognize as the commencement of a building. Brooks *v.* Lester, 36 *Md.* 65.

Driving stakes to indicate the line of the foundation, and doing a few hours' work digging away the dirt at one corner, is not such a "commencement" of building as will give a mechanic's lien priority to that of a mortgage. Kelly *v.* Rosenstock, 45 *Md.* 389.

COMMERCE. The United States constitution gives congress power to regulate commerce. What is meant by commerce in this connection has been adjudicated in several cases.

Commerce is the interchange or mutual change of goods, productions, or property of any kind between nations or individuals. Transportation is the means by which commerce is carried on. Council Bluffs *v.* Kansas City, &c. R. R. Co., 45 *Iowa*, 338.

The word commerce comprehends navigation; and a power to regulate navigation is as expressly conferred as if that term had been added. Gibbons *v.* Ogden, 9 *Wheat.* 1.

Commerce is not limited to the mere buying and selling of merchandise, but comprehends the entire commercial intercourse with foreign nations and among the several states. It includes navigation, as well as traffic, in its ordinary signification, and embraces ships and vessels as the instruments of intercourse and trade, as well as the officers and seamen who navigate and control them. People *v.* Brooks, 4 *Den.* 469; see also Smith *v.* Turner, 7 *How.* 392; United States *v.* Holliday, 3 *Wall.* 417.

Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states. The power to regulate it embraces all the instruments by which such commerce may be conducted. Welton *v.* State, 91 *U. S.* 275.

Commerce is traffic; is an act; is the act of buying and selling; and not the result of the act, not the thing bought or the thing that stands in the place of the thing sold, — the price; nor is it the sales. True, the liberal rule of construction makes commerce include intercourse and navigation; but the word has no such meaning by dictionaries, by the common law, or by usage. Padelford *v.* Mayor, &c. of Savannah, 14 *Ga.* 438.

The trade or business of parties who reside and do business in one state, and as travelling merchants and pedlars vend foreign merchandise in another state, is purely internal traffic in the latter state, and does not come within the meaning of the constitutional clause. That clause does not comprehend any commerce which is purely internal, between man and man in a single state, or between different parts of the same state, and not extending to or affecting other states; and commerce among the states means commerce which concerns more states than one. Ward *v.* Maryland, 9 *Am. Law Reg.* N. S. 424; Sears *v.* Warren County, 36 *Ind.* 267.

Commerce is not limited to an exchange of commodities only, but includes, as well, intercourse with foreign nations and between the states; and includes the transportation of passengers. Steamboat Co. *v.* Livingston, 3 *Cow.* 713; People *v.* Raymond, 34 *Cal.* 492.

Commerce includes intercourse by telegraph. Western Union Tel. Co. *v.* Atlantic, &c. Tel. Co., 5 Nev. 102.

Commercial brokers. Persons who sell goods in their own name, at their own store, on commission, and have possession of the goods as soon as the sales are made, and who deliver or send them off to their customers, are not taxable as commercial brokers. Under the internal revenue laws, that phrase means persons who negotiate sales or purchases in the names of the parties primarily interested; not persons authorized to sell in their own names, or on their own account. Slack *v.* Tucker, 23 *Wall.* 321, 331.

Commercial paper. The bankrupt law of 1867 and amendment of 1874, Rev. Stat. § 5021, cl. 8, directs that suspending payment of one's commercial paper, under certain circumstances, shall be deemed an act of bankruptcy. See ACT OF BANKRUPTCY. What is meant by commercial paper has been adjudicated in several decisions.

The term commercial paper means bills of exchange, promissory notes, bank-checks, and other negotiable instruments for the payment of money, which, by their form and on their face, purport to be such instruments as are, by the law-merchant, recognized as falling under the designation of commercial paper. *Re* Hercules Mut. Life Ass. Soc., 6 *Bankr. Reg.* 338.

It includes bills of exchange, promissory notes, and negotiable bank-checks; paper governed by those rules which have their origin and are established upon the custom of merchants in their commercial transactions, known as the law-merchant. *Re* Nickodemus, 3 *Bankr. Reg.* 230.

It means any negotiable paper governed by the law-merchant, on which the alleged bankrupt is a party liable. It is not confined to paper given for value, but includes accommodation bills and notes. *Re* Chandler, 1 *Low.* 478; 4 *Id.* 213.

Accommodation paper is not commercial paper within the section above mentioned; and the maker cannot be forced into bankruptcy for suspending payment of it. *Re* Clemens, 2 *Dill.* 533.

Commercial paper means negotiable paper given in due course of business, whether the element of negotiability be given it by the law-merchant or by statute. A note given by a merchant for money loaned is within the meaning. *Re* Sykes, 5 *Biss.* 113.

COMMISSION. 1. Doing or performing; perpetration; usually spoken of offences, as the commission of larceny.

2. Formal written authority; a document issued by government conferring powers; as the commission of an officer or of a vessel of war; a commission to take testimony.

3. A limited body of persons authorized to perform some public service or duty; a board; as commission of assize, or of delegates; commission to revise statutes or codify laws. In these phrases one cannot always say with certainty whether the word means the body of persons or the authority. There have been an indefinite number of these commissions created for a variety of purposes both in England and in the United States.

4. The compensation of an agent or bailee, when estimated by the value of the property involved in his dealings; as the commission of a broker. In this sense the plural form is often used.

5. A species of bailment, being an undertaking, without reward, to do something for another person; mandate.

Commission is the warrant or letters-patent which all persons exercising jurisdiction, either ordinary or extraordinary, have to authorize them to hear or determine any cause or action; as the commission of the judges, &c. Commission is with us as much as *delegatio* with the civilians; and this word is sometimes extended farther than to matters of judgment. *Jacob.*

The word commission imports a written authority. United States *v.* Reyburn, 6 *Pet.* 352, 364.

An officer appointed provisionally, subject to the action of an examining board, even though he is assigned to duty, is not "in commission" so as to entitle him to mileage or pay, until the action of such board. Greer *v.* United States, 3 *Ct. of Cl.* 182.

Commission merchant. A term which is synonymous with factor. It means one who receives goods, chattels, or merchandise for sale, exchange, or other disposition, and who is to receive a compensation for his services, to be paid by the owner, or derived from the sale, &c., of the goods. Perkins *v.* State, 50 *Ala.* 154.

Commission of lunacy. A process issued from chancery or other court having jurisdiction of lunatics, to ascertain and report whether a certain person, alleged to be insane, is so, and therefore a fit subject for guardianship.

Commission to take depositions, or testimony. A written authority issued by a court of justice, giving power to take the testimony of witnesses who cannot be personally produced in court, reduce it to writing, and return it to the court to be read on the trial. Such commissions are allowed where witnesses are abroad, or are going abroad; where they are too ill or infirm to attend court, &c., but only in civil causes, or by consent.

COMMISSIONER. A title of office; applied to various officers whose duties are usually of ordinary administrative character.

Under the United States government, a number of offices of considerable importance have received this term; such as the commissioner of agriculture, of customs, of education, of fish and fisheries, of the general land office, of Indian affairs, of patents, of pensions. They have charge of the administration of the acts of congress relating to the subjects confided to them respectively. Their duties are prescribed by the revised statutes and subsequent laws.

In England, the title has also been very extensively used; as to designate commissioners for taking affidavits, commissioners of sewers, commissioners of woods and forests, record commissioners, &c.

Commissioners of circuit courts. The administration of the business of the circuit and district courts is largely aided, especially in criminal procedure, by a class of officers known as the commissioners of the circuit courts, or United States commissioners.

Authority to appoint such commissioners was first conferred for the purpose of making additional provision for taking acknowledgments of bail and affidavits. For this purpose, the circuit

courts were empowered to appoint as many discreet persons in different parts of any district in which the existing provision for taking bail and affidavits in civil causes was inadequate, as such courts should deem necessary. And bail and affidavits so taken were declared to have the same force and effect as if taken before a judge of the court; and any person swearing falsely therein was made liable to the same punishment.

The functions of the commissioners were subsequently enlarged, by successive enactments and rules of court, to embrace many other functions. And, by an act passed Sept. 18, 1850, the superior courts of organized territories were authorized to appoint similar commissioners.

The powers and duties of these commissioners are now declared in detail by various sections of the revised statutes. A most important branch consists in their authority to take preliminary examinations of persons charged with offences against United States laws, and commit them for trial; also of persons claimed for extradition to foreign countries.

The United States commissioners, in the exercise of their powers as such, are regarded as officers of the courts, and, when they sit as committing magistrates, their proceedings are subject to the revision of the circuit courts.

Commissioners for various special purposes, such as to administer oaths to appraisers, to take depositions, to hear and determine or to report to the court upon questions of fact, or intricate accounts, prize commissioners, &c., are allowed by the statutes of the United States.

Commissioner of deeds. An officer in very many of the United States whose authority is to take acknowledgments of deeds; also, to administer oaths voluntarily taken out of court; take affidavits, &c.

Commissioner of highways. In most of the states, the opening, alteration, repair, and vacating of highways are placed in the charge of commissioners, usually three in number, for each county or township.

COMMITMENT. The sending a person charged with an offence to prison, either to await his trial, or, after trial and sentence, to suffer imprisonment; also, the warrant or order by authority of which a person is sent to prison; called also *mittimus*.

COMMITTEE. A person, or several persons associated, to whom matters are referred for deliberation, superintendence, or action.

In parliamentary and legislative practice, almost all business brought forward is referred to some committee for examination and consideration. The committees hold meetings apart from those of the general body; examine all details connected with the matters referred to them; examine witnesses, if testimony is necessary; and report their opinion to the house, together with — if they think legislative action is desirable — a bill appropriate to be passed. But these reports are advisory only.

Committee is also applied to a person appointed by a court of chancery or probate jurisdiction, under authority of law, to take charge of the person or estate, or both, of an individual who has been ascertained to be insane.

COMMODITIES. A statute authorizing excise taxes upon "any produce, goods, wares, merchandise, and commodities," embraces every thing which may be the subject of taxation, and authorizes a tax upon the privilege of pursuing particular branches of business and employment. The term means convenience, privilege, profit, and gains. Provident Institution *v.* Massachusetts, 6 *Wall.* 611; S. P. Portland Bank *v.* Apthorp, 12 *Mass.* 252.

Commodities includes all movables which are the objects of commerce. Best *v.* Bauder, 29 *How. Pr.* 489.

A statute which prohibits buying or receiving "any coin or commodity whatever" includes all species of personal property. Barnett *v.* Powell, *Litt. Sel. Cas.* 409.

Roots or plants offered for sale by a person travelling from place to place are commodities within the meaning of the United States revenue laws. Best *v.* Bauder, 29 *How. Pr.* 489.

COMMON. As a noun, signifies the right of one person to take or use the product of lands the property of another. It is an incorporeal hereditament.

The right usually signified by the term is common of pasture; the right to feed live-stock on another's land. There are also common of estovers, or

the right to take wood; common of piscary, or the right of fishing; common of turbary, or the right of digging turf; common in the soil, or the right of digging for coal, minerals, &c.; and some others. These rights have had but little distinct recognition in the United States.

Common of pasture is either appendant, appurtenant, because of vicinage, or in gross.

Common appendant is a right belonging to the owners or occupiers of arable land, under the lord of a manor, to put commonable beasts upon the lord's waste, and upon the lands of other persons within the same manner. Commonable beasts are either beasts of the plough, or such as manure the ground.

Common appurtenant arises from no connection of tenure, but may be annexed to lands in other lordships; or may extend to such beasts as hogs, goats, or the like, which neither plough nor manure the ground. This kind of common can be claimed only by special grant or prescription.

Common because of vicinage is where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another; the beasts of the one straying mutually into the other's fields, without any molestation from either. This is only a permissive right; and therefore either township may inclose and bar out the other, though they have intercommoned time out of mind.

Common in gross, or at large, is such as is neither appendant nor appurtenant to the land, but is annexed to a man's person, being granted to him and his heirs by deed, or claimed by prescriptive right. *Mozley & W.*

Common is also used, apparently as a noun, though perhaps as an adjective, agreeing with field understood, throughout the cities, incorporated towns, and villages of the United States, to signify a lot or piece of land set apart for public uses, such as open-air meetings, reviews of the militia, recreation of the people, &c.; as Boston Common. See Patterson *v.* McReynolds, 61 *Mo.* 203.

COMMON. This adjective occurs, in one or other of its vernacular senses of frequent, ordinary, usual, or, belonging to several persons, subject to plural or general ownership, in several compounds and phrases.

Common assurances. The legal evidences of the translation of property, whereby every person's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed.

The common assurances are of four kinds: By matter *in pais*, or deed, which is an assurance transacted between two or more private persons *in pais* in the country; that is (according to the old common law) upon the very spot to be transferred. By matter of record, or an assurance transacted only in the sovereign's public courts of record, or under the authority of a public board or commission empowered by act of parliament to record its proceedings. By special custom, obtaining in some particular places, and relatiog only to some particular species of property; which three are such as take effect during the life of the party conveying or assuring. The fourth takes no effect till after his death, and that is by devise, contained in his last will and testament. 2 *Bl. Com.* 290.

Common bail. Nominal sureties on arrest. As a relaxation of arrest for debt, defendants were allowed, in certain cases in English practice, to put in bail who need not justify, and this practice grew into a system of entering nominal or fictitious sureties in a great variety of actions upon ordinary debts; while in those cases in which there were reasons for maintaining the policy of arrest and imprisonment, special bail, or veritable bail, who would justify, were required. Entering common bail amounted to no more than appearing in the action.

Common bar. Another name for the plea of blank bar, *q. v.*

Common barratry, or barretry. See BARRATRY, 2.

Common bench. An earlier name of the English court of common pleas. See COURT OF COMMON PLEAS.

Common council. The name of the representative body of a municipal corporation; otherwise called the council, or the city council. Its organization and powers differ, according to local statutes. See *Dill. Mun. Corp.* 326, for a general account.

Common counts. Averments of a cause of action, incorporated in a declaration, not as descriptive of the particular circumstances of the plaintiff's case, as he expects to prove it, but in order that he may have a proper averment, to enable him to take advantage of the legal effect of the proof, whatever it may be, if in any aspect it can warrant a recovery.

Common field. This term is of American origin, and was adopted by congress to designate small tracts of ground of a pe-

culiar shape, usually from one to three arpents in front by forty in depth, used by the occupants of the French villages in Missouri and other French settlements for purposes of cultivation, and protected from inroads by cattle by a common fence. The peculiar shape of the lot, its contiguity to others of similar shape, and the purposes to which it was applied, constituted it a common-field lot. Glasgow *v.* Hortig, 1 *Black*, 595.

Common fishery. A fishing ground where all persons have a right to take fish. The expression is to be distinguished from common *of* fishery, which means a right to take fish in waters on lands of another person.

Common highway. See HIGHWAY. The word common in this expression seems superfluous. To be open to public use is of the very nature of a highway.

Common informer. One who makes it a habit or practice to hunt out the commission of offences, and give intelligence thereof to the authorities, with a view to profiting by the share of the penalty or forfeiture allowed by law to the informer, and not because he is required thereto by any duty of office.

Common intendment, intent, or sense. The natural and ordinary meaning of language. See CERTAINTY.

Common labor. By Ind. Rev. Stat. 1843, ch. 53, § 123, the making of a promissory note on Sunday is an act of common labor. Reynolds *v.* Stevenson, 9 *Ind.* 112.

So is the selling of liquor or cigars on Sunday (Ind. Laws 1859, 159). Voglesong *v.* State, 9 *Ind.* 112; Foltz *v.* State, 33 *Id.* 215. To the contrary, in Delaware, Hall *v.* State, 4 *Harr.* (*Del.*) 132.

But gaming has been held not to be common labor within the meaning of the Sunday law. State *v.* Conger, 14 *Ind.* 396.

The prohibition of common labor upon the Sabbath, in the Ohio act for the prevention of immoral practices, embraces the business of "trading, bartering, selling, or buying any goods, wares, or merchandise." Cincinnati *v.* Rice, 15 *Ohio*, 225.

Common nuisance. A nuisance (*q. v.*) is termed common or public when it operates to the prejudice of the public in the neighborhood generally; and private, when it affects only one or some few individuals.

Common offenders; such as common barrators, drunkards, scolds, sellers, thieves. Common, in this connection, imports frequency. But a man may be convicted of being a common drunkard without proof that he was constantly drunk, or even that he was drunk every day, during the period covered by the complaint. Commonwealth *v.* McNamee, 112 *Mass.* 285.

To convict one as a common offender, a common barrator, a common seller of liquor, &c., three distinct unlawful acts must be proved. One act of sale, accompanied by evidence of all the necessary arrangements for selling liquors, and being prepared and ready and willing to sell to all who might apply as purchasers, will not constitute a common seller of liquors, though it may sustain a finding of three sales. Commonwealth *v.* Tubbs, 1 *Cush.* 2.

A common seller is one who sells frequently, usually, customarily, habitually. State *v.* O'Connor, 49 *Me.* 594.

As to when one may be sentenced to increased punishment, as a common and notorious thief, under statutes of Massachusetts, see Commonwealth *v.* Hope, 22 *Pick.* 1; Stevens *v.* Commonwealth, 4 *Metc.* (*Mass.*) 360; Haggett *v.* Commonwealth, 3 *Id.* 457; Rice *v.* Commonwealth, 12 *Id.* 246.

Common pleas. The brief designation of a court of common pleas. See COURT OF COMMON PLEAS.

Common recovery. A mode of transferring the title to lands, formerly in use in England, and resorted to in instances in some of the United States; but abolished for England by Stat. 3 & 4 Wm. IV. ch. 74, and either abrogated or disused, generally, throughout the states at the present day. It consisted in prosecuting a fictitious suit against the tenant of the freehold, who, by mutual understanding, made no defence, whereupon a judgment was obtained, vesting the title in the nominal plaintiff, the intended grantee. This device was employed as a means of evading some statutes restricting conveyances in form.

Common schools. The schools established by law, maintained at the expense of the state, county, or other local organization, and open to the children of the inhabitants at large, free of individual charge for tuition; the public schools. See People *v.* Board of Education of Brooklyn, 13 Barb. 400, 410.

They are to be distinguished from schools established by private enterprise, in which pupils must be supported by private liberality, or by payments for the various pupils, and which pupils

become entitled to enter only by private contract.

The phrases, common schools and public schools, have acquired in Massachusetts a well-settled signification. They are never applied to the higher seminaries of learning, such as incorporated academies and colleges. The latter, in a certain broad and comprehensive sense, are public institutions, because they are controlled by corporations, and are usually open to all persons who are willing to comply with the terms of admission and tuition. But the broad line of distinction between these and the "public or common schools" is, that the latter are supported by general taxation, that they are open to all, free of expense, and that they are under the immediate control and superintendence of agents appointed by the voters of each town and city. Merrick *v.* Inhabitants of Amherst, 12 *Allen*, 500.

The schools kept by the Roman Catholic orphan asylum society of the city of Brooklyn are not "common schools," within the meaning of that phrase as used in the state constitution. People *v.* Board of Education, 13 *Barb.* 400.

The phrase, teacher of common schools, held to mean a teacher in the free common schools of the state established by law. Trustees *v.* Simpson, 11 *Ind.* 520.

Common scold. A person addicted to the habit or practice of abusive language or vituperation, in places and modes rendering it a disturbance to the neighborhood, and a public annoyance. This is an offence at common law, being a species of nuisance.

Common seal. A seal adopted and used by a corporation in execution of instruments required in its corporate dealings. To have a common seal is one of the distinguishing powers of a corporate body.

Common sergeant, is a judicial officer attached to the corporation of the city of London, who assists the recorder in disposing of the criminal business at the Old Bailey sessions. *Mozley & W.*

COMMON CARRIER. A person or company whose business it is to transport, for pay, movable property of any one who will hire them.

The holding themselves out to carry for any one, and the taking pay for the service, distinguishes common from private carriers. See CARRIER.

By familiar rules of law, common carriers are subject to serious and peculiar liability for the safe-keeping and delivery of property intrusted to them for transportation; being, in general, liable as insurers, except for losses caused by inevitable accident, or overwhelming force of a public enemy, or, as expressed in the quainter language of the former years, by the act of God or of the king's enemies, unless some exemption from this stringent rule is incorporated in the particular contract for transportation, or established by a notice which the courts in some jurisdictions deem equivalent to contract. The decisions upon what constitutes a common carrier, and who is to be deemed a common carrier, relate chiefly to this liability for losses; the question intended is, whether the party undertaking transportation is liable in all events, except for inevitable accident and acts of a hostile military force.

A common carrier is one who makes it a business to transport goods, either by land or water, for hire, and holds himself ready to carry them for all persons who apply and pay the hire. The Huntress, *Dav.* 82; Fish *v.* Chapman, 2 *Ga.* 349; Verner *v.* Sweitzer, 32 *Pa. St.* 208; Bank of Orange *v.* Brown, 3 *Wend.* 158; see Alexander *v.* Greene, 7 *Hill*, (*N. Y.*) 533, 564.

Where one holds himself out to carry the goods of all persons indifferently, he will be considered a common carrier, and will incur the liability of that character. Mershon *v.* Hobensack, 22 *N. J. L.* 372; Russell *v.* Livingston, 19 *Barb.* 346; Fuller *v.* Bradley, 25 *Pa. St.* 120.

Persons whose business is, and is represented by them to the public to be, to receive, convey, and deliver money, bank-bills, and goods of such as choose to employ them, for a compensation, are common carriers. They are not forwarders, for they retain custody of the property during its passage, and until delivery. Russell *v.* Livingston, 19 *Barb.* 346; Sherman *v.* Wells, 28 *Id.* 403, Newstadt *v.* Adams, 5 *Duer*, 43.

To make a person a common carrier, he must exercise the business as a public employment; he must undertake to carry goods for persons generally; he must hold himself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation *pro hac vice*. Fish *v.* Chapman, 2 *Ga.* 349; ——— *v.* Jackson, 1 *Hayw.* 14; Satterlee *v.* Groat, 1 *Wend.* 272; Samms *v.* Stewart, 20 *Ohio*, 69; but see Favor *v.* Philbrick, 5 *N. H.* 358.

A person who undertakes, though only *pro hac vice*, to carry by river, for hire, without special contract, incurs the responsibility of a common carrier. Moss *v.* Bettis, 4 *Heisk.* 661.

To charge a person as a common carrier, it must be shown that the usage of his

business includes the goods carried, or that there was a special contract to carry them. Tunnell *v.* Pettijohn, 2 *Harr.* (*Del.*) 48; s. p. Powell *v.* Mills, 30 *Miss.* 231.

No person is a common carrier in the sense of the law who is not a carrier for hire. A mere gratuity or voluntary gift will not constitute the relation. But it is not necessary that the compensation should be a fixed sum: a *quantum meruit*, inuring to the benefit of the owners, is sufficient. Citizens' Bank *v.* Nantucket Steamboat Co., 2 *Story*, 16.

One who is accustomed to undertake to transport for hire the goods of those who choose to employ him, though this is not his usual or ordinary occupation, is a common carrier. But a farmer who assumes the business of a carrier at certain seasons of the year does not thereby necessarily incur the responsibilities of a common carrier, as to all contracts for transportation made at other seasons. Haynie *v.* Baylor, 18 *Tex.* 498.

One who has never assumed or offered to carry chattels of a certain class, except upon special terms exempting him from all the important duties and liabilities of a common carrier, cannot be made amenable in the character of a common carrier as to such property. So held, in case for a refusal to carry live-stock. Lake Shore, &c. R. R. Co. *v.* Perkins, 25 *Mich.* 329.

The proprietors of metropolitan cabs and omnibuses are not common carriers. Ross *v.* Hill, 2 *Com. B.* 887.

A London cab proprietor is not a common carrier, because, although he plies with a carriage by land, and professes openly to carry passengers and goods for hire, yet he does not ply regularly between different specified places, but merely lets out his carriage, with the horse and driver, by the distance or the hour, to proceed to any destination which the hirer may indicate. *Chorley on London Cabs*, 10.

A London omnibus proprietor is not a common carrier, because although he plies with a carriage by land, and professes openly to carry passengers for hire between different specified places, yet he does not profess openly to carry goods for hire, but merely receives occasional, and at his own option, some trifling articles of luggage with the passengers, to be carried gratuitously for their accommodation. *Addis. Contr.* 492, 499.

A court may assume that the owner of an omnibus line is a common carrier, without proof. Parmelee *v.* McNulty, 19 *Ill.* 556.

The practice of conveying for hire, in a stage-coach, parcels not belonging to passengers, constitutes the proprietors of the coach common carriers; and they are liable as partners for the loss of such parcels by the driver, he being one of the proprietors. Dwight *v.* Brewster, 1 *Pick.* 53; Beckman *v.* Shouse, 5 *Rawle*, 179; Robertson *v.* Kennedy, 2 *Dana*, 430; but compare Blanchard *v.* Isaacs, 3 *Barb.* 388; Shelden *v.* Robinson, 7 *N. H.* 157.

Persons transacting business as an express company in forwarding goods from place to place for hire, in vessels and conveyances owned by others than themselves, are not common carriers, and are not liable as such, but are bailees for hire. Hersfield *v.* Adams, 19 *Barb.* 577.

An express company is to be regarded as a common carrier, and its responsibility for the safe delivery of property intrusted to it is the same as that of a carrier. Belger *v.* Dinsmore, 51 *Barb.* 69, 34 *How. Pr.* 421; Buckland *v.* Adams Exp. Co., 97 *Mass.* 124; Southern Exp. Co. *v.* Newby, 36 *Ga.* 635.

A city express company, engaged in carrying parcels between the city of New York and Brooklyn, and in carrying the trunks of travellers to and from the passenger depots of the various railroads, may be deemed common carriers. Richards *v.* Westcott, 2 *Bosw.* 589.

In Indiana, express companies are, by statute (1 *Gav. & H.* 327) common carriers. American Exp. Co. *v.* Hockett, 30 *Ind.* 250.

And an express company may become liable as a common carrier, although it has not complied with the requirements of section 2 of the statute. United States Exp. Co. *v.* Rush, 24 *Ind.* 403.

A public ferryman is a common carrier. Babcock *v.* Herbert, 3 *Ala.* 392; Hall *v.* Renfro, 3 *Metc.* (*Ky.*) 51.

And a private ferryman, not on a public road, may yet incur the liabilities of a common carrier by notoriously undertaking to transport, for hire, all persons indifferently, with their carriages and goods. Hall *v.* Renfro, 3 *Metc.* (*Ky.*) 51.

One who receives goods to forward them for hire, it being known to the owner that he has no interest in the freight of the goods, owns no part of the boats employed in the carriage, and that his only business in relation to the carriage of goods consists in forwarding them, is not a common carrier, nor liable, like a carrier, as insurer. Roberts *v.* Turner, 12 *Johns.* 232.

One who contracts to cut a lot of timber and transport it to a place where it is to be delivered and used, does not act, while transporting the timber, as a common carrier. Pike *v.* Nash, 3 *Abb. App. Dec.* 610.

If parties calling themselves forwarders so act and conduct their business as to lead the public to regard them as carriers, and employ them as such, without intimation of their true character, the liability of a carrier attaches to them. Teall *v.* Sears, 9 *Barb.* 317.

Railroad companies are common carriers, although not declared to be such in the charter. Chicago & Aurora R. R. Co. *v.* Thompson, 19 *Ill.* 578; Heineman *v.* Grand Trunk R. R. Co., 31 *How. Pr.* 430; Rausemer *v.* Toledo, &c. R. R. Co., 25 *Ind.* 434; and see Porter *v.* Chicago, &c. R. R. Co., 20 *Ill.* 407.

A railroad company, operating a rail-

road belonging to the state, are liable as carriers for negligence of state officers in the performance of duties connected with the road. Ryland *v.* Peters, 5 *Pa. L. J. R.* 126.

If a railroad company take a car for transportation over their road, and have exclusive charge of it, though it remain on its own trucks, they are responsible for it as common carriers, and not merely as persons towing vessels are. New Jersey R. R. Co. *v.* Pennsylvania R. R. Co., 27 *N. J. L.* 100.

Railroad companies are private carriers merely, as towards one who hires cars, motive power, &c., at lower rates, so as to assume the risk himself. Kimball *v.* Rutland & Burlington R. R. Co., 26 *Vt.* 247; Austin *v.* Manchester, &c. Railw. Co., 11 *Eng. L. & Eq.* 506, 21 *L. J.* N. S. 179, 10 *C. B.* 454; East Tennessee, &c. R. R. Co. *v.* Whittle, 27 *Ga.* 535; Ohio & Mississippi R. R. Co. *v.* Dunbar, 20 *Ill.* 623.

A sleeping-car company is not responsible either as a common carrier or as an innkeeper. It is bound, however, not only to furnish its guests a berth, but to keep a watch during the night, exclude unauthorized persons from the car, and take reasonable care to prevent thefts. Blum *v.* Southern Pullman Palace Car Co., 22 *Int. Rev. Rec.* 305.

Masters and owners of vessels, who undertake to carry goods for hire, are liable as common carriers, whether the transportation be from port to port, within the state, or beyond the sea, at home or abroad. Elliott *v.* Rossell, 10 *Johns.* 1.

Express companies are common carriers, notwithstanding their bills of lading dispute it. Bank of Kentucky *v.* Adams Exp. Co., 93 *U. S.* 174.

Pullman Palace Car Company is not a common carrier. Pullman Palace Car Co. *v.* Smith, 73 *Ill.* 360.

An ocean steamship company is not a common carrier, as to baggage in staterooms. American Steamship Co. *v.* Bryan, 83 *Pa. St.* 446.

The master of a canal-boat is a common carrier. Arnold *v.* Halenbake, 5 *Wend.* 33.

The owner of a canal-boat, used generally for transporting his own merchandise, entered into a contract with common carriers to transport a boat-load of freight for an agreed price. Held, that this did not make him a common carrier. It is the business of carrying goods for others, not a single act, known to the consignor to be outside the usual employment, which fixes the liability of a common carrier. Fish *v.* Clark, 49 *N. Y.* 122.

Steamboat companies are liable as common carriers. Boon *v.* Steamboat Belfast, 40 *Ala.* N. S. 184; compare Cox *v.* Peterson, 30 *Id.* 608; Hibler *v.* McCartney, 31 *Id.* 501.

The owners of a tow-boat are not liable as common carriers. An action against them, for loss of the vessel in tow, must be founded on negligence. Hays *v.* Millar, 77 *Pa. St.* 238; Smith *v.* Pierce, 1 *La.* 350; Caton *v.* Rumney, 13 *Wend.* 387; Alexander *v.* Greene, 3 *Hill*, 9; Wells *v.* Steam Navigation Co, 2 *N. Y.* 204; The Lyon, 1 *Brown Adm.* 59; The Stranger, *Id.* 281; The Oconto, 5 *Biss.* 460.

A tow-boat used in towing barges or other water craft, which are loaded with freight, from one point to another on the Mississippi river, is a common carrier. Bussey *v.* Mississippi Valley Transp. Co., 24 *La. Ann.* 165.

Telegraph companies are common carriers, and liable as such; as in a case where the loss of a debt occurred through delay in the transmission of a message. Parks *v.* Alta, &c. Telegraph Co., 13 *Cal.* 422; S. P. Bryant *v.* American Telegraph Co., 1 *Daly*, 575.

A telegraph company cannot be considered a common carrier, since it does not contract in any common-law obligation. Birney *v.* New York, &c. Co., 18 *Md.* 341.

COMMON LAW. 1. In its broadest and most general signification, those rules or precepts of law in any country, or that body of its jurisprudence, which is of equal application in all places; as distinguished from local laws and rules.

2. That system of law or body of jurisprudence which has prevailed in England, and is characteristically the growth and development of that kingdom (being derived therefrom by her colonies and by most of the United States); as distinguished from the Roman civil law, the canon law, the Hindu law, and other leading systems of distinct governments.

3. So much of the above-mentioned system of jurisprudence as is derived from the immemorial customs of the people, ascertained and expressed by the judgments of the courts; as distinguished from legislative enactments, or positive or statute law.

4. So much of the above-mentioned system of jurisprudence as became, by adoption of the English colonies in America, the foundation of the law of nearly all the United States. In this sense, statutes of parliament enacted prior to the revolution, and deemed appropriate to the situation and wants of the colonies, are included.

5. So much of the above-mentioned system of jurisprudence as is governed by definite and peremptory rules of law, technically so called; as distinguished from those systems in which the administration of justice is governed origi-

nally, and in theory, by the judicial discretion vested in the court, or by the instruction of authorities in religion; or equity, admiralty, and ecclesiastical law.

The common law, mentioned in the seventh amendment of the constitution, is the common law of England, and not that of any individual state. United States *v.* Wonson, 1 *Gall.* 20.

The term common law is used in contradistinction to equity and admiralty and maritime jurisprudence. It includes not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights are to be ascertained and determined, in contradistinction to those where equitable rights alone are recognized, and equitable remedies administered. It does not refer to the particular form of procedure which may be adopted. Parsons *v.* Bedford, 3 *Pet.* 433, 446, 447; Fenn *v.* Holme, 21 *How.* 481, 486.

There is no common law of the United States, as contradistinguished from the individual states; and the courts of the United States, instead of administering the common law, or any particular system, conform to the law of the states where they are situated. People *v.* Folsom, 5 *Cal.* 374.

Proceedings on *habeas corpus* before a circuit judge at chambers are not proceedings according to the course of the common law, in the sense in which that expression is applied to proceedings reviewable on writs of error. Faust *v.* Judge, &c., 30 *Mich.* 266.

Common-law procedure acts. Three acts of parliament passed in the years 1852, 1854, and 1860, respectively, for the amendment of the procedure in the common-law courts. The common-law procedure act of 1852 is Stat. 15 & 16 Vict. ch. 76; that of 1854, Stat. 17 & 18 Vict. ch. 125; and that of 1860, Stats. 23 & 24 Vict. ch. 126. *Mozley & W.*

COMMONALTY. The masses of the people, undistinguished by rank or office. Thus, when applied to the realm of England, it excludes the royal family and nobility. When applied to a municipal corporation, it embraces the mass of citizens, and excludes the corporate officers. Mayor, aldermen, and commonalty is the ordinary corporate name of a city.

COMMONS. In English political phraseology, signifies all that class of subjects who are not noblemen, and thus does not vary materially from one signification of commonalty. Commoner: a member or individual of this class.

COMMONWEALTH. Originally, the common weal or public interest. Sometimes it is used to designate a republican form of government.

It was applied to the government of England during the period from the execution of Charles I., in 1649, to the restoration of the monarchy under Charles II., in 1660. It has also been adopted as the name of several of the states: the commonwealth of Massachusetts, Pennsylvania, Virginia, Kentucky.

COMMORANCY. The condition of abiding or dwelling; inhabitancy. Commorant: applies descriptively to a person who abides or dwells in a place.

Communis error facit jus. Common error makes a rule of law. A general and long-continued practice of what is erroneous makes the error the rule. This maxim is not to be read literally, or understood in the widest sense of its terms. An inveterate practice, both of general observance and of long continuance, may be sustained against objections or defences founded upon error in such practice; as in the case of modes of conveyance which have been long in use; but, beyond matters of practice, the maxim has no application. Erroneous views of the law, however widely held and acted upon, even where sustained by judicial decisions, are no answer to the enforcement of the true rule, when the error has been discovered and clearly ascertained; otherwise, an error as to the law, or a misconception of the law, would be set up in destruction of the law. The many vulgar errors as to substantive rules of law, — such as that, to disinherit a child, a small sum, as one shilling, must be bequeathed; that a husband may dispose of his wife by selling her in the open market-place with a halter around her neck; that a man who marries a woman in debt, by taking her from the hands of the clergyman clothed only in her shift, escapes liability for her debts, — however commonly received or practised, could never thereby become established as law. Even as to matters of legal opinion, Lord Denman, in delivering judgment in the House of Lords, in the celebrated case of O'Connell *v.* Regina, 11 *Cl. & F.* 372, declared that a large portion of the legal opinion which has

passed current for law falls within the description of "law taken for granted;" and that "when, in the pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and restatement of a doctrine — the mere repetition of the *cantilena* of lawyers — cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle."

COMMUNITY. A term applied in French law, also in Louisiana, to the title or ownership of the property of two persons who are intermarried.

It is sometimes distinguished as conventional community, or that which is created by express agreement in the marriage contract, and legal community, or that which arises by operation of law where the contract is silent. This last is what is usually meant by the term when used alone.

The community includes the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations, made jointly with them both, or by purchases, or in any other similar way, even although the purchase be only in the name of one of the two, and not of both, because, in that case, the period of time when the purchase is made is alone attended to, and not the person who made the purchase. Clark *v.* Norwood, 12 *La. Ann.* 598.

COMMUTATION. Substitution of a less onerous obligation for the original one. Commutation of fares consists in selling a ticket for a term at a less price than the aggregate of daily fares for the term. Commutation of imprisonment allows a prisoner to acquire, by good behavior, a right to take a shorter term of imprisonment than that imposed by his original sentence.

COMPACT. An agreement or contract. Usually applied to agreements of independent states or sovereignties.

A compact is a mutual consent of parties concerned respecting some property or right that is the object of the stipulation, or something that is to be done or forborne. Canal Co. *v.* R. R. Co., 4 *Gill & J.* 1.

The terms compact and contract are synonymous. Green *v.* Biddle, 8 *Wheat.* 1, 92.

COMPANY. An association of persons for the purpose of carrying on some enterprise or business. It is used to represent members of a partnership whose names do not appear in the firm. It often signifies an incorporated association; or may mean an association organized like a corporation, though unchartered. Compare ASSOCIATION. It also enters into the names of many classes of corporations. In this connection, it seems usually to designate an organization for the purpose of carrying on a business for profit.

The proper signification of the word company, when applied to persons engaged in trade, denotes those united for the same purpose or in a joint concern. It is so commonly used in this sense, or as indicating a partnership, that few persons accustomed to purchase goods at shops, where they are sold by retail, would misapprehend that such was its meaning. Palmer *v.* Pickham, 33 *Me.* 32.

English clubs are not companies within the joint-stock companies' winding-up acts. *Re* St. James Club, 16 *Jur.* 1075, 18 *Eng. L. & Eq.* 589.

Companies clauses consolidation act. An English act, Stat. 8 Vict. ch. 16, passed in 1845, for the general regulation of public companies; business corporations. The act was framed by gathering from all prior acts of parliament clauses still in force affecting corporations, and consolidating them in one enactment; hence the name, meaning the act consolidating clauses of previous laws relating to public companies.

COMPARISON OF HANDS, or HANDWRITING. That mode of ascertaining the genuineness of a signature or manuscript which consists in comparing the chirography with that of other papers admitted or proved to be in the handwriting of the person to whom the paper in question is attributed.

COMPENSATIO; COMPENSATION. A remedy in the civil and Scotch law, analogous to set-off.

Compensatio criminis. Set-off of guilt. The technical name of the plea of recrimination in a suit for divorce; a plea that the plaintiff is guilty of the same kind of offence with which he or she charges the defendant as a ground of divorce.

COMPENSATION. Amends for a loss or privation.

As compared with consideration and damages, compensation, in its most careful use, seems to be between them. Consideration is amends for something given by consent, or by the owner's choice. Damages is amends exacted from a wrong-doer for a tort. Compensation is amends for something which was taken without the owner's choice, yet without commission of a tort. Thus, one should say, consideration for land sold; compensation for land taken for a railway; damages for a trespass. But such distinctions are not uniform. Land damages is a common expression for compensation for lands taken for public use.

Compensation is a return which is given for something else; a consideration. Searcy *v.* Grow, 15 *Cal.* 117.

Compensation is of three kinds: legal, or by operation of law; compensation by way of exception; and by reconvention. Stewart *v.* Harper, 16 *La. Ann.* 181.

The phrase compensation differs from salary. One who is county collector and treasurer is entitled to but one compensation. Kilgore *v.* People, 76 *Ill.* 548.

As used in the Ohio state constitution, compensation defines the money that must be paid to satisfy a wrong or injury inflicted; and such money must cover the extent of the injury, irrespective of the value of the property taken. Symonds *v.* Cincinnati, 14 *Ohio*, 175.

Compensation, in a statute providing a mode of determining compensation for land taken for public use, means an equivalent for the value of the land. Any thing beyond that is more than compensation. Any thing short of it is less. New Jersey R. R. & Tr. Co. *v.* Suydam, 17 *N. J. L.* 25, 47; compare Van Schoick *v.* Delaware, &c. Can. Co., 20 *N. J. L.* 249, 252.

Compensation, as used in a constitutional provision that private property shall not be taken for public use unless just compensation be made therefor, means compensation must be in money. Any benefit to the remaining property of the owner, arising from public works for which a part has been taken, cannot be considered as compensation. Alabama, &c. R. R. Co. *v.* Burkett, 42 *Ala.* 83.

The term "just compensation" for injury to property taken by a railroad, excludes from consideration the general enhancement of the value of other property of the same owner. The cash value and the actual damage are the true standard by which to determine the compensation to which in such cases the party is entitled. Brown *v.* Beatty, 34 *Miss.* 227; Isom *v.* Mississippi Central R. R. Co., 36 *Id.* 300.

Benefit to the adjacent property of the owner whose land is taken for a public use, is, in so far, compensation for the taking, within the meaning of the constitution; and, if it equal the loss or damage from the taking, it is a just compensation. Betts *v.* City of Williamsburgh, 15 *Barb.* 255.

When the word just is used (as in Nev. Const. art. 1, § 8) to intensify the word compensation, something more than the mere market value should be deemed intended. Virginia, &c. R. R. Co. *v.* Henry, 8 *Nev.* 165.

In an agreement to pay a solicitor just and reasonable compensation for services rendered by him as such, means neither more nor less than taxable costs. Culley *v.* Hardenbergh, 1 *Den.* 508.

Comperuit ad diem. He appeared at the day. This phrase is used as the technical name of a plea, in an action of debt upon a bail bond, that the defendant appeared at the day required, according to the condition of the bond.

COMPETENT. Able; fit; qualified; authorized or capable to act; as a competent witness; competent to hold office, or to sue. Competency: the fact of being qualified or legally capable.

Competent jurisdiction, in a statute, held to mean jurisdiction of the person as well as of the subject-matter. Babbitt *v.* Doe *d.* Brush, 4 *Ind.* 355.

COMPILE. To compile is to copy from various authors into one work. Between a compilation and an abridgment there is a clear distinction. A compilation consists of selected extracts from different authors; an abridgment is a condensation of the views of one author. Story *v.* Holcombe, 4 *McLean*, 306, 314.

COMPLAINANT. One who makes or prefers an accusation of crime. Also, often, the party instituting a suit in equity; the term plaintiff being usually appropriated to the actor in an action at law or in a civil action under the codes of procedure.

COMPLAINT. 1. A formal accusation or charge of the commission of an offence, preferred before a magistrate or tribunal authorized to make inquiry.

2. The name given, by the New York code of procedure, and by several of the codes adopted in other states, to the first pleading in a civil action, on behalf of the plaintiff; corresponding to the declaration or bill under the practice of courts of common law or equity.

Where criminal prosecutions, under a statute, are to be instituted on complaint, a complaint under oath or affirmation is implied, as a part of the technical meaning of

the terms. Campbell *v.* Thompson, 16 *Me.* 117.

When used in a criminal statute, complaint sometimes includes indictment. Commonwealth *v.* Haynes, 107 *Mass.* 194.

Compos mentis. Sound of mind. Having possession of one's mental faculties.

COMPOSITION. An agreement for the reduction of a demand. In this sense of the term, it has several somewhat distinct applications in jurisprudence.

Composition deed. An agreement between a debtor and various creditors, that he shall make certain stipulated partial payments, usually proportional, upon his debts, and that upon making these he shall be discharged from the residue.

Bouvier and Burrill both define the term as an agreement between a debtor and creditor, by which, &c., as if a composition might be between a debtor and one creditor only. But we do not understand that the term is properly so used. Accord is the proper term for an agreement between a single creditor and a debtor, for a discharge of the debt by a less payment; and accord and satisfaction, for such an agreement consummated by actual payment and acceptance in full. See ACCORD. The term composition deed is better reserved for engagements in which several creditors of a debtor — not all, necessarily, but a number — agree with him, and in effect with each other, that he shall be released on making the partial payments he proffers. The distinction is important, because it is the mutual agreement of the creditors among themselves which furnishes the consideration to sustain the agreement, while it remains executory. An agreement between a debtor and a single creditor for a discharge, to be given upon making a partial payment in future, lacks consideration. It is when several creditors unite in the deed, so that the engagement of one forms a consideration for that of another, that an executory agreement of this nature becomes obligatory.

An agreement between a debtor and a single creditor, providing for stipulated partial payments in discharge of the entire debt, is invalid for want of consideration; but where several creditors join, the consent of each one furnishes a consideration for that of the others. Pierson *v.* McCahill, 21 *Cal.* 122; Mitchell *v.* Sawyer, 71 *N. C.* 70; Renard *v.* Tuller, 4 *Bosw.* 107; Hall *v.* Merrill, 5 *Id.* 266, 9 *Abb. Pr.* 116.

Composition of a demand means payment of a part in satisfaction of the whole. Abandoning a prosecution on payment of costs merely, is not making a composition. Haskins *v.* Newcomb, 2 *Johns.* 405.

Composition in bankruptcy. Both the English and American bankrupt laws contain provisions for composition; which is, in effect, an arrangement between the bankrupt and the creditors, whereby the amount he can be expected to pay is liquidated, and he is allowed to retain his assets, upon condition of his making the payments agreed upon. It is, in effect, a composition deed, arranged under the sanction of the bankrupt law.

Under the American system, the resolution of composition must be passed by a majority in number of the creditors assembled at a meeting duly called for that purpose, and confirmed by the signatures of the debtor and two-thirds in number and one-half in value of all the creditors. Creditors whose debts do not exceed $50 may be reckoned in the majority in value, but not in number. Creditors fully secured can take no part in the composition, without first relinquishing their security for the benefit of the estate. *U. S. Rev. Stat.* 989, § 5103.

Composition of offences. Compositions were in ancient times allowed for crimes and offences, even for murder. *Jacob.* They are no longer permissible. See COMPOUNDING.

Composition of tithes, or real composition. This arises in English ecclesiastical law, when an agreement is made between the owner of lands and the incumbent of a benefice, with the consent of the ordinary and the patron, that the lands shall, for the future, be discharged from payment of tithes, by reason of some land or other real recompense given in lieu and satisfaction thereof. 2 *Bl. Com.* 28; 2 *Steph. Com.* 727.

COMPOUND INTEREST. The term compound interest has but one meaning. It signifies the adding of the growing interest of any sum to the sum itself, and then the taking of interest upon this

accumulation. Camp *v.* Bates, 11 *Conn.* 487.

COMPOUNDING. An engagement between one who is immediately affected by an offence committed, and the offender, that the former will refrain from prosecuting on consideration of money paid, or of a return of the property stolen, or the like, by the latter.

Compounding a felony, is, upon well-settled principles, an offence in itself; and so, also, is compounding a misdemeanor, Jones *v.* Rice, 18 *Pick.* 440; except that in respect to offences of a private nature, which also involve a cause of action for damages, the law allows, to some extent, a compromise of the private claim.

In England, compounding a felony seems to be regarded as generally criminal; while a misdemeanor may be compounded by leave of the court. Thus it is said to be not uncommon, when a person has been convicted of a misdemeanor more immediately affecting an individual, — as a battery, imprisonment, or the like, — for the court to permit the defendant to speak with the prosecutor, before any judgment is pronounced; and, if the prosecutor declares himself satisfied, to inflict but a trivial punishment. 4 *Steph. Com.* 234, 235.

COMPROMISE. An agreement between the parties to a controversy, for the settlement of the same.

In old English law, and in the civil law, it seems to have been used in the sense of submitting to arbitration.

When a suit is not carried through to verdict, or decree, or judgment, but the parties agree upon certain terms, which include a stay of proceedings, they are said to compromise the suit.

Compromise is defined by La. Code to be an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their difficulties by mutual consent in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing. Sharp *v.* Knox, 4 *La.* 456.

COMPTE ARRÊTÉ. *A compte arrêté* is an account stated in writing, and acknowledged to be correct on its face by the party against whom it is stated. Chevalier *v.* Hyams, 9 *La. Ann.* 484.

COMPURGATOR. A corroborator, by oath, of the innocence of another. Formerly, a person accused of crime might, in many cases, purge himself, by oath that he was not guilty, from the accusation, and be thereupon acquitted. As this usage, notwithstanding the solemnities adopted in administering the oath, was found to encourage perjury, and to be dangerous to the public safety in other respects, the accused was, in later times, required to produce a certain number of his neighbors, friends, or relatives, who should swear that they believed the accused had sworn truly; and these witnesses were called compurgators. This mode of trial was extended to certain civil actions, as to the actions of debt, and detinue, under the name wager of law (*q. v.*), where it had the effect of a verdict for the defendant. It was employed as a method of defence in England so late as 1824, in a case reported in 2 *Barn. & C.* 538, which was abandoned by the plaintiff. On account of the availability of this mode of trial in debt and detinue, the action of assumpsit was adopted in actions on simple contracts, and trover instead of detinue. But wager of law was finally abolished by Stat. 3 & 4 Wm. IV. ch. 42, § 12.

CONCEAL. To keep secret, withhold from the knowledge of others, or shelter from observation or search. Also, to hide; to withdraw where one cannot be found. Concealment: the act of concealing or condition of being concealed. See ALIUD EST CELARE, &c.

This word, according to the best lexicographers, signifies to withhold or keep secret mental facts from another's knowledge, as well as to hide or secrete physical objects from sight or observation. Gerry *v.* Dunham, 57 *Me.* 339.

The terms "misrepresentation" and "concealment" have a known and definite meaning in the law of insurance. Misrepresentation is the statement of something as fact which is untrue in fact, and which the assured states, knowing it to be not true, with an intent to deceive the underwriter, or which he states positively as true, without knowing it to be true, and which has a tendency to mislead, such fact in either case being material to the risk. Concealment is the designed and intentional withholding of any fact material to the risk, which the assured, in honesty and good faith, ought to communicate to the

underwriter; mere silence on the part of the assured, especially as to some matter of fact which he does not consider it important for the underwriter to know, is not to be considered as such concealment. If the fact so untruly stated or purposely suppressed is not material, that is, if the knowledge or ignorance of it would not naturally influence the judgment of the underwriter in making the contract, or in estimating the degree and character of the risk, or in fixing the rate of the premium, it is not a "misrepresentation" or "concealment" within the clause of the conditions annexed to policies. Daniels *v.* Hudson River Fire Ins. Co., 12 *Cush.* 416.

Section 68 of the duties collection act of congress of March 2, 1799 (1 Stat. at L. 677), — authorizing customs officers to search for and seize goods subject to duty, which are concealed, — requires that the goods should be secreted, withdrawn from view. The section does not extend to a case where the goods are fraudulently removed.

Mere removal of goods, though fraudulent, is not a concealment of them. United States *v.* Three Hundred and Fifty Chests of Tea, 12 *Wheat.* 486.

Concealed may apply to real as well as to personal property. One who takes an apparently legal title to real property, which is void through a secret defect, may be said to conceal such property. Harlow *v.* Tufts, 4 *Cush.* 448, 453.

The term concealed weapons means weapons wilfully or knowingly covered or kept from sight. Owen *v.* State, 31 *Ala.* 387.

Where a statute of limitations provides that its operation shall be suspended if the debtor conceals the cause of action, something more than mere silence is necessary: there must be an arrangement or contrivance to prevent subsequent discovery, and of an affirmative character. The defendant is prohibited from doing, at any time, any thing to prevent the plaintiff from ascertaining, subsequently to the transaction out of which the right of action arises, the facts upon which that right depends, either by affirmatively hiding the truth, or by any device avoiding inquiry which would result in discovery. Boyd *v.* Boyd, 27 *Ind.* 429.

The mere fact that the owner of stolen goods and his family have no knowledge of the fact that the goods have been stolen, does not amount to a concealment of the larceny, on the part of the thief, within a provision, that, where he conceals the crime, the time of such concealment is not to be included in computing the period of limitation. Flee *v.* State, 13 *Ind.* 324.

"Conceal" and "harbor," in Ala. Pen. Code, ch. 4, § 14 (Clay's Dig. 419, § 14), are descriptive of two offences: a person may be convicted of "harboring," on proof that he, knowing the slave to be a runaway, fed her, or furnished her with shelter and the like, to enable her to remain away from her master, or to deprive her master of her service, although he may not have "concealed" her. McElhaney *v.* State, 24 *Ala.* 71.

There can be no case of such concealing that will not also be a case of harboring. To conceal, then, is both to harbor and to hide. Cook *v.* State, 26 *Ga.* 593.

"Conceal" and "harbor," in the fugitive slave law of 1793, do not indicate two distinct offences, but are descriptive of the same offence. Driskill *v.* Parrish, 3 *McLean*, 631, 643.

The concealment, by a debtor, to avoid summons, which will authorize an attachment of his estate, involves the intention on the part of the debtor to delay or prevent his creditors from enforcing their demands in the ordinary legal modes. This he may accomplish by secreting himself upon his own premises, or by departing secretly to a more secure spot, either in or out of the county of his residence. Dunn *v.* Salter, 1 *Duv.* 342.

A man who leaves a place to avoid service of process, requesting false information to be given of his movements, conceals himself so that process cannot be served upon him, within the meaning of the attachment law of Illinois. If he was in another county, it is no objection that process was not issued to that county. North *v.* McDonald, 1 *Biss.* 57.

The fact that the defendant lives out of the county where he does business does not amount to concealing himself, within the statute. Boggs *v.* Bindskoff, 23 *Ill.* 66.

CONCESSI. I have granted. A prominent word of grant in the old Latin forms of conveyances of land. *Concessimus:* we have granted. See also DEDI.

The word *concessi*, or *feoffavi*, implies a warranty in an estate for years, but not in an estate in fee. Frost *v.* Raymond, 2 *Cai.* 188.

CONCLUDE. To close or end; to terminate. Conclusion: the closing or ending, 1. of mental deliberation, as conclusions of law or fact; or, 2, of a written instrument, as the conclusion of an indictment. Conclusive: that which, by law, terminates claim or discussion; as a conclusive judgment, conclusive evidence.

Conclusion against the form of the statute. Indictments for offences of statutory creation are required to conclude, that is, end, with a technical phrase in recognition of this; as, against the form of the statute in such case made, &c.; or, in the Latin form, *contra formam statuti.*

Conclusion of declaration. That part of the declaration which follows

the statement of the cause of action, and shows the motive or object of the plaintiff in suing. In personal and mixed actions, which are brought for damages, the modern form of the conclusion is: "to the damage of the plaintiff ——— dollars, and thereupon he brings suit," &c.

Conclusion of plea. In common-law pleading, when the plea tenders a complete issue, it must conclude "to the country," as it is called; that is, by the words, "and of this he puts himself upon the country," meaning a proffer to submit the cause to a jury for decision upon the truth of his defence. If the plea alleges new matter, it concludes with a verification: "and this he is ready to verify;" or, if it is matter of record, "to verify by the record." The formal parts of declarations and pleas have been the subject of so much regulation by recent statutes in different jurisdictions that these rules are no longer of general application.

CONCORD. Agreement. It has been especially applied to an agreement between parties intending to levy a fine, prescribing how, or in what manner the lands shall pass. It also denotes an agreement between two persons, one of whom has a right of action against the other, settling what amends shall be made for the breach or wrong; a compromise or an accord. *Wharton.*

CONCORDAT. A compact; a treaty. Used of a public act of agreement; and generally of one with the pope, in regard to ecclesiastical matters.

CONCURSO. Suit *in concurso* is a remedy provided by state laws, to enable creditors to enforce their claims against a debtor. Schroeders *v.* Nicholson, 2 *La.* 350.

CONDEMNATION MONEY. As used in an appeal bond, this phrase means the damages which should be awarded against the appellant by the judgment of the court. It does not embrace damages not included in the judgment. Doe *v.* Daniels, 6 *Blackf.* 8.

CONDITION. A qualification, restriction, or limitation annexed to an estate, right, or interest, whereby such estate, right, or interest may be created, enlarged, suspended, or defeated, upon an uncertain event. The clause in an agreement, conveyance, will, or other instrument in writing, which expresses the condition by which the obligation, right, interest, or estate created by such instrument may be modified or destroyed, is also called a condition; and the term is also applied to the uncertain event upon the happening or not happening of which the modification or destruction of such obligation, right, interest, or estate depends.

Conditions are frequently annexed to real estate, or to some right or interest in real estate, and are then, in general, expressed in the conveyance or devise by which such estate or interest is created or given. But they may also be annexed to bequests, bonds, and other obligations and contracts personal in their nature, and are sometimes contained in statutes and records.

Conditions affecting freehold estates in lands must be created at the same time as the original conveyance or contract, but may be by a separate instrument, which is then considered as constituting one transaction with the original. But conditions affecting chattels, rents, annuities, and the like, may sometimes be created subsequently to the principal deed. At common law, a condition, or the benefit of a condition, could only be reserved to the grantor, lessor, or assignor, and his heirs or personal representatives, and not to a stranger; and this remains in many of the United States a characteristic of a condition, as distinguished from a limitation, although changed in England by Stat. 8 & 9 Vict. ch. 106. Formerly, great importance was attached to the use of particular words in creating a condition. Thus the phrases, "upon condition," "provided always," or "so that," were deemed sufficient to create a condition, even without words of reentry; and other phrases, such as "if it shall happen," were sufficient only when a clause of re-entry was added. But, under the later decisions, any words which clearly express an intention to create a condition are sufficient. "Upon condition" is a very usual form.

Conditions annexed to realty are to be distinguished from other qualifications, limitations, or restrictions, of like nature, such as charges upon land by will, covenants, limitations, and remain-

ders. Thus, when a testator creates a charge upon the devisee personally in respect of the estate devised, the devisee takes the estate on condition; but where a devise is made of an estate, and also a bequest of so much to another person, payable from the estate, it is rather to be held a charge. Wherever a forfeiture of the estate is not expressed or implied, it is not a condition, but merely a charge. The distinction between conditions and covenants depends rather upon the intention of the parties than upon any fixed rules of construction; but in conveyances, a covenant may be made by either the grantor or grantee; a condition by the grantor only. As to limitations, besides the distinction already mentioned, that only the grantor or his heirs or personal representatives may take advantage of a condition, while a limitation may be to or for the benefit of a stranger, another difference is, that a condition does not determine an estate without an entry or claim, while a limitation does. In a conditional limitation, the reversion is to a third person; in a condition simply, the reversion is to the grantor, his heirs and devisees. And with regard to remainders, while a condition may operate to defeat an estate before its natural termination, a remainder does not take effect until the completion of the preceding estate.

Many distinct classes of conditions are designated by particular terms. Such are express conditions, otherwise termed conditions in deed, which are such as are stated in words; distinguished from implied conditions, sometimes called conditions in law, which are those not expressed directly, but are imposed by law in view of the facts of the case. Thus, when a person makes a lease of lands to another, reserving a rent to be paid at a certain day, upon condition that, if the lessee fails in payment at the very day, then it becomes lawful for the lessor to enter, this is an express condition. But when a person grants another an office, though no condition is expressed in the grant, yet the law makes an implied condition, which is, if the grantee do not justly execute all things belonging to the office, it shall be lawful for the grantor to enter and discharge him from his office.

The most important distinction among conditions is that between conditions precedent and conditions subsequent. Every condition must be either precedent or subsequent. A precedent condition must happen or be performed before the estate, right, or interest to which it is annexed can vest or take effect. A condition subsequent may happen or be performed after the commencement or taking effect of the obligation, estate, right, or interest to which it is annexed, and which may be defeated by non-performance of the condition, while by performance it is kept alive and continued. An example of a condition precedent is where an estate is granted to one for life, or for years, upon condition that, if the grantee pay to the grantor a certain sum of money at such a day, then he shall have the fee; in this case, the condition precedes the estate in fee, and on performance thereof the grantee gains the fee. But where a man grants to another his estate, &c., in fee, upon condition that the grantee shall pay to him at such a day a certain sum, or that his estate shall cease, here the condition is subsequent, and following the estate, and upon the performance thereof continues and preserves the same; so that a condition precedent gets and gains the thing or estate made upon condition by the performance of it, as a condition subsequent keeps and continues the estate by the performance of the condition. Repugnant conditions are those which are inconsistent with and contrary to the principal act or transaction. Conditions not repugnant are sometimes termed, by way of distinction, consistent conditions.

Collateral conditions require the doing of something collateral to the principal act or transaction. Inherent conditions are such as are annexed to the rent reserved out of the land whereof the estate is made. *Shep. Touch.* 118.

Conditions are likewise *affirmative*, which consist of doing an act; *negative*, which consist of not doing an act; *restrictive*, for not doing a thing; *compulsory*, as that the lessee shall pay rent, &c.; *single*, to do one thing only; *copu-*

lative, to do divers things; and *disjunctive*, where one thing of several is required to be done. *Shep. Touch.* 117; 2 *Com. Dig.* tit. Condition; *Bac. Abr.* tit. Condition.

A condition is a qualification or restriction annexed to a conveyance. The words must not only be such as of themselves import a condition, but must be so connected with the grant in the deed as to qualify or restrain it. Laberee *v.* Carleton, 53 *Me.* 211.

The question, whether a condition annexed to a devise is to be regarded as a condition precedent or a condition subsequent, must be determined by the intention of the testator; and this is to be searched for in the will. Taylor *v.* Mason, 9 *Wheat.* 325; Finlay *v.* King, 3 *Pet.* 346, 374.

Condition, in an agreement, may be construed to mean "terms," in order to effectuate the intention of the parties. Meanor *v.* M'Kowan, 4 *Watts & S.* 302.

CONDITIONAL. That which is dependent upon or granted subject to a condition, *q. v.*

Conditional fee. A fee restricted by the grant to some particular class of heirs, and therefore subject to the condition implied, if not expressed, that, if the donee should die without such heirs, the land should revert to the donor or his heirs. In other words, it was a fee-simple, subject to the condition that the grantee had heirs of the prescribed class. This species of estate is not generally recognized in the United States.

Conditional liability. The liability of a surety on a guardian's bond, before breach in the condition of the bond, is a conditional liability within the meaning of the second clause of section 19 of the bankrupt law of March 2, 1867, and a discharge in bankruptcy releases the surety. Reitz *v.* People, 72 *Ill.* 435.

Conditional limitation. A conditional limitation is where an estate is so expressly defined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail. 1 *Steph. Com.* 309. Between conditional limitations and estates depending on conditions subsequent there is this difference, that in the former the estate determines as soon as the contingency happens; but in the latter it endures until the grantor or his heirs take advantage of the breach. *Id.* 310.

A condition determines an estate after breach, upon entry or claim by the grantor or his heirs; a limitation marks the period which determines the estate without any act on the part of him who has the next expectant interest. A conditional limitation is, therefore, of a mixed nature, partaking both of condition and of a limitation. Proprietors of Church *v.* Grant, 3 *Gray*, 143.

When a condition subsequent is followed by a limitation over, in case the condition is not fulfilled, or there is a breach, it is termed a conditional limitation. Stearns *v.* Godfrey, 16 *Me.* 158.

Conditional limitations consist in the original limitations or definitions of an estate, and not in the determination or destruction by means of a condition of an estate previously limited. They apply both to real estate and to personal estate. *Brown.*

Conditional obligation. Usually, an obligation assumed subject to a condition. But in Louisiana the term seems used in a sense equivalent to implied obligation.

The Louisiana code defines conditional obligations as those which result from the operation of law, from the nature of the contract, or from the presumed intent of the parties. Moss *v.* Smoker, 2 *La. Ann.* 989.

Conditional sale. A sale made subject to a condition.

Conditional sales are distinguishable from mortgages. They are to be taken strictly as independent dealings between strangers. A mortgage is a security for a debt, while a conditional sale is a purchase for a price paid, or to be paid, to become absolute on a particular event; or a purchase accompanied by an agreement to resell upon particular terms. Sewall *v.* Henry, 9 *Ala.* 24.

CONDONATION. The forgiveness by a husband or wife of a breach, on the part of the other, of his or her marital duties.

The legal effect of such forgiving or condonation is, that the party cannot subsequently seek redress for an offence already forgiven. For instance, if, after his knowledge of the wife's adultery, a husband cohabits with her, such an act of condonation bars him from his remedy of divorce; and a wife is equally barred who has condoned an act of cruelty on the part of the husband. But it is an important qualification of the general doctrine of condonation, that a subsequent repetition of the crime revives the former offence, and nullifies the intermediate act of condonation by the injured party.

Condonation is a conditional forgiveness founded on a full knowledge of all antecedent guilt. Odom *v.* Odom, 36 *Ga.* 286.

The term condonation necessarily includes that operation of the mind, evinced

by words or acts, known as forgiveness; the free, voluntary, and full forgiveness and remission of a matrimonial offence. Unless accompanied by that operation of the mind, even cohabitation without fraud or force is insufficient to establish a condonation. Betz *v.* Betz, 2 *Robt.* 694.

CONFESS. To acknowledge, admit, or assent to an allegation or charge. Usually spoken of charges of tortious or criminal conduct. Where the matters involved are not against one's character, admit or assent are the more usual words (except in the old phrase, confession and avoidance). Confession: the act or fact of acknowledging the truth of a charge; also, the expression, written or oral, in which such acknowledgment is conveyed.

Confession and avoidance. A phrase in the law of pleading, descriptive of that class of pleas which admit the truth of the matters averred, but allege new matter, meet and overthrow them. Often a defendant cannot deny the matters averred in the declaration, yet can establish a complete defence, by showing some new fact which avoids the effect they would otherwise have. Thus, to set up payment does not deny the indebtedness charged: it admits it, but avoids the consequence.

CONFIDENTIAL COMMUNICATION. A phrase descriptive of information given between persons standing in some relation of duty or trust, on account of which the law will not require it to be divulged, or hold the person making it liable therefor. Examples are, the communications between husband and wife, attorney and client, employer and clerk. Privileged communication is a more common and better phrase.

CONFINEMENT. An act of congress, April 30, 1790, § 12, 1 Stat at L. 115, declares confinement of a master of a vessel, by the seamen, punishable. This has given rise to some decisions on the meaning of the word, in this connection. It is held that any restraint of the master's liberty, whether by depriving him of the use of his limbs, or by shutting him in the cabin, or, by intimidation, preventing him from the free use of every part of the vessel, amounts to such a "confinement" as is punishable. United States *v.* Sharp, *Pet. C. Ct.* 118. A confinement of the master may be completed by any moral or physical restraint which prevents his freedom of movement, and command of the ship. The restraint must, however, in either case, be illegal; for it is no offence for the seamen to confine the master for a justifiable cause, or in justifiable self-defence. United States *v.* Thompson, 1 *Sumn.* 168. And it is sufficient that there is a personal seizure or restraint of the master, although it may be for the purpose of inflicting personal chastisement upon him. United States *v.* Savage, 5 *Mas.* 460. But a mere assault and battery upon the master does not amount to a confinement. United States *v.* Lawrence, 1 *Cranch C. Ct.* 94.

CONFIRM. To complete or establish that which was imperfect or uncertain; to ratify what has been done without authority or insufficiently. Confirmation: an act or instrument supplying defects in a preceding one, or rendering valid and obligatory something which might have been set aside.

The term has a technical use in conveyancing, where it signifies a deed made by one supposed to have some interest or estate in lands, to a person who has possession thereof, or some evidence of title thereto, whereby the imperfect, incomplete, or voidable estate of the latter is made perfect, and rendered unavailable, so far, at least, as any interest in the grantor is concerned. It includes, also, such an instrument as gives approbation or assent to an estate previously created, and, as far as is in the confirmer's power, makes it good and valid.

CONFISCATE. To appropriate as government property; to seize and adjudicate for a forfeiture; to adjudicate and condemn to the public treasury. Confiscation: the act or proceeding of taking or condemning property as forfeited to the sovereign power. Confiscated: taken by government as forfeited.

Originally, these words seem to have included any seizure of property to enrich the government, irrespective of the grounds or reasons which justified it; but usage at the present day tends

strongly to confine them to seizures in the exercise of authority to punish offences, and chiefly to seizures in punishment of a breach of allegiance, or in exercise of belligerent rights and under the laws of war. A taking of property, not primarily to enrich the state, but because the individual thing taken is required for the public use, is seldom called confiscating it. And even a taking in enforcement of a forfeiture imposed for a breach of a municipal law, as where a vessel implicated in smuggling is taken from the owners and condemned to government, is oftener termed seizure than confiscation. Thus, confiscate is narrower than take; it is taking in the exercise of the powers of government to compel obedience and submission to its laws and authority, and does not include taking in the exercise of powers to secure the public convenience, and provide for the general wants; the powers of taxation and eminent domain. It is nearly equivalent to seize, and to one sense of forfeit; as when we say that the law forfeits a thing, meaning imposes a forfeiture of it; but the other use, as in saying that the owner of a thing forfeits it by his offence, is much more common. It differs from capture, even when used with reference to exercise of belligerent rights, in implying an action of government within its own jurisdiction over persons territorially subject to its sway, and by means within the ordinary exercise of civil authority; while capture presents the idea of an employment of military or naval force, outside or independent of civil jurisdiction.

To confiscate is to transfer property from private to public use; or to forfeit property to the prince or state. Ware *v.* Hylton, 3 *Dall.* 199.

CONFLICT OF LAWS. A phrase applied to the doctrine which treats of the proper application of the differing laws of different states or nations, to matters claimed to be subject to both. Thus, if the validity of a marriage made in one country, between parties who have since become residents of another, or if the distribution of assets situated in one state, of a person who died in another, would be determined in one way by the law of the place where the marriage was made or the property lies, but in another by the law of the domicile involved, a question of the conflict of laws arises. It is considered one of the most intricate and difficult branches of jurisprudence. See *Story on the Conflict of Laws.*

CONFORMITY. Adherence to the church of England; acceding to its doctrine and usages.

Conformity, bill of, see BILL OF CONFORMITY.

CONFUSION. Admixture; blending; intermingling.

Confusion of boundaries. The title of that branch of equity jurisdiction which relates to the ascertainment of conflicting, disputed, or uncertain boundaries.

Confusion of goods. A pouring together or intermixture of goods, the property of one man, with those belonging to another, so that the two can no longer be distinguished.

The term is of importance in discussions relative to the right of property in cases where articles have become confused by the negligence or improvident act of the owner of a portion. On this subject the general rule is, that if the intermixture is by consent, the proprietors have an interest in common, in proportion to their respective shares. If one owner wilfully intermixes goods with those of another man, without his approbation or knowledge, the common law does not allow him any remedy, but gives the entire property, without any account, to the one whose original property has been, without his concurrence, thus rendered uncertain; the civil law, however, allows a satisfaction for what a person has thus lost. For further distinctions, see *Schouler Pers. Prop.* 40–54.

The term confusion is applicable to a mixing of chattels of one and the same general description, differing thus from accession, which is where various materials are united in one product. Confusion of goods arises wherever the goods of two or more persons are so blended as to have become undistinguishable. 1 *Schouler Pers. Prop.* 41.

Confusion is a mixture of liquids, as wine and wine, or wine and honey, or melted silver and gold, or the intermixture of money, coin, or hay, that forms one undistinguishable mass. The placing of crockery, china,

or other articles resembling each other, on the same shelf, is not a confusion of them, within the meaning of the law. Treat *v.* Barber, 7 *Conn.* 274.

When there has been such an intermixture of goods owned by different persons, that the property of each can no longer be distinguished, what is denominated a confusion of goods has taken place. And this may take place with respect to mill logs and other lumber. Hesseltine *v.* Stockwell, 30 *Me.* 237.

Confusion of rights, or titles. A civil-law expression synonymous with merger as used in the common law, applying where two titles to the same property unite in the same person, Palmer *v.* Burnside, 1 *Woods*, 179; or where there is a union of the characters of debtor and creditor in the same person; as if the creditor becomes heir of the debtor, or the debtor heir to the creditor.

CONGRESS. In general, an assembly of persons deputed to deliberate upon affairs of state. In the United States, it is the name of the legislative body of the national government; the term legislature being in general use to designate the law-making bodies of the states.

The congress, as it is styled in the constitution, or congress, as popularly called, is created by the constitution of the United States, and clothed with all the legislative powers possessed by the general government; these powers being, however, defined with care. It consists of two houses: a senate, composed of senators, two in number, from each state, elected by the state legislatures; and a house of representatives, composed of members elected by the people inhabiting the various districts into which the states are divided for the purpose, whose number is regulated from time to time, in proportion to the existing population. Senators are elected for six years, representatives for two. Congress meets annually, on the first Monday of December, at the seat of government; and special sessions may be called, by the president, when public occasion requires.

The constitutional powers of congress are substantially as follows:

1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States. 2. To borrow money on the credit of the United States. 3. To regulate commerce with foreign nations and among the several states and with the Indians. 4. To establish a uniform rule of naturalization and uniform laws of bankruptcy throughout the United States. 5. To coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures. 6. To provide for the punishment of counterfeiting the securities and current coin of the United States. 7. To establish post-offices and post-roads. 8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. 9. To constitute tribunals inferior to the supreme court. 10. To define and punish piracies and felonies on the high seas and offences against the laws of nations. 11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water. 12. To raise and support armies. 13. To provide and maintain a navy. 14. To make rules for the government of the land and naval forces. 15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions. 16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States. 17. To exercise exclusive legislation over the District of Columbia, and also over all places purchased for forts, magazines, arsenals, dock-yards, and other needful buildings. 18. To make all laws necessary and proper for carrying into execution the foregoing powers.

CONJUGAL RIGHTS. The personal rights arising from the relation of husband and wife.

In England, a suit may be maintained for a restitution of conjugal rights, where one party without legal excuse lives separate from the other; but this is a branch of the ecclesiastical jurisdiction, and is a remedy which has never been adopted in the United States.

CONNECT. In a railroad company's agreement to transport perishable goods by a special daily train to a certain point, "there to connect with" another railroad at a certain hour, imports a complete delivery the moment such first carriers' cars reach the point where the roads of the two companies join, and the engine is detached from the car. Truax *v.* Philadelphia, &c. R. R. Co., 3 *Houst.* 533.

CONNECTION. Is used in 1 Mich. Comp. Laws, § 2032, in its common and approved meaning at the time of the passage of the act; and denotes any relation, organic or conventional, by which one society is linked or united to another. Allison *v.* Smith, 16 *Mich.* 405.

Connections is a loose and indefinite word; more vague than relations. In popular phrase, a wife's relations are her husband's connections; but connections, unless they are also relations, never take by the statute of distributions. Storer *v.* Wheatley, 1 *Pa. St.* 506.

The phrase guilty connection does not, of itself, describe any specific offence; but, when applied to a man and woman, it imports a carnal connection. State *v.* George, 7 *Ired. L.* 321.

CONNIVANCE. A wrongful, corrupt, or guilty assent to or permission of a tort or offence.

It usually implies a consent given while the tort or offence is proceeding, and one which is given contrary to law or good morals; but does not imply any actual co-operation, only the bare assent or neglect to forbid or oppose.

CONSANGUINITY. Blood relationship; kindred by birth; the connection imputed to persons in view of their having a common ancestor. Consanguinity is spoken of as lineal or collateral. It is lineal between two persons one of whom is descended from the other; as between a given person, usually called in this connection the *propositus*, and his son or grandson, his father or grandfather. It is collateral where the two persons are descended from some common ancestor, but neither of them from the other; thus the collateral relatives of the *propositus* are his brother or sister, his nephew, his uncle, cousin, &c.

Consanguinity is reckoned by degrees. In computing lineal consanguinity, each generation answers to one degree. For collateral consanguinity two different modes are employed by the common law and by the civil; but the difference is a verbal one, and does not affect the right to inherit.

CONSENSUS. Accord; agreement of minds; consent. Consensual: contract or relation established by mutual consent of parties only.

Consensus, non concubitus, facit matrimonium. Consent, not sexual intercourse, constitutes marriage. The mutual agreement of the contracting parties to live together as husband and wife is the essence of the marriage contract, not sexual intercourse. Thus a contract to marry *per verba de presenti*, though not followed by cohabitation, amounts to a valid marriage. On the other hand, no valid marriage can be contracted where either party is at the time under mental incapacity, and therefore incapable of giving the consent, which is an absolute requisite.

The maxim is also a rule of the civil law, by which marriage was considered a mere consensual contract, differing from other contracts of that class only in being indissoluble by the consent of the contracting parties. It was also deemed to be a contract executed without any part performance. And although by the common law some religious solemnity was essential to constitute a full and complete marriage, yet the mere consent of the parties expressed *per verba de presenti* was sufficient to render the contract of marriage indissoluble between the parties themselves, and either of them might compel the solemnization of the required ceremonial. *Broom Max.* 506; Regina *v.* Millis, 10 *Clark & F.* 655.

Consensus tollit errorum. Consent takes away error. The effect of an error in procedure may be obviated by consent of parties. And the consent will be implied from a mere acquiescence of the party who might take advantage of the error. Upon this maxim rests the doctrine of waiver, which is of wide application in pleading and in all matters of practice. But the principle that an error may be cured by the consent or waiver of the party who might take advantage of it, applies to matters of form chiefly, and does not in general extend to substantial rights. Thus consent cannot give jurisdiction. And with respect to pleadings, while objections of mere form are waived by pleading over instead of objecting, defects in matters of substance may often be reached by a demurrer interposed after pleading over. So in other proceedings in an action, a mere irregularity may be waived by the opposite party proceeding in the action, after knowledge of such irregularity, and without objection, where a correction might have been made, if objection had been taken; but any thing which is altogether defective, and is an absolute nullity, cannot be waived by any subsequent proceedings

or laches of the opposite party. *Broom Max.* 136.

CONSENSUAL. Contracts formed by mere consent are so styled.

CONSENT. Approval; permission; concurrence of wills.

Consent is an act of the reason, upon deliberation, the mind weighing, as it were, the good or evil on either side; and implies three things, — a physical power, a mental power, and a free use of both; hence, if consent is obtained by intended imposition, surprise, undue influence, &c., it is treated as no consent. See *Story Eq. Jur.* 186.

There is a difference between consenting and submitting: every consent involves a submission; but a mere submission does not necessarily involve consent. Barnes *v.* Butcher, 9 *Carr. & P.* 722.

Consent rule. A proceeding in the old action of ejectment, by which the tenant in possession specified for what purposes he intended to defend, and bound himself to admit all the fictions necessary under that action for trying the title to the land in question, every thing, in fact, but the title itself. Except on condition of entering into this stipulation, he was not admitted to defend his title.

CONSEQUENTIAL. The term consequential damage means sometimes damage which is so remote as not to be actionable; sometimes damage which, though somewhat remote, is actionable; or damage which, though actionable, does not follow immediately, in point of time, upon the doing of the act complained of. Eaton *v.* B., C., & M. R. R., 51 *N. H.* 504.

CONSIDERATION. The inducement or compensation for something promised or done; the material cause which moves a party to agree; something that deserves and is to receive a recompense.

The consideration is ordinarily of the essence of a contract; for promises which have no consideration are not, in general, enforceable by law, unless, sometimes, when embodied in a formal sealed instrument, or when third persons, by acting upon the supposition they were valid, acquire the just right to have them enforced.

In general, a consideration may be either an advantage or benefit moving to the promisor, or a loss or privation sustained by the promisor upon request of the promisee.

Considerations are called express, when they are stated in words, oral or written, in the contract; and implied, where they are enforced by law, without requiring that they should have been stated.

Considerations are distinguished, according to their nature and power to sustain a contract, into several classes. Valuable: when the benefit conferred on the promisor or the detriment sustained at his instance by the promisee, is of a property nature, is, though remotely, capable of estimation; a consideration of this class is required to sustain a transfer of property as against creditors and purchasers in good faith, for value. Equitable, or moral; when they involve only the performance by free-will of an obligation which was once enforceable, but is so no longer. Good: where neither value nor obligation underlies the inducement, but the transaction is founded on kinship, natural affection, and the like. Illegal: when they involve the doing something prohibited by law. Impossible: when they cannot, by reason of their inherent difficulty, be performed.

CONSIDERATUM. A phrase of the old formula or style of giving judgments was, *et ideo consideratum est per curiam*, and therefore it is considered by the court, that, &c., stating whatever is adjudged.

CONSIGN. To send one's movable property to a person in another place, for custody, sale, &c. Consignment: the act or transaction of sending property away for sale, &c.; also, sometimes, the bulk or mass of goods themselves which are so sent. Consignor: the owner or person by whom property is sent upon a consignment. Consignee: the person to whom it is sent.

Consigned implies agency, not ownership in the consignee. Rolker *v.* Great Western Ins. Co., 4 *Abb. App. Dec.* 76.

CONSIMILI CASU. In like case.

An early English statute (Westm. 2 ch. 24) provided that as often as it should happen in chancery that in one case a writ is found and in the like case (*in consimili casu*) a remedy is wanting,

the clerks of the chancery should agree to make a writ. *Termes de la Ley.* Quite a number of writs were framed in the exercise of this authority, somewhat as, later, in courts of common law, special actions on the case were allowed where declarations employing only the common counts were not appropriate. Such writs were described as the writs framed *in consimili casu.* And one of these, either because it was very often used, or for some other cause giving it prominence, became known as the writ *consimili casu.* It lay for a reversioner, where the tenant for life or by the curtesy aliened in fee or for life, against the party to whom the tenant so aliened the property.

CONSISTORY COURTS. Courts held by diocesan bishops within their several cathedrals, for the trial of ecclesiastical causes arising within their respective dioceses. The bishop's chancellor, or his commissary, is the judge; and from his sentence an appeal lies to the archbishop. (*Cowel;* 3 *Bl. Com.* 64; 3 *Steph. Com.* 305, 306.) *Mozley & W.*

CONSOLATO DEL MARE. The title of an ancient and highly esteemed collection of sea laws, of continental Europe.

CONSOLIDATION. Union or merger of several individuals of homogeneous nature in one.

To consolidate means more than to rearrange or re-divide. It means, to unite in one mass or body; as, to consolidate the forces of an army. To consolidate two bills, in parliamentary usage, is to unite them in one. *Independent Dist. of Fairview* v. *Durland,* 45 Iowa, 53.

Consolidation of actions. This expression applies to a mode of proceeding applicable where several actions are pending in the same court, between the same parties, and involving the same question. Under such circumstances, the court may direct that one cause only shall proceed to trial, and the others shall follow the event of that; or, in some jurisdictions, that all the actions be consolidated into one, and proceed to trial and judgment as one suit.

What is known in English practice as the consolidation rule is a rule for consolidating actions, said to have been devised by Lord Mansfield, the effect of which is to bind the plaintiffs or defendants in several actions by the verdict in one, where the questions in dispute and the evidence to be adduced are the same in all. *Lush's Pr.* 752; *Kerr's Act. Law.*

Consolidation of benefices, or **parishes,** is the uniting of two or more of either into one.

Consolidation of clauses. Several acts of parliament which have attained celebrity on account of their comprehensive character and the importance of the subjects to which they relate are known by a phrase descriptive of the manner in which they were framed. They were not draughted anew, but compiled chiefly by extracting from previous laws the clauses relating to the topic in question, and consolidating them in one act; the general object being to give the old law in a new and more convenient form. Thus, there have been the companies clauses consolidation act, and the lands clauses consolidation act; meaning acts formed by consolidating the clauses of existing laws relative to incorporation and management of public companies, or to the taking of lands.

Consolidation of corporations. In case two or more corporations, usually such as were organized for the same general purpose, or for connected purposes, become merged or united in one, this is termed, usually, in the United States, consolidation; in England, amalgamation, *q. v.*

CONSOLS. An abbreviation of the expression consolidated annuities, and used in modern times as a name of various funds united in one for the payment of the British national debt. In comparatively early times loans were obtained by the British government upon the pledge of various taxes as security for repayment; each fresh loan being secured upon a distinct source of income. In 1751, by which time these loans had become too large for government to contemplate a payment of principal, and too numerous to be separately managed, they were united in one general stock, bearing an interest of three per cent, and known as the consols, or the consolidated annuities. *Wharton.*

CONSORTIUM. Marriage; also union, society, companionship.

CONSPIRACY. The agreement or engagement of persons to co-operate in accomplishing some unlawful purpose, or some purpose which may not be unlawful, by unlawful means. State *v.* Mayberry, 48 *Me.* 218; State *v.* Rowley, 12 *Conn.* 101; Smith *v.* People, 25 *Ill.* 17; Commonwealth *v.* Hunt, 4 *Metc.* (*Mass.*) 111; State *v.* Bartlett, 30 *Me.* 132; Alderman *v.* People, 4 *Mich.* 414; State *v.* Burnham, 15 *N. H.* 394; Hinchman *v.* Richie, *Bright.* 143. The gist of a conspiracy is the unlawful combining; and the conspiracy — that being distinguishable from the unlawful thing to be done — is complete when the combination or agreement is made: it is not necessary that the conspirators should have proceeded to actual efforts to accomplish their purpose, unless this is required by statute. Commonwealth *v.* Judd, 2 *Mass.* 337; Commonwealth *v.* Tibbetts, *Id.* 538; Commonwealth *v.* Warren, 6 *Id.* 74; People *v.* Mather, 4 *Wend.* 259; State *v.* Cawood, 2 *Stew.* 360; State *v.* Rickey, 9 *N. J. L.* 293; State *v.* Buchanan, 5 *Har. & J.* 317; Collins *v.* Commonwealth, 3 *Serg. & R.* 220; see also Respublica *v.* Ross, 2 *Yeates*, 8; Morgan *v.* Bliss, 2 *Mass.* 112; Commonwealth *v.* Hunt, *Thach. Cr. Cas.* 609; People *v.* Richards, 1 *Mich.* 216. Still less is it necessary that the conspirators should succeed. At common law, the mere conspiracy constituted the offence; under the statutes of many of the states, some act must be done in execution of the design agreed on to complete the offence. State *v.* Norton, 23 *N. J. L.* 33. The final result does not vary the legal character of the offence. Hazen *v.* Commonwealth, 26 *Pa. St.* 366. Conspiracy is, in its nature, a joint offence; less than two persons cannot be accused of it. Commonwealth *v.* Manson, 2 *Ashm.* 31; McDermut's Case, 4 *City H. Rec.* 12.

The common-law doctrine of conspiracy has been, in many of the states, remodelled by statutes which define the offence, tending generally, we believe, towards a restriction upon the common-law definition. These statutes must be consulted for an accurate view of the elements of the offence in the particular state.

Conspiracy is defined as an agreement between two or more persons falsely to charge another with a crime punishable by law, either from a malicious or vindictive motive or feeling towards the party, or for the purpose of extorting money from him; or wrongfully to injure or prejudice a third person, or any body of men, in any other manner; or to commit any offence punishable by law; or to do any act with intent to prevent the course of justice; or to effect a legal purpose with a corrupt intent, or by improper means. *Brown.*

Conspiracy is a consultation or agreement between two or more persons, either falsely to accuse another of a crime punishable by law; or wrongfully to injure or prejudice a third person, or any body of men, in any manner; or to commit any offence punishable by law; or to do any act with intent to prevent the course of justice; or to effect a legal purpose with a corrupt intent, or by improper means. *Hawk. Pl. C.* ch. 72, § 2; *Archb. Cr. Pl.* 390 (adding also combinations by journeymen to raise wages); State *v.* Murphy, 6 *Ala.* 765.

Conspiracy is a confederacy between two or more persons to injure an individual by an unlawful act, &c. McIntyre *v.* Mancius, 16 *Johns.* 592.

Conspirators, is not used as precisely equivalent to persons committing the offence of conspiracy. It has received a different shade of meaning from being defined by statute, in England, as meaning those who bind themselves by oath, covenant, or other alliance, that every of them shall aid the other falsely and maliciously to indict persons, or falsely to move and maintain pleas, &c. 33 *Edw. I.* st. 2. Besides these, there are conspirators in treasonable purposes, as for plotting against the government.

CONSTABLE. 1. In the middle ages, this name was applied to a high officer, under monarchical governments, notably in France and England, who was the keeper of the peace of the nation, having both civil and military powers. Besides the chief command of the military forces, he exercised the supreme judicial power in all military matters, and was the highest, or one of the highest, officers of state. The office was abolished or disused in both France and England, the powers conferred being considered too great to be safely exercised by a subject. The office of constable of Scotland continued to exist

until abolished in the reign of George III.

2. In modern times, the name usually designates an officer whose general duty is to keep the peace within a particular district, and who, as conservator of the peace, exercises a limited judicial power, having authority to arrest supposed offenders, where crimes are committed within his view, or even upon information from others of the commission of a crime. Constables are frequently given by statute a ministerial authority in the execution of process, both civil and criminal; and are charged with attendance upon courts and justices of the peace, the summoning and keeping of juries, &c.

In England, constables were distinguished as high constables and petty constables, according to the territorial jurisdiction which was conferred upon each class, high constables being the conservators of the peace within a franchise or hundred, petty constables within a town or parish; and each having like duties assigned to them by act of parliament, particularly the service of the summonses and the execution of the warrants of the justices of the peace, relative to the apprehension and commitment of offenders. The utility of the office of high constable is, however, considered questionable; and by statute 32 & 33 Vict. ch. 47, passed in 1869, the justices for each county were directed to consider and determine whether it was necessary that the office of high constable of each hundred, or other like district within their jurisdiction, should be continued. In each county of England, a county constabulary is now established, under a chief constable. Special constables may also be appointed by the magistrates, to execute warrants on particular occasions, or to act in aid of the preservation of the peace on special emergencies, where an increase of the existing police force appears desirable. This office, in the absence of volunteers, is compulsory.

In the United States, the office of constable corresponds to that of petty constable in England. Besides their general authority and duties as conservators of the peace, under which they may arrest, without process, on a reasonable suspicion of felony, for offences against the peace committed in their presence, and in various other cases, they have other duties specially assigned to them by statute; generally the execution of process issued by justices of the peace or other judicial officers, and attending justices and other courts. In many cities of the United States, the chief officer of the police or constabulary force is entitled high constable. The powers and duties of such officers are fixed by the statutes creating the office.

CONSTAT. It appears. 1. Used in its literal sense in the phrase *non constat.* It does not appear; it does not follow.

2. Used in English law as the name of a certificate by an officer that certain matters therein stated appear of record; as in the exemplification under the great seal of the enrolment of letters-patent; *constat* being the initial word of the certificate.

CONSTITUENT. In its most general sense, one who has authorized another to act for him. Thus used, it may include principals who have made agents, or clients who have employed attorneys. More frequently it is used in a limited sense, signifying one who is represented by another person politically; the electors in the district of a representative in congress, or in the legislature, are termed his constituents.

CONSTITUTION. 1. The form of government of a nation or country; the distinguishing nature and features of its political organization.

2. A written instrument emanating from the people of a nation or state, organizing government, prescribing its form and methods, and conferring and limiting political powers.

3. An eminent or important law or edict; as the novel constitutions of Justinian; the constitutions of Clarendon.

It is in the second of the above senses that the term is chiefly used in American jurisprudence; and in this use it differs from charter, and from bill of rights. A constitution creates a government: it assumes that the people are the source of all political authority, and it purports to confer that authority, as a gift from the people, upon a legislature, an execu-

tive, a judiciary, and other officers, of their creation. A charter, meaning such an instrument as Magna Charta, emanates from a government already existing; it assumes that the sovereign power, as established, is clothed with full political power; and it proceeds to declare restrictions upon that power in recognition and protection of popular rights. But constitution has sometimes been employed to characterize political instruments of the charter character.

For a sketch of the growth of the English constitution, as it is called, see *Brown*.

Constitutional. In countries having a written constitution, such as Switzerland and the United States, the word constitutional means "in conformity with the constitution," and the word unconstitutional means "in violation of the constitution;" the constitution, in all such countries, being the supreme law of the state. The same terms are sometimes applied to the legislation of the British parliament; but then can scarcely mean more than conformity with, or variation from, some traditional maxims of legislation.

Constitutions of Clarendon. Certain constitutions, or statutes, made in the reign of Henry II., A.D. 1164, in a great council held at Clarendon, whereby the king checked the power of the pope and his clergy, and greatly narrowed the exemption the ecclesiastics claimed from the secular jurisdiction. They sent all controversies arising out of ecclesiastical matters to the civil courts; restricted appeals to the pope in spiritual matters; defined the privileges and obligations of archbishops and bishops; extended the rights of the crown in ecclesiastical property; and forbade the clergy to assume to enforce payment of debts.

CONSTRUCT. To build; erect; put together, ready for use.

A statute relating to railroads "hereafter constructed" applies to a road which has been laid out, and upon the road-bed or bridges upon which expenses have been incurred, although not completed at the crossing. Attorney-General *v.* Ware River R. R. Co., 115 *Mass.* 400.

An apparatus attached to a machine is constructed at the time when it is attached to the machine; it is not necessary that the machine should be geared and doing work. Troy Co. *v.* Odiorne, 17 *How.* 72.

Construction, in a statute giving a lien for "construction or repair of vessels," has been held to include alterations and reconstructions, as well as the original construction; on the ground that, if the latter only had been intended, the word building would have been more natural. The Ferax, *Sprague*, 180.

Labor and materials furnished in the alteration of a vessel to fit her for new uses are furnished in her "construction and repair." Donnell *v.* The Starlight, 103 *Mass.* 227.

CONSTRUCTION. Explanation or interpretation; generally, of writings. Strictly, the term signifies determining the meaning and proper effect of language by a consideration of the subject-matter and attendant circumstances in connection with the words employed. Thus, Dr. Lieber says that construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text, — conclusions which are in the spirit, though not within the letter, of the text. *Leg. & Pol. Hermen.* And Professor Parsons says, that, while interpretation does not go beyond the written text, construction takes place where texts to be interpreted and construed are to be reconciled with the rules of law, or with compacts or constitutions of superior authority, or where we reason from the aim or object of an instrument, or determine its application to cases unforeseen and unprovided for. 2 *Pars. Contr.* 491, note (*a*). Compare INTERPRETATION.

CONSTRUCTIVE. That which is deduced, made out, or established by construction; or imputed by inference or presumption of law, rather than believed upon direct evidence; that which is implied, rather than actual.

Constructive assent, or consent. An assent or consent imputed to a party from a consideration of his conduct; as distinguished from one which he voluntarily expresses.

Constructive fraud. Conduct which necessarily operates to defraud is treated by courts of justice as fraudulent, without inquiring into the actual motive; and this imputation or judgment of the law that the acts in question were fraudulent in nature and tendency stamps them with what is called constructive

fraud. Thus, a conveyance of property may be pronounced void for fraud upon the grantor's creditors, either upon proof that the grantor intended to defraud them, which is actual fraud, or that the conveyance, under the circumstances, necessarily operated to defraud, which is constructive fraud.

Constructive larceny. Larceny established by construction of the conduct of the accused; as where the taking was not, in appearance, a theft, but he took possession with intent to steal.

Constructive malice. Malice imputed by law, because the effect of the conduct shown is necessarily unlawful and injurious; as distinguished from express malice, which is established by direct proof that the wrong-doer intended to injure.

Constructive notice. Knowledge imputed to a person of something which he was in duty bound to know, though he was perhaps in fact ignorant. Placing a deed upon record gives constructive notice of its contents to all persons concerned, not because it is believed they have read the record, but because they should do so.

Constructive taking. A phrase used in the law to imply any act short of an actual taking of goods, by which a person shows an intention to convert them to his use; as if a person intrusted with the possession of goods deals with them contrary to the orders of the owner.

Constructive total loss, is where a vessel insured remains *in specie*, and is susceptible of repairs or recovery, but at an expense exceeding its value when restored, and the insured abandons the vessel to the underwriter. Here there is not an actual destruction of the whole vessel, but the injury is treated as an entire loss, by construction.

Constructive treason. Acts raised to the grade of treason by construction of law. The doctrine of constructive treason was deemed by the founders of the United States government likely to be oppressive and harsh in its operation, and was abrogated by incorporating definitions of the offence in the constitution.

Constructive trust. A trust raised by law is often styled constructive, irrespective of the reasons for establishing it. Thus used, the term is interchangeable with "implied" trust. But we advise confining constructive trust to designate trusts raised or impressed from reasons of equity and justice independent of probable intent. "Express" and "implied" trusts will then be, respectively, such as the parties have declared in words, and such as their language indirectly indicates they intended. See EXPRESS; IMPLIED; RESULTING; where the reasons for this view are more fully given.

CONSUETUDO. A custom. Sometimes used for the common law, *i. e.* the whole body of customary law, and sometimes for a special or local custom, spoken of in contradistinction from the general law.

Consuetudo Angliæ. The custom of England; the common law.

Consuetudo debet esse certa. A custom ought to be certain.

Consuetudo est altera lex. Custom is another law.

Consuetudo est optimus interpres legum. Custom is the best interpreter of laws.

Consuetudo loci est observanda. The custom of a place is to be observed. A local custom may have the force of a law. Although a custom, to be generally binding, must, among other requisites, be generally known and observed in a country or trade, yet a custom purely local may become binding on those in the locality, and be the law as to the persons and things it concerns, at the particular place or within the particular district.

CONSUL. An officer of a commercial character, appointed by the different states to watch over the mercantile interests of the appointing state, and of its subjects in foreign countries. There are usually a number of consuls in every maritime country, and they are usually subject to a chief, who is called the consul-general. A consul is not a public minister, nor entitled to the immunities of such; but, in the absence of an ambassador, or *chargé d'affaires*, a consul-general may act as temporary minister, and, as such, be entitled, for the time,

to these immunities, and to that position. See *Tuson on Consuls.*

The word is said to have been anciently the title of an earl or count, bestowed in virtue of those officers being called by the king for consultation. *Burrill.*

A foreign consul is a public agent, who is ordinarily clothed with authority only for commercial purposes. He is not considered as a minister or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. The Anne, 3 *Wheat.* 435.

That consuls-general and vice-consuls are included in the general name consul, see *U. S. Rev. Stat.* § 4130.

Consular court. Under treaties, consuls and other commercial agents have had conferred upon them a certain judicial authority over their own countrymen within the territory of the nation to which they are accredited. Among Christian nations, this jurisdiction is usually limited to the decision of controversies in civil cases arising between fellow citizens or subjects of the consul within the territorial limits of his consulate; the administration of the estates of his countrymen deceased within the same limits; and the registering and certifying wills, contracts, and other instruments executed in his presence. To consuls of Christian nations resident within countries whose political and religious institutions are different, a civil and criminal jurisdiction over their countrymen is generally intrusted, by treaty, to the exclusion of the local magistrates and tribunals; and a like jurisdiction is frequently conferred by legislation of their own government upon commercial representatives in uncivilized countries with whom no treaties are made. This jurisdiction is limited in its extent, and, in all important matters, subject to review by the superior courts of the home country. The name consular court is sometimes given to the sitting of a consul or other persons in the exercise of such functions; but, in general, the judicial authority conferred is merely incidental to the more important duties of the consular office, and does not involve the establishment of such a tribunal as is properly called a court. In the United States, however, the term consular court is recognized, and the organization and procedure in such courts carefully regulated by statute *U. S. Rev. Stat.* § 4083 *et seq.*; the jurisdiction of each, of course, depending upon the treaty stipulations with the particular nation, as well as upon the statutes referred to.

CONSULTATION. The name of a writ in English practice by which a cause which has been removed by writ of prohibition from the ecclesiastical court to the king's court was returned thither again; for the judges of the king's court, finding the cause to be improperly removed from the ecclesiastical court, upon consultation or deliberation, decree it to be returned again. The consultation seems however, in practice, frequently to have been between the judges of the spiritual court and the court of law issuing the prohibition, and not among the judges of the latter court merely. The writ is, in many respects, analogous to the writ of *procedendo*, q. v.

CONTEMPLATION. Bankrupt and insolvent laws have contained provisions relative to acts done, conveyances made, &c., by debtors "in contemplation of bankruptcy," or "of insolvency;" and these have given rise to decisions on the meaning of this phrase.

It was decided by the United States supreme court, under the bankrupt act of 1841 (overruling several decisions of the lower courts), that to render a security void as given "in contemplation of bankruptcy," it is not sufficient that the debtor should have contemplated a state of insolvency: he must have contemplated an act of bankruptcy, or an application by himself to be declared a bankrupt, at the time when he gave the security. Buckingham *v.* McLean, 13 *How.* 150.

The words "in contemplation of insolvency or bankruptcy," in the bankrupt act of 1867, do not require an absolute inability to pay all debts in full on a close of business. If a man cannot pay his debts in the ordinary course of business, as men in trade usually do, he is "insolvent;" and if he has a knowledge of facts which establish that this is the case, any act done by him which gives a preference must be deemed to have been done "in contemplation" of insolvency. Rison *v.* Knapp, 1 *Dill.* 186; Martin *v.* Toof, *Id.* 203.

Contemplation of insolvency should be deemed to mean something more than mere expectation of it: it includes making provision against its results. Heroy *v.* Kerr, 8 *Bosw.* 194.

By contemplation of bankruptcy is meant a contemplation of the breaking up of one's business, or an inability to continue it. Atkinson *v.* Farmers' Bank, &c., *Crabbe*, 529.

It means a contemplation of becoming a broken and ruined trader, according to the original signification of the term; a person whose table or counter of business is broken up, *bancus ruptus*. Everett *v.* Stone, 3 *Story*, 446.

Where the bankrupt act speaks of a conveyance or transfer by a debtor "in contemplation of bankruptcy," it does not necessarily mean, in contemplation of his being declared a bankrupt under the statute, but in contemplation of his actually stopping his business, because of his insolvency and incapacity to carry it on. Arnold *v.* Maynard, 2 *Story*, 349; see Ashby *v.* Steere, 2 *Woodb. & M.* 347.

Contemporanea expositio est optima et fortissima in lege. A contemporaneous exposition is the best and strongest in law. The best and surest mode of expounding an instrument is by referring to the time when and circumstances under which it was made. Thus, in construing old deeds and writings, care must be taken to expound their words according to the meaning which the words bore at the time when they were used; not according to the meaning attached to the same words in later times. Such construction may be by acts as well as by formal exposition; hence ancient instruments may be interpreted by contemporaneous usage; or the intention of the parties may be elucidated by the conduct they have pursued; and where the words of an instrument are ambiguous, the courts will call in aid acts done under it as a clew to the intention. *Broom Max.* 682.

The same principle is applied to the interpretation of statutes, the rule as to which is well stated by Lord Coke, as follows: "Great regard ought, in construing a statute, to be paid to the construction which the sages of the law, who lived about the time or soon after it was made, put upon it; because they were best able to judge of the intention of the makers at the time when the law was made." 2 *Inst.* 11, 136, 181. Such a construction is more likely to be correct, where there is a difference of opinion, than another construction put upon it long afterwards by those who can only gather its purpose from the terms in which it is expressed. But contemporary usage is operative only as the interpreter of a doubtful law; if the language of the statute be plain, usage cannot avail against it. The rule amounts to no more than this, that, if an act be susceptible of the interpretation which has been put upon it by long usage, the courts will not disturb that construction. Pochin *v.* Duncombe, 1 *Hurl. & N.* 856.

CONTEMPT. Disobedience to, or interruption of, the orders or proceedings of a court or legislative body; conduct directly subversive of the authority of the judiciary or legislature.

This, however, is only a general indication of the nature and tendency of the acts which have from time to time, and in various jurisdictions, been pronounced contempts. With respect to contempts of court, it was early established that courts of justice have an inherent power to punish persons for contempt of rules and orders, disobedience or resistance to their process, disturbing their sessions, &c.; and this implied power has been often exercised, and seems, in earlier and unsettled periods of jurisprudence, to have been carried to an extreme. Abuses of the power have led to its restriction; hence in several jurisdictions statutory limitations have been imposed upon the power of courts to punish for contempt. Thus, early in the judicial history of the United States, Judge Peck, having rendered an opinion in an important case, which was severely criticised in a newspaper as erroneous and contrary to law, committed the writer of the article for a contempt. Judge Peck was impeached for this committal, as unjust and oppressive. He was tried before the United States senate, and acquitted by one vote, on the ground, it is understood, that, though the committal was illegal, he acted ignorantly. But an act was immediately passed, being brought forward by Mr. Buchanan, one of the counsel for the impeachment, limiting the power of the federal courts in punishing for contempts. Those courts can punish only in cases of misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice; misbehavior of officers of the courts in their official

transactions; and disobedience to any process, decree, &c., of the court. *Rev. Stat.* § 725. Similar restrictions are imposed upon the courts of many of the states, by enactments of the state legislatures, which furnish a definition of contempt, or rather a specification of the contempts which are punishable within their jurisdictions.

Independent of such statutes, the question of what constitutes a contempt is a question of judicial discretion, for the determination of the court or judge whose authority has been impugned; and the cases range over a very great variety of acts. See *U. S. Digest*, tit. Contempt.

The power of a legislative body to punish for contempts of its authority is deduced from its power to make rules; for this implies a power of enforcing them, and attachment for contempt is the customary way of punishing violation. 1 *Kent. Com.* 236; Anderson *v.* Dunn, 6 *Wheat.* 204. Such implied power is, however, often restricted or regulated by express statute; as, in New York, by 1 N. Y. Rev. Stat. 154, § 13; in respect to congress by U. S. Rev. Stat. §§ 101–103.

Contempt is a disobedience to the court, by acting in opposition to the authority, justice, and dignity thereof. (2 *Swift Dig.* 358.) Lyon *v.* Lyon, 21 *Conn.* 185.

Contempts are of two kinds, — criminal and constructive. Criminal contempts are those committed in the immediate view and presence of the court, such as insulting language or acts of violence, which interrupt the regular proceedings in courts. Constructive contempts are those which arise from matters not transpiring in court, but in reference to failures to comply with the orders and decrees issued by the court, and to be performed elsewhere. Androscoggin, &c. R. R. *v.* Androscoggin, &c., 49 *Me.* 392.

CONTENTIOUS. Contested; litigated. The word applies to proceedings prosecuted to determine a controversy, as distinguished from formal and *ex parte* matters. The litigious proceedings in ecclesiastical courts are sometimes said to belong to its contentious jurisdiction, in contradistinction to what is called its voluntary jurisdiction, which is exercised in the granting of licenses, probates of wills, dispensations, faculties, &c.

CONTENTS. The word contents, as used in the phrase, "any suit to recover the contents of any promissory note or other chose in action," in the judiciary act of congress of Sept. 24, 1789, § 11, means the specific sums named in and payable by the terms of the instruments. An action to recover damages for the neglect of a collecting agent to protest a note is not an action for the contents of a note; because it is not founded on the contract contained in the note. Barney *v.* Globe Bank, 5 *Blatchf.* 107, 114.

A bill of lading, containing the usual clause, "shipped in good order," &c., and adding, "contents unknown," acknowledges only the fair external appearance of the packages, excluding any implication as to quantity, quality, or condition of the article; and the burden is on the shipper to prove the condition of their contents when they came on board. Clark *v.* Barnwell, 12 *How.* 272. Compare Zerega *v.* Poppe, *Abb. Adm.* 397.

CONTESTATIO LITIS. Contestation of suit. A narrative of the controversy made by the parties; and corresponding to the modern pleadings. Also, the process of coming to an issue in pleading; the forming an issue; or the issue or question in dispute itself.

CONTIGUOUS. Used in a policy of fire insurance, in reference to a building, means in close proximity; in actual close contact. Arkell *v.* Commerce Ins. Co., 69 *N. Y.* 191.

CONTINGENCY. An event that may occur; a possibility.

In a statute providing that in a proceeding by trustee process, in order to charge a person as trustee, the debt must be "due absolutely, and without depending on any contingency," the contingency contemplated is not a mere uncertainty how the balance may stand between the principal defendant and the alleged trustees; but is such a contingency as may preclude the principal from any right to call the alleged trustee to account. Dwinel *v.* Stone, 30 *Me.* 384.

Contingency of a process. Where two or more processes are so connected that the circumstances of the one are likely to throw light on the others, the process first enrolled is considered as the leading process, and those subsequently brought into court, if not brought in the same division, may be remitted to it, *ob contingentiam;* on account of their nearness or proximity in character to it. The effect of remitting processes in this manner is merely to bring them before the same division of the court or same lord ordinary. In other respects they remain distinct. *Bell.*

Contingency with a double aspect. This expression is employed to denote the express limitation of one contingent remainder in substitution for another

contingent remainder; as where land is given to A for life, and if he have a son, then to that son in fee; if he have no son, then to B in fee. Such a disposition of lands is to be distinguished from the limiting of one fee upon another fee, which is not permitted at common law, by the fact that the second contingent remainder is not limited upon the first, but is a mere substitute in case the first shall fail, which does not in any manner derogate therefrom.

Although a fee cannot, in conveyances at common law, be mounted on a fee, yet two or more several contingent fees may be limited merely as substitutes or alternatives one for the other, and not to interfere; but so that one only take effect, and every subsequent limitation be a disposition substituted in the room of the former, if the former should fail of effect. Thus in the case of Loddington *v.* Kime, 1 *Ld. Raym.* 208, which was a devise to A for life, without impeachment of waste, and if he have issue male, then to such issue male and his heirs for ever, and if he die without issue male, then to B and his heirs for ever, it was held that the first remainder was a contingent remainder in fee to the issue of A, and the remainder to B was also a contingent fee, not contrary to, or in any degree derogatory from, the effect of the former, but by way of substitution for it. And this sort of alternative limitation was termed a contingency with a double aspect. For if A had issue male, the remainder was to vest in that issue in fee; but if A had no issue male, then it was to vest in B in fee; and these were limitations of which the one was not expectant upon and to take effect after the other, but were contemporary; to commence from the same period, not indeed together, but the one to take effect in lieu of the other, if that failed. *Fearne, Cont. Rem.* 373.

A contingency with a double aspect occurs when one event only is expressed by the party, and two events are clearly in his contemplation. This is a construction in favor of the intention, that the intention may not be frustrated. The general rule is, that an interest to commence on a contingency shall not take place unless that contingency shall arise. It is in a few cases only that this favor is extended by construction. The exception seems to have been borrowed from the mode in which remainders are limited, and the construction which the limitations of remainders receive, and under which every estate will take place after the preceding estate, without any regard to the particular time at which, by the words of the remainder, the estate is to take place. In these cases, the court proceeds on the intention that the determination of every prior or intermediate estate shall accelerate the commencement of the more remote estate. It is on similar grounds of intention that the contingency with double aspect is allowed; for it is allowed on the idea that, by the intent of the testator, the estate limited on a contingency referable to one estate shall also take place in case the contingency should not arise on which the prior gift is to vest an interest; and then, in point of law, the contingency has a double aspect; providing, by expression, for a contingency annexed to the interest previously limited, and also, by inference and construction of law, for the event that the contingency on which the prior interest is to vest shall never arise. *Wharton.*

CONTINGENT. Possible; liable, but not certain, to occur; dependent upon an uncertain event.

Contingent demand, or liability. The "uncertain and contingent demands" which might be proved against the estate of a bankrupt under the United States bankrupt act of 1841 did not include demands whose existence depended on a contingency, but existing demands the cause of action upon which depended on a contingency. French *v.* Morse, 2 *Gray*, 111.

Before demand and notice, the claim of the holder of a note against the indorser is a contingent liability merely. Matter of Loder, 4 *Ben.* 305; *Id.* 328.

A liability for damages for an ordinary trespass is not a contingent liability. Boutel *v.* Owens, 2 *Sandf.* 655; 2 *Code R.* 40.

Contingent estate. A future estate, the taking effect of which is dependent upon the happening of some uncertain event; such as an estate limited to a person not *in esse*. Such estates are variously designated as contingent remainders, contingent uses, &c., according to the nature of the particular estate; the quality of dependence upon an uncertain event being the peculiar characteristic of all classes of contingent estates.

A future estate is contingent while the event upon which, or the person to whom, it is limited to take effect is uncertain. 1 *N. Y. Rev. Stat.* 723, § 13.

A contingent estate depends for its effect upon an event which may or may not happen; as an estate limited to a person not *in esse*, or not yet born. *Crabbe, Real Prop.* § 946.

An estate is contingent while the person to whom it is limited is uncertain; *i.e.*, while it is uncertain who will take if the precedent estate should terminate. Sheridan *v.* House, 4 *Abb. App. Dec.* 218.

Contingent, applied to a use, remainder, &c., implies that no present interest exists, and that whether such interest or right ever will exist depends upon a future uncertain event. Jemison *v.* Blowers, 5 *Barb.* 686.

Contingent legacy. A legacy made dependent upon some uncertain event. Thus, a legacy given to a person upon his marriage, or when he shall attain the age of twenty-one years, is a contingent legacy, until it becomes vested upon the occurrence of the particular event.

Contingent remainder. A remainder whose vesting or taking effect in interest is, by the terms of its creation, made to depend upon some contingency which may never happen, or which may not happen till after the determination of the preceding estate, or the happening of some other event, by reason of which its capacity of taking effect may be for ever defeated. See CONTINGENT ESTATE.

Four classes of contingent remainders are distinguished by Mr. Fearne: 1. Where the remainder depends entirely on a contingent determination of the preceding estate itself. 2. Where the contingency, on which the remainder is to take effect, is independent of the determination of the preceding estate. 3. Where the condition upon which the remainder is limited is certain in event, bnt the determination of the particular estate may happen before it. 4. Where the person to whom the remainder is limited is not yet ascertained, or is not yet in being. For illustrations of each of these classes, with the exceptions and limitations, see *Fearne Cont. Rem.* 4–9.

The distinction between contingent remainders, of the first class above mentioned, and conditional or contingent limitations, consists in this: it is essential to an estate in remainder that it should wait the regular expiration of the particular estate, and should not take effect in possession till that expiration; but a conditional limitation takes effect on the happening of an event during the continuance of the particular estate. See *Id.* 10, 14.

A contingent remainder is an estate in remainder which is limited to take effect either to a dubious and uncertain person, or upon a dubious and uncertain event, by which no present or particular interest passes to the remainder-man, so that the particular estate may chance to be determined and the remainder never take effect. 2 *Bl. Com.* 169.

A remainder limited so as to depend upon an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate. *Fearne Cont. Rem.* 3.

A contingent remainder cannot take effect until the "prior particular estates" (*i.e.*, the interests for life, or otherwise, appointed to take effect before it) have come to an end; nor, also, unless the requisite contingency has happened. In the former respect, it resembles a vested remainder, and differs from an executory interest. In the latter, it differs from a vested remainder, and resembles an executory interest. It has the weakness of both these estates, and the strength of neither. In many cases which may be conceived, the distinction between a vested and a contingent remainder is one of extreme technicality. *Mozley & W.*

It is not the mere uncertainty of its ever taking effect in possession that makes a remainder contingent, as distinguished from a vested remainder. Wherever the preceding estate is limited, so as to determine on an event which certainly must happen; and the remainder is so limited to a person *in esse*, and ascertained, that the preceding estate may, by any means, determine before the expiration of the estate limited in remainder, — such remainder is vested. On the contrary (save in a few cases excepted on special considerations), wherever the preceding estate is limited, so as to determine only on an event which is uncertain, and may never happen; or wherever the remainder is limited to a person not *in esse*, or not ascertained; or wherever it is limited so as to require the concurrence of some dubious uncertain event, independent of the determination of the preceding estate, and duration of the estate limited in remainder, to give it a capacity of taking effect, — then the remainder is contingent. *Wharton.*

Contingent use. A use whose taking effect is, by the terms of its creation, made to depend upon a contingency. Thus, a conveyance to the use of A and B, after a marriage shall be had between them, raises a contingent use. Contingent uses are simply contingent remainders limited by way of uses, and take effect in imitation of contingent remainders. They are otherwise called future uses, and sometimes springing uses.

CONTINUANCE. Postponement; adjournment of proceedings in a cause to a future day.

The term originated when all the proceedings in a cause were conducted orally and in presence of the court, and were entered upon record as they transpired. As the proceedings generally occupied more days than one, the court

used to adjourn them from time to time; if these adjournments, which were called continuances, were not made, the suit was at an end, since there was no period at which either party had a right again to call the court's attention to it; and if the continuance, though made, were not entered on the record, the suit was equally at an end, since the record was the only evidence the court would admit of the fact of the continuance.

Subsequently, when a cause was put down in the list of causes to be tried at a certain time, and, from some cause or other, it was not then tried, but was adjourned, a minute of such adjournment was entered on the record, which was technically termed entering a continuance, because such entry signified that the cause was not yet finished, but continued pending.

Continuance in office. A provision in the bond of a treasurer of a corporation, whose office is annual, securing his fidelity during his continuance in office, means no longer time than the year for which he was chosen, and such further time as is reasonably sufficient for the election and qualification of his successor; it cannot be extended to embrace an indefinite period by re-election or otherwise. Mutual Loan, &c. Assoc. *v.* Price, 16 *Fla.* 204.

Continuous adverse use. Is interchangeable with the term "uninterrupted adverse use." Davidson *v.* Nicholson, 59 *Ind.* 411.

CONTINUANDO. By continuing. Under former common-law practice, when one who suffered successive injuries from a continuation of a trespass desired to recover all his damages in one action, he might do so by alleging in his declaration that the wrong was done *continuando*, i.e. continually; was kept up between the two days specified.

This form is now disused; and in such cases the various trespasses may be alleged to have been committed between certain days.

CONTRA. Against; in opposition to; to the contrary. Is frequently used to denote opposition of counsel or of the court to matter urged in argument. Also, after citation of cases in support of a position, *contra* is often prefixed to citations of cases opposed to it.

Contra bonos mores. Against good morals. This phrase is frequently applied to contracts which are held void because opposed to sound morality. All contracts or obligations which are given for an immoral consideration, or which arise out of an immoral transaction; contracts which are an incentive to crime; or those even which are offensive to decency, or involve mischievous or pernicious consequences, — are *contra bonos mores*, and therefore void.

Contra formam statuti. Against the form of the statute. This phrase was formerly the proper formal conclusion of an indictment for an offence created by statute, and of a declaration for a statute penalty.

Contra formam collationis. Contra formam feoffamenti. Initial words, and hence the names of two writs, now obsolete, which lay to enforce the objects for which lands had been granted. See *Termes de la Ley.*

Contra non valentem agere nulla currit præscriptio. Against one not capable of acting prescription does not run.

Statutes of limitation do not run against a party not capable of acting in support of his rights. Prescription is the result, and, in a measure, the penalty of negligence or laches, and hence does not run against a person under disability. Statutes of limitation generally provide for the suspension of their operation in cases of infancy, coverture, and other disabilities, until the removal of the disability.

So war, by preventing a subject of one belligerent from taking judicial proceedings in the courts of the other, suspends any statute limiting such proceedings.

Contra pacem. Against the peace. This phrase was formerly used in indictments and declarations in civil actions of trespass to signify that the acts complained of were committed against the peace of the king or the public. The entire clause in Latin was *contra pacem domini regis*, — against the peace of the lord the king. The corresponding phrases used in American law are "against the peace of the people," or "against the peace of the commonwealth."

CONTRABAND. Contrary to a ban, or edict; prohibited. Often used in short for contraband of war.

Contraband of war. Prohibited by the laws of war. Vessels of a neutral nation which attempt to carry to a belligerent supplies and munitions adapted to aid directly in maintaining the war, expose themselves, by the laws of war, to capture and to confiscation of the goods, and sometimes of the ship, by the other belligerent. Merchandise coming within this principle is termed contraband of war. It is not practicable to give any reliable definition of what articles are and what are not contraband; much depends on the situation of the parties at war, and the circumstances of the case, and the question has often been the subject of treaty provisions. The general ground of the doctrine is, that a neutral shall not aid either belligerent, to the prejudice of the other, by supplies for continuing the war. The destination and purpose of a cargo, to aid in the war, will often render things contraband which, under other circumstances, would not be deemed so.

The theory of the present law of contraband had its origin in the school of Bologna, but its complete development was coincident with the development of the modern laws of commerce. By this term we now understand a class of articles of commerce which neutrals are prohibited from furnishing to either one of the belligerents, for the reason that, by so doing, injury is done to the other belligerent. To carry on this class of commerce is deemed a violation of neutral duty, inasmuch as it necessarily interferes with the operations of the war, by furnishing assistance to the belligerent to whom such prohibited articles are supplied. *Halleck Int. Law*, 570.

Goods contraband of war are of two descriptions: munitions of war, the property of a neutral, bound from a neutral port to the territory of either of the belligerents, after the existence of the war is known; and every species of neutral goods bound from a neutral port to a port belonging to either of the powers at war, and known to be blockaded by the other power. Richardson *v.* Maine Ins. Co., 6 *Mass.* 102.

Provisions are not, in general, deemed contraband; but they are contraband if destined for the military use of the enemy. The Commercen, 1 *Wheat.* 382; see N. Y. Firemen's Ins. Co. *v.* DeWolf, 2 *Cow.* 56.

Money and bullion, when destined for hostile use or for the purchase of hostile supplies, are contraband of war. United States *v.* Dickelman, 92 *U. S.* 620.

CONTRACT, *v.* To agree; to exchange promises; to promise something for a consideration. Contract, *n.*: an agreement, or mutual undertaking; an exchange of promises or engagements in consideration of each other; a meeting of minds in acceptance of a promise made for a consideration. Also, the instrument or language embodying such a mutual undertaking, exchange of promises or meeting of minds.

Very numerous are the definitions which have been offered of this term; the following are those which present distinctive elements:

An agreement, upon sufficient consideration, to do or not to do a particular thing. 2 *Bl. Com.* 442; 2 *Kent Com.* 449.

A covenant or agreement between two or more persons, with a lawful consideration or cause. *West's Symbol.* part 1. *Jacob.*

A deliberate engagement between competent parties, upon a legal consideration, to do, or abstain from doing, some act. *Wharton.*

A contract or agreement is either where a promise is made on one side and assented to on the other; or where two or more persons enter into engagement with each other, by a promise on either side. 2 *Steph. Com.* 54.

A contract, in legal contemplation, is an agreement between two or more parties for the doing or not doing some particular thing.

We have not included the consideration in this definition of the contract, as we do not regard it as, of itself, an essential part thereof. 1 *Pars. Contr.* 6.

A compact between two or more parties. It is either executory or executed. An executory contract is one in which the party binds himself to do or not to do a particular thing; a contract executed is one in which the object of contract is performed. Fletcher *v.* Peck, 6 *Cranch*, 87, 136.

An agreement between two or more persons to do or not to do a particular thing. Charles River Bridge *v.* Warren Bridge, 11 *Pet.* 420, 572; Sturges *v.* Crowninshield, 4 *Wheat.* 122.

A voluntary and lawful agreement, by competent parties, for a good consideration, to do or not to do a specified thing. Robinson *v.* Magee, 9 *Cal.* 81.

A contract (*con-traho*) is a drawing together of minds, until they meet. This agreement to do or not to do a particular thing is the contract. McNulty *v.* Prentice, 25 *Barb.* 204.

It ordinarily applies to agreements where both parties become obligated; and not to notes and bills, where one party only is bound. Safford *v.* Wyckoff, 4 *Hill*, 442, 456.

It does not, like "deed," bond, &c., necessarily import that there was a written instrument. Pierson *v.* Townsend, 2 *Hill.* 550.

A deliberate engagement between competent parties to do or to abstain from doing some act. In its widest sense, the term includes records and specialties; but is usually employed to designate only simple or parol contracts. Pelham *v.* State, 30 *Tex.* 422.

The expression, a contract for the payment of money, in a statute entitling an assignee to maintain an action in his own name, does not include a judgment. Johnson *v.* Martin, 54 *Ala.* 271.

A statute declaring males of the age of eighteen, and females of fifteen, competent to contract marriage, means the actual forming of the marriage contract. The statute does not enable a minor to bind himself by an executory promise to marry. Frost *v.* Vought, 37 *Mich.* 65.

Unless a person knows, while service is being rendered, that the other is acting for him, or where he has such information as would lead a person of ordinary understanding under like circumstances to believe that the other was so acting, no implication of employment can be made. A contract is the meeting of the minds of the contracting parties, and where there is no express contract, the party sought to be charged must have such knowledge, or what is equivalent thereto, before his mind can act on the subject and assent to the terms of the contract. Atwater *v.* Lockwood, 39 *Conn.* 45.

A contract, here a subscription to corporate shares, if it exists at all, must do so by reason of an assent of each party to every proposition of the other, without any modification. Wherever there is not an assent, express or implied, to the terms of the proposed contract by both parties, there is no mutuality or any contract. Belfast, &c. Ry. Co. *v.* Unity, 62 *Me.* 148.

Contracts are called *express*, when the terms of the agreement on both sides are stated in words, orally or in writing, and *implied*, when they are raised or imposed by law, upon a construction of the acts of the parties, and in view of what justice requires from them.

Express contracts are classified as contracts of *record*, which are really judgments, or of the nature of judgments; *special* contracts, or specialties, which class includes the various instruments requiring seals; and *simple*, or parol contracts, or such as are either oral, or written, but not under seal. The statutes of frauds generally require that certain contracts of the simple class should be evidenced by a memorandum; but this has not generally been thought a sufficient reason for setting them apart as a distinct class. Contracts are *executory* while some act remains to be done, in performance of them; and *executed*, after every thing has been performed. A contract may be executory as respects one party, and executed as concerns the other. The promise to pay often remains executory long after the consideration for the payment becomes executed.

The constitution of the United States forbids any state to pass a law "impairing the obligation of contracts;" and this has given rise to several decisions upon what is a contract, within this provision.

The following have been held to be contracts:

A compact between the different states of the Union. Green *v.* Biddle, 8 *Wheat.* 1; Pennsylvania *v.* Wheeling & Belmont Bridge Co., 13 *How.* 518; Allen *v.* McKean, 1 *Sumn.* 276; Bennett *v.* Boggs, *Baldw.* 60; Spooner *v.* McConnell, 1 *McLean*, 337.

A legislative grant; it is a contract executed. Fletcher *v.* Peck, 6 *Cranch*, 87; Terrett *v.* Taylor, 9 *Id.* 43.

An act incorporating a private corporation. Dartmouth College *v.* Woodward, 4 *Wheat.* 418; The Binghampton Bridge, 3 *Wall.* 74. And see numerous cases collected, *Abb. Dig. Corp.* 157, note.

Such as a charter of a bank. Providence Bank *v.* Billings, 4 *Pet.* 514; Gordon *v.* Appeal Tax Court, 3 *How.* 133; Planters' Bank *v.* Sharp, 6 *Id.* 301; Curran *v.* Arkansas, 15 *Id.* 304.

A statute of a state authorizing public officers to contract with any person for the construction of a toll bridge, and declaring that the contract should bind the state, and that it should not be lawful for any person or persons whatever to erect any other bridge over or across the said river for a term of years. Bridge Proprietors *v.* Hoboken Co., 1 *Wall.* 116.

A statute excusing grantees of public lands from making actual settlement during the period in which they were prevented from settlement by the enemy. Huidekoper *v.* Douglas, 3 *Cranch*, 1.

A statute declaring that lands to be purchased for the Indians should not thereafter be subject to any tax. New Jersey *v.* Wilson, 7 *Cranch*, 164.

A law of a state issuing transferable swamp scrip, and exempting the land from taxation for ten years, or until reclaimed. McGee *v.* Mathis, 4 *Wall.* 156.

A sheriff's bond given to secure his paying over moneys collected by him; he is not a mere bailee of money received, but his bond has the force of a contract that he will pay over. State *v.* Gatzweiler, 49 *Mo.* 18.

The following transactions have been

held not to be contracts, within the protection of the constitution:

The provision does not extend to the mere case of an oppressive use of the right of eminent domain by the legislature of a state. Mills *v.* St. Clair County, 8 *How.* 569.

Compulsory proceedings by a corporation to acquire the title of real property under their charter do not constitute a contract vesting any rights in a corporation, where, after taking the proceedings, the corporation neglect for years to fulfil essential conditions, on performance of which their acquiring a title depends. In such a case, the interposition of the legislature, by a statute requiring the court to set aside the inquisition had, is not obnoxious to the objection that it impairs the obligation of the contract. Baltimore & Susquehanna R. R. Co. *v.* Nesbitt, 10 *How.* 395.

The appointment of a public officer, under an act of the legislature fixing his compensation, is not a contract with him for the payment of such compensation, within the meaning of the provision of the constitution, so as to prevent the legislature from removing the officer, or altering the compensation from time to time. Butler *v.* Pennsylvania, 10 *How.* 402; Commonwealth *v.* Mann, 5 *Watts & S.* 418; Commonwealth *v.* Bacon, 6 *Serg. & R.* 322; State *v.* Smedes, 26 *Miss.* 47.

A right of government to priority of payment from debtors forms no part of the contract; it is rather a personal privilege, dependent on the law of the place where the property lies, and where the court sits which is to decide the case. Harrison *v.* Sterry, 5 *Cranch*, 289.

A law granting to a town the right to keep a ferry across a public river does not amount to a contract between the state and the town, so far as to preclude the legislature from revoking the grant. Such a grant is rather a public law than a contract, and towns are subject to legislation for public purposes. East Hartford *v.* Hartford Bridge Co., 10 *How.* 511; affirming s. c. 16 *Conn.* 149; 17 *Id.* 79.

A statute by which a state waives its prerogative of exemption from being sued in its own courts is not a contract, the obligations of which are impaired by a subsequent law taking away the right to bring such suits. Beers *v.* Arkansas, 20 *How.* 527; People *v.* Commissioners of Taxes, 47 *N. Y.* 501.

Marriage is not a contract within the constitutional provision protecting the obligation of contracts. It is a civil institution or relation, subject to be regulated and controlled by law, so far as the rights of the parties thereto in the property of each other is concerned. Starr *v.* Hamilton, *Deady*, 268.

The following decisions illustrate the views which have been taken of the meaning of contract in various applications and uses:

The word contract, in the statute of frauds, does not include a recognizance. A recognizance is merely an acknowledgment of record of a pre-existing debt. Gay *v.* State, 7 *Kan.* 394.

A mere promise by one to pay money to another is a contract, and is within the meaning of the provision of the statute of frauds requiring a memorandum in writing of any agreement not to be performed within one year, as well as a mutual agreement, where each party stipulates to something. Cabot *v.* Haskins, 3 *Pick.* 83.

A letter from A to B & M, with an indorsement thereon by B, relating in direct terms to the letter, bearing the same date, and purporting to be a material and substantial part of it, together constitute a perfect contract, the terms of which cannot be varied by parol proof. Mallory *v.* Tioga R. R. Co., 3 *Abb. App. Dec.* 139.

Contracts in a statute provision requiring that contracts made by banks, and all bills and notes by them issued and put in circulation as money, shall be signed by the president or vice-president and cashier, should be construed in a limited sense, and does not include indorsement of a note. Allison *v.* Hubbell, 17 *Ind.* 559; Jones *v.* Hawkins, *Id.* 550.

Marriage, in Indiana, is a civil contract, embraced in a provision declaring contracts made with negroes void. Barkshire *v.* State, 7 *Ind.* 389; but compare Noel *v.* Ewing, 9 *Id.* 37.

Enlistments into the army, made under the inducements held out by the laws of the United States, are contracts; and, although the government be a party, still the contracts ought to be construed according to those well-established principles which regulate contracts generally. 6 *Op. Att.-Gen.* 187.

A notice printed at the head of each page of a hotel register, requiring money, jewelry, and valuables to be placed in the safe in the office, otherwise the proprietor will not be responsible for any loss, is not a contract, — at least without proof that the guest's attention was called to it, and he signed his name with intent to be bound by it. Ramaley *v.* Leland, 6 *Robt.* 358.

Passenger tickets, issued by carriers, which do not purport to be contracts, are rather to be regarded as receipts for passage-money, and intended to serve as tokens, than as contracts; and are not within the rule excluding parol evidence to vary a written agreement. Quimby *v.* Vanderbilt, 17 *N. Y.* 306.

A receipt for towage, delivered before performing the work to the owner of the vessel towed, which contains a clause that the towing is to be done "at the risk of the owner or master of the vessel towed," constitutes a complete contract, not a mere receipt. Milton *v.* Hudson River Steamboat Co., 4 *Lans.* 76.

A forwarder's written acknowledgment of the receipt of goods from one person, on

account of another, to be forwarded, is a contract with the latter person, not a mere receipt for the goods. Niles *v.* Culver, 8 *Barb.* 205.

A receipt, such as is ordinarily issued by an express company, is not rendered a contract so as to require a five-cent stamp, under the internal revenue laws, merely by the fact that it contains a notice of the terms upon which the company are willing to undertake the transportation. De Barre *v.* Livingston, 48 *Barb.* 511.

A due bill payable in merchandise was held a contract requiring a stamp. United States *v.* Learned, 1 *Abb. U. S.* 483.

A pawnbroker's ticket, issued in compliance with a statute requiring such a ticket to contain "the particulars of the contract," is a contract requiring a stamp, under an act of congress prescribing stamps upon any agreement or contract. United States *v.* Smith, 1 *Sawyer*, 192.

Contractor. The primary meaning of the word is, one who contracts; one of the parties to a bargain. He who agrees to do any thing for another is a contractor. Kent *v.* N. Y. Central R. R. Co., 12 *N. Y.* 628.

But it may include sub-contractors. Warner *v.* Hudson River R. R. Co., 5 *How. Pr.* 454; Mundt *v.* Sheboygan, &c. R. R. Co., 31 *Wis.* 451.

CONTRARY. A verdict contrary to law is not merely one that is defective or insufficient in law. A verdict may be defective and insufficient in the law, and yet not be contrary thereto. A verdict which is contrary to law is one which is contrary to the principles of law as applied to the facts which the jury were called upon to try, — contrary to the principles of law which should govern the cause. Bosseker *v.* Cramer, 18 *Ind.* 44.

CONTRIBUTE. To furnish one's share towards money or supplies necessary to meet an obligation or prosecute an enterprise of himself and others. Contribution: the share due from or provided by one of several persons to assist in discharging a common obligation, or advancing a common enterprise. Contributor: one who provides a portion of what is required for the discharge of an obligation or prosecution of an enterprise by himself and others. Contributory, *n.*: one who is liable to be required to contribute towards the discharge of a common indebtedness.

Contribution arises in various cases: where one of several joint debtors has paid the whole debt; where one of several sureties has paid the sum for which the principal was bound; where one legatee or distributee has been compelled to provide for payment of debts of the decedent which were equally chargeable on others; where a settlement of partnership affairs shows that one partner has paid more than his share towards the firm debts; where a corporation becomes insolvent, and recourse to the private property of shareholders is necessary; where jettison is made of goods on board ship to save vessel and cargo, and the loss ought in justice to be shared. In many cases like these the party who has at first borne the loss may require others equally liable with him to contribute towards reimbursing him.

As this doctrine does not rest upon express contract, but upon natural justice and equity, it was at first chiefly a branch of equity jurisprudence; but the principles have to a considerable extent been adopted by and are enforced in courts of law.

It is a maxim that there is no contribution among tortfeasors. One who has been made to pay damages for a wilful wrong, cannot, in general, claim any reimbursement from persons who may have co-operated with him in it.

CONTRIBUTIVE, or CONTRIBUTORY. When an injury is attributable in part to the negligence of a wrongdoer and in part to the negligence of the sufferer, the rule of common-law courts is that the sufferer cannot recover damages; and his negligence, when thus set up in defence of his action, is called contributive or contributory negligence. The meaning is, negligence of the sufferer, which contributes to his injury.

CONTROLLER, or COMPTROLLER. An overseer of accounts; an officer charged with revising and verifying the accounts of others; one who keeps a counter register of accounts.

Burrill explains that the word is not derived from *compte*, or *accompt*, an account, but from *contre*, against, and *rotulator*, or *rouleur*, an enroller; making its true signification to be the keeper of a counter roll. Hence the spelling *controller* is preferable.

CONTROVERSY. The constitution of the United States declares that the judicial power shall extend to all controversies between, &c. It is consid-

ered that in this connection controversy is in one respect narrower in meaning than case; for it includes only civil disputes, while case includes criminal proceedings. See CASE; also, *Curt. Jur. & Pr. of U. S. Courts*, 85; *Story Const.* § 1668; 2 *Dall.* 419. In another aspect, controversy is broader in meaning: it regards the substance of the dispute or question at issue, while case suggests the mode of bringing it to the courts for decision.

Controversy may include an action regularly commenced and at issue. Sands *v.* Harvey, 4 *Abb. App. Dec.* 147.

CONTUMACY. Contempt of court; disobedience to an order or citation from a court. Used chiefly of ecclesiastical tribunals.

CONVENTIO. In old English law, and in the civil law, means an agreement, as in the following maxims:

Conventio privatorum non poteat publico juri derogare. The agreement of individuals cannot derogate from public right.

Conventio vincit legem. The express agreement of parties overcomes the law.

CONVENTION. 1. A somewhat general term, inclusive of agreements, compacts, and mutual engagements of various kinds; chiefly used, however, of those entered into between sovereign powers; as the postal conventions between the United States and foreign nations.

2. The name of an old writ that lay for the breach of a covenant.

3. A meeting of delegates elected for other purposes than ordinary legislation; as, a convention to prepare a constitution.

4. In extraordinary emergencies in English history, when a royal summons to parliament to meet was not possible, the lords and commons have assembled as by their own inherent authority. Parliaments thus convened have been called convention parliaments. Thus, in the year 1660 the convention parliament met, which restored King Charles the Second; and in 1688 the lords and commons met to dispose of the crown and kingdom in favor of the Prince of Orange. 1 *Bl. Com.* 151, 152; 2 *Steph. Com.* 456.

CONVENTIONAL. Agreed upon; founded on consent; something which derives validity from actual assent of parties, as distinguished from that which is imposed by law.

CONVERSION. 1. A transmutation or interchange of one kind of property for another, as of lands into money.

In this sense the term is chiefly used of a theoretic or hypothetical substitution of property for money, or *vice versa*, to which courts of equity resort, when necessary for doing justice in the division or administration of property. Thus, if lands are by will directed to be sold for the purpose of a division of proceeds, or if money is left to be invested in land, equity will often treat the change as having been made, and determine the title, as if the sale or purchase had been completed, although it has not been. This is known as the doctrine of equitable conversion. Suppose, for example, land is directed by a will to be sold and the price divided among the testator's children, and one of these children dies before the sale is made; then, if strict rules of law are applied, that child's share, being still land, must descend; but by the doctrine of equitable conversion, treating the land as converted into money from the date when the will takes effect, the share may go to the administrator, to be disposed of as personal assets.

2. A wrong; consisting in dealing with the property of another, as if it were one's own without right.

Conversion imports an unlawful act, not a mere nonfeasance. Bowlin *v.* Nye, 10 *Cush.* 416.

Conversion includes an unlawful taking of goods out of the possession of the owner; the using a thing, without the license of the owner, and a wrongful sale of it. Clark *v.* Whitaker, 19 *Conn.* 319.

Assuming to one's self the property and right of disposing of another man's goods, is a conversion. The fact that defendant comes lawfully into possession, forms no objection to the action. It is the breach of the trust, or the abuse of such lawful possession, which constitutes the conversion. Murray *v.* Burling, 10 *Johns.* 172.

To constitute a conversion, it is not necessary to show a manual taking of the thing in question, nor that the defendant has applied it to his own use; but the assuming a right to dispose of it, or exercising

a dominion over it, to the exclusion or in defiance of the plaintiff's right, is a conversion. Bristol *v.* Burt, 7 *Johns.* 254; Murray *v.* Burling, 10 *Id.* 172; Reynolds *v* Shuler, 5 *Cow.* 323; Connah *v.* Hale, 23 *Wend.* 462.

One who, being lawfully in possession, wrongfully parts with the possession to the injury of the owner, is liable in trover for a conversion. Spencer *v.* Blackman, 9 *Wend.* 167.

CONVEY. To transfer property; more strictly and usually, to transmit real property, or pass the title thereto, by a sealed writing. Conveyance: the transaction of passing the title to property, usually real property; also, the instrument or deed in writing by which this is done.

Conveyances of property of every description were no doubt originally made by mere delivery of the property; actual delivery, whenever the property was capable of it; and symbolical delivery, in other cases. In the various formalities used as modes of conveyance among the Romans, the delivery is always the essential, and often the only, requisite. By the Saxons, among whom conveyance of lands by delivering the possession, or some symbol of the possession, was anciently practised, conveyance by writing was also used; and, probably on account of the convenience of the writing as an evidence and record of the transaction, written conveyances in various forms were adopted and continue to be used in England and the United States as the usual and proper method of transferring title to real property, and the best evidence of such transfers, excepting, of course, cases where title passes by descent or operation of law.

In the early modes of conveyance in England, a purchaser of lands was put into actual possession by entering upon the land, or by some equivalent act, no writing being necessary, in such cases, to pass the title; which mode of transfer was termed "livery of seisin." But conveyances of incorporeal things, which could not be made by any such overt act of possession, were effected by deed, evidencing the transfer; and this method was termed "grant." As all conveyances were either by livery of seisin or by grant, according to the nature of the property or interest conveyed, these terms were used to distinguish corporeal from incorporeal hereditaments; the former were said to "lie in livery," the latter to "lie in grant." When written conveyances came into use in all cases, a conveyance of a corporeal hereditament was technically termed a feoffment, the name grant continuing to be applied to conveyances of incorporeal hereditaments. This distinction continued to be observed in English conveyancing until the Stat. 8 & 9 Vict. ch. 106, § 2, since which all corporeal hereditaments, so far as regards the conveyance of the immediate freehold thereof, are deemed to lie in grant as well as in livery; and grant is now the ordinary form of conveyance of lands in England. The conveyance by feoffment, however, was practically disused after the passage of the statute of uses.

Many other forms of conveyance were and still are in use, adapted to the circumstances of particular classes of transactions, such as gifts, partitions, exchanges, defeasances, &c. Others were adopted in consequence of the operation of the statute of uses, of which bargain and sale (*q. v.*) is an illustration. Blackstone enumerates (2 *Com.* 309), as conveyances by the common law, feoffment, gift, grant, lease, exchange, and partition, as original or primary conveyances; and, as derivative or secondary conveyances, release, confirmation, surrender, assignment, and defeasance. The conveyances which he mentions as deriving their force from the statute of uses are, covenant to stand seised to uses, bargain and sale, lease and release, deed to lead and declare uses, and deed of revocation of uses. Of the last class, the conveyance by bargain and sale was the most frequently used. The definitions of these various conveyances may be found under the particular words or phrases by which they are designated; see also DEED.

In the United States, the statutes of frauds, which have been generally enacted, make an instrument in writing necessary to convey lands or any interest therein. And in most of the states, a writing under the hand and seal of the grantor is required by statute for the transfer of a freehold interest in lands.

The forms of conveyance are also prescribed by statutes in many states; but such statutes are generally deemed directory only, not mandatory; and the common-law modes are usually recognized as familiar and effectual forms of conveyance. Thus, in Massachusetts, the conveyance in common use is a modified form of the ancient feoffment; but the statutes recognize bargain and sale, or other like conveyance, and declare that a deed of quitclaim and release of the form in common use shall be sufficient to pass all the estate which the grantor could lawfully convey by deed of bargain and sale. Like provisions exist in the statutes of Connecticut and several other states in regard to deeds of quitclaim. Conveyance by bargain and sale, however, is the mode commonly practised in the United States. Even in New York, where grant is the only form of conveyance authorized by statute, and where feoffments, with livery of seisin, as a mode of conveying lands, are expressly abolished, conveyances by bargain and sale, and by lease and release, are allowed to be used, and are deemed to be grants.

To convey real estate is, by an appropriate instrument, to transfer the legal title to it from the present owner to another. Abendroth *v.* Town of Greenwich, 29 *Conn.* 356.

Convey, in a deed, is equivalent to grant, and passes the title. Patterson *v.* Carneal, 3 *A. K. Marsh.* 618.

Convey relates properly to the disposition of real property, not to personal. Dickerman *v.* Abrahams, 21 *Barb.* 551, 561.

Convey does not imply a consideration. Spicer *v.* Norton, 13 *Barb.* 542.

In construing agreements to convey, it has been held that one who has agreed to convey does not show performance by proving tender of a deed, but he must show that he had a title to it at the time, so that his deed would have conveyed the property, Abendroth *v.* Greenwich, 29 *Conn.* 356; Lawrence *v.* Dole, 11 *Vt.* 549; that where one agrees to convey by quitclaim deed, this has reference to the title as it was at the time of the agreement; not to one subsequently acquired, Woodcock *v.* Bennet, 1 *Cow.* 711; that an agreement to convey in fee-simple is satisfied by a deed without covenants, Fuller *v.* Hubbard, 6 *Id.* 13; that an agreement to convey generally is an agreement to convey free from incumbrances, Matter of Hunter, 1 *Edw.* 1.

A statutory power to convey ought, on the principle that the greater includes the less, to be construed as implying a power to mortgage. Pickett *v.* Buckner, 45 *Miss.* 226, 245.

Conveyance may include leases. Jones *v.* Marks, 47 *Cal.* 242.

May include mortgages. Odd Fellows Savings Bank *v.* Banton, 46 *Cal.* 603; Babcock *v.* Hoey, 11 *Iowa*, 375.

That conveyance imports an instrument under seal, see Livermore *v.* Bagley, 3 *Mass.* 487.

The lien of a judgment is not a conveyance, within the meaning of the California registry act. Wilcoxson *v.* Miller, 49 *Cal.* 193.

Conveyance includes every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected in law or equity, except last wills and testaments, leases for a term not exceeding three years, and executory contracts for the sale or purchase of lands. 1 *N. Y. Rev. Stat.* 762, § 38; 2 *Id.* 137, § 7.

Where a reservation was made in an agreement "for the use of all the water from the spring, the same as it has been formerly conveyed for the use of the paper-mill," it was held that "conveyed" referred to the conveyance of water in the pipes, and not the conveyance of the right. Even if it were a term of art, it could not be received in its technical sense where water was the subject-matter spoken of. Edelman *v.* Yeakel, 27 *Pa. St.* 26.

An indictment charging that the defendant "furnished B," who was confined in jail, with certain instruments to aid his escape, is not good under a statute which prohibits "conveying" into any jail, arms, &c. Francis *v.* State, 21 *Tex.* 280.

Conveyancer. One whose business it is to draw deeds, bonds, mortgages, wills, writs, or other legal papers, or to examine titles to real estate. Act of July 13, 1866, § 9, 14 *Stat. at L.* 118.

He who draws conveyances; especially a barrister who confines himself to drawing conveyances, and other chamber practice. *Mozley & W.*

Conveyancing. That branch of law which treats of the transfers of property, particularly of realty.

CONVICT, *v.* To condemn for crime; to find guilty of an offence. Convict, *n.*: a person who has been found guilty of an offence by verdict of a jury or other decision of a tribunal authorized to ascertain guilt for the purpose of inflicting punishment. Convicted: legally ascertained to be guilty. Conviction: the act or proceeding of pronouncing a person guilty of an offence and punishable therefor.

Conviction is sometimes applied to the record of the summary proceedings had

before a magistrate or justices authorized thereto, resulting in the conviction and sentence of an offender. Such conviction, or, more properly, record of conviction, should show a charge or complaint; a summons, notice, arrest, &c., giving him opportunity to defend; his appearance, either his plea of guilty or competent evidence against him; and, lastly, the judgment or sentence.

Conviction is an adjudication that the accused is guilty. It involves not only the *corpus delicti*, and the probable guilt of the accused, but his actual guilt. Nason *v.* Staples, 48 *Me.* 123.

Conviction does not necessarily imply a judgment. Shepherd *v.* People, 24 *How. Pr.* 38.

The ordinary legal meaning of conviction, when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt; while judgment or sentence is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained. A pardon granted after verdict of guilty, but before sentence, and pending a hearing upon exceptions taken by the accused during the trial, is granted after conviction, within the meaning of a constitutional restriction upon granting pardon before conviction. When, indeed, the word conviction is used to describe the effect of the guilt of the accused as judicially proved in one case, when pleaded or given in evidence in another, it is sometimes used in a more comprehensive sense, including the judgment of the court upon the verdict or confession of guilt; as, for instance, in speaking of the plea of *autrefois convict*, or of the effect of guilt, judicially ascertained, as a disqualification of the convict. Commonwealth *v.* Lockwood, 109 *Mass.* 323; see Howard *v.* Packard, 17 *Pick.* 380.

Conviction, as used in Gen. Stat. ch. 131, § 13, — allowing the conviction of any crime to be shown to affect the credibility of a witness, — implies a judgment of court. Proof of an indictment and plea of guilty, not yet followed by a judgment, is not enough. The term conviction is most commonly used to signify a jury's verdict of guilty; but, in the statute in question, and some other instances, it signifies judgment and sentence, upon a verdict or confession. Commonwealth *v.* Gorham, 99 *Mass.* 420.

The phrase, convicted of crime, as used in a statute declaring certain persons incapacitated from holding office and giving testimony, cannot properly be applied to a person until after rendition of judgment against him on a verdict of guilty. Faunce *v.* People, 51 *Ill.* 311.

Under a statute that an attorney shall be struck from the roll, "on conviction," &c., it was held that proof made that one had passed counterfeit notes, knowing them to be such, and that, being indicted therefor, and confined in jail, he escaped therefrom, did not warrant his being struck off. State *v.* Foreman, 3 *Mo.* 602.

CONVOCATION. An assembly of all the clergy of England, to consult of ecclesiastical matters, held in time of parliament, one in each of the provinces of Canterbury and York. In the former province, convocation is composed of two houses, the archbishop and bishops sitting in the upper, and the deans, archdeacons, and proctors representing the inferior clergy in the lower. In the province of York, convocation consists of one house only; or, rather, the two houses do not sit separately. Since the reign of Henry VIII., convocations can make no canons, or even confer for that purpose, without license from the sovereign; nor can they make any repugnant to the common or statute law; and none of their canons bind the laity, unless they pass both houses of parliament. In later times, convocations have been seldom summoned, and then only *pro forma*, their meeting being followed by an immediate adjournment. They are now summoned with each parliament, but merely to consult of ecclesiastical matters.

COPARCENARY. An estate which arises when lands of inheritance descend to two or more persons as one heir. Coparceners: persons who hold an estate in coparcenary.

Coparcenary arises only by descent. By the common law, where a person seised in fee-simple or fee-tail dies intestate, leaving two or more females as his next co-heiresses, — *e.g.* his daughters, sisters, aunts, cousins, or their representatives, — such females are deemed one heir, the law of primogeniture not obtaining between females in equal relationship to the ancestor; they all inherit, and their estate is a coparcenary. An estate of the same nature arises where, by a particular custom, as gavelkind, lands descend to two or more males in equal degree; *e.g.*, to the sons, brothers, or uncles of the deceased intestate.

In coparcenary there is a unity,

though not an entirety, or necessarily an equality, of interest. There is no right of survivorship. On the death of one of two coparceners intestate, her moiety descends (subject to curtesy, if any) to her heir-at-law, although a male and a collateral; and the tenant by the curtesy, or the heir-at-law, will hold their estates by coparcenary with the surviving parcener. So long as it passes by descent, the estate continues to be coparcenary; but, as soon as any part is severed by conveyance from one or more of the coparceners, that part is held in common between the alienee and the remaining coparceners, who, as between themselves, continue to hold in coparcenary.

Coparcenary is intermediate between joint tenancy and tenancy in common. It resembles joint tenancy in the unity of title and similarity of interest, but differs in that it relates to the estate, while joint tenancy relates to the persons. Joint tenants always claim by act of the parties; coparceners always by descent. Thus, if sisters purchase an estate, to hold to them and their heirs, they are joint tenants, not coparceners. The right of survivorship also in joint tenancies has no application to estates in coparcenary. Again, one joint tenant can convey his interest to another by release, but not by feoffment, each being equally seised of the whole, while tenants in common may convey to one another by feoffment, but not by mere release; but coparceners may use either form in conveying their interests one to another. As to partition of estates in coparcenary, see ENITIA PARS; PARTITION.

In the United States, tenancy in coparcenary rarely arises under the statutes of descents in the various states, or is not distinguished from tenancy in common. By the Virginia statute of descents, the estate was recognized, and the term coparceners applied to males as well as females.

Copulatio verborum indicat acceptationem in eodem sensu. The coupling together of words shows that they are to be understood in the same sense.

The meaning of a word may be ascertained by reference to the meaning of the same word in a similar connection, or of other words associated with it. Where an expression, whether a phrase or a single word, occurring in a deed or other instrument, is ambiguous, or the meaning obscure, the meaning and intention may be ascertained by referring to the same expression used elsewhere in the same instrument, where the meaning is clear and free of ambiguity; the conjunction or juxtaposition leads to the inference that the word or phrase was intended to have the same interpretation. And where the meaning of any particular word is doubtful or obscure, or where a particular expression when taken singly is inoperative, the intention of the party using it may frequently be ascertained and carried into effect by looking at adjoining words, or at expressions occurring in other parts of the same instrument. *Broom Max.* 588.

COPY, *v.* To reproduce or transcribe written or printed language, or a design, device, picture, or work of art. Copy, *n.*: a reproduction or transcript of language, written or printed, or of a design, device, picture, or work of art.

As respects documents, *examined* copies are those which have been compared with the originals; *exemplified* copies are those which are attested under seal of a court; and *certified* or *office* copies are those which are made and attested by officers having charge of the originals, and authorized to give copies officially.

A copy of a book is understood to be a transcript of the language in which the conceptions of the author are clothed; of something printed and embodied in a tangible shape. The same conceptions, clothed in another language, cannot constitute the same composition. Hence a translation is not, in any just sense, a copy or transcript of a book. Stowe *v.* Thomas, 2 *Wall. Jr.* 547; 2 *Am. Law Reg.* 229.

Under a statute imposing penalty for printing any copy of a book, an action will not lie for printing a portion, although so much as to amount to an infringement of its copyright. The words any copy, as used in such statute, must be construed to mean a transcript of the entire work. Rogers *v.* Jewett, 12 *Mo. Law Rep.* N. S. 339.

COPYHOLD. A tenure by copy of court-roll, at the will of the lord of the manor, according to the custom of the manor. A species of estate at will in England, being a holding at the will

of the lord, according to certain particular customs of each manor, which customs were preserved and evidenced by the rolls of the several courts-baron in which they were entered. It is villenage tenure divested of its servile incidents. The term is also used in a general sense to include every customary tenure in England, as distinguished from freehold. Copyhold does not exist, and the doctrine has no application in the United States.

Copyholders were originally villeins or slaves, permitted by the lord, as an act of pure grace or favor, to enjoy the lands at his pleasure; being in general bound to the performance of agricultural services, such as ploughing the lord's demesne, carting the manure, and other servile works. The will of the lord originated the custom of the manor, and came at last to be controlled by it. *Mozley & W.*

COPYRIGHT. Authority to control the publication of a literary work, assured by law to the author or proprietor, in return for the advantage derived by the community from its publication.

Copyright is quite distinct from literary property. Keene *v.* Wheatly, 9 *Am. Law Reg.* N.S. 44. Upon general principles of law, the time, labor, and skill employed in embodying thoughts in a manuscript are recognized as creating a property, just as really as that bestowed in any other skilled manufacture. An author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or who, by obtaining a copy, endeavors to realize a profit by its publication. Wheaton *v.* Peters, 8 *Pet.* 591, 656; Little *v.* Hall, 18 *How.* 165; Keene *v.* Wheatley, 9 *Am. Law Reg.* 33; Bartlette *v.* Crittenden, 4 *McLean*, 300; Bartlett *v.* Crittenden, 5 *Id.* 32; 7 *West. Law J.* 49; Crowe *v.* Aitken, 2 *Biss.* 208. So, also, the author of letters or papers of whatever kind, whether they be letters of business or private letters, or literary compositions, has a property and exclusive right therein, unless he unequivocally dedicates them to the public or to some private person; and no person has any right to publish them without his consent, unless when such publication is required to establish a personal right or claim, or to vindicate character. Folsom *v.* Marsh, 2 *Story C. Ct.* 100; United States *v.* Tanner, 6 *McLean*, 128; Bartlett *v.* Crittenden, 5 *Id.* 32; 7 *West. Law J.* 49. And this common-law right of literary property has a broad protection in the United States, by Rev. Stat. § 4966, providing that every person who shall print or publish any manuscript whatever, without the consent of the author or proprietor first obtained, if such author or proprietor is a citizen of the United States, or resident therein, shall be liable to the author or proprietor for all damages occasioned by such injury.

But the application of the ordinary principles of the law of property to artistic and literary works is not sufficient for the encouragement of artists and writers, owing to the fact that any extended profit or advantage from the labor bestowed upon them is only to be derived through the printing and publishing of multiplied copies of the work, and this operates, if the ordinary principles of the law of property are to be applied without modification, as a gift or abandonment of the work to the public; for in respect to the results of labor generally, while it is true that the law protects the original producer in his ownership, so long as he continues to hold his exclusive right, yet it is also true, that, if he once deliberately abandons, dedicates, or parts with that right, he cannot again reclaim it.

To remedy this deficiency, the laws of the United States, as also those of Great Britain and other countries, provide that upon publishing his work, and upon complying with certain statutory conditions, such as making public record of the title, furnishing copies, &c., the author, artist, dramatist, &c., or other proprietor, shall enjoy, for a limited term, the sole right of publishing; shall have the monopoly of making copies. This is his copyright. Keene *v.* Wheatley, 9 *Am. Law Reg.* N. S. 44; Stowe *v.* Thomas, 2 *Wall. Jr.* 547; 2 *Am. Law Reg.* N. S. 229.

In other words, literary property is the common-law ownership of the original work; copyright is the statutory right to make all the copies of it that

shall be made for a term of years. For the statutes creating and regulating the right in the United States, see Rev. Stat. § 4948.

In early books, copy is used in the sense of copyright; thus Lord Mansfield, in Millar *v.* Taylor (*Burr.* 2303, 2396), speaking of what is now called copyright, defined copy to be "an incorporeal right to the sole printing and publishing of somewhat intellectual communicated by letters;" and observed that this was the technical sense in which the term had been used for ages. He also ruled that the property in the copy is an incorporeal right to print a set of intellectual ideas or modes of thinking, communicated in a set of words and sentences, and modes of expression. See also Jeffreys *v.* Boosey, 4 *Ho. of L. Cas.* 815.

In England, copyright in books is chiefly regulated by Stat. 5 & 6 Vict. ch. 45, passed in the year 1842, which provides that the copyright of a book shall endure for the life of the author, and for seven years longer, and for not less than forty-two years from the first publication. But the right of property in copyright must be registered in the registry of the Stationers' Company; and, after such registry, it is assignable by a mere entry of the transfer in the same registry in the manner prescribed by the act. Copyrights in sculptures and designs have also been protected by various acts of parliament, of which the most recent are the copyright of designs act, 1858 (21 & 22 Vict. ch. 70), for the protection of designs for articles of ornament and utility, and the act of 1862 (25 & 26 Vict. ch. 68), for the protection of paintings, drawings, and photographs. International copyright is provided for by the 7 & 8 Vict. ch. 12; but the provisions of that statute only go to secure to the authors of books published abroad the right of copyright when the same are republished in her majesty's dominions, and do not of course oblige foreign countries to extend to British authors the like protection. *Brown; Mozley & W.*

Copyright is the exclusive right of the owner of an intellectual production to multiply and dispose of copies; the sole right to the copy, or to copy it. The word is used indifferently to signify the statutory and the common-law right; or one right is sometimes called copyright after publication, or statutory copyright; the other copyright before publication, or common-law copyright. The word is also used synonymously with literary property; thus, the exclusive right of the owner publicly to read or exhibit a work, is often called copyright. This is not strictly correct. Drone, Copyright, 100.

CORAM. Before; in the presence of.

Coram ipso rege. Before the king himself.

Coram nobis. Before us. **Coram vobis.** Before you. These two Latin phrases are applied, respectively, to a writ of error allowed to review proceedings had in the same court, and to one issued to bring up a record of what has been done in an inferior court for revision. In the latter use of the writ, which is the most common, its substantial direction, addressed to the court below, is a requirement to certify up the proceedings or record "before you." Conversely, if the object of the writ is to review proceedings in the same court, as is sometimes allowed, they are alluded to as had "before us."

Coram non judice. Before one not a judge. Any proceedings before a judge or tribunal not clothed with jurisdiction of them are said to have been done *coram non judice;* before one who was no judge. He may have been a judge for other causes; the expression does not imply an intruder into the office; but if he had not the proper jurisdiction to authorize the acts in question, he is, as to those, not a judge.

CORD. Usage has defined a cord of wood to mean 128 cubic feet, and a contract for sale of wood by the cord calls for this quantity. Kennedy *v.* Oswego, &c. R. R. Co., 67 *Barb.* (*N. Y.*) 169.

CORN. In the English usage, includes grain, generally; the various farinaceous seeds which grow in ears, and are used for food. In the United States, it commonly signifies maize only. This is because the early settlers in America found maize cultivated by the Indians, and, being unfamiliar with it, they gave it the name Indian corn.

Corn, as used in this country in statutes of a modern date, is by custom applied to maize or Indian corn only, and not to other kinds of grain. Commonwealth *v.* Pine, 2 *Pa. L. J. R.* 154.

Corn, in the Ala. act of 1875, prohibiting the severance and exportation of "corn," &c., is to be taken in the popular acceptation, and not technically. Sullins *v.* State, 53 *Ala.* 474.

Corn laws. A former system of legislation in England, laying duties on importation of various kinds of grain.

CORODY. A provision or support.

CORONATION OATH. The oath administered to a sovereign of England, before coronation. By it the king or queen swears, in substance, to govern the kingdom of England, and the dominions thereto belonging, according to the statutes in parliament agreed on, and the laws and customs of the same; to cause law and justice in mercy to be executed; to maintain the laws of God, the true profession of the gospel, and the Protestant reformed religion established by law, and to preserve unto the bishops and clergy of the realm, and to the churches committed to their charge, all such rights and privileges as by law appertain to them, or any of them. For the full form, in questions and answers, see *Wharton.*

CORONER. The name of an officer of great antiquity in England, whose powers and duties at the common law have been but little affected by statutes. The office is principally of a judicial character. The most important function of the coroner is the making inquiry concerning the manner of the death of any person who is slain, or dies suddenly, or in prison. Another branch of his office is to inquire concerning shipwrecks, and certify whether wreck or not, and who is in possession of the goods. Concerning treasure trove, he is also to inquire who were the finders, and where it is. The coroner is also a conservator of the peace, and a magistrate by virtue of his appointment. He also acts as a substitute for the sheriff, when special circumstances render substitution necessary, and may then serve process in place of the sheriff. The office is, in general, a county office; but several coroners are frequently appointed for the same county.

CORPORAL. Relating to the body; bodily. Should be distinguished from corporeal, *q. v.*

Corporal oath. An oath taken by the party laying his hand upon the gospels while the oath is administered to him. More generally a solemn oath.

The terms corporal oath and solemn oath are, in Indiana, at least, used synonymously; and an oath taken with the uplifted hand may be properly described by either term. Jackson *v.* State, 1 *Ind.* 184.

CORPORATION. A natural person, or body of persons, upon whom has been conferred a distinct legal existence continued by succession, and certain characteristic powers possessed and exercised independent of any changes of members. These characteristics are, generally, power to admit and remove members, to act by a common seal; to purchase, hold, and dispose of property, real and personal; to sue and be sued; and to make by-laws. Corporate; that which appertains or relates to a corporation.

Corporations have been called *aggregate* or *sole*, according as they consist of more than one natural person, or of one only. In early English usage, sole corporations, such as the king, the bishop, and the like, were of, perhaps, equal importance with the aggregate class; but in modern times, and especially in American books, the expression sole corporation has lost importance.

They are called *public* or *municipal* (some of them *quasi*), when established to exercise functions of civil government, or accomplish purposes of purely public interest; and *private*, when they are created for advantage, benefit, or emolument of individuals. Recent decisions seem not to be agreed whether "corporation" without an adjective includes both private and public bodies, or is presumably confined to private ones. A statute as to pleading non-existence of corporations was held to include municipal corporations, such as cities, towns, and villages, as well as private corporations. Hixon *v.* George, 18 *Kan.* 253. Statutes extending garnishment and supplementary proceedings to persons, including corporations, have been held not to extend to municipals. Wallace *v.* Lawyer, 54 *Ind.* 501; Memphis *v.* Laski, 9 *Heisk.* 511. The context and general object must govern.

By the original theory of incorporation, individual members are not liable for corporate debts. The great increase, in modern times, of the number and variety of associations of persons formed for business enterprises has generated a necessity, on considerations of public expediency, of preserving to some extent the principle of individual liability for debts incurred by an association: and this has been done in different ways

in England and the United States, involving a somewhat different use of the term corporation. In the United States, the general tendency has been to use the term corporation freely for the various bodies chartered by the legislatures or organized under general acts, but to impose an individual liability by a specific enactment: the name corporation is used; but the full common-law exemption of the individual members from the corporate debts is not given. In England, the tendency seems to have been to keep to the use of corporation in its original sense, implying non-liability of members; and, if this exemption is not to be accorded, to give the body some different name, "public company" being the most common.

In like manner, the general current of American decisions has been to the effect that the word corporation embraces an association formed under general laws; or, in other words, a body formed pursuant to a statute authorizing the formation of an "association" composed of stockholders, and governed by president and directors, and declared by the statute to be, when duly formed, a body corporate and politic, and vested with enumerated powers, such as are usually incident to corporations. Such a body is not a *quasi* corporation, nor a joint-stock company, or limited partnership. Falconer *v.* Campbell, 2 *McLean*, 195. This question was the subject of much litigation in the courts of New York, in cases turning on provisions of the constitution of that state restricting the enactment of charters, and the provisions of law regulating corporations; and the final result of the conflicting cases has been to sustain, as respects most purposes, the proposition of the text. Consult Thomas *v.* Dakin, 22 *Wend.* 9; Warner *v.* Beers, 23 *Id.* 103; Parmley *v.* Tenth Ward Bank, 3 *Edw.* 395; People *v.* Assessors of Watertown, 1 *Hill*, 616; Bank of Watertown *v.* Assessors of Watertown, 25 *Wend.* 686; Willoughby *v.* Comstock, 3 *Hill*, 389; People *v.* Supervisors of Niagara, 4 *Id.* 20, 7 *Id.* 304; Leavitt *v.* Yates, 4 *Edw.* 134; Leavitt *v.* Tylee, 1 *Sandf. Ch.* 207; Boisgerard *v.* New York Banking Co., 2 *Id.* 23; Matter of Bank of Dansville, 6 *Hill*, 370; Gifford *v.* Livingston, 2 *Den.* 380; Case *v.* Mechanics' Banking Association, 1 *Sandf.* 693; Leavitt *v.* Blatchford, 5 *Barb.* 9; Cuyler *v.* Sanford, 8 *Id.* 225; Gillet *v.* Moody, 3 *N. Y.* 479; Talmage *v.* Pell, 7 *Id.* 328; Tracy *v.* Talmage, 18 *Barb.* 456; Gillet *v.* Phillips, 13 *N. Y.* 114; Leavitt *v.* Blatchford, 17 *Id.* 521; Codd *v.* Rathbone, 19 *Id.* 37; DeBow *v.* People, 1 *Den.* 9; Purdy *v.* People, 4 *Hill*, 384; People *v.* Morris, 18 *Wend.* 325; People *v.* Purdy, 2 *Hill*, 39; Palmer *v.* Lawrence, 5 *N. Y.* 389. But it was held that an individual banker (under the New York act of 1838) is not a corporation; for there is no provision for succession; the heir or legatee may continue his business (Laws of 1857, ch. 189), and the banker may sell the business (Laws of 1854, ch. 242); the business is his individual affair, and he may sue in relation to it in his individual name. Codd *v.* Rathbone, 19 *N. Y.* 37; s. p. Hallet *v.* Hanower, 33 *Barb.* 537; see also Bank of Havana *v.* Magee, 20 *N. Y.* 355. Therefore, provisions relative to any "moneyed corporation" do not apply to an individual banker. Cuyler *v.* Sanford, 8 *Barb.* 225.

Corporations are sole or aggregate. An aggregate corporation, at common law, is a collection of individuals united into one collective body, under a special name, and possessing certain immunities, &c., which do not belong to the natural persons composing it. A minister, seised of parsonage lands, in right of the parish, is a sole corporation for this purpose, and holds the same to himself and his successors. Brunswick *v.* Dunning, 7 *Mass.* 447; Weston *v.* Hunt, 2 *Id.* 501.

A corporation sole consists of a single person, who is made a body corporate and politic, in order to give him some legal capacities and advantages, and especially that of perpetuity; as a bishop, dean, &c. Bank of Havana *v.* Wickham, 7 *Abb. Pr.* 134; and see Overseers of Poor *v.* Sears, 22 *Pick.* 122.

An aggregate corporation, at common law, is a collection of individuals, united into one collective body, under a special name, and possessing certain immunities, privileges, and capacities, in its collective character, which do not belong to the natural persons composing it. It is an artificial person, existing in contemplation of law, and endowed with certain powers and franchises, which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage. Dartmouth College *v.* Woodward, 4 *Wheat.* 518, 561.

An aggregate corporation is an artificial body of men, composed of divers individuals; the ligaments of which body are the franchises and liberties bestowed upon it, which bind and unite all into one, and in which consist the whole frame and essence of the corporation. Thomas *v.* Dakin, 22 *Wend.* 9, 70.

It is a collection of individuals united in one body, under such a grant of privileges as secures a succession of members without changing the identity of the body, and constitutes the members for the time being one artificial person or legal being, capable of transacting some kind of business like a natural person. People *v.* Assessors of Watertown, 1 *Hill*, 616, 620.

There are three classes of corporations: public municipal corporations, the object of which is to promote the public interest; corporations technically private, but of a *quasi* public character, having in view some public enterprise in which the public interests are involved, such as railroad, turnpike, and canal companies; and corporations strictly private. Miners' Ditch Co. *v.* Zellerbach, 37 *Cal.* 543.

A corporation founded by private beneficence, though for objects of general welfare, such as the education of young men, is a private and not a public corporation. Public corporations are generally esteemed such as exist for political purposes only, such as towns, cities, parishes, and counties; and in many respects they are so, although they involve some private interest; but, strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder or the nature and objects of the institution. The uses may, in a certain sense, be called public, but the corporations are private, — as much so, indeed, as if the franchises were vested in a single person. Dartmouth College *v.* Woodward, 4 *Wheat.* 518, 562; Rundle *v.* Delaware & Raritan Canal, 1 *Wall. Jr.* 275.

Public corporations are not those necessarily whose objects are of a public character, but those created for political purposes, with powers to be exercised for the public good. Tinsman *v.* Belvidere, &c. R. R. Co., 26 *N. J. L.* 148; Ten Eyck *v.* Delaware & Raritan Canal, 18 *Id.* 200.

A public corporation is one that is created for political purposes, with political powers, to be exercised for purposes connected with the public good in the administration of civil government; an instrument of the government, subject to the control of the legislature, and its members officers of the government, for the administration or discharge of public duties, as in the cases of cities, towns, &c. Regents *v.* Williams, 9 *Gill & J.* 365.

A corporation is private, as distinguished from public, unless the whole interest belongs to the government, or the corporation is created for the administration of political or municipal power. Rundle *v.* Delaware & Raritan Canal, 1 *Wall. Jr.* 275.

A bank whose stock is owned by private persons is a private corporation; and the legislature cannot control or alter the grant without consent of the corporators. Logwood *v.* Huntsville Bank, *Minor*, 23; State *v.* Tombeckbee Bank, 2 *Stew.* 30.

An incorporated academy is a private corporation, although it may derive a part of its support from the government. Cleveland *v.* Stewart, 3 *Ga.* 283.

Several state constitutions define corporation thus: "The term corporation, as used in this article, shall be construed to include all associations and joint-stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships." *N. Y. Const. of* 1846, art. 8, § 3; *Cal. Const. of* 1849, art. 4, § 33; *Mich. Const. of* 1850, art. 15, § 11; *Kan. Const. of* 1859, art. 12, § 6.

Same provision, with the addition of the words "except such as embrace banking privileges." *Minn. Const. of* 1857–58, art. 10, § 1.

A statute which prohibits corporations from interposing the defence of usury will be held to apply to foreign corporations litigating in the courts of the state making the enactment. Southern Life Ins. & Trust Co. *v.* Packer, 17 *N. Y.* 51.

An English joint-stock company, organized under an act of parliament which, though it stipulates that it does not incorporate the company, and that the individual liability of members is preserved, yet grants powers of a corporate nature to the company, — so that the company has a name as an association, continuing the identity of the body through all changes of members; holds property divided in transferable shares; enjoys the capacity to sue and be sued in the name of an officer, without liability to abatement by reason of the death or resignation of the officer, or by change in membership, — may be taxed as a "foreign corporation." Such bodies, indeed, are not pure corporations, but are intermediate between corporations as known to the common law and ordinary partnerships. But when, by legislative authority or sanction, an association is formed capable of acting independently of the rules and principles that govern a simple partnership, it is so far clothed with corporate powers that it may be treated, for the purposes of taxation, as an artificial body; and becomes subject, as such, to the jurisdiction of the government, under which it undertakes to act and contract in its associated capacity. Oliver *v.* Liverpool, &c. Ins. Co., 100 *Mass.* 531, 10 *Wall.* 566.

That the United States may be deemed

a corporation, see United States *v.* Hillegas, 3 *Wash.* 73.

A state is a corporation. State of Indiana *v.* Woram, 6 *Hill*, 33.

A state may sue as a corporation. Woodward *v.* Janes, 2 *Johns. Cas.* 417; Whitaker *v.* Cone, *Id.* 58; Hines *v.* State of North Carolina, 10 *Smed. & M. Ch.* 529.

A state is not embraced in the word corporation as used in a United States internal revenue law imposing a tax on corporations. Georgia *v.* Atkins, 1 *Abb. U. S.* 22; 35 *Ga.* 315.

That a county is a corporation, but the people of it are not, see Smith *v.* Myers, 15 *Cal.* 33.

That a county is a public corporation, created for political purposes, and invested with subordinate legislative powers, see Maury County *v.* Lewis County, 1 *Swan*, 236.

There is a distinction between proper aggregate corporations and the inhabitants of any district who are by statute invested with particular powers without their consent. These are called *quasi* corporations; viz., counties, towns, parishes, school districts, &c. Reddle *v.* Proprietors of Locks, &c., 7 *Mass.* 187; School District in Rumford *v.* Wood, 13 *Id.* 198; Damon *v.* Granby, 2 *Pick.* 352; Adams *v.* Wiscasset Bank, 1 *Me.* 363; Mower *v.* Leicester, 9 *Mass.* 250.

That counties are mere *quasi* corporations, invested with corporate powers, *sub modo*, and for a few specified purposes, but deficient in many of the powers incident to the general character of corporations, see Goodnow *v.* Commissioners of Ramsey County, 11 *Minn.* 31; Louisville & Nashville R. R. Co. *v.* County Court of Davidson, 1 *Sneed*, 637, 687; Hannibal & St. Joseph R. R. Co. *v.* Marion County, 36 *Mo.* 294; Reardon *v.* St. Louis County, *Id.* 555.

Towns are regarded as corporations so far as corporate powers are granted, or are incidental to express grants. North Hempstead *v* Hempstead, 2 *Wend.* 109; People *v.* Morris, 13 *Id.* 325.

In New Hampshire, the original proprietors of townships are regarded as corporations, and are subject to the same general rules and regulations, and are invested with similar powers. Atkinson *v.* Bemis, 11 *N. H.* 44.

A school district is a public, territorial corporation. Gilman *v.* Bassett, 33 *Conn.* 298; and see Williams *v.* Franklin Township Academical Association, 26 *Ind.* 310; Whitmore *v.* Hogan, 22 *Me.* 564; Winspear *v.* Holman, 37 *Iowa*, 542.

A school society is a corporation competent to take a bequest, or devise, in trust, for educational purposes. First Congregational Society of Southington *v.* Atwater, 23 *Conn.* 56.

That the trustees of a school district in Missouri are not a corporation, in such sense as to be liable to an action subjecting the school property to execution, see Allen *v.* Trustees of School District, 23 *Mo.* 418.

That a board of school commissioners is a public corporation, see School Commissioners *v.* Putnam, 44 *Ala.* 566.

The board of supervisors of a county are not a corporation; and as such board, and apart from the county, they are not liable to a suit. They can be sued only as representing the county. Boyce *v.* Supervisors of Cayuga, 20 *Barb.* 294. To similar effect is Brady *v.* Supervisors of New York, 2 *Sandf.* 460. Compare Jansen *v.* Ostrander, 1 *Cow.* 670; that the supervisor of a town may be considered to be a corporation, and to have the capacity of suing and being sued, in right of the office he holds, so far as his trust is concerned.

Overseers of the poor, in New York, are a corporation, *sub modo*. Rouse *v.* Moore, 18 *Johns.* 407.

In Mississippi, trustees of the poor are held to be a public corporation, and subject to the control of the legislature. Governor *v.* Gridley, 1 *Miss.* 328.

The water commissioners of the city of New York, are not a corporation. Appleton *v.* Water Commissioners of New York, 2 *Hill*, 432.

Boards of health, in New York, are not corporations, as respects the power to sue and be sued. Gardner *v.* Board of Health of New York, 10 *N. Y.* 409; People *v.* Supervisors of Monroe, 18 *Barb.* 567.

Commissioners appointed for organizing an educational institution, and vested with certain powers preliminary to the exercise of corporate powers by the institution, were held not a corporation. Board of Commissioners for Frederick Female Seminary *v.* State, 9 *Gill*, 379.

The general assembly of the Presbyterian church is not a corporation, nor a *quasi* corporation. Commonwealth *v.* Green, 4 *Whart.* 531.

The treasurer of the trustees of Davidson College is not a corporation sole. McDowell *v.* Hemphill, 1 *Wins. L. & Eq.* 96.

Corporate authorities, as used in section 5 of article 9 of the Illinois constitution, relating to municipal corporations, means those municipal officers who are either directly elected by the people to be taxed, or appointed in some mode to which they have given their assent. The phrase does not include commissioners appointed by the legislature to carry on some special improvement within the corporate limits. People *v.* Chicago, 51 *Ill.* 17; s. p. Gage *v.* Graham, 57 *Id.* 144.

Corporate existence. As used in a statute dating the "corporate existence" of a corporation from the filing of the articles with the secretary of state, means full authority to transact business. Hurt *v.* Salisbury, 55 *Mo.* 310.

Corporate purpose, embraces only such purposes as are germane to the objects of the creation of the municipality. These do not include that of securing the location of a state reform school. Livingston County *v.* Weider, 64 *Ill.* 427.

The question, what is a corporation purpose within the constitutional provisions relating to the powers of municipal corporations, must be decided by the facts of each particular case; but the judgment of the local government of such a corporation may in general be safely taken as *prima facie* evidence as to whether the object proposed is a legitimate "corporation purpose." It is not necessary that the object for which a tax is imposed by the corporate authorities should be within the corporate limits to make it a corporate purpose. It is sufficient if it be a matter of vital importance to the permanent interests of the corporation, although situated beyond the limits thereof; and an appropriation may consequently be made to the construction of a part of a public work lying beyond the limits of the state. McCallie *v.* Mayor, &c. of Chattanooga, 3 *Head*, 317.

Corporation act. The Stat. 13 Car. II. st. 2, ch. 1, since repealed; which required that persons elected to office in any corporate town should have taken the sacrament within the previous year, and should take the oaths of allegiance and supremacy.

CORPOREAL. Having a body; consisting of material substance; material.

Corporeal is distinguished from corporal in that it is applied to express the inward and essential nature of a material substance, as corporeal body, corporeal hereditament; while corporal relates to the exterior, as corporal punishment, corporal touch. Or corporeal means that which has a body, is physical; while corporal means that which affects some body.

The distinction between things corporeal and incorporeal, in Roman law, rested upon the sense of touch; tangible objects only were considered corporeal. In modern law, all things which may be perceived by any of the bodily senses are termed corporeal; although a common definition of the word includes merely that which can be touched and seen. *Co. Litt.* 9 *a.*

The division of things into corporeal and incorporeal is coincident with the division of the Roman law into tangible (*quæ tangi possunt*) and intangible (*quæ tangi non possunt*). The nomenclature of the Roman division is derived from the sense of touch, which was the most important of the senses in the opinions of the ancient Democritean school, or school of natural philosophy; the nomenclature of the English division is derived from the equally natural distinction of what is sensible to the body (or bodily senses) generally. In itself, the distinction, as resting in nature, is necessarily permanent; in its consequences, it was chiefly remarkable in the diversity which it occasioned in the mode of the transfer of property, for things which were corporeal were capable of manual or bodily transfer, *e. g.*, by feoffment with livery, but things which were incorporeal were not capable of such a mode of transfer, and required for their transfer a deed of grant. Since the Stat. 8 & 9 Vict. ch. 106, § 2, the last-mentioned diversity has been mitigated, although not yet entirely removed, inasmuch as things corporeal are now capable of transfer by deed of grant, but things incorporeal are still (and must necessarily continue always to be) incapable of transfer by feoffment with livery. *Brown.*

Corporeal hereditaments. Hereditaments which are of a material nature, and may be perceived by the senses; material and permanent objects which may be inherited. The term land includes all corporeal hereditaments.

Corporeal possession of land, is a residence on or occupation or cultivation of the same. Dickson *v.* Marks, 10 *La. Ann.* 518.

Corporeal property. Such as affects the senses, and may be seen and handled by the body, as opposed to incorporeal property, which cannot be seen or handled, and exists only in contemplation. Thus a house is corporeal, but the annual rent payable for its occupation is incorporeal. Corporeal property is, if movable, capable of manual transfer; if immovable, possession of it may be delivered up. But incorporeal property cannot be so transferred, but some other means must be adopted for its transfer, of which the most usual is an instrument in writing. *Mozley & W.*

In the civil law, corporeal property is that which consists of such subjects as are palpable. At common law, the term to signify the same thing is "property in possession." It differs from incorporeal property, which consists of choses in action and easements. *Bouvier.*

CORPUS. Body; the substance or whole of a thing.

Corpus comitatus. The body of a county. The county as a whole, as distinguished from a part of it, or any particular locality within it; or from the legal entity composed of the inhabitants. See BODY.

Corpus cum causa. See HABEAS CORPUS CUM CAUSA.

Corpus delicti. The body of the offence; the substance of a crime; the substantial and fundamental fact of the commission of a crime. The

general rule is, that there can be no conviction for crime unless the *corpus delicti* is established; that is, until the fact that the crime has been actually perpetrated is proved. Thus, one accused of homicide cannot be convicted unless the death be first distinctly proved.

Corpus juris canonici. The body of the canon law. The collections of the decrees and canons of the Roman church, constituting the body of ecclesiastical law of that church, termed the canon law, *q. v.*

Corpus juris civilis. The body of the civil law. The collection of the elements of Roman law, the opinions of eminent lawyers, and imperial constitutions, published in the reign of Justinian, and which constituted the body of civil law then existing. It is sometimes termed simply *corpus juris.*

CORROBORATE. Is used, in a sense not materially different from its vernacular meaning, to denote the fortifying of evidence by some matter likely to inspire increased confidence. It is generally applied where the evidence already adduced is, if believed, sufficient for the purpose, but is liable to some suspicion, to remove which the party must produce auxiliary evidence. Thus it is said that no conviction may be had for seduction on the uncorroborated testimony of the woman; that testimony of an accomplice or of an impeached witness needs corroboration.

The expression corroborating circumstances clearly does not mean facts which, independent of a confession, will warrant a conviction; for then the verdict would stand not on the confession, but upon those independent circumstances. To corroborate is to strengthen, to confirm by additional security, to add strength. The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness, or to comport with some facts otherwise known or established. Corroborating circumstances, then, used in reference to a confession, are such as serve to strengthen it, to render it more probable; such, in short, as may serve to impress a jury with a belief in its truth. State *v.* Guild, 10 *N. J. L.* 163.

CORRUPT. An act is said to be corrupt, or corruptly done, when the chief motive is a design to acquire or cause an advantage of a pecuniary nature; when it is done for an unlawful profit. Corruption, when applied to officers, trustees, &c., signifies inducing a violation of duty by means of pecuniary considerations.

Corrupt does not convey a precise idea. What it does express, though still in a vague manner, is the quantity — what it endeavors, though unsuccessfully, to express, is the quality — of the blame. 1 *Benth. Ev.* 351.

Corrupt practices at elections have been the subject of several stringent enactments of parliament. See *Wharton.*

Corruptio optimi est pessima. The corruption of the best is the worst.

Corruption of blood. The destruction of the inheritable quality in the blood of a person, the result of which is an incapacity to inherit or to transmit an inheritance to others. In England, this was formerly an immediate consequence of an attainder for treason or felony; it was understood to cause a corruption of blood, whereby an attainted person could neither inherit lands or other hereditaments from his ancestors, nor retain those he was already in possession of, nor transmit them by descent to any heir; but the same escheated to the lord of the fee, subject to the king's superior right of forfeiture; and the person attainted also obstructed all descents to his posterity, whereon they were obliged to derive a title through him to a remoter ancestor. But corruption of blood has been practically abolished in England by various statutes modifying the common-law doctrine. And the constitution of the United States declares that "no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted." See ATTAINDER; BILL OF ATTAINDER.

CORTES. The name of the legislative assemblies, the parliament or congress, of Spain and Portugal.

COST. The cost of an article purchased at any particular place for the purpose of being exported is the price given, together with every charge which attended the purchase and the exportation, and which was paid, or is supposed to be paid, at the place whence the article is exported. Goodwin *v.* United States, 2 *Wash.* 493.

Cost price is the price actually paid for the goods, not what they should have cost. An agreement by a merchant to deliver

goods at cost price means the price they cost him, without reference to depreciation or actual market value at the time the goods are called for. Buck *v.* Burk, 18 *N. Y.* 337.

COSTS. A pecuniary allowance, made by positive law, to the successful party in a suit or distinct proceeding within a suit, in consideration of and to reimburse his probable expenses.

The term includes only taxable costs, not attorney's fees. McDonald *v.* Page, *Wright*, 121.

An agreement to pay the costs of a suit means only the legal costs. Wallace *v.* Coates, 1 *Ashm.* 110.

"All the costs that have accrued," when the words are used in the compromise of a pending suit, or in a private statute providing for such compromise, mean costs that would follow the judgment, and do not include attorney's fees. Tallassee Manuf. Co. *v.* Glenn, 50 *Ala.* 489.

The word costs, when used in relation to the expenses of legal proceedings, signifies the sums prescribed by law as charges for the services enumerated in the fee-bill. Apperson *v.* Mut. Benefit Life Ins. Co., 38 *N. J. L.* 388.

A bond to indemnify a sheriff against "costs, charges, and expenses," which he should incur in defending a suit, does not extend to damages recovered against him. Scott *v.* Tyler, 14 *Barb.* 202.

The phrase costs of suit includes commissions of clerk of court and sheriff or marshal, upon money collected upon execution. Kitchen *v.* Woodfin, 1 *Hugh.* 340.

In the prosecution and defence of actions, the parties are necessarily put to certain expenses, or *costs*; consisting of money paid to the king and government for fines and stamp duties; to the officers of the courts; and to the counsel and attorneys for their fees, &c. These costs may be considered either as between attorney and client, or as between party and party. In the latter case they are either interlocutory, or those given on various motions and proceedings in the course of a suit; or final, to which the term of costs is most generally applied. *Jacob.*

COUNCIL. This title is applied to an advisory body created by the laws of some of the states, to assist the governor in his determinations. It is also applied to the legislative body of a city; as the common council.

COUNSEL; COUNSELLOR. The term commonly bestowed upon lawyers, throughout the United States, in respect of the capacity or function of advocating a cause in court; in distinction from the duty of draughting and serving writs, pleadings, notices, &c., and other matters transpiring in the office of the lawyer or the clerk of court, which is the function of the attorney. The term corresponds to barrister in English usage, and advocate in that of Scotland. But as in recent times the two functions are, as a general thing, in the United States, united in the same person, the distinction in meaning between attorney and counsel or counsellor is not rigidly maintained. In New York, it has been somewhat revived by a very recent rule of the court of appeals, prescribing at least two years' practice or study after admission as an attorney, before one can be admitted as a counsellor. See ADVOCATE; ATTORNEY; BARRISTER.

Counsel's opinion, or advice of counsel. In certain cases, as when one who has preferred a complaint is sued for malicious prosecution, or where an attorney is sued for negligence, it is an important ground of defence to show that defendant acted by advice of counsel, or took counsel's opinion.

Counsel's signature. This is required, in some jurisdictions, to be affixed to pleadings; for satisfying the court that they are interposed in good faith and upon legal grounds.

COUNT. 1. A title of nobility.

2. A distinct statement, in a declaration or indictment, of the cause of action or offence.

The term is most frequently employed in reference to pleadings conducted according to the course of the common law. Under this system, the cause of action is customarily stated in several different modes, alleging the legal effect of the facts which the plaintiff expects to prove, in various different aspects; in order that, whatever the condition of the proof at the close of the trial may prove to be, the plaintiff may have in his declaration an averment under which he may recover, if in any aspect a recovery is warranted by law. These distinct, alternative statements of the cause of action are called counts.

COUNTER-CLAIM. The codes of reformed procedure which have been adopted in many of the United States in recent years have introduced a liberal practice of allowing a defendant to oppose a recovery sought by plaintiff,

by setting up and establishing any cross-demand which may exist in his favor against plaintiff. This practice is comprehensive of both recoupment and set-off; it is also broader; demands may often be interposed as a counter-claim, which could not be in the other modes. The New York code, which is a representative of others on this subject, defined a counter-claim, by section 150; see *infra*. Any claim coming within this section may be set up by defendant in his answer, with the effect, that, if the plaintiff's cause of action and the counter-claim are both established, the counter-claim reduces the plaintiff's demand; while, if the defendant defeats the claim in suit upon its merits, and establishes his counter-claim also, he recovers judgment for the latter.

A counter-claim must be one "existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action; 1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of action. 2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action." *N. Y. Code of Pro.* § 150.

A counter-claim is an opposition claim, or demand of something due; a demand of something which of right belongs to the defendant, in opposition to the right of the plaintiff. Silliman *v.* Eddy, 8 *How. Pr.* 122. And see RECOUPMENT; SET-OFF; also *U. S. Dig.* tit. Set-off.

It is any claim or demand of the defendant against the plaintiff in an action, which, if allowed, will reduce or overrun the plaintiff's claim. Gage *v.* Angell, 8 *How. Pr.* 335.

When a defendant has, against the plaintiff, a cause of action, upon which he might have maintained a suit, such cause of action is a counter-claim; in other words, a cross-demand. Davidson *v.* Remington, 12 *How. Pr.* 310.

A counter-claim in actions arising upon contract must be a demand which might have arisen out of, or could have had some connection with, the original transaction, in the view of the parties. It must be one which the parties may have supposed, when they made the contract, might, in some event, give one party a claim against the other for compliance or non-compliance with its provisions. Conner *v.* Winton, 7 *Ind.* 523.

A counter-claim is a claim which, if established, will defeat or in some way qualify the judgment to which the plaintiff is otherwise entitled. Dietrich *v.* Koch, 35 *Wis.* 618.

COUNTERFEIT, *v.* To make something falsely and fraudulently, in imitation or the semblance of that which is true. Counterfeit, *n.*: A thing made falsely and fraudulently in imitation or the semblance of that which is true.

These words are chiefly used of imitations of coin, or of paper money or securities depending upon pictorial devices and designs for identity or assurance of genuineness. The making a false imitation of an instrument depending on signatures to show genuineness and validity is more properly styled forgery.

Counterfeit money must be like the true money; for the word counterfeit implies resemblance or likeness; and without it there is very little danger of imposition or fraud. 1 *Hale*, 184, 215; 5 *Bac. Abr.* 129. Counterfeit imports an imitation, likeness, resemblance. State *v.* Calvin, *R. M. Charlt.* 151.

A counterfeit bill is one printed from a false plate, and not a bill printed, legitimately or illegitimately, from the genuine plate. Kirby *v.* State, 1 *Ohio St.* 185.

Counterfeiter, is one who unlawfully makes base coin in imitation of the true metal, or forges false currency, or any instrument of writing, bearing a likeness and similitude to that which is lawful and genuine, with an intention of deceiving and imposing upon mankind. Thirman *v.* Matthews, 1 *Stew.* 384.

COUNTERPART. One of two corresponding copies of a written instrument; a duplicate.

When the several parts of an indenture are interchangeably executed by the parties thereto, that part or copy which is executed by the grantor is called the original, and the rest are counterparts; though of late it is most frequent for all the parties to execute every part, which renders them all originals. (2 *Bl.* 296; 1 *Steph. Com.* 483.) A duplicate copy of a deed is, however, frequently called a counterpart. *Mozley & W.*

The term seems derived from the ancient practice of executing indentures and chirographs by writing them twice on the same sheet of parchment, beginning from a space in the middle (where it was afterwards divided by cutting through); the parts, when thus written, lying opposite or counter to each other. *Burrill.* See CHIROGRAPH.

COUNTER-PLEA. A pleading of an incidental kind, diverging from the main series of the allegations. Thus, when a party demanded oyer, in a case where upon the face of the pleading his

adversary conceived it to be not demandable, the latter might demur, or, if he had any matter of fact to allege as a ground why the oyer could not be demanded, he might plead such matter, and if he pleaded, the allegation was called a counter-plea to the oyer. *Steph. Plead.* 79. These pleas are now but little used.

In the more ancient system of pleading, counter-plea was applied to what was, in effect, a replication to aid prayer, *q. v.*; that is, where a tenant for life or other limited interest in land, having an action brought against him in respect of the title to such land, prayed in aid of the lord or reversioner for his better defence, that which the demandant alleged against either request was called a counter-plea. *Cowel.*

COUNTRY. 1. The inhabitants of the vicinage; the community from which a jury is to be drawn. Thus the common termination of a plea tendering an issue of fact calling for jury trial was, of this the party "puts himself upon the country." Compare PAIS.

2. The territory of an independent nation, or even the nation itself; as in the phrase, a foreign country.

The word country, as used in the United States revenue laws, embraces all the possessions of a foreign state, however widely separated, which are subject to the same supreme executive and legislative control. Stairs *v.* Peaslee, 18 *How.* 521.

In a statute prescribing that the value of articles imported shall be estimated by their value at the principal markets of the country from which they are exported at the time of exportation, without reference to the country of their production, the word country is used with reference to state or nation, rather than mere local and geographical division; hence an article imported from Halifax is to be appraised according to its value in the principal markets of the British dominions. *Ib.*

In its primary meaning, country signifies place; and, in a larger sense, the territory or dominions occupied by a community; or even waste and unpeopled sections or regions of the earth. But its metaphorical meaning is no less definite and well understood; and in common parlance, in historical and geographical writings, in diplomacy, legislation, treaties, and international codes, the word is employed to denote the population, the nation, the state, or the government, having possession and dominion over a territory. United States *v.* The Recorder, 1 *Blatchf.* 218, 225; 5 *N. Y. Leg. Obs.* 286.

Country is used, in the act of March 1, 1817, concerning navigation, in this enlarged sense; and embraces the colonies of any foreign power, within the scope of the act, as well as those dwelling within its proper territory. It means the entire nation, and not merely a section or portion of territory belonging to the nation. *Ib.*

In act of July 14, 1862, § 14, which prescribes an additional duty on goods the produce of countries beyond the Cape of Good Hope, but imported from places this side of it, the word countries is used in a local and geographical sense, without regard to the subdivision of the territory under different governments, and therefore includes the British East Indies. Campbell *v.* Barney, 5 *Blatchf.* 221.

COUNTY. The name bestowed in England and most of the United States upon the principal civil division of a kingdom or state; such a division as anciently was governed by a count (or earl), from which the name is derived. It is now used for the territory comprised within the boundaries of a county, and also for the inhabitants collectively in their political capacity, or as a legal community having distinct rights, powers, and liabilities; the latter use being, probably, the most frequent in jurisprudence.

County, from *comitatus*, signifies the same as shire, the one coming from the French, the other from the Saxon. It contains a circuit or portion of the realm, into which the whole land is divided, for the better government of it, and the more easy administration of justice, so that there is no part of this kingdom that lies not within some county; and every county is governed by a yearly officer, the sheriff. (*Fortescue*, ch. 24.) Of these counties, the numbers have been different at different times. It seems that this division of the kingdom was made by King Alfred. *Jacob.*

When the terms "county" and "people of the county" are interchangeable, see County Court of St. Louis County *v.* Griswold, 58 *Mo.* 175.

County aforesaid. Where more than one county is named in a declaration, "county aforesaid" refers to the county named in the margin. Sutton *v.* Fenn, 2 *W. Bl.* 847.

County board, in Ill. Const. 1870, art. 10, § 10, means the body authorized to transact county business. It embraces the board of supervisors in counties under township organization, and the board of county commissioners to be elected in counties not under township organization, and also applied to the county courts in such counties until they were superseded. Broadwell *v.* People, 76 *Ill.* 554.

County bridge. A bridge of the larger class, erected by the county, and which the

county is liable to keep in repair. Taylor *v.* Davis County, 40 *Iowa*, 295.

County commissioners. The officers having general charge of the business of a county are in some of the states called by this name; in other states, supervisors.

County corporate. A city or town with more or less territory annexed to it, to which, out of special grace and favor, the kings of England have granted the privilege to be counties of themselves, and not to be comprised in any other county; but to be governed by their own sheriffs and other magistrates, so that no officers of the county at large have any power to intermeddle therein. Such are London, York, Norwich, &c. 1 *Bl. Com.* 120.

County court. In England, there was a court of great antiquity and dignity thus entitled. This old county court was a tribunal incident to the jurisdiction of the sheriff, and was not a court of record. It had formerly extensive jurisdiction in personal actions, and power to entertain many real actions. Proceedings were removable from it into a superior court by *recordari facias loquelam*, or writ of false judgment. Wharton describes it as still having authority to proclaim outlawries of absconding debtors, and power to hold elections of knights of the shire, coroners, and otherwise act for the county.

The title is, later, employed for tribunals of limited jurisdiction established in the county of Middlesex, under Stat. 22 Geo. II. ch. 33; and later still, upon a larger class of tribunals of limited jurisdiction, established under Stat. 9 & 10 Vict. ch. 95, known as the county courts act. In pursuance of this act, the whole of England and Wales, with the exception of London, has been divided into districts, in which the several county courts are established; upwards of 500 in all. By the county courts act and subsequent acts these courts have 1. A common-law jurisdiction, including recovery of debts or damages not exceeding £50; consent actions of every description; ejectments, where the annual value and rent do not exceed the sum of £20; actions for sums not exceeding £50 on contract transferred by order of a superior court; actions of tort transferred in like manner, upon affidavit of defendant that plaintiff has no visible means of paying costs; applications for discovery of documents; interrogatories, and compelling an answer thereto; attachments of debts; and equitable defences and replications. 2. An equity jurisdiction, in cases where the amount involved does not exceed £500; which includes suits by creditors, legatees, heirs-at-law, and next of kin, against or for accounts or administration of personal or real estate, or both; suits for the execution of trusts; suits for foreclosure or redemption, or for enforcing any charge or lien; suits for specific performance, or for the delivering up or cancelling any agreement for the sale or purchase of any property; proceedings under the trustee relief acts, or trustee acts; proceedings relating to the maintenance or advancement of infants; suits for the dissolution or winding up of partnerships; and proceedings for orders in the nature of injunctions. 3. Certain jurisdiction in probate, admiralty, and bankruptcy.

The county courts have also exercised an auxiliary or ministerial jurisdiction, in connection with the superior courts of law and equity. They were not abrogated by the supreme court of judicature acts, but the fusion of law and equity, and many other provisions governing remedies, apply to them. See a judicial statement of the operation of those acts upon the administration of justice in the county courts, in 59 Law Times (Oct. 9, 1875), 379.

Throughout the United States, county court is extensively used as a name for a class of courts having civil jurisdiction in controversies of medium grade, also varied powers in the charge and care of persons and estates coming within legal guardianship; a limited criminal jurisdiction; appellate jurisdiction over justices of the peace; and numerous powers and duties in the administration of county affairs and business.

The term county court, as used in section 21 of the act of Feb. 12, 1849, was designed only to apply to the sittings of the county court for the transaction of county business. County of St. Clair *v.* Irwin, 15 *Ill.* 54.

County court and court of the county are convertible terms. Palmer *v.* Craddock, 1 *Sneed*, 215.

When action of the county court is mentioned, reference is had to the court as pre-

sided over by the county judge alone, unless the subject involves levies, appropriations, and those other financial matters wherein the justices of the peace are associated with him. Bowling Green, &c. R. R. Co. *v.* Warren County Court, 10 *Bush*, 711.

County officer. One of the officers by whom the county performs its usual political functions, — its functions of government. A constitutional provision, that all "county officers shall be elected by the electors of the respective counties," does not prevent the legislature from passing an act authorizing a county subscription to be made to the stock of a railroad corporation, and naming in the act a board of commissioners to carry its provisions into effect. Such commissioners, in performing a ministerial duty of issuing bonds to pay for the stock subscribed, do not act as county officers. Sheboygan Co. *v.* Parker, 3 *Wall.* 93. Compare Matter of Whiting, 2 *Barb.* 513; Matter of Carpenter, 7 *Id.* 30.

The county judge is not embraced by the phrase county officers. State *v.* Glenn, 7 *Heisk.* 472.

County palatine. A term bestowed upon certain counties in England, the lords of which in former times enjoyed especial privileges. They might pardon treasons, murders, and felonies. All writs and indictments ran in their names, as in other counties in the king's; and all offences were said to be done against their peace, and not, as in other places, *contra pacem domini regis*. But these privileges have in modern times nearly disappeared.

County purpose. The term includes only the ordinary expenses of the county; the payment of the county debt or the interest thereon is not within these ordinary expenses. McCormick *v.* Fitch, 14 *Minn.* 252.

Subscription to a local railroad is a county purpose, for which the legislature may constitutionally authorize a county tax. Louisville, &c. R. R. Co. *v.* County Court of Davidson, 1 *Sneed*, 637.

The term county purpose does not include labor upon a local drain or watercourse. State *v.* Seaman, 23 *Ohio St.* 389.

County rate. A tax levied on the occupiers of lands, and applied to many miscellaneous purposes incident to the government of a county; among which the most important are those of defraying the expenses connected with prisons, reimbursing to private parties the costs they have incurred in prosecuting public offenders, and defraying the expenses of the county police. *Wharton.*

County rates are certain assessments imposed on every parish of a county by the justices assembled in quarter sessions, and are applicable chiefly to the payment of coroner's fees for travelling, and to the repair of county bridges, highways, jails, houses of correction, shire-halls, and lunatic asylums. They are also devoted to the payment of the charges of prosecuting felons and vagrants, and bringing insolvent debtors before the circuit commissioners. These rates are assessed upon the full and fair annual value of lands and tenements ratable to the relief of the poor, and are raised by the church-wardens and overseers, who pass them over, through the high constables, to the county treasurer. *Cabinet Lawyer*, 660.

COUPON. A part of a commercial instrument, intended to be cut off, and used as evidence of something connected with the contract mentioned in the instrument. Coupons are generally attached to bonds or certificates of loan, upon which interest is payable at particular periods; and, when the interest accrues, they are cut off and presented to the obligor or borrower, as an independent demand. 27 UC CRL 224.

A coupon is a remnant shred (*papier portant interet*); a dividend in the public funds; an interest certificate, — printed at the bottom of transferable bonds, given for a term of years. There are as many of these certificates as there are payments of interest to be made. At each time of payment one is *cut off* and presented for payment. Hence the name coupon. The term does not imply a negotiable contract, unless the word bearer, holder, or equivalent words are in the instrument. Myers *v.* York, &c. R. R., 43 *Me.* 232.

COUR DE CASSATION. Court of cassation, or breaking. The supreme judicial tribunal of France, and court of last resort, both civil and criminal.

COURT. Court, says Cowel, is the house where the king remaineth with his retinue; also, the place where justice is administered. These two meanings were, in the beginning, closely connected. For, in early English history, when the king was actually the fountain and dispenser of justice, nothing could be more natural than that subjects aggrieved by the conduct of powerful barons, or complaining of each other's shortcomings or misconduct, should use the expression "the court," in speaking of the journey to the place where the king was domiciled, and the application to him preferred, usually, in the court (*curia* or *curtis*) of the palace, for interference and redress. Anciently, the "court," for judicial purposes, was the king and his immediate attendants; later, it meant, in the judicial sense, those to whom he had delegated the authority to determine controversies and dispense justice, but who still sojourned or trav-

elled with him. It was an important stipulation in Magna Charta, that the court (speaking judicially) should no longer migrate with the royal progresses, but should be held at some settled place; which was carried into effect by the organization of *aula regia*, q. v. Now, the word court might well have been changed for a more appropriate substitute. But names are more enduring than things. Court continued in use in the sense of a tribunal of justice; an authority organized to hear and determine controversies in the exercise of judicial power.

Court has also been retained in its original and general sense, in the titles of some deliberative bodies, such as the general court of Massachusetts (the legislature); court of aldermen, or of directors, in occasional English use.

From the frequent necessity for discriminating between the judge or judges charged with deciding the law, and the jury intrusted with the determination of the facts, arises a usage of employing the phrase the court, to signify the permanent judicial members, as opposed to the jury. Thus, in some uses court may include the jury; more strictly it does not. Whether a clerk is an essential member of a court is not easily determined. Some have considered the attendance and co-operation of a clerk the distinguishing element between a court and a judge acting individually. Blackstone, indeed, says, that in every court there must be at least three constituent parts, — the actor, *reus*, and *judex;* the actor, or plaintiff, who complains of an injury done; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex*, or judicial power. 3 *Bl. Com.* 25. But we do not think that the parties enter into the proper definition of the term. Burrill's definition seems more accurate: An organized body, with defined powers, meeting at certain times and places for the hearing and decision of causes and other matters brought before it, and aided in this, its proper business, by its proper officers; viz., attorneys and counsel to present and manage the business, clerks to record and attest its acts and decisions, and ministerial officers to execute its commands and secure due order in its proceedings.

A place of meeting, assigned by law, is probably a proper element of a court. Judicial functions can be exercised by courts only when in actual session at the times and places specified by law, and in the manner which the law provides. Proceedings at another time and place, or in another manner, though in the personal presence and under the direction of a judge, are *coram non judice*, and void. Wightman *v.* Karsner, 20 *Ala.* 446; Brumley *v.* State, 20 *Ark.* 77.

Various classes of courts are designated by particular names, expressing distinction in the nature or extent of their jurisdiction, the system of jurisprudence or the principles upon which they administer justice, or in their forms and manner of procedure. Such terms are:

Courts of *original jurisdiction*, signifying courts which have jurisdiction of causes in the first instance, as distinguished from those having jurisdiction to review the decisions or proceedings of other courts by appeal, writ of error, or other similar means. The latter class are termed courts of *appellate* jurisdiction, frequently appellate courts, and sometimes courts of error.

Courts of *general jurisdiction;* those having jurisdiction of causes of every nature, with few or no exceptions; distinguished from those which have cognizance of certain limited classes of causes only, and which are termed courts of limited jurisdiction, or of special jurisdiction. Courts whose jurisdiction is limited territorially, having jurisdiction over causes arising or persons being within certain comparatively narrow limits, are called *local* courts.

Inferior courts, meaning sometimes courts which are subordinate to other courts, sometimes, merely courts of limited jurisdiction; from which are distinguished *superior* courts, which term designates courts of controlling authority as to inferior courts, yet which are courts of original jurisdiction, whether with or without appellate jurisdiction over the inferior courts; and *supreme*

courts, designating those which possess the highest jurisdiction, generally exercised by reviewing the decisions of either superior or inferior courts, or both. These three terms are all somewhat vague, and are differeutly used in various judicial systems, according to the peculiar organization and relations of the courts. Thus, in England, the term superior courts was long the distinctive name of the group composed of the court of chancery, and the three highest common-law courts, — the king's bench, common pleas, and exchequer: all of inferior jurisdiction to these being known as inferior courts.

Civil courts; including all which afford remedies for the enforcement of private rights and the redress of private wrongs, as distinguished from *criminal* courts, whose object is the redress of public wrongs and punishment of public offences.

Courts of *law*, which administer justice according to the principles and forms of the common law; courts of *equity*, whose jurisdiction and procedure are defined by equitable principles and forms; courts of *bankruptcy* and courts of *insolvency*, having cognizance of the administration of the law of bankruptcy and the distribution of insolvent estates; courts of *admiralty*, whose jurisdiction is limited to maritime causes, and which proceed under the forms of admiralty practice; *prize* courts, having jurisdiction of maritime captures; *courts-martial*, having cognizance of offences against military law, and proceeding under military forms; and *ccclesiastical* courts, also called courts *Christian*, which deal with matters relating to religion or ecclesiastical persons, — all which terms once denoted distinct classes of courts, some of which, as courts-martial, still preserve a separate existence; but in modern times the functions of several of these are frequently united in a single tribunal.

A familiar distinction is that between courts of *record* and courts *not of record:* the former being described as courts whose acts and judicial proceedings are enrolled for a perpetual memory and testimony, which have power to fine and imprison, and upon whose judgments error may be brought. In modern usage, a court of record is generally distinguished by the possession of a seal.

A statute passed in pursuance of a treaty stipulation to receive and adjust claims, authorizing certain judges to do so on *ex parte* applications, and to transmit the evidence and the decision to the executive department, does not create a court or judicial tribunal, but the judge acts as a commissioner, and his decision is not appealable. United States *v.* Ferreira, 13 *How.* 40.

Where the mayor of Leavenworth is sitting to hear the examination of offenders (as he may do), the tribunal is a court within the meaning of art. 3, § 1, of the constitution, and the proceeding is a prosecution. Malone *v.* Murphy, 2 *Kan.* 250.

A court which is entitled to have a seal is a court having a seal, though it actually has none. Ingoldsby *v.* Juan, 12 *Cal.* 564.

The words "court" and "judge," or "judges," are frequently used in our statutes as synonymous. When used with reference to orders made by the court or judges, they are to be so understood. Michigan Central R. R. Co. *v.* Northern Indiana R. R. Co., 3 *Ind.* 239.

The term court may be construed to mean the judges of the court, or to include the judges and jury, according to the connection and the object of its use. Gold *v.* Vt. Central R. R. Co., 19 *Vt.* 478.

An acknowledgment of a sheriff's deed certified by the clerk to have been taken "before the judge of the circuit court," held, to be not fatally defective; the terms judge and court being sufficiently synonymous to exclude any presumption that the acknowledgment was not taken before the court. McClure *v.* McClurg, 53 *Mo.* 173.

Court, in rule 82 of N. Y. Rules of 1858, No. 52, — requiring applications for allowance to be made "to the court before which the trial is had or the judgment rendered," — means justice. Dyckman *v.* McDonald, 5 *How. Pr.* 121; Osborne *v.* Betts, 8 *Id.* 31.

A change of judges after verdict, and before final decree, does not change the court. For all judicial purposes it remains the same; and such succeeding judge may render a final decree without hearing any evidence. Hedrick *v.* Hedrick, 28 *Ind.* 291.

The casual and temporary absence of one of the judges of a court from the seat assigned him neither breaks up the court nor impairs the validity of its proceedings. Tuttle *v.* People, 36 *N. Y.* 431.

The chancellors present at the hearing and decision of a cause constitute the court; and an absent chancellor's opinion will not be taken into consideration for the purpose of showing a division in the court. Johnson *v.* Lewis, 1 *Rich.* 390.

The office of clerk is not necessary to the existence of a court. The court may keep its own minutes and make its own adjournments without a clerk. Mealing *v.* Pace, 14 *Ga.* 596.

An inferior court, within the meaning of Const. art. 5, § 1, is a court whose judgments or decrees can be reviewed, on appeal or writ of error, by a higher tribunal, whether that tribunal be the circuit or supreme court. Nugent *v.* State, 18 *Ala.* 521.

To constitute a court a superior court as to any class of actions, within the common-law meaning of that term, its jurisdiction of such actions must be unconditional, so that the only thing requisite to enable the court to take cognizance of them is the acquisition of jurisdiction of the persons of the parties. Simons *v.* De Bare, 4 *Bosw.* 547.

Coke's definition — a court is a place where justice is judicially administered — wants fulness. In addition to the place, there must be the presence of the officers constituting the court. Time must be regarded also; for the officers of a court must be present at the time appointed. To constitute a court, its officers, and the time and place of holding it, must be those prescribed by law. Hobart *v.* Hobart, 45 *Iowa*, 501.

Court-house, in the law regulating execution sales, means the building where the court is being held, although it may be a church near the regular court-house. Kane *v.* McCown, 55 *Mo.* 181.

A power in a mortgage to sell "at the north door of the court-house," may be well executed by a sale at the ruins of the north door, if the building has meantime been destroyed by fire. The meaning of the phrase consists in identifying a place of sale, not in the identity of the door. Waller *v.* Arnold, 71 *Ill.* 350.

Such a power applies to a building appropriated by order of the county court to court purposes, pending repairs in the court-house proper. Hambright *v.* Brockman, 59 *Mo.* 52.

Courts of England. In Anglo-Saxon times, the courts of justice were the following: Wittenagemot, which was the court of appeal; council of wittenagemot, being the prototype of the privy council; shire-gemot, or county court, called also sheriff's tourn, and being the court of first instance for general civil cases; and the hundred courts and tything courts, which were courts for cases of smaller and merely local importance. Each of these courts, except the council of wittenagemot, exercised a criminal as well as a civil jurisdiction.

The courts which possessed criminal jurisdiction were:

In Anglo-Norman times, the county court, hundred court, and tything courts remained; but, in addition to them, a new court was introduced, being the court called the *aula regis* or *curia regis*, and which supplied the place of the Anglo-Saxon wittenagemot. This tribunal was, in fact, interchangeable with the house of lords, which thereupon became the supreme appellate court, and exercised for centuries an original jurisdiction also.

Additional to the house of lords, there were successively developed from *aula regis* the following: The judicial committee of the privy council, which remains a committee still; the court of exchequer, the separation of which from the *aula regis* is commonly assigned to the reign of Richard I., when the purposes of the king's revenue, for which exclusively it was set apart, necessitated its more permanent constitution as a court; the court of common pleas, the separation of which from the *aula regis* is commonly assigned to a date anterior to Magna Charta (it seems to be mentioned therein as a court already established), and which received, as subject-matter of its jurisdiction, civil causes (chiefly real property controversies) between subjects, in which the king had no interest; the court of king's bench, the separation of which from *aula regis* is commonly assigned to the reign of Edward I., that reign being the epoch of the establishment of common-law procedure in its leading features; the court of chancery, which acquired existence and jurisdiction as a separate court, in the reign of Edward III., under an ordinance directing the lord chancellor to inquire of matters of "grace," and was strengthened in the next reign (Richard II.) by receiving authority to issue the subpœna; and the star chamber, which was the residuum of the *aula regis* after the separation of the court of chancery, and had a jurisdiction partly civil but principally criminal, it being a tribunal supplementary to the other courts, and interposing where the others were from any cause prevented from acting. And, besides the above, which came into existence by successive divisions of the jurisdiction of *aula regis*, are the following, whose origins are independent of that tribunal: The court of admiralty, developed out of the jurisdiction of the constable over maritime causes; the courts-martial, developed

out of the jurisdiction of the earl marshal over military causes; the judges of assize and jail delivery, descended from the justices itinerant or in eyre, who were first appointed by an act of parliament, in 1176; and the courts ecclesiastical, which may have had an origin from the church, but have derived, since the reformation, their authority from the king, as the head of the church of England.

The judicial system of England has now been reorganized by two acts, taking effect together in November, 1875, — the Stat. 36 & 37 Vict. ch. 66, and 38 & 39 Vict. ch. 77. They are known as the supreme court of judicature acts.

With respect to the styles of courts, the judicial organization, and the distribution of jurisdictions, these acts unite and consolidate into one supreme court of judicature in England the following courts: High court of chancery, court of queen's bench, court of common pleas, court of exchequer, high court of admiralty, court of probate, court of divorce and matrimonial causes; the London court of bankruptcy remains an independent court, though the office of chief judge in bankruptcy is filled by a judge of the high court of justice, and the decisions of the court are subject to review by the high court of appeal. The supreme court is subdivided into two permanent divisions, —the high court of justice and the court of appeal; the former of which has original and some appellate jurisdiction, and the latter appellate and some original jurisdiction. The members of the high court of justice are, the lord chief justice of England, the master of the rolls, the lord chief justice of the common pleas, the lord chief baron of the exchequer, the vice-chancellors of the high court of chancery, the judge of the court of probate and of the court for divorce and matrimonial causes, the puisne judges of the court of queen's bench and of the court of common pleas, the junior barons of the court of exchequer, and the judge of the high court of admiralty. The lord chief justice of England is president of the court. The judges of the high court of appeal are, the lord chancellor, the lord chief justice of England, the master of the rolls, the lord chief justice of the common pleas, and the lord chief baron of the exchequer, who are styled the *ex officio* judges of the court; also, the lords justices of appeal in chancery, and an additional judge appointed, these being the ordinary judges of the court, and styled justices of appeal. The appointment, if necessary, of additional judges of appeal is authorized. The lord chancellor is president of the court of appeal.

Many provisions, in detail, are made for eligibility of persons to be appointed judges; for the tenure of the office of a judge; for rendering every such judge incapable of sitting in the house of commons; for the oath of office of a judge; for the precedence of judges, and for the non-judicial extraordinary duties of judges; for the rights and obligations of existing judges; for the salaries and retiring pensions of future judges; and for resignations of judges.

The high court of justice is declared a superior court of record, and invested with the following jurisdictions: 1. All the jurisdiction of the high court of chancery, as well in its common law as in its equity side, and including therein the ordinary and also the special jurisdiction of the master of the rolls, other than and except the following jurisdictions, — the appellate jurisdiction of the court of appeal in chancery, or of the same court sitting as a court of appeal in bankruptcy; the jurisdiction of the court of appeal in chancery of the county palatine of Lancaster; the jurisdiction, whether of the lord chancellor or of the lords justices (that of the lords justices being, however, in a manner transferred), over idiots, lunatics, and persons of unsound mind; the jurisdiction of the lord chancellor in the matter of letters-patent and in the matter of commissions or other writings under the great seal, or over colleges and charities; and the jurisdiction of the master of the rolls over records in England. 2. All the jurisdictions of the court of queen's bench, the court of common pleas at Westminster, the court of exchequer, the high court of admiralty, the court of probate, the court for divorce and matrimonial causes, the court of com-

mon pleas at Lancaster, and that at Durham, and the courts created by commissions of assize, oyer and terminer, and jail delivery; including in such jurisdictions the respective jurisdictions exercised by all or any one or more of the judges of the courts named, respectively, whether sitting in court or in chambers, or elsewhere, and all powers ministerial, and other of such respective courts and of their or any of their respective judges, and all duties and authorities incident to the same jurisdictions, or any part thereof, respectively.

The court of appeal is declared a superior court of record, and invested with the following jurisdictions: 1. The appellate jurisdiction of the lord chancellor and of the court of appeal in chancery, and of the same court sitting as a court of appeal in bankruptcy; the jurisdiction of the court of appeal in chancery of the county palatine of Lancaster, and of the chancellor of the duchy and county palatine of Lancaster when sitting alone or apart from the lords justices of appeal in chancery as a judge of rehearing or appeal from decrees or orders of the court of chancery of the county palatine of Lancaster; the jurisdiction of the court of the lord warden of the stannaries and his assessors, and of the lord warden in his capacity of judge; the jurisdiction of the court of exchequer chamber; the appellate jurisdiction of her majesty in council, or of the judicial committee of her majesty's privy council in admiralty and luuacy matters. 2. The appellate jurisdiction in respect of all judgments and orders of the high court of justice, or of any judges or judge thereof, with such powers incident thereto as are necessary for the exercise of the same jurisdiction, and as are given to the high court of justice. The acts preclude error or appeal being brought to the house of lords or to the judicial committee of the privy council from any judgment or order of the following courts: The high court of justice, the court of appeal, or the court of chancery of the county palatine of Lancaster; with a saving clause as to proceedings while the existing courts continue to exist. In case any ecclesiastical causes are referred to the court of appeal, that court shall be constituted of such of the judges of the court of appeal (to be assisted by such assessors, being archbishops or bishops of the church of England) as her majesty may direct by any general rules to be made by order in council upon the advice of any five or more of the judges of the court of appeal, and of any two or more of the said archbishops and bishops, being members of the privy council, subject to the same rules being approved by parliament. The several jurisdictions which in the act are mentioned to be transferred to the court of appeal respectively are abrogated, subject to provisions as to the existing business.

The high court of justice is divided into five divisions, called, respectively, the chancery division, queen's bench division, common pleas division, exchequer division, and probate, divorce, and admiralty division; to each of which are assigned, as the general rule, the judges of the old courts similarly named, and substantially the respective jurisdictions of those courts. And many provisions are made, as to matters of detail, for the distribution and despatch of business, and the conduct of proceedings. The practice is to follow the act, and rules and orders of court made pursuant to it; and, in the absence of such regulation upon any special point, shall be as nearly as may be the same as the old procedure and practice.

Procedure is modified by provisions establishing a fusion of law and equity remedies, and by enactment of some rules governing the determination of legal rights of frequent occurrence; both which are more fully stated under JUDICATURE ACTS, *q. v.*

The change in the organization of the English courts called for a change in the arrangement and system of the reports. The reports of the council of law reporting are accordingly now published in a new issue, commencing with the year 1876, one series comprising the appeal cases, or decisions of the court of appeal, and five series corresponding with and named for the five divisions of the high court of justice.

Besides the courts of superior jurisdic-

tion, described in the above sketch, are many courts of inferior or local jurisdiction, also ecclesiastical courts. For the description of the various English courts, see their respective names; such as AULA REGIA; CHANCERY; COUNTY COURT; COURT OF APPEAL; COURT OF ARCHES; COURT-BARON; COURT OF CHIVALRY; COURT OF COMMON PLEAS; COURT FOR CONSIDERATION OF CROWN CASES RESERVED; COURT OF THE CORONER; COURT OF COUNTY PALATINE; COURT FOR DIVORCE AND MATRIMONIAL CAUSES; COURT OF DELEGATES; COURT OF THE DUCHY OF LANCASTER; COURT OF EXCHEQUER; COURT OF EXCHEQUER CHAMBER; COURT OF FACULTIES; COURT OF HUSTINGS; COURT OF KING'S (or QUEEN'S) BENCH; COURT-LEET; COURT OF THE LORD HIGH STEWARD; COURT OF MARSHALSEA; COURT-MARTIAL; COURT OF OYER AND TERMINER; COURT OF PECULIARS; COURT OF PIEPOUDRE; COURT OF PROBATE; COURT OF REQUESTS; COURT OF STANNARIES; COURT OF STAR CHAMBER; COURTS OF THE UNIVERSITIES; ECCLESIASTICAL COURTS; HIGH COURT OF ADMIRALTY; HIGH COURT OF CHANCERY; HIGH COURT OF JUSTICE; HUNDRED COURT; PREROGATIVE COURT; SUPERIOR COURT; SUPREME COURT OF JUDICATURE.

Courts of the states, or state courts. While there is more uniformity than might be expected in the judicial systems of the several states, considering that in organizing their tribunals they act independently of each other, and of any common standard, it is yet difficult to give any general sketch of the state judiciaries which shall be at all minute and particular, while correct as to all. It may be said, however, that there is very generally a supreme court, having both original and appellate jurisdiction, the judges of which separately visit various county seats at stated times to hold jury trials, and afterward meet and hold court together to review the decisions made by each other upon their circuits; thus the court is at once the court of last resort and the tribunal of largest original jurisdiction. But in some of the states, where the increased judicial business has required it, an appellate court above the supreme has been established; and in some others the jurisdiction of the supreme court is appellate only. For original suits of lesser moment, there is, as a general thing, in each of the counties into which a state is divided, a court for the trial of suits in the first instance, known, usually, as the court of common pleas, the county court, the circuit court for the county, or some similar name; and this often has appellate jurisdiction over still inferior jurisdictions. In each county is, also, a court for the care of estates of deceased persons and superintendence of children and lunatics, and for other matters involving legal care of property without active lawsuits, which is differently styled probate court, orphans' court, surrogate's court, and the like, in different states. Then in each township are justices of the peace, clothed with authority to try lawsuits involving small amounts, or founded upon minor wrongs. In many of the larger cities, where it is found that the general system is inadequate for the increased judicial business, additional courts for the locality are established; for these, of the higher grade, city court and superior court are very common names; while inferior ones are in many cases styled district or justices' courts.

In a few of the states, where the distinction between law and equity is strongly preserved, distinct courts of chancery exist; but more commonly such equity jurisdiction as is there exercised is vested in courts having also common-law powers.

The trial of the graver offences is, perhaps, reserved to the supreme court; those of a medium character are often cognizable in a court of sessions, or in the county court, or in a branch of the supreme court termed the oyer and terminer, or in some court of the city having local criminal jurisdiction; while petty offences are triable before justices of the peace, or recorders, or police courts in cities. It is not practicable to enumerate all the titles employed to designate courts of the states; but the more important ones are the subject of separate explanations, under their appropri-

ate names, either below or under the heads.

Prior to the organization of the present constitutional government of the United States in 1789, several of the states maintained courts of admiralty; but these were abrogated by the federal constitution, which vested that branch of jurisprudence exclusively in the national courts. See Nicholson *v.* State, 3 *Har. & M.* 109; The Portland *v.* Lewis, 2 *Serg. & R.* 201.

For some account of the character of the leading courts of the states, see the various titles most in use; such as CIRCUIT COURT; CITY COURT; COUNTY COURT; COURT OF APPEALS; COURT OF CHANCERY; COURT OF COMMON PLEAS; COURT OF IMPEACHMENT; COURT OF ORDINARY; COURT OF OYER AND TERMINER; COURT OF PROBATE; COURT OF SESSIONS; DISTRICT COURT; JUSTICES' COURT; MUNICIPAL COURT; ORPHANS' COURT; PARISH COURT; POLICE COURT; SUPERIOR COURT; SUPREME COURT; SURROGATE'S COURT.

Courts of the United States, or United States courts. The purpose of the people of the United States, in organizing their present political system, to establish a dual system, — a national government for national purposes, for duties of common concern to the whole people; and a government by states for objects local or peculiar, or colored by the differing circumstances of the different communities, — involved the necessity of creating a twofold system of courts; accordingly the United States government has its distinct scheme of courts, clothed with powers appropriate to the national sphere. The constitution itself creates the supreme court. Acts of congress have established circuit and district courts for the ordinary administration of justice throughout the states, in controversies coming within the national jurisdiction. See CIRCUIT COURT; DISTRICT COURT; SUPREME COURT. The same authority has founded appropriate courts for the administration of justice in the District of Columbia (see SUPREME COURT OF THE DISTRICT OF COLUMBIA) and in the territories, and a court of claims *(q. v.)* for the determination of claims preferred by individuals against the government.

The expression, courts of the United States has come to be employed in two senses: sometimes as signifying the jurisdiction exercised under the national authority in the administration of justice within the states; in other cases, as including any of the courts established by the national government. In the first or strictest sense, — as when one speaks of the equity or criminal jurisdiction of the United States courts, the right of an assignee to sue in United States courts, and like expressions, — the meaning is, the district and circuit courts, and the supreme court in its appellate capacity. But, in instances where the phrase has been used in acts of congress, the context and general purpose of the act have been held to show that the court of claims, the supreme court of the District of Columbia, and the courts created for the territories, have been held included.

For an account of the different courts of the United States separately considered, see CIRCUIT COURT; COURT OF CLAIMS; DISTRICT COURT; SUPREME COURT.

The courts established or sanctioned in Mexico during the war by the commander of the American forces were nothing more than the agents of the military power to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power, and their decisions were under its control. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize. Jecker *v.* Montgomery, 13 *How.* 498.

The supreme court of the District of Columbia is embraced by the expression, "courts of the United States in the general laws of congress;" such as the acts regulating the testimony of parties in the courts of the United States. Noerr *v.* Brewer, 1 *McArthur*, 507.

Territorial courts are not courts of the United States, within the meaning of the constitution of the United States. The state courts, and not the federal courts, are the successors of the territorial courts, on the admission of the territory to the Union as a state. Beatty *v.* Ross, 1 *Fla.* 198.

The phrase, courts of the United States, is sometimes used to include courts established by congress in the territories; sometimes it does not. United States *v.* Haskins, 3 *Sawyer*, 262.

A territorial court is a United States court, within the meaning of the act of May 12, 1864, and is to be regarded as co-ordinate with the courts organized under the constitution. *Re* Osterhaus, 6 *Am. L. J. Rep.* 519.

Territorial courts. The territories are not states within the meaning of that word as generally used in the statutes relative to the jurisdiction and powers of the courts of the United states, Campbell *v.* Read, 2 *Wall.* 198; accordingly, the distinction between the federal and state jurisdictions, under the constitution of the United States, does not exist as to the territories, either in respect to the jurisdiction or the subjects submitted to the cognizance of their courts. They are legislative governments, and their courts legislative courts. Congress, in the exercise of its powers in the organization and government of the territories, combines the powers of both the federal and state authorities. Scott *v.* Jones, 5 *How.* 343. The jurisdiction of these courts, therefore, is not restricted by the limits of the judicial power of the United States as defined in the constitution, Benner *v.* Porter, 9 *How.* 235; and they are courts of the United States only in the sense that they are created by the government of the United States, and derive all their powers from the acts of congress.

In the organized territories (except Arizona), the judicial power is vested in a supreme court, district courts, probate courts, and justices of the peace. *Rev. Stat.* § 1907.

By the revised statutes, the supreme court of each territory consists of a chief justice and two associate justices, appointed for four years, who are required to hold an annual term at the seat of government of the territory.

Each territory is divided into three judicial districts, and a district court is prescribed to be held by one of the justices of the supreme court, at a time and place prescribed by law; and terms for causes in which the United States are not a party are held in the counties fixed by the laws of the territory. The supreme and district courts, respectively, possess chancery as well as common-law jurisdiction. Writs of error, bills of exceptions and appeals, are allowed in all cases from the final decisions of the district courts to the supreme court, under such regulations as may be prescribed by the territorial legislature. Justices of the peace are not given jurisdiction of any matter in controversy when the title of land may be in dispute, or where the debt or sum claimed exceeds one hundred dollars. The district courts have the same jurisdiction, in all cases arising under the constitution and laws, as is vested in the circuit and district courts of the United States; and the first six days of every term of the district courts, or as much as may be necessary, is required to be appropriated to the trial of causes arising under the constitution and laws; and writs of error and appeal in all such cases are to be made to the supreme court of such territory, as in other cases. A marshal and attorney are appointed, as are the judges, by the president and senate, and a clerk by each supreme court judge in his district. Many other details of organization and powers are prescribed by the revised statutes. Some embarrassment has been caused by questions of jurisdiction arising upon the change of the government of a territory into a state government. It is competent for congress to provide for the transfer of causes, whether civil or criminal, which are pending at the termination of the territorial government, to the national courts, with authority to proceed therein to a final disposition. Without such authority, cases pending in the territorial courts abate when the courts cease to exist by the change of organization. Forsyth *v.* United States, 9 *How.* 571; and see act of congress of June 12, 1858.

COURT OF APPEAL. The name of one of the two subdivisions of the supreme court of judicature in England, as constituted by the judicature acts of 1873 and 1875. The judges of the court are, the chancellor, the chief justice of England, the master of the rolls, the chief justice of the common pleas, the chief baron of the exchequer (who are judges *ex officio*), and the justices of appeal in chancery, with one additional judge, and more if necessary. The chancellor is the president of the court. Its jurisdiction is chiefly appellate; and

it is, in general, the tribunal of last resort in all ordinary suits and proceedings.

COURT OF APPEALS, or COURT OF ERRORS. One or other of these titles, with slight modifications, is employed in a number of the states, particularly Delaware, Kentucky, Maryland, New Jersey, New York, Texas, Virginia, and West Virginia, to designate a court chiefly, often exclusively, of appellate jurisdiction, and constituting the court of last resort in the state, though subject in constitutional cases to review in the supreme court of the United States.

Court of appeals in cases of capture. This was the name of a court created by the congress of the United States under the articles of confederation which preceded the adoption of the constitution. It had appellate jurisdiction in prize causes. Its jurisdiction and powers have been considered in Talbot *v.* Three Brigs, 1 *Dall.* 95; Miller *v.* The Resolution, 2 *Id.* 19; Ross *v.* Rittenhouse, *Id.* 160; Penhallow *v.* Doane, 3 *Id.* 54; United States *v.* Peters, 5 *Cranch*, 115; United States *v.* Bright, 1 *Whart. Dig.* (2d ed.) 143.

COURT OF ARBITRATION. A court of somewhat novel character, the full title of which is the court of arbitration of the chamber of commerce of the state of New York, has been organized in New York city, under authority of a state law passed in 1874. It is designed to meet the exigencies of commercial life in that city. Any party or parties having a controversy or dispute upon any mercantile subject may summon the opposite party to appear before the chamber of commerce for the settlement of such dispute by one or more arbitrators, if all the parties are regularly elected members of such chamber of commerce; and other persons, parties to any controversy or dispute arising within the port of New York, or relating to a subject-matter situate or coming within that port, may voluntarily appear and submit the same to the chamber of commerce, which thereby obtains jurisdiction of such matter and the parties. The official arbitrator, appointed by the governor of the state, presides; but the parties may name others to sit and decide the case with him. The pleadings are simple, each of the opposite parties presenting his views of the difficulty between them, and sustaining his side, with witnesses duly called. Counsel may be employed, if desired. The award of the arbitrator secures a final settlement of the matter submitted to him, is conclusive upon all parties thereto, and must be sustained in all the courts of the state. For a full statement of the jurisdiction, powers, and practical working of the court, see *N. Y. Laws* 1874, ch. 278, and *Laws* 1875, ch. 495.

COURT OF ARCHES. The name of an English ecclesiastical court, originally the court of appeal of the archbishop of Canterbury. Its name was derived from that of the church of St. Mary-le-Bow, in which the court was anciently held, called in Latin *Sancta Maria de arcubus*, the church of arches, from the peculiar architecture of its steeple. The judge was in like manner termed the dean of the arches. The ancient jurisdiction of the court extended only over the thirteen peculiar parishes belonging to the archbishop in London, but, the office of dean of the arches having been united with that of the archbishop's principal official, he subsequently, in right of such added office, received and determined appeals from the sentences of all inferior ecclesiastical courts within the province. A practice also grew up of bringing suits in this court in the first instance, the cognizance of which properly belonged to inferior jurisdictions within the province, but in respect of which the jurisdiction of the inferior judge was waived by a proceeding known in the canon law as letters of request, *q. v.* An appeal formerly lay from the court of arches to the court of delegates, and afterwards to the privy council.

COURTS OF ASSISE. See ASSISE.

COURT-BARON. The name of an English court incident to every manor in the kingdom, held by the steward within the manor. Courts-baron were of two natures: one, termed the customary court-baron, appertained entirely to the copyholders; in it their estates were transferred by surrender and admit-

tance, and other matters were transacted relative to their tenures only. The other, termed the freeholders' court-baron, was a court of common law, not of record, held before the freehold tenants who owed suit and service to the lord of the manor; and of this court the steward of the manor was rather the registrar than the judge. Its most important business was to determine, in the real action called the writ of right, all controversies relating to lands within the manor. It also had jurisdiction of personal actions, where the debt or damages did not amount to 40*s*. These courts, however, were long since disused; and their jurisdiction was practically taken away by the provision of the county courts act, 1867 (30 & 31 Vict. ch. 142, § 28), by which no action or suit, which can be brought in any county court, is maintainable in any inferior court not being a court of record.

Courts-baron seem to have been held in the colony of New York, while it was an English province. *Bouvier.*

COURT OF CHANCERY. The name usually applied in England and the United States to a court possessing general equity jurisdiction. The title of the former superior court of chancery in England was high court of chancery, *q. v.* In some of the United States, the title court of chancery is applied to a court possessing general equity powers, distinct from the courts of common law. This is now the case in Delaware, New Jersey, and Vermont. In Kentucky and Tennessee the title chancery court is used with a similar meaning. And throughout all the states the terms court of chancery or court of equity are used synonymously with reference to any court exercising equity jurisdiction, although not exclusively a court of equity. See CHANCERY.

The defendant in an action at law gave a bond conditioned to perform such order or decree as the court of chancery should pass in the premises. Held, that his failure to perform a decree of a county court, sitting as a court of equity, was not within the condition. Morgan *v.* Morgan, 4 *Gill & J.* 395.

COURT OF CHIVALRY. The name of an ancient English court, originally held before the lord high constable and the earl marshal jointly, and having jurisdiction both civil and criminal. It was also a court of honor, giving reparation in matters of that nature for which the common law gave no redress. Its civil jurisdiction extended to contracts and other matters touching deeds of arms and war, and its criminal jurisdiction to pleas of life and member in matters of arms and deeds of war. Upon the abolition of the office of high constable, the court lost its criminal jurisdiction, and during the eighteenth century was altogether disused. It was not a court of record. From it an appeal lay to the king in person. The modern military law and courts-martial appear to have been derived from this court.

COURT OF CLAIMS. Upon general principles, the sovereign power cannot be sued except by its own consent; the United States have created this tribunal, in which demands preferred by individuals against the national government may be brought to a judicial determination. The court was first created by act of Feb. 24, 1855; but under this law its powers were very limited, as in case of allowance of a claim it could only report to congress a bill authorizing payment, and this was subject to the same delays as a favorable report from a committee on claims would be. Subsequent acts have substantially reorganized the court upon the basis of rendering its judgments, unless appealed from, payable directly from the treasury.

The power of the court to render judgment only extends to a judgment for a money demand; and this is held to restrain the jurisdiction so that the court has no power to proceed upon any other claims than those for payment of money due, Alire's Case, 6 *Wall* 573, 3 *Ct. of Cl.* 447; and the claim must be in the nature of a claim of legal cognizance, founded on breach of contract. The court has no equitable jurisdiction, Bonner *v.* United States, 9 *Wall.* 156; nor can it entertain a demand against the government grounded in tort, Gibbons *v.* United States, 8 *Wall.* 269; but it may adjudge a set-off, Allen *v.* United States, 17 *Wall.* 207.

The court is composed of five judges,

three of whom constitute a quorum; but the concurrence of three is necessary to decide a cause. It holds an annual session, at Washington. Its decisions are, in cases specified by law, subject to an appeal to the supreme court.

COURT OF COMMISSIONERS OF SEWERS. The name of certain English courts created by commission under the great seal pursuant to the statute of sewers (23 Hen. VIII. ch. 5). The powers of each court are confined to such county or particular place as the commission shall expressly name. Their jurisdiction is to overlook the repairs of the banks and walls of the sea-coast and of navigable rivers, to cleanse such rivers and the streams communicating therewith, and to assess rates upon the owners of lands within their district for expenses. 3 *Bl. Com.* 73, 74; 3 *Steph. Com.* 296–298.

COURT OF COMMON PLEAS. In England, the court of common pleas, or, as it has also been called, the common bench, has been for centuries an important common-law court. The date of its origin is not certainly known, but appears to be anterior to Magna Charta. Its early jurisdiction embraced controversies between subject and subject, in which the crown had no interest: these, in the earliest times, were real-property actions chiefly; but, with the advance of civilization and increased variety and value of subject-matter of suits between individuals, the scope for the exercise of the jurisdiction of the court increased proportionately. It was also intrusted with a certain appellate jurisdiction over proceedings of revising barristers and some other matters. 3 *Bl. Com.* 36; 3 *Steph. Com.* 333. By the supreme court of judicature act, 1873, 36 & 37 Vict. ch. 66 (see COURTS), the business of the court of common pleas has been, from the time that the act came into operation (1875), transferred to the common pleas division of the high court of justice established under that act.

In many of the United States, court of common pleas has been used for a court of medium grade, corresponding nearly with county courts, so styled, in other states. The jurisdiction, territorially considered, is generally coextensive with a county; in some states, common pleas courts are established in every county; in others, only in particular counties, apparently those where extra-judicial business calls for an additional court. In New York, there was formerly a common pleas court for every county; but they were replaced under the constitution of 1846, except as to the court of common pleas for the city and county of New York, which still exists.

Court of common pleas for the city and county of New York, is the oldest judicial tribunal in the state. Under the name of "mayor's court," it existed from early colonial times; and it continued to be known by that name until 1821. At that date, as the mayor of the city, by whom the court was formerly held, had long since ceased to preside in it, the name was changed. The organization and powers of this court were remodelled, with those of the other courts, under the constitution of 1846. It has the same jurisdiction in civil actions as is possessed by the New York superior court; and, in addition, has power to entertain certain special proceedings, and to hear and determine appeals from the inferior local courts of the city,—the marine court and district courts. Formerly, its decisions on these appeals were final; but it now is authorized to permit an appeal to be taken from its determination in these cases to the court of appeals.

From 1846 to 1870, the common pleas was composed of three judges. In 1870, three more judges were added. Its business is transacted at special and general terms, organized on the same general plan with the supreme court and of the New York superior court. As it has full power, both legal and equitable, in actions properly brought before it, and its decisions at general term are only reviewable upon appeal to the courts of appeals, it is considered, in respect to actions of which it has jurisdiction, as a court of co-ordinate authority with the supreme court. 1 *Abb. N. Y. Dig.* xi. For a full history of the court, see 1 *E. D. Smith*, xvii.

COURT OF CONSCIENCE. See COURT OF REQUESTS.

COURT FOR CONSIDERATION OF CROWN CASES RESERVED. This court was established by Stat. 11 & 12 Vict. ch. 78, passed in 1848, being composed of the judges of the superior courts of Westminster, or such of them as are enabled to attend, for the purpose of deciding any question of law reserved for their consideration in the form of a special case by any judge or presiding magistrate in any court of oyer and terminer, jail delivery, or

quarter sessions, before which a prisoner was found guilty by verdict. 4 *Steph. Com.* 442.

COURT OF CONVOCATION. See CONVOCATION.

COURT FOR THE CORRECTION OF ERRORS. A name formerly used in some of the United States, *e.g.* New York and South Carolina, as the title or part of the title of a court of appellate jurisdiction. See COURT OF IMPEACHMENT.

COURT OF COUNTY PALATINE. According to Jacob and Tomlins, (voc. county), the counties of Chester, Durham and Lancaster were called counties palatine; and Durham and Lancaster had, each, distinct courts of law and equity; while Chester had a court of mixed jurisdiction, which has been, however, abolished.

COURT OF DELEGATES. A tribunal composed of delegates appointed by royal commission, and formerly the great court of appeal in all ecclesiastical causes. The powers of the court were, by 2 & 3 Wm. IV., ch. 92, transferred to the privy council. A commission of review was formerly granted, in extraordinary cases, to revise a sentence of the court of delegates, when that court had apparently been led into material error. *Brown.*

COURT FOR DIVORCE AND MATRIMONIAL CAUSES. The name of an English court established in 1857 by the divorce act of that year (20 & 21 Vict. ch. 85), of which the judges were the lord chancellor and the judges of the superior courts at Westminster, together with the judge of the probate court; the last-named judge being the judge in ordinary of the divorce court. To this court was transferred the matrimonial jurisdiction of the ecclesiastical courts, together with the power, previously exercised by private acts of parliament, to grant divorces *a vinculo* in certain cases. And, by Stat. 21 & 22 Vict. ch. 93, persons might apply to this court for a declaration of their legitimacy, or of the validity of the marriages of their fathers and mothers, or of their grandfathers and grandmothers; or for declaration of their own right to be deemed natural-born subjects. 2 *Steph. Com.* 239. By the supreme court of judicature act, this court is merged in the high court of justice.

COURT OF EQUITY. See COURT OF CHANCERY.

COURT OF ERRORS. The title employed in several of the states to designate a court chiefly, often exclusively, of appellate jurisdiction, and constituting the court of last resort in the state, though subject, in constitutional cases, to review in the supreme court of the United States.

COURT OF EXCHEQUER. The name of one of the three superior courts of common law, which for so long time existed in England; this being the lowest of the three in rank. It was of very ancient origin (see COURTS, subd. *Courts of England*), being created principally to order the revenues of the crown, and to recover the king's debts and duties. It derived the name exchequer from a checked cloth, resembling a chess-board, which covered the table, and on which, when certain of the king's accounts were made up, the sums were marked and scored with counters.

The exchequer consisted of two divisions, — the receipt of the exchequer, which manages the royal revenue, and the court, or judicial part. This court originally had jurisdiction of cases involving injury to the revenue; but the privilege of suing and being sued in this court was early extended to persons who were in account with the crown, on the theory that the remedy thus accorded them enabled them better to meet their obligations and balances; and, later, personal actions generally were embraced, upon a fiction that the plaintiff was indebted to the king, and needed a recovery upon his demand against the defendant, to enable him to pay his taxes, &c. The court of exchequer was, until 1842, subdivided into a court of equity and a court of common law; but, by the Stat. 5 Vict. ch. 5, all the equity jurisdiction of the court of exchequer was transferred to the court of chancery. This court consisted, moreover, of a revenue side, and of a common-law or plea side. On the

revenue side, it ascertained and enforced the proprietary rights of the crown against the subjects of the realm; on the plea side, it administered redress between subject and subject in all actions personal. 3 *Bl. Com.* 44–46; 3 *Steph. Com.* 338–340. By the judicature act, the business of the court of exchequer has been transferred to the exchequer division of the high court of justice.

COURT OF EXCHEQUER CHAMBER. The name of a former English court of appeal, intermediate between the superior courts of common law and the house of lords. When sitting as a court of appeal from any one of the three superior courts of common law, it was composed of judges of the other two courts. 3 *Bl. Com.* 56, 57; 3 *Steph. Com.* 333, 356. By the supreme court of judicature act, the jurisdiction of this court is transferred to the court of appeal.

The court of exchequer chamber was first erected by Stat. 31 Edw. III. ch. 12, to determine causes upon writs of error from the common-law side of the court of exchequer. It was composed of the lord chancellor and lord treasurer, together with the justices of the king's bench and common pleas. By statute 27 Eliz. ch. 8, a second court of exchequer chamber, in imitation of this court, was formed, consisting of the justices of the common pleas, and the barons of the exchequer, before whom writs of error might be brought to review suits originally brought in the court of king's bench. (3 *Bl. Com.* 56.) Causes which the judges, on argument, find to be of great weight and difficulty are sometimes adjourned to this court before any judgment is rendered on them in the court below (4 *Inst.* 119).

In the court of exchequer chamber there are no more than two return days in every term; one, the general affirmance day, being appointed by the judges to be held a few days after the beginning of every term, for the general affirmance or reversal of judgments; the other, the adjournment day, is usually held a day or two before the end of every term. On the first of these days judgments are affirmed or reversed, or writs of error *non prossed;* the intent of the latter is to finish such matters as were left undone at the former. On either of these days judgments may be affirmed or reversed, or writs of error non prossed, on paying a fee extraordinary to the clerk of the errors, and setting down the cause for affirmance two days before the adjournment day. *Jacob.*

COURT OF GENERAL SESSIONS. The title of a court in some of the states, chiefly of criminal jurisdiction. In the county of New York the court of general sessions is held by a single judge, who may be either the recorder of the city and county, or the judge of the court of general sessions; and two branches of the court may be held at once. It has jurisdiction of all crimes and misdemeanors; also appellate jurisdiction from the court of sessions.

COURT OF HUSTINGS. Courts of hustings are mentioned in the charters of Great Yarmouth, Lincoln, York, and Norwich; and the name is to this day given to the temporary courts held for the election of members of parliament in every county and borough. But "court of hustings," generally means the court of that name held within the city of London, before the lord mayor, recorder, and sheriffs. This court is the representative, within the city, of the ancient county court of the sheriff. It had exclusive jurisdiction in all real and mixed actions for the recovery of land within the city, except ejectment. But now that all real and mixed actions, except ejectment, are abolished, the jurisdiction of this court has fallen into comparative desuetude. (3 *Bl. Com.* 80; 3 *Steph. Com.* 293, note; *Pulling Cust. Lond.*) *Mozley & W.*

COURT OF IMPEACHMENT. This term signifies a court authorized to try charges against a public officer, of malversation in office, where the prominent question is his removal from office, rather than his amenability to punishment. See IMPEACHMENT.

By the United States constitution, the senate has the sole power to try all impeachments; and the chief justice presides. But we do not understand that the senate becomes a court in thus sitting, though it is often so described, but rather that it acts as senate in the exercise of a peculiar authority.

In New York, before the constitution of 1846, there was a court for the trial of impeachments and correction of errors, in which the state senators, as such, participated, but which was a distinct court, and had jurisdiction of impeachment cases. The scheme of courts established by the constitution of 1846 embraces,

as the first on the list, the court for the trial of impeachments. *Code of Pro.* § 9.

The common law is not applicable to questions concerning the organization of a court of impeachment, but only to the trial; the body that prefers, as well as the body that tries, the charges being unknown to the common law, and dissimilar to the British parliament. Adams *v.* Hillyer, 2 *Kan.* 17.

COURT OF KING'S (or QUEEN'S) BENCH. The name of an English court of great antiquity and authority, for centuries the supreme court of common law of the kingdom. It was the direct successor of the *aula regia*. Its name is derived from the fact that anciently the king in person sat in the court; and it was always in theory held before the sovereign, its title changing to court of queen's bench during the reign of a queen. But although supposed to follow the person of the sovereign, it was in fact permanently fixed at Westminster, being the highest in rank of the three superior courts of common law there held. It was composed of a lord chief justice and four puisne or associate justices, who were all, by virtue of office, the sovereign conservators of the peace and supreme coroners of the kingdom. The jurisdiction of the court, although originally only criminal in its nature, including trespasses, began at an early period to be extended, and gradually came to include also all personal actions between subject and subject at common law, and actions of ejectment. It had also extensive supervisory powers over inferior tribunals, and magistrates, corporations, &c. Its jurisdiction and powers are transferred, by the judicature acts of 1873 and 1875, to the high court of justice created by those acts.

Connected with the court of queen's bench and auxiliary thereto, was the practice court, usually presided over by the puisne judges in rotation. The practice court, called also the bail court, heard and determined common matters of practice and ordinary motions for writs of *mandamus* prohibition, &c.

The court of king's bench is so called because the king used formerly to sit in court in person, the style of the court still being *coram ipso rege*. During the reign of a queen it is called the queen's bench, and in the time of Cromwell, during the usurpation, it was styled the upper bench. This court consists of a chief justice and four puisne judges, who are, *ex officio*, the sovereign conservators of the peace, and supreme coroners of the land. Although the king used to sit in this court himself, and still is supposed so to do, he did not, neither by law is he empowered to, determine any cause or motion, but by the mouth of his judges, to whom he has committed the whole of his judicial authority. It has been said that Henry III. sat in person with the justices in *banco regis* several times, being seated on a high bench, and the judges on a lower one at his feet; this, however, is doubtful. Edward IV. sat three days, in the second year of his reign, wholly to see, as he was young, the mode of administering justice. James I., it is also said, sat there for a similar reason. (3 *Bl. Com.* ch. 4.)

It is said that in Westminster Hall, under the modern erections for the courts of king's bench, and chancery, there still remain a stone bench or table and a stone chair, used by some of our ancient kings, when they sat in parliament, or for the administration of justice. This court, which is the remnant of the ancient *aula regia*, is not, nor can it be, from its nature and constitution, fixed to any certain place, but may follow the king's person wherever he goes. It hath, indeed, for some centuries past, usually sat at Westminster, this being an ancient palace of the crown, but might remove with the king to York or Exeter, if he thought proper to so command. After Edward I. had conquered Scotland, it usually sat at Roxburgh. Toward the latter end of the Norman period, the *aula regis*, which was, before, one great court, presided over by a *justiciar*, was divided into four distinct courts: the court of chancery, king's bench, common pleas, and exchequer. After the establishment of the common pleas, which was for the express purpose of determining civil suits, the court of king's bench was accustomed, in ancient times, to be especially exercised in all criminal matters and pleas of the crown, leaving the judging of private contracts and civil actions to the common pleas and other courts. The court has always retained a supreme original jurisdiction in all criminal matters. *Tomlins.*

This court, upon the crown side, took cognizance of all criminal causes from high treason down to the most trivial misdemeanor or breach of the peace. Into it, also, indictments from all inferior courts might be removed by writ of *certiorari*, and be tried. On the plea side it exercised a general jurisdiction over all actions between subject and subject, with the exception of real actions and suits concerning the revenue. Its jurisdiction in civil actions was formerly limited to trespass or injuries said to have been committed *vi et armis*, but by means of fictions it took jurisdiction over all personal actions, and continues to ex-

ercise it under 2 Wm. IV., ch. 39, which abolished the fictions. *Wharton.*

The court keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined before itself, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, and in every case where there is no other specific remedy, it protects the liberty of the subject by speedy and summary interposition. It takes cognizance both of criminal and civil causes; the former in what is called the crown side, or crown office; the latter, in the plea side of the court. (3 *Bl. Com.* 41–44; 4 *Id.* 265–267.) *Mozley & W.*

COURT-LEET. The name of an English court of record held once in the year, and not oftener, within a particular hundred, lordship, or manor, before the steward of the leet; being the king's court granted by charter to the lords of those hundreds or manors. Its office was to view the frankpledges, — that is, the freemen within the liberty; to present by jury crimes happening within the jurisdiction; and to punish trivial misdemeanors. It has now, however, for the most part, fallen into total desuetude; though in some manors a court-leet is still periodically held for the transaction of the administrative business of the manor. (4 *Bl. Com.* 273, 274; 4 *Steph. Com.* 321–323.) *Mozley & W.*

COURT OF THE LORD HIGH STEWARD. The name of an English court instituted for the trial, during the recess of parliament, of peers indicted for treason or felony, of for misprision of either. Into this court indictments against peers of parliament are removed by *certiorari*. The office of lord high steward is created in modern times, when occasion requires, and for the time being, only; and he, with such of the temporal lords as may take the proper oath, and act, constitute the court; he sitting, substantially, as judge; they as jurors.

COURT OF MARSHALSEA. A court which had jurisdiction of all trespasses committed within the verge of the king's court, where one of the parties was of the royal household; and of all debts and contracts, when both parties were of that establishment. (3 *Bl. Com.* 75.) It was abolished by 12 & 13 Vict. ch. 101, § 13. (3 *Steph. Com.* 315, note.) *Mozley & W.*

The marshalsea court, or court of the marshal of the king's household, was originally held before the steward and marshal, and was instituted to administer justice between the king's domestic servants, in order that they might not be drawn into other courts, and thus deprive the king of their services. This court is now merged into the palace court (*curia palatii*), which was established by Charles I., to be held before the steward of the household and knight marshal, and the steward of the court or his deputy, with jurisdiction in all manner of personal actions arising between any parties within twelve miles of the king's palace at Whitehall. The court is now held once a week, together with the ancient court of marshalsea, in the borough of Southwark, and a writ of error lies from thence to the court of king's bench. *Holthouse.*

COURT-MARTIAL. Courts-martial, as organized under the laws of the United States, lack somewhat of the permanent character and established place of session which ordinarily characterize a "court." Yet they are said to be judicial tribunals constituted by statutory authority, and organized in pursuance of statutory regulation, for the administration of a great and important department of jurisprudence, — the law military. They are, in the strictest sense, courts of justice, having jurisdiction of a large, and, in some respects, distinct community, and taking judicial cognizance of the duties and obligations which the citizen assumes when he enters, by enlistment or otherwise, into the military service of the country. They are, moreover, not only legally constituted courts of justice, but also courts whose judgments in cases fitted for their consideration and determination are as final, conclusive, and authoritative as those of any judicial tribunal of the country. Records of Courts-Martial, 11 *Op. Att.-Gen.* 137.

The several states do not maintain armies; but in the exercise of the power to organize a militia they may and do authorize courts-martial, whose jurisdiction and powers are, however, of minor importance.

In England, courts-martial are said to be two: 1. A court having jurisdiction to try and punish offences against the provisions of the mutiny act, and the articles of war made by the sovereign in pursuance thereof. Courts of this class are either general, detachment-general, district or garrison, regimental or detachment; of these, only the first two can try a commissioned officer, or pass sentence of death or penal servitude.

2. A court erected under the acts for the government of the navy, for the punishment of offences against naval discipline. A court for the trial of offences against naval discipline is called a naval court-martial. 2 *Steph. Com.* 589–598; *Simmons Courts-Martial.*

The authority of the court of chivalry, first established by the common law, and confirmed by several statutes, was never objected to, even in criminal cases, until the post of high constable was laid aside; from that time until the revolution there does not appear to have been any court for the administration of martial law; and the authority of the court of chivalry, as held from time to time by the earl-marshal, was exercised only in civil matters. During this time there are instances of courts or commissions erected for the administration of martial law; though illegal, they were sustained from necessity. And the two houses of parliament, in the beginning of their rebellion against Charles I., passed an ordinance (evidently unconstitutional), in 1644, appointing commissioners to execute martial law. This ordinance was adopted as a model for the mutiny act passed after the revolution. It was not till 1689 that a regular act was passed for punishing mutiny and desertion by courts-martial. This act, originally temporary, has been annually renewed. Courts-martial are now held by the same authority as the other courts of judicature of the kingdom; the crown has the prerogative of clemency or pardon, but can no more add to or alter the sentence of a court-martial than he can a judgment given in the courts of law. *Jacob.*

COURT OF ORDINARY. A name applied in some of the United States, as Georgia, to a court which has jurisdiction of the probate of wills and the administration of estates and decedents. See ORDINARY.

COURT OF OYER AND TERMINER. In England, courts for the examination and trial of persons accused of crime, held by commissioners appointed and authorized under the great seal, are called, from the terms of the commission, courts of oyer and terminer, and general jail delivery. Under the two commissions, they possess the broadest criminal jurisdiction.

In the United States, the name court of oyer and terminer, sometimes with various additions, is in general use as the title, or part of the title, of a state court of criminal jurisdiction, or of the criminal branch of a court of general jurisdiction.

COURT OF PECULIARS. The name of an English ecclesiastical court, a branch of the court of arches (*q. v.*), of more limited territorial jurisdiction.

The court of peculiars has jurisdiction over all those parishes, dispersed through the province of Canterbury, which are exempt from the ordinary's jurisdiction, and subject to the metropolitan only. *Mozley & W.*

COURT OF PIEPOUDRE. The name of an English court of special jurisdiction, incident to every fair or market, which has long since fallen into disuse. Its jurisdiction was both civil and criminal, but extended only to matters occurring at the particular fair or market.

A court of record incident to every fair and market, of which the steward of him who owned the toll of the market was the judge. Its jurisdiction extended to all commercial injuries done in that fair or market, and not in any preceding one. From this court a writ of error lay in the nature of an appeal to the courts at Westminster. *Mozley & W.*

The court of *piedpoudre* was so called either from the dusty feet of the suitors or because justice is there done as speedily as dust falls from the foot, or as derived from the old French *pied puidreaux* referring to pedlers or petty chapmen, such as resorted to fairs and markets. *Wharton.*

COURTS OF PRINCIPALITY OF WALES. A species of private courts of a limited, though extensive, jurisdiction, which were erected all over the country, principally by Stat. 34 & 35 Hen. VIII., ch. 26. These courts have all been abolished by Stat. 11 Geo. IV., and 1 Wm. IV.; the principality being divided into two circuits, which are visited by the judges in the same manner as in England, for the purpose of hearing and determining those causes which are ready for trial. 3 *Bl. Com.* 77.

COURT OF PROBATE. The name of an English court established in 1857, under the probate act of that year (20 & 21 Vict. ch. 77), to which court was transferred the testamentary jurisdiction of the ecclesiastical courts. 2 *Steph. Com.* 192.

By the judicature acts, this court is merged in the high court of justice.

In many of the United States, court of probate, or probate court, is used as the title of the court having general probate jurisdiction; that is, to take proof of wills, to issue letters testamentary, letters of guardianship and of administration, to superintend the ad-

ministration of estates and the accountings of representatives and trustees, and many cognate matters. The same jurisdiction is exercised in other states by orphans' or surrogates' courts. To this strictly probate jurisdiction is often added a limited jurisdiction in civil or criminal actions. Courts under the title of court of probate, or probate court, exist in Alabama, Arkansas, California, Connecticut, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, and Vermont.

COURT OF REQUESTS. 1. The name of an ancient English court of equity of the same nature with the court of chancery, but inferior to it; of which the lord privy seal was chief judge, assisted by the masters of requests. Having assumed great power, so that it became burdensome, it was abolished by Stat. 16 & 17 Car. I. ch. 10.

2. Court of requests (otherwise called court of conscience) is the title of courts for the recovery of small debts formerly established by acts of parliament in various parts of the kingdom of England, but for the most part abolished by Stat. 9 & 10 Vict. ch. 95.

COURT OF SESSION. The name of the highest court of civil jurisdiction in Scotland.

It was composed of fifteen judges, now of thirteen. It sits in two divisions, the lord president and three ordinary lords form the first division, the lord justice clerk and three other ordinary lords form the second division. There are five permanent lords ordinary attached equally to both divisions; the last appointed of whom officiates on the bills, *i. e.*, petitions preferred to the court during the session, and performs the other duties of junior lord ordinary. The chambers of the parliament house in which the first and second divisions hold their sittings are called the inner house; those in which the lords ordinary sit as single judges to hear motions and causes are collectively called the outer house. The nomination and appointment of the judges is in the crown. *Wharton.*

COURT OF SESSIONS. In New York, except in the county of that name, the court of special sessions is composed of the county judge, who presides, and two associates, elected for that purpose, and styled justices of sessions. The jurisdiction is solely criminal, and extends to the trial of misdemeanors, and, generally, to all criminal matters formerly cognizable by the court of general sessions of the peace of the county. These courts are held at the same time and place at which county courts are held.

In the county of New York there are two courts of sessions, — the court of special sessions and the court of general sessions. The former is composed of and held by any three of the police justices of the city, and has exclusive jurisdiction of all misdemeanors, unless the accused elects, on his examination before the committing magistrate, to be tried in the court of general sessions. The court of general sessions is held by a single judge, who may be either the recorder of the city and county, or the city judge, or the judge of the court of general sessions; and two branches of the court may be held at the same time. Its jurisdiction extends to all crimes and misdemeanors whatsoever, including crimes punishable with death or imprisonment for life. It has also appellate jurisdiction from the court of special sessions.

COURT OF STANNARIES. The name of an English court established in Devonshire and Cornwall, for the administration of justice among the miners and tinners, and that they may not be drawn away from their business to attend suits in distant courts. The stannary court is a court of record, with a special jurisdiction.

All tinners and laborers in and about the stannaries, (*i. e.* the mines and works in Devon and Cornwall, where tin metal is dug and purified) may sue and be sued in this court in all matters arising within the stannaries, excepting pleas of land, life, and member. But since the Stat. 9 & 10 Vict. ch. 95, the plaintiff may choose between the stannary court and the county court of the district in which the cause of action arose.

COURT OF STAR CHAMBER. This was an English court of very ancient origin, but new-modelled by Stats. 3 Hen. VII. ch. 1, and 21 Hen. VIII. ch. 20, consisting of divers lords, spiritual and temporal, being privy councillors, together with two judges of the courts of common law, without the intervention of any jury. The jurisdiction extended legally over riots, perjury, misbehavior of sheriffs, and other misdemeanors contrary to the laws of the land; yet it was afterwards stretched to the asserting of all proclamations and orders of state, to the vindicating of illegal commissions and grants of monopolies; holding for honorable that which it pleased, and for just that which it profited, and becoming both a court of law to determine civil rights, and a court of revenue to enrich the treasury. It was finally abolished by Stat. 16 Car. I. ch. 10, to the general satisfaction of the whole nation. *Mozley & W.*

See an elaborate and interesting account, 12 *Am. Law Rev.* 21.

COURTS OF UNIVERSITIES. The chancellor's courts in the universities of England used to enjoy the sole jurisdiction, in exclusion of the king's courts, over all civil actions and suits whatsoever, when a scholar or privileged person was one of the parties, excepting in such cases where the right of freehold was concerned. These privileges were granted in order that the students might not be distracted from their studies by legal process from distant courts. And these university courts were at liberty to try and determine either according to the common law of the land, or their own local customs, at their discretion. These privileges are still in part exercised at Oxford, but by a recent private statute have been taken away from Cambridge. In pursuance of Stat. 17 & 18 Vict. ch. 45, and 25 & 26 Vict. ch. 26, § 12, the procedure is as in the county courts, and the rules of the statute law of England have taken the place of the rules of the civil law. *Brown.*

COURT-ROLLS. The rolls of a manor, whereon are entered all surrenders, wills, grants, admissions, and other acts relating to the manor. They are considered to belong to the lord of the manor, and are kept by the steward as his agent; but they are in the nature of public books for the benefit of the tenants as well as the lord, so that it is a matter of course for the courts of law to grant an inspection of the court-rolls in a question between two tenants. *Scriven Copyholds.*

COURTS OF WESTMINSTER HALL. This is a general, popular expression, frequent in English books, designating, collectively, the higher English courts. Anciently the court travelled with the king. See COURTS. But as this was inconvenient to suitors, witnesses, and jurors, a provision was included in Magna Charta looking towards a permanent establishment of the principal tribunals. The palace of Westminster Hall became the site. The expression, superior courts at Westminster Hall, included, before the changes introduced by the judicature act, the court of chancery, the king's bench, common pleas, and exchequer. See *Brown.*

COUSIN. In English writs, commissions, and other formal intruments issued by the crown, signifies any peer of the degree of an earl. The appellation is as ancient as the reign of Henry IV., who, being related or allied to every earl then in the kingdom, acknowledged that connection in all his letters and public acts; from which the use has descended to his successors, though the reason has long ago failed. (1 *Bl. Com.* 398; 2 *Steph. Com.* 603, 604.) *Mozley & W.*

COVENANT. 1. The general signification of the word covenant includes any kind of promise or contract, whether made verbally or in writing. In its technical sense a covenant is an agreement or promise in writing, under seal, between two or more persons, whereby one or more of them promises the performance or non-performance of certain acts, or stipulates that a certain state of things does or does not, or shall or shall not, exist. It is distinguished from a simple contract by being under seal. The word is not usually employed as descriptive of any deed complete in itself, but is applied to a clause of agreement contained in an instrument under seal.

To create an express covenant, the word covenant is the proper term, but it is not essential. Such words as "I agree," "I bind myself" and the usual language of a bond have been held sufficient. And, in general, any words plainly showing the intent of the parties so to bind themselves raise an express covenant. Besides express covenants, a covenant may, in proper cases, be implied, that is, raised or imputed by law, upon inference of an intent which is not plainly declared by the instrument.

The distinction between dependent and independent covenants is of importance. If two or more covenants in an instrument are so related that a party

cannot claim performance of one, unless he has performed or tenders performance of another, the covenants are called dependent. If the obligation of a covenant rests upon its own terms, irrespective of performance or non-performance of others, though in the same instrument, it is called independent.

Covenants are often mentioned as real covenants, or covenants running with land. These are such as relate to or are connected with real property, so that they bind whoever, successively, may acquire the land, though he never made the covenant. The most important class of real covenants comprises those termed covenants for title, the purpose of which is to assume the full enjoyment of what the deed purports to convey.

These covenants are, respectively, the covenant of seisin,— that the grantor is seised of a specified estate in the premises conveyed; the covenant of right to convey, — that the grantor has a perfect right to convey the premises; the covenant for quiet enjoyment, — that the grantee shall quietly possess and enjoy the premises without interruption; the covenant against incumbrances, — that there are no incumbrances upon the premises other than such as may be specified; the covenant for further assurance, — that the grantor, his heirs, &c., will execute any further conveyance or assurance required to effect the purpose of the deed; and, in the United States, the covenant of warranty, which is more commonly used than any of the others, though not used in England, — that the grantor will warrant and for ever defend the title of the grantee to the premises conveyed.

Many covenants are distinguished according to the specific purpose of each. Such are covenants to convey; covenants not to sue; covenants against nuisances in conveyances, leases, &c.; and covenants for renewal in leases.

Covenant is a contract, and is a writing obligatory, or parol promise, according as it is sealed or not. Magee *v.* Fisher, 8 *Ala.* 320.

The following are the rules for deciding whether in any given case a covenant is dependent or independent:

1. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to, or may, happen before the thing which is the consideration for the money or other act is to be performed, an action may be brought for the money, or to enforce doing the other act, before the performance of the consideration.

2. Where a covenant goes only to part of the considerations on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant; and an action may be maintained for a breach of the covenant on the part of the defendant, without any averment of performance in the declaration.

3. Where two acts are to be done at the same time, neither party can maintain an action against the other without showing performance of, or an offer to perform, his part, although it be not defined which of them is obliged to do the first act; and this third rule applies more especially to all cases of sale. *Brown.*

Covenants are either dependent, concurrent, or mutual and independent. The first depends on the prior performance of some act or condition, and until the condition is performed the other party is not liable to an action on his covenant. In the second, mutual acts are to be performed at the same time; and if one party is ready, and offers to perform his part, and the other neglects or refuses to perform his, he who is ready and offers has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act. The third sort is where either party may recover damages from the other for the injuries he may have received by a breach of the covenants in his favor; and it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. Bailey *v.* White, 3 *Ala.* 330.

A covenant real has for its object something annexed to, or inherent in, or connected with, land or other real property, and runs with the land, so that the grantee of the land is invested with it, and may sue upon it for any breach happening in his time. Davis *v.* Lyman, 6 *Conn.* 249.

2. A form of action at common law to recover damages for the breach of a contract under seal. This is the proper remedy, under common-law practice, in all cases of breach of a promise made under seal where the damages are unliquidated; in such cases, neither assumpsit nor debt can be maintained. It is also a concurrent remedy with debt in some cases; but is said never to be concurrent with assumpsit.

COVENABLE. Is a French word signifying convenient or suitable; as, covenably endowed. It is anciently written convenable. *Termes de la Ley.*

COVENTRY ACT. A notable Eng-

lish statute, the 22 & 23 Car. II. ch. 1, punishing mayhem. It derived its name from being occasioned by an assault on Sir John Coventry. It has been superseded by later legislation on the same subject.

COVERTURE. Marriage, in its sense of a status, not in that of a ceremony; the condition of being married. It is used almost exclusively of woman. Covert, or couverte: married. Originally, covert meant covered, protected, sheltered; but there is no occasion for its use in this sense in modern law.

Coverture is when a man and woman are married together; now whatsoever is done concerning the wife in the time of the continuance of this marriage is said to be done during the coverture, and the wife is called a woman covert, and thereby is disabled from contracting with any one to the prejudice of herself or her husband, without his consent or privity, or, at least, without his allowance and confirmation. *Termes de la Ley.*

COVIN. A secret assent determined in the hearts of two or more to the prejudice of another; as if tenant for life or tenant in tail secretly conspire with another, that the other shall recover against the tenant for life lands which he holds, &c., to the prejudice of the one in reversion; or, if an executor or administrator permit judgments to be entered against him by fraud, and plead them to a bond, or any fraudulent assignment or conveyance be made, the injured party may plead covin and obtain relief. *Termes de la Ley.*

Covin has been defined by Lord Ellenborough as being a contrivance between two persons to defraud or cheat a third. Mix *v.* Muzzy, 28 *Conn.* 166.

COW. A heifer, twenty months old, and which has not begun to give milk, may be exempt from execution as a cow. Carruth *v.* Grassie, 11 *Gray*, 211.

Where the writ in replevin described the property as a heifer, and the certificate of appraisement styled it a cow, held, that the variance was not material. Pomeroy *v.* Trimper, 8 *Allen*, 398.

In a penal statute which mentions both cows and heifers, they should be discriminated; and by the term cow must be understood one that has had a calf. Rex *v.* Cook, 1 *Leach Cr. Cas.* 123; 2 *East Pl. Cr.* 616.

CRAFT. The expression, "bay or river craft, or other boat," in the code of Virginia, includes steamboats of five hundred tons burden. And the word craft includes all kinds of sailing vessels. The Wenonah *v.* Bragdon, 21 *Gratt.* 685.

A small pleasure boat, without deck, propelled by a small steam engine, and run occasionally by its owners for pleasure only, was held not within the provisions of the United States steam inspection laws, which require every ferry-boat, canal-boat, yacht, "or other small craft of light character propelled by steam," to be inspected. United States *v.* The Mollie, 2 *Woods*, 318.

CRANAGE. A liberty to use a crane for drawing up goods and wares of burden from ships and vessels, at any creek of the sea, or wharf, unto the land and to make a profit of doing so. It also signifies the money paid and taken for the service. *Tomlins.*

CRASSA NEGLIGENTIA. Gross negligence. See NEGLIGENCE.

CREATE. To create a charter or a corporation is to make one which never existed before, while to renew one is to give vitality to one which has been forfeited or has expired; and to extend one is to give an existing charter more time than originally limited. Moers *v.* City of Reading, 21 *Pa. St.* 188.

The continuance of an old charter is not the creation of a new corporation, and does not infringe a constitutional provision restricting the creation of new corporations, but recognizing and continuing existing ones. People *v.* Marshall, 1 *Gilm.* 672.

An act remedying a technical defect in the organization of a corporation, *e. g.* insufficiency in the proof or acknowledgment of a certificate of organization of a banking association formed under a general statute, is not an act to create a corporation. Syracuse City Bank *v.* Davis, 16 *Barb.* 188.

CREDENTIALS. Papers which give a title or claim to confidence; particularly the letters of commendation and power given to an ambassador or public minister by the power which sends him to a foreign court.

CREDIBLE. Worthy of belief. Credibility: trustworthiness; the quality of being entitled to belief.

In general usage, competency and credibility of witnesses are quite distinct. Credibility, as contrasted with competency, implies that the witness is one who may testify, and relates to the degree of belief with which his statements are to be received. But credible is sometimes used in the sense of competent.

Credible witness, in Conn. Rev. Stat. tit. 5, § 54, providing for the certification of copies of records, means a witness giving testimony under the sanction of the witnesses' oath, and who may be cross-examined as to the existence of the record and the accuracy of the copy. Dibble *v.* Morris, 26 *Conn.* 416.

As used in the Georgia statute of frauds, the expression imports that the witnesses are not to be idiots, lunatics, or convicts. Hall *v.* Hall, 18 *Ga.* 40.

Credible is sometimes synonymous with competent. Garland *v.* Crow, 2 *Bailey*, 24.

By credible witness, in Mass. Stat. 1783, ch. 24, relative to attestation of wills, is meant competent witness. Hawes *v.* Humphrey, 9 *Pick.* 350; s. p. Amory *v.* Fellowes, 5 *Mass.* 229; Sears *v.* Dillingham, 12 *Id.* 358.

As used in a statute (Mass. Stat. 1792, ch. 32), — requiring that a will disposing of real property shall be attested and subscribed by three or more credible witnesses, — credible is equivalent to competent, it is not construed in the loose popular sense, as meaning a person of good moral character and reputation in fact, and personally worthy of belief; but as meaning a person entitled to be examined in a court of justice, though subject to have his actual credit weighed and considered by the court or jury. The meaning of the statute is that the will must be attested by three persons competent to be examined as witnesses in a court of justice, upon the questions whether the will was duly executed, and by a person of sound and disposing mind. Haven *v.* Hilliard, 23 *Pick.* 10.

CREDIT. Confidence or trust reposed in one's ability and intention to pay what he may promise. Also, a term allowed for payment of a price; usually spoken of the price of goods sold. Credits: the various items in account which are due to the person concerned, in distinction from debits, which are due from him. Creditor seems to mean one who has given credit, and has become entitled to payment in consequence; but is used for holders of demands which perhaps did not originate in giving credit. Thus judgment creditor is one who has recovered and is entitled to payment of a judgment; and whether the judgment was founded on a commercial indebtedness, or on a tort, or otherwise, would make no difference.

As to letter of credit, see LETTER.

The credit of an individual is the trust reposed in him by those who deal with him, that he is of ability to meet his engagements; and he is trusted, because through the tribunals of the country he may be made to pay. The credit of a government is founded on a belief of its ability to comply with its engagements, and a confidence in its honor, that it will do that voluntarily which it cannot be compelled to do. Owen *v.* Branch Bank of Mobile, 3 *Ala.* 258.

Credit is the capacity of being trusted. Dry Dock Bank *v.* American Life Ins. & Trust Co., 3 *N. Y.* 344, 356.

In an enlarged and commercial sense, credit implies reputation, confidence; a basis upon which its possessor may trade continuously without immediate payment. Rindge *v.* Judson, 24 *N. Y.* 64, 71.

CREDITOR. Is he that trusts another with any debt, be it in money or wares. (*Cowel.*) But the word is used in a larger sense to signify any one who has a legal claim against another. *Mozley & W.*

Where a deed contains a general covenant of warranty, and there is, at the time of its execution, a paramount outstanding title, by which the vendee may be, or actually is, afterwards evicted, he is a creditor of the covenantor, within the meaning of the statute of frauds (Clay's Dig. 254, § 2), from the execution of the deed. Gannard *v.* Eslava, 20 *Ala.* 732.

The use of the words "creditor" and "debtor," in a statute providing that in actions to recover back usurious interest paid the debtor (the creditor being living) may be a witness, does not confine the enactment to cases where the relation of debtor and creditor actually exists at the time of trial. They are used as a designation of persons merely. Although the relation has been wholly dissolved, the person who was a debtor in the loan in question may testify. Gifford *v.* Whitcomb, 9 *Cush.* 482.

Creditors, in the provisions of 2 Rev. Stat. 136, §§ 5, 6, — designating the creditors of a vendor of chattels, who may avail themselves of the neglect of a mortgagee to take and hold possession, — includes creditors who become such at any time while the possession still remains in the mortgagor; and it embraces simple contract creditors, although these cannot assert their rights until they have obtained judgment, and, as to personal property, execution. And the holder of a promissory note for value may be a creditor within the abovementioned provisions, although the note does not become due until after the mortgagor's possession has terminated. Thompson *v.* Van Vechten, 5 *Abb. Pr.* 458. But compare 6 *Bosw.* 373; 27 *N. Y.* 568.

Creditor's bill, or suit. The term creditor's bill is applied to a bill in equity, filed by one or more creditors of a deceased person in behalf of himself or themselves and all other creditors who shall come in under the decree, for an account of the assets and a due settlement of the estate of the deceased. The suit commenced by such a bill is commonly termed a creditor's suit. The principle upon which the proceeding is sustained is, that as executors and administrators have great power of preference at law, courts of equity ought, according to the maxim that equality is equity, to interpose, upon the application of any creditor, by such a bill, to secure a distribution of the assets, without preference to any one or more cred-

itors; and the decree is usually framed to effect this purpose.

These terms are also used, in the United States, to designate proceedings to enforce the security of a judgment creditor against the property or interests of his debtor, sustained upon the theory that the judgment is in the nature of a lien upon such property or interest, such as may be enforced in equity. The object sought is either to remove obstructions to the operation of the legal remedy by execution, or to reach property not liable to execution; and, to accomplish this, a judgment creditor may compel a discovery and account, either from the debtor or a third person; may restrain the transfer of property; and may obtain a satisfaction of the judgment, even out of property not liable to execution; the grounds and the nature of the relief afforded varying under the statutes and practice of different states. In many of the states, the creditor's suit has been superseded by a proceeding in the original action supplementary to the execution.

Creditor's bill, as used in Illinois Chancery Code, §§ 36, 37, denotes a bill by which a creditor seeks to satisfy his debt out of some equitable estate of the defendant, which is not liable to a levy and sale under an execution at law; not a naked bill to remove a fraudulent conveyance out of the way of his execution. Newman *v.* Willetts, 52 *Ill.* 98.

CREEK. Imports a recess, cove, bay, or inlet in the shore of a river, and not a separate or independent stream; though it is sometimes used in the latter meaning. Schermerhorn *v.* Hudson River R. R. Co., 38 *N. Y.* 103.

CREW. The word crew, as used in the act of congress of March 3, 1835, § 3, — punishing cruelty by a master or other officer, towards the crew, — includes and protects the officers as well as the common seamen. Whenever, in a statute, the words master and crew occur in connection with each other, the word crew embraces all the officers as well as the common seamen. United States *v.* Winn, 3 *Sumn.* 209, 212; 1 *Law Rep.* 63.

The word crews, in the piracy act of 1819, ch. 200, includes the master and officers as well as the sailors. Millaudon *v.* Martin, 6 *Rob.* (*La.*) 534.

CRIER. An officer of a court whose duty it is to proclaim the opening and adjournment; to call the names of parties, jurors, and witnesses as they are successively wanted; and perform other similar services.

CRIME. An act or omission forbidden by law, under threat of punishment; an offence; a wrong considered in its aspect of a violation of the rights of the community. In a narrower sense, crime is employed to designate the more aggravated offences, and misdemeanor the lesser ones; but the better usage is to consider crime as including misdemeanor. But the use of the terms crime, offence, felony, and misdemeanor is far from uniform, even among legal writers. 29 UCQB 81:41 Dr

Crimes are divided into *mala in se* and *mala prohibita*, according as their guilt may be known by natural law, or is only created by positive prohibition.

They are called *felonies* or *misdemeanors*, according to their grade or degree of guilt; measured in various jurisdictions by a statutory line of division. See FELONY; MISDEMEANOR.

A crime is an act committed or omitted, in violation of a public law, either forbidding or commanding it; a breach or violation of some public right or duty due to a whole community, considered as a community in its social aggregate capacity, as distinguished from a civil injury. "Crime" and "misdemeanor," properly speaking, are synonymous terms; though in common usage crime is made to denote such offences as are of a deeper and more atrocious dye. 4 *Bl. Com.* 5.

A crime, as opposed to a civil injury, is the violation of a right, considered in reference to the evil tendency of such violation, as regards the community at large. 4 *Steph. Com.* 4.

A crime may be defined to be any act done in violation of those duties which an individual owes to the community, and for the breach of which the law has provided that the offender shall make satisfaction to the public. *Bell.*

Crimes are those wrongs which the government notices as injurious to the public, and punishes in what is called a criminal proceeding, in its own name. 1 *Bish. Cr. L.* § 43.

The distinction between a crime and a tort or civil injury, is, that the former is a breach and violation of the public right and of duties due to the whole community considered as such, and in its social and aggregate capacity; whereas the latter is an infringement or privation of the civil rights of individuals merely. *Brown.*

It is not very easy in theory, and it is quite impossible according to the English law, to lay down any single principle by which to distinguish crimes from civil in-

juries, — private from public wrongs. By the English law a distinction exists; but it seems wholly technical, depending sometimes on the situation of the agent; sometimes on the nature or relations of the thing which is the object of the act; sometimes on the manner in which the act is done; sometimes on the consequences of the act, the time of doing it, and other grounds which it would be useless to enumerate, because they can be learned thoroughly only by an acquaintance with the law itself. *Wharton.*

The New York revised statutes employ the terms crime and offence as equivalent to each other, and as denoting any offence for which any criminal punishment may by law be inflicted. 2 *N. Y. Rev. Stat.* 702, § 22; see *Warren, Law Studies* (2d Am. ed.), 355.

The commissioners who reported the New York penal code also based their definitions upon the usage which grew up under the revised statutes, employing crime and offence in the extensive signification, and confining felony and misdemeanor to denote the classes into which crimes are divided. *Report of a Penal Code*, § 3.

Crime and misdemeanor are synonymous terms. State *v.* Corporation, &c., *T. U. P. Charlt.* 235.

Crime comprehends misdemeanors. Every misdemeanor is a crime, though not one of the gravest character. Van Meter *v.* People, 60 *Ill.* 168.

Crime, as used in a constitutional prohibition against involuntary servitude, includes misdemeanors, — indictable offences not amounting to felonies. *Re* Bergin, 31 *Wis.* 383.

Crime, in the provision of the United States constitution (art. 4, § 2) for extradition of persons charged with "treason, felony, or other crime," is synonymous with "misdemeanor;" and includes every offence below felony, punishable by indictment, as an offence against the public. Matter of Clark, 9 *Wend.* 212.

It includes every offence forbidden and made punishable by the laws of the state where the offence is committed. Kentucky *v.* Dennison, 24 *How.* 66, 102.

It is not confined to what were crimes at common law, at the adoption of the constitution; but is *nomen generalissimum*, and embraces every indictable offence. It was selected in order to extend the regulation to all classes of offenders, guilty of the minor offences, such as assaults, libels, and the entire train of similar misdemeanors of this grade. Matter of Voorhees, 32 *N. J. L.* 139, 144.

A misdemeanor punishable by a fine not exceeding $5,000, is within the meaning of the word crime, as used in the extradition clause. Morton *v.* Skinner, 48 *Ind.* 123.

Crime against nature. The offence of buggery or sodomy.

The phrase, "crime against nature," includes both bestiality and sodomy; just as felony includes murder, larceny, &c. Ausman *v.* Veal, 10 *Ind.* 355.

CRIMEN. Crime. Also, accusation. Used in some Latin phrases pertaining to criminal law.

Crimen falsi. The crime of falsifying.

This expression, in modern use, at least, is not so much the name of any one distinct crime as the designation of a class; being those which involve falsification or deception. Forgery is a prominent example; but others are included, such as counterfeiting money or official seals, making or dealing by false weights or measures, perjury, and perhaps adulteration of provisions, falsification of writings, and the like.

The use of the term is not uniform in respect to what offences are embraced.

The technical signification of the term *crimen falsi* is understood to be forgery of any kind, perjury, dealing with false weights and measures, altering the current coin, making false keys, and the like. Johnston *v.* Riley, 13 *Ga.* 97.

The *crimen falsi* includes the offence of attempting to secure the conviction of another and innocent person for a crime one has one's self committed. Webb *v.* State, 29 *Ohio St.* 351, 358.

It does not include the statutory offence of arson in the third degree. Harrison *v.* State, 55 *Ala.* 239.

The terms *crimen falsi* and infamous crime are not co-extensive. The latter includes only those species of the *crimen falsi* which may injuriously affect the administration of justice by the introduction therein of falsehood and fraud, such as forgery. United States *v.* Block, 4 *Sawyer*, 211.

Crimen furti. The crime of theft.

Crimen incendii. The crime of burning.

Crimen innominatum. The nameless crime. A term for buggery or sodomy.

Crimen læsæ majestatis. The crime of wounding majesty; that is, treason.

Crimen raptûs. The crime of rape.

Crimen roberiæ. The crime of robbery.

CRIMINAL, *n.* A person who has committed crime; one guilty of an offence. Criminal, *adj.:* that which involves or is affected by the guilt of a public offence; also, that which pertains to or is connected with the law of crimes, or the administration of penal justice.

Criminal act, or action. Either phrase is equivalent to crime; or is sometimes used with a slight variation of meaning, as if the legal guilt of the thing done were not absolutely sure, or not very gross. It is an euphemism for "crime."

Criminal action, or prosecution. A suit instituted for the enforcement of penal law, to secure the conviction and punishment of an offender. "Prosecution" alone, when used in the sense of a legal proceeding, and in ordinary context, sufficiently indicates that a proceeding for crime is intended, without a prefix of the word criminal. See also CIVIL ACTION.

Criminal case. An action, suit, or cause instituted to secure conviction and punishment for a crime. See CASE.

Criminal cases are those which involve a wrong or injury done to the republic for the punishment of which the offender is prosecuted in the name of the whole people. Grimball *v.* Ross, *T. U. P. Charlt.* 175.

Prosecutions for violations of a license law are not criminal cases in the sense of the term as used in the Georgia constitution, which provides that the superior courts shall have exclusive jurisdiction in all criminal cases, except those specified. Floyd *v.* Commissioners of Eatonton, 14 *Ga.* 354.

Criminal cases includes prosecutions for all offences not crimes or misdemeanors, but in the nature of crimes, and which are punished, not by indictment, but by forfeitures and penalties. It includes all *qui tam* actions, prosecutions for bastardy, informations in the nature of a *quo warranto*, and suits for the violation of ordinances. Wiggins *v.* City of Chicago, 68 *Ill.* 372; compare Woodward *v.* Squires, 39 *Iowa*, 435.

A statute declaring fees of court officers in criminal cases chargeable to the county does not include prosecutions founded upon city ordinances and conducted in tribunals of the municipality. Mixer *v.* Supervisors of Manistee, 26 Mich. 422.

Criminal cases, in the Massachusetts statute allowing peremptory challenges of jurors, includes a proceeding under a claim for liquors seized as kept with intent to sell unlawfully. Commonwealth *v.* Intoxicating Liquors, 115 *Mass.* 142.

Criminal conversation. Adultery, considered in its aspect of a civil injury to the husband entitling him to damages; the tort of debauching or seducing of a wife. Often abbreviated to *crim. con.*

Criminal court. Those courts which are charged with the administration of the law of crimes and punishments are often styled, collectively, the criminal courts.

Criminal information. A species of prosecution which may in a proper case be instituted for the enforcement of the criminal law, without the interposition of a grand jury, and by the attorney-general or other law officer of government. See INFORMATION.

Criminal informations are of two sorts: 1. *Ex officio*, which is a formal written suggestion of an offence committed, filed by the attorney-general, or in the vacancy of that office by the solicitor-general, in the court of queen's bench, without the intervention of a grand jury. It lies for misdemeanors only, and not for treasons or felonies. The usual purposes are seditious or blasphemous libels or words, seditious riots not amounting to treason, libels upon the queen's ministers, the judges or other high officers, reflecting upon their conduct in the execution of their official duties; obstructing such officers in the execution of their duties; against officers themselves for bribery, or for other corrupt or oppressive conduct. The information is filed in the crown office without the previous leave of the court. 2. Information by the master of the crown office, which is filed at the instance of an individual, with the leave of the court; and usually confined to gross and notorious misdemeanors, riots, batteries, libels, and other immoralities. *Wharton.*

Criminal law. That branch of jurisprudence which treats of crimes and punishments.

Criminal-law consolidation acts. The Stat. 24 & 25 Vict. ch. 94–100, passed in 1861, for the consolidation of the criminal law of England and Ireland. They have been of great importance as a codification of the English modern criminal law, and have been separately published in several forms.

Criminal letters. A form of criminal prosecution in Scotland, corresponding to a criminal information in England.

Criminal process. Process issued for the commencement of a criminal action or prosecution.

Criminal process issues to compel a person to answer for a crime or misdemeanor, where punishment of some kind or other must be the consequence of conviction. Ward *v.* Lewis, 1 *Stew.* 26.

CRIMINALITER. Criminally. This term is used, in distinction or opposition to the word *civiliter*, civilly, to distinguish a criminal liability or prosecution from a civil one.

CROPPER. One who, having no interest in the land, works it in consideration of receiving a portion of the crop for his labor. Try *v.* Jones, 2 *Rawle*, 11.

The difference between a tenant and a cropper is: a tenant has an estate in the land for the term, and, consequently, he has a right of property in the crops. Until division, the right of property and of possession in the whole is the tenant's. A cropper has no estate in the land; and, although he has in some sense the possession of the crop, it is the possession of a servant only, and is, in law, that of the landlord, who must divide off to the cropper his share. Harrison *v.* Ricks, 71 *N. C.* 7.

CROSS, *n.* In the execution of writings, a person unable to write may make the sign of the cross, and his name may be written in juxtaposition with it by some person for him; and this is a good execution.

CROSS, *adj.* Is applied to various demands and proceedings which are connected in subject-matter, but run counter to each other.

Cross-action. A having brought an action against B, if B brings an action against A in reference to the same transaction, the second action is called a cross-action.

Cross-appeal. If both parties to a judgment are dissatisfied therewith, and each accordingly appeals, the appeal of each is called a cross-appeal in relation to that of the other.

Cross-bill. A bill filed by a defendant in a suit in equity, against the complainant or other defendants in the same suit, or against both, touching the matters in question in the original bill. The object sought is usually to obtain a discovery, or to obtain full relief for the defendant as well as the complainant, by introducing matters not proper to be set up by answer, or to obtain relief between the defendants. A cross-bill should state the original bill, and the proceedings thereon, and the rights of the defendant exhibiting the bill which are necessary to be made the subject of a cross-litigation, or the grounds on which he resists the claims of the plaintiff in the original bill, if that is the object of the new bill. But it should not introduce new parties, or new and distinct matters. It is considered as a defence to the original bill; both causes proceed and are heard together, and are disposed of by a single decree.

A cross-bill is preferred by one or more of the defendants, in answer to an original petition which is pending against them, for the purpose of obtaining a discovery from the plaintiff in the original petition, of some matters of which the defendant hath no other evidence, and to introduce into the case certain matters and things which could not be properly disclosed by an answer only, in order to enable the court to do more perfect justice in the cause amongst all the parties concerned. *Termes de la Ley;* 1 *Root*, 579.

A cross-bill is a bill brought by a defendant against a plaintiff, or other parties in a former bill depending, touching the matter in question in that bill. It is usually brought either to obtain a necessary discovery of facts in aid of the defence to the original bill, or to obtain full relief to all parties in reference to the matters of the original bill. It is to be treated as a mere auxiliary suit. Ayres *v.* Carver, 17 *How.* 591; Kidder *v.* Barr, 35 *N. H.* 235.

A cross-bill is a species of pleading, used for the purpose of obtaining a discovery necessary to the defence, or to obtain some relief founded on the collateral claims of the party defendant to the original suit. Tison *v.* Tison, 14 *Ga.* 167.

In the very elementary nature of the thing, a cross-bill is a bill filed by a party defendant to a suit; and it must be so framed that both causes may be heard together, and one decree cover both. McDougald *v.* Dougherty, 14 *Ga.* 674.

Cross-demand. A having preferred a demand against B, if B opposes it by preferring a demand against A, this is called a cross-demand.

Cross-errors, arise where the respondent in a writ of error assigns errors upon his part.

Cross-examination. The examination of a witness on behalf of a party against whom the witness has been called and examined, conducted in the hope of eliciting something to break the force of his previous or direct examination.

Cross-remainder, is where each of two grantees has reciprocally a remainder in the share of the other. (2 *Bl. Com.* 381; 1 *Steph. Com.* 354.) Thus, if an estate be granted as to one-half to A for life, with remainder to his children in tail, with remainder to B in fee-simple; and, as to the other half, to B for life, with remainder to his children in tail, with remainder to A in fee-simple, — these remainders are called cross-remainders. *Mozley & W.*

CROSSED CHECK. A check crossed with two lines, between which are

either the name of a bank or the words "and company," in full or abbreviated. In the former case, the banker on whom it is drawn must not pay the money for the check to any other than the banker named; in the latter case, he must not pay it to any other than a banker. 2 *Steph. Com.* 118, note (*c*); *Stat.* 19 & 20 *Vict.* ch. 25; 21 & 22 *Vict.* ch. 79.

CROWN, *n.* Is often put for the royal power. Crown, *adj.*: that which concerns or pertains to the sovereign; as in these phrases:

Crown cases. Prosecutions on behalf of the king (or queen); criminal cases. Crown cases reserved are questions of law which arise at criminal trials (except in the case of demurrers), and are referred to the court of criminal appeal.

Crown debts. Debts due to the crown.

Crown lands. The demesne lands of the crown.

Crown law. Criminal law, in England.

Crown office, or **side.** The criminal office or branch of the court of king's or queen's bench.

Crown paper. A paper containing the list of criminal cases which await the hearing or decision of the court.

CRUELTY. Inhuman conduct towards living creatures; wanton or careless infliction of pain upon the body; injury of the person or feelings; abuse; ill-treatment.

What constitutes cruelty to a person depends upon the relation of the parties concerned. Where an act, which in common parlance would be described as cruel, is committed by one individual upon another, as separate, independent members of the community, the term cruelty is not usually employed: the act is termed assault, malicious mischief, mayhem, &c. Cruelty is more appropriate where the parties sustain a special relationship; as that of husband and wife, parent and child, guardian and ward.

Cruel includes both wilfulness and malicious temper of mind with which an act is done, as well as a high degree of pain inflicted. Acts merely accidental, though they inflict great pain, are not cruel in the sense of the word as used in statutes against cruelty. Commonwealth *v.* McClellan, 101 *Mass.* 34,

Flogging is not "a cruel and unusual punishment," within the meaning of the third section of the act of March 3, 1835 (4 Stat. at L. 776). United States *v.* Collins, 2 *Curt.* 194.

1. With respect to the relation of husband and wife, the cruelty which entitles the injured party to a divorce is conduct which endangers the life or health of the complainant, and renders cohabitation unsafe and intolerable. Many decisions establish this proposition. See 7 *U. S. Dig.* 322, ¶ 3755.

To constitute legal cruelty, there must be good ground to apprehend danger to life, limb, or health. There must be a reasonable apprehension of bodily hurt. Evans *v.* Evans, 1 *Hag. Cons. Rep.* 35; Dysart *v.* Dysart, 11 *Jur.* 490; Odom *v.* Odom, 36 *Ga.* 286; Perry *v.* Perry, 2 *Paige*, 501.

Cruel and inhuman treatment, under the Wisconsin statute granting divorce for such cause, is such conduct as would render it unsafe and improper for the wife to live with her husband. Johnson *v.* Johnson, 4 *Wis.* 135.

Blows inflicted by a husband on his wife constitute cruelty. Armant *v.* Husband, 4 *La. Ann.* 137.

If the husband inflicts on the wife, by force or violence, bodily pain or suffering, and especially degrading pain or suffering, such as cow-hiding or whipping, this would be cruel treatment. But this, and such as this, is not all that constitutes cruel treatment. The commission of acts which outrage the feelings of modesty and decency, such as threatening to commit, or attempting to commit, adultery, or cursing, abusing, or using insulting and opprobrious language, where done between husband and wife, whether by the husband to the wife, or by the wife to the husband, and in the knowledge or coming to the knowledge of both; these also, if persisted in and unatoned for, constitute cruel treatment. Gholston *v.* Gholston, 31 *Ga.* 625.

For a husband to charge his wife with adulterous intercourse, without ground, is undoubtedly an act of gross cruelty. Pinkard *v.* Pinkard, 14 *Tex.* 356; Cook *v.* Cook, 11 *N. J. Eq.* 195.

Or to attempt to draw his wife to his bed when he is violently affected with a venereal disease, is also cruelty. Durant *v.* Durant, 1 *Hag. Ecc. Rep.* 733, 768, note.

An attempt on the part of a husband to debauch his own women-servants is a strong act of cruelty, as being an indignity and outrage to his wife's feelings. *Id.*

Violent and reckless conduct of a drunken husband towards an inoffensive wife comes within the cruelty denominated *sævitia*, although, when sober, he is good-natured and affectionate. Lockridge *v.* Lockridge, 3 *Dana*, 28.

Where a husband is habitually intoxicated, and in this condition threatens his

wife with violence, pursues her through the house and yard and attempts to strike her with a chair; or when he returns home at midnight and abuses and kicks her, — such conduct comes within the legal meaning of cruelty. Hughes *v.* Hughes, 19 *Ala.* 307.

Words of menace, intimating a malignant intention of doing bodily harm, and even affecting the security of life, are legal cruelty. The court is not to wait till the threats are carried into execution; but is to interpose where the words are such as might raise a reasonable apprehension of violence, and excite such fear and terror as make the life of the wife intolerable. D'Aguilar *v.* D'Aguilar, 1 *Hag. Ecc. Rep.* 773, note; Mason *v.* Mason, 1 *Edw.* 278.

Menaced violence, such as threatening to cut an arm off, or to run the body through with a red-hot poker, while at the same time brandishing it, and other exhibitions of passion which might terminate in actual violence, are sufficient to found a case of legal cruelty. Hulme *v.* Hulme, 1 *Add. Ecc.* 29.

The husband taking to a separate bed is not pleadable as cruelty. D'Aguilar *v.* D'Aguilar, 1 *Hag. Ecc. Rep.* 773, note.

Word of abuse and reproach create only resentment, and are not legal cruelty. *Id.*

Even a threat of violence, when none is offered, does not constitute a sufficient ground of divorce. Shell *v.* Shell, 2 *Sneed*, 716.

The husband's refusal to permit his wife to attend a church, of which she is a member, is not ground for a separation. Lawrence *v.* Lawrence, 3 *Paige*, 267.

Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty. Still less is conduct cruelty where it wounds not the natural feelings, but the acquired feelings, arising from particular rank and station. Evans *v.* Evans, 1 *Hag. Cons. Rep.* 35.

The charge of cruelty must be sustained by grave and weighty facts, which show that the duties of the married life cannot be discharged. Tantalizing language on the part of the husband, supplying his wife with scanty clothing when his means are ample, and other acts of meanness, will not sustain the charge. Johnson *v.* Johnson, 4 *Wis.* 135.

Smashing dishes, using grossly improper language, and threats to kick from the house, are insufficient to establish a charge of cruelty as ground of divorce. Close *v.* Close, 24 *N. J. Eq.* 338.

Pulling or twisting a wife's nose in a harsh and vulgar manner, when done but once, does not constitute cruelty in the sense that the wife's life is thereby rendered burdensome and intolerable. Richards *v.* Richards, 37 *Pa. St.* 225.

Mental anxiety, excitement, bodily illness, though occasioned to the wife by the conduct of the husband, does not constitute cruelty, unless such conduct is accompanied with violence or threats of violence. Chesnutt *v.* Chesnutt, 1 *Spinks*, 196.

To sustain a bill for a separation, by the husband, it is not sufficient to show a single act of violence on the wife's part, or even a series of acts: he must establish such a continued course of bad conduct on the part of the wife, towards himself and those under his care and protection, as to satisfy the court that it is unsafe for him to cohabit or live with her. Hence it is proper to set forth acts of violence and misconduct towards the complainant's children, visitors, and servants. Perry *v.* Perry, 1 *Barb. Ch.* 516.

2. With respect to children, laws have recently been enacted specifically to prevent cruelty to children; chiefly, however, by promoting the organization of societies to watch the welfare of that class of children who are peculiarly open or subject to abuse, rather than by introducing any new views as to what constitutes cruelty. By the New York act of April 21, 1875, relating to incorporation of societies for the prevention of cruelty to children, any such society may prefer a complaint before any court or magistrate, having jurisdiction, for the violation of any law relating to or affecting children. Under this act societies have been organized in New York city, Rochester, Newburgh, and Buffalo, and there are similar societies in New Hampshire, San Francisco, Cleveland, and Philadelphia. *Delafield on Children*, 1876. These societies are authorized to prosecute parties who maltreat children, on the general ground of cruelty. The abuses which existing statutes characterize as misdemeanors are thus, in effect, brought into the category of acts of cruelty to children. Acts of this description are the employment of children as acrobats or beggars, the seduction or abduction of children, harsh treatment of apprentices, &c.

3. What constitutes cruelty to animals has been the subject of an important advance in jurisprudence. The early administration of the law was founded upon two ideas: that animals (many of them) are property, and any ill-treatment of one which depreciates its value is a wrong to property; and that inhuman and barbarous treatment of animals is shocking or demoralizing

to persons who witness it, and therefore an offence in the nature of nuisance. More recently has been developed the view that sentient life should be, for its own sake, protected by the law from wanton, reasonless infliction of suffering. Founded on this view, and originating in a movement initiated by the New York society for the prevention of cruelty to animals, laws and efficient societies for the prevention of cruelty to animals have been established in nearly all the states and territories of the Union. Throughout the world there were, in 1876, 229 of these societies. Their labors have had an important effect in developing the meaning of the term cruelty.

Where a cow was stoned, clubbed, and beaten to death in the streets of Washington, D. C., the court held that the gist of the offence was the public cruelty of the act which brought it within the category of nuisances. United States *v.* Jackson, 4 *Cranch C. Ct.* 483.

Tying the tongue of a calf to prevent its sucking a cow, was held punishable in Morris & Clark's Case, 6 *N. Y. City Hall Rec.* 62.

Cock-fighting must be considered a barbarous diversion, which ought not to be encouraged or sanctioned in a court of justice, and cruelty to these animals in throwing sticks and stones at them, forms part of the dehortatory charge of judges to grand juries. It makes little difference whether they are lacerated by sticks and stones, or by the bills of each other. Lord Ellenborough in Squires *v.* Whisken, 3 *Camp.* 140; Bates *v.* M'Cormick, 9 *L. T. Rep.* N. S. 175.

Cruel beating or torture, for the purpose of training or correcting an intractable animal; pain inflicted in wanton or reckless disregard of the suffering it occasioned, and so excessive in degree as to be cruel; torture inflicted by inattention and criminal indifference to the agony resulting from it, as in the case of an animal confined and left to perish from starvation, — are all punishable under Mass. Gen. Stat. ch. 145, § 41, against cruel treatment of animals, even if it does not appear that pain was the principal object. Severe pain inflicted upon an animal, for the mere purpose of causing pain or indulging vindictive passion, is cruel. Commonwealth *v.* Lupkin, 7 *Allen*, 579.

Where colts are confined in a barn-yard, and then driven over scythes maliciously placed in the bar-way, the act is wanton cruelty, and punishable as a misdemeanor. State *v.* Briggs, 1 *Aik.* 226.

Under Stat. 12 & 13 Vict. ch. 92, providing for the punishment of cruelty to animals, the word cruelty means the unnecessary abuse of any animal; and the cruelty to be prevented by it is as great when practised upon a pigeon, turkey, or other domestic bird, as upon a domestic quadruped. Budge *v.* Parsons, 3 *Best & S.* 382.

By N. H. Rev. Stat. ch. 219, § 12, if any person wilfully and maliciously kills, maims, beats, or wounds any horse, cattle, sheep, or swine, he shall be punished by fine or imprisonment, or both. This law was designed to restrain the exercise of cruelty to animals, and is founded upon a high moral principle, which denounces the wanton and unnecessary infliction of pain even upon animals created for the use of man, as contrary alike to the principles of Christianity and the spirit of the age. At the same time, there is no purpose to interfere with the infliction of such chastisement as may be necessary for the training or discipline by which such animals are made useful. The distinction is between that chastisement which is really administered for purposes of training and discipline, and the beating and needless infliction of pain, which is dictated by a cruel disposition, by violent passions, a spirit of revenge, or reckless indifference to the sufferings of others. If resorted to in good faith and for a proper purpose, it will not be necessarily malicious because it may be deemed to be excessive; but the undue severity should be carefully weighed by the jury in determining whether it was not in fact dictated by a malevolent spirit, and not by any justifiable motive. State *v.* Avery, 44 *N. H.* 392.

In respect to offences consisting in cruelty to animals, the N. Y. Stat. 1867 is to be deemed declaratory of the common law; and driving a horse, while ignorant that it is sick or sore, is not, *per se*, tormenting or torturing it, within the meaning of the act. Stage Horse Cases, 16 *Abb. Pr.* N. S. 51.

. By the New York act relating to animals, cruelty includes every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted. *Laws*, 1874, ch. 12, § 8.

CRUISE. Imports a definite place, as well as time of commencement and termination, unless such construction is repelled by the context. When not otherwise specially agreed, a cruise begins and ends in the country to which a ship belongs, and from which she derives her commission. The Brutus, 2 *Gall.* 526.

Cui licet quod magnus, non debet quod minus est non licere. He who has authority to do the more important act shall not be debarred from doing what is of less importance. A man having power to do a thing, may do less than such power authorizes him to do. This maxim is contained within the more general principle, *omne majus continet in se minus*, q. v., — the greater contains the less, — and is a rule of very

general application. Thus, in the law of real property, one who has a power to convey in fee-simple may grant for life or for a term of years; the estate in fee-simple including all the others. The most frequent application of the maxim is in the law of principal and agent, in determining the validity of acts of an agent under a general authority.

Cuicunque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit. To whomsoever any one grants any thing, he is supposed to grant also that without which the thing itself could not exist. By a grant of any thing, all the means to attain it, and all the fruits and effects of it, are granted also; and pass inclusive together with the thing, by the grant of the thing itself, without express mention. In the case of Lord *v.* Commissioners of Sydney, 12 *Moo. P. C.* 499, the rule is thus expressed by Lord Coleridge: "If you grant any thing, you are presumed to grant, to the extent of your power, that without which the thing granted cannot be enjoyed." This is a fundamental maxim in the construction of conveyances of real estate. One of the familiar illustrations is the case of a conveyance of a piece of ground surrounded by other lands of the grantor; by which a right of way to come to it, over other lands of the grantor, passes to the grantee. So a right of way appurtenant to land passes to the tenant even by a parol demise of the land, where nothing is said about it at the time of the demise. By the grant of trees, power is granted to enter on the land and take them away; and by a grant of fish in a pond is granted power to come upon the banks and fish for them. The same principles apply to reservations and exceptions as to grants, and, in like manner, to the rights of tenants to emblements, way-going crops, &c. So, by a mere license or permission to use a thing, every thing is granted necessary for the grantee to have and enjoy such use; as where one has a license to lay pipes in the land of another to convey water, he may enter and dig the land in order to repair the pipes, although the soil belongs not to him, but to such other person.

But the maxim must be understood as applying only to such things as are incident to the grant, and directly necessary to the enjoyment of the thing granted. Thus, as to one of the illustrations already given, a way of necessity is limited by the necessity which created it; and when such necessity ceases, the right of way also ceases; hence, if, at any subsequent period, the party who was entitled to such way can, by passing over his own land, come to the place to which it led by as direct a course as he could by using the old way, the way ceases to exist as a way of necessity. So, under a grant of fish in ponds, the grantee may, as already stated, come upon the banks to fish for them; but he cannot cut the banks to drain the ponds.

The general principle applies to grants from a sovereign or government, as well as to private grants. Thus a corporate franchise carries with it the power to make by-laws, as incident to the general powers of the corporation, and all other powers necessary for carrying into effect the objects for which the corporation is created.

Cuilibet in sua arte perito est credendum. Any one skilled in his own art is to be believed. Persons of skill in any particular science, trade, or profession are received as witnesses, not only to speak to facts, but also to give their opinions; contrary to the general rule that the opinion of a witness is not evidence. Such witnesses are termed experts, *q. v.* The fact that such a witness has the necessary skill must be proved by a preliminary examination; but that being established, he may give his opinion either upon facts known to himself, or upon a statement of facts by other witnesses, or in answer to a hypothetical question setting forth the facts so stated. Thus the opinion of medical men as to the state of a patient whom they have seen is competent evidence; and in cases where they have not themselves seen the patient, their opinions upon the nature of his symptoms, as described by other witnesses who have seen him, are admissible.

Cujus est dare, ejus est disponere. Whose it is to give, his it is to dispose. He who can give, can also regulate the

disposal of the gift. This maxim sets forth the principle upon which the feudal system of feoffment depended, but is to be understood as applying to modern grants in a qualified sense only. The bargainor of an estate may, since the land moves from him, annex such conditions as he pleases to the estate bargained, provided they are not illegal, repugnant, or impossible; and, as between landlord and tenant, the landlord may annex whatever conditions he please to his grant, provided they are not illegal or unreasonable. Upon this principle, a covenant by the tenant not to assign is valid, the landlord having a right to exercise his judgment with respect to the person to whom he trusts the management of his estate. *Broom Max.* 459. But a person having merely the power to give, has not, necessarily and in every case, the power also to regulate the disposition of the gift. Thus, where a power of apportionment is given to a parent under a marriage settlement or a will, to apportion a certain fund among certain persons in such proportion as he pleases, he has undoubtedly the power to give, but he cannot regulate the disposal of the gift by any conditions not authorized by the power under which he acts.

The right of thus regulating the property or estate conveyed is termed the *jus disponendi* (q. v.) of the grantor or landlord.

Cujus est instituere, ejus est abrogare. Whose it is to institute, his it is to abrogate. He who institutes or ordains may abrogate. The signification of this maxim is so limited by exceptions and qualifications, that it can scarcely be considered a general principle. Its application is almost limited to things which one institutes not only by, but for, himself. Contracts may, generally, be abrogated or altered by those who made them. Statutes may be repealed by the authority which enacted them. A will may be revoked or altered at any time before the death of the testator. But there are many cases in which the person from whom a right proceeds cannot recall the right conferred, and where one cannot abrogate that which he has once settled or instituted. The grantor even in a deed of gift cannot, after delivery of the deed, recall or alter the gift at will. Parents who have by marriage settlement conferred upon the children of the marriage certain rights cannot, either separately or together, abrogate what they have thus done, so as to lessen the children's rights. And, in general, the maxim does not apply in cases where, by the thing settled or ordained, rights have been vested in or conferred upon a third party.

Cujus est solum, ejus est usque ad cœlum et ad inferos. He who owns the soil, owns it to the sky and to the centre of the earth. The owner of land owns also every thing above and below it to an indefinite extent. Land, in its legal signification, has an indefinite extent upwards as well as downwards; upwards, therefore, no man may erect any building or the like, to overhang another's land; and downwards, whatever is in a direct line between the surface of any land and the centre of the earth belongs to the owner of the surface. So that the word land includes not only the face of the earth, but any thing under it or over it; and if a man grants all his lands, he grants thereby all his mines, his woods, his waters, and his houses, as well as his fields and meadows. But this maxim states merely a presumption, which may be rebutted by showing a distinct title to the soil, and to that which is above or beneath it. Thus one may have an inheritance in an upper chamber, though the lower buildings and soil be in another. So mines may form a distinct possession and different inheritance from the surface; and it frequently happens that a person entitled both to the mines and the land above conveys away the land, excepting out of the grant the mines which would otherwise have passed under the conveyance of the land; and thus one has the land above and another the mines below. *Broom Max.* 398.

CULPABLE. Means not only criminal, but censurable; and, when the term is applied to the omission by a person to preserve the means of enforcing his own rights, censurable is more nearly an equivalent. As he has merely lost a right of action which he might voluntarily relinquish, and has wronged nobody but himself, culpable

neglect conveys the idea of neglect which exists where the loss can fairly be ascribed to the party's own carelessness, improvidence, or folly. Waltham Bank *v.* Wright, 8 *Allen*, 121.

Culpable negligence is the omission to do something which a reasonable and prudent man would do, or the doing of something which such a man would not do, under the circumstances surrounding each particular case; or it is the want of such care as men of ordinary prudence would use under similar circumstances. Woodman *v.* Nottingham, 49 *N. H.* 387.

CULPRIT. A mild term imputing crime; applied to one accused, but not yet convicted, or to one doubtless guilty, but of an offence not heinous.

Blackstone believes it an abbreviation of the old forms of arraignment, whereby, on the prisoner's pleading not guilty, the clerk would respond: *culpabilis, prit;* i. e. he is guilty and the crown is ready. It was (he says) the *viva voce* replication, by the clerk, on behalf of the crown, to the prisoner's plea of *non culpabilis; prit* being a technical word, anciently in use in the formula of joining issue. 4 *Bl. Com.* 339.

Donaldson says the clerk would ask the prisoner: Are you guilty or not guilty? Prisoner: Not guilty. Clerk: *Qu' il paroit* (may it appear so); how will you be tried? These words, hurriedly pronounced, came to sound: Culprit, how will you be tried?

Christian explains *prit* as a corruption of *pnt*, written for *ponit*, which stood for *ponit se super patriam*, the declaration that issue was joined. 3 *Sharsw. Bl.* 340, note 9.

Webster pronounces such derivations erroneous, and says the word is a modification of culpit, or culped, participle of a supposed verb to culpe, to accuse or charge with crime.

Wharton derives it from *culpa*, one who is indicted.

CULTIVATED. A field on which a crop of wheat is growing is a cultivated field, although not a stroke of labor may have been done in it since the seed was put in the ground, and it is a cultivated field after the crop is removed. It is, strictly, a cultivated piece of ground. State *v.* Allen, 13 *Ired. L.* 36.

Cum onere. With the burden; subject to an incumbrance or charge. A purchaser with knowledge of an incumbrance upon the property purchased takes the property *cum onere*; that is, subject to the incumbrance.

Cum testamento annexo. With the will annexed. Where a will does not name any person as executor, or does not name a person capable to act as such; or where the person or persons named refuse to act, and administrators are appointed to carry out the provisions of the will, — such administration is termed administration *cum testamento annexo*, and the persons appointed are called administrators *cum testamento annexo;* the use of the phrase being derived from the reference in the letters of administration to the will annexed.

CUMULATIVE. Additional; that which is superadded to another thing of the same nature, and not substituted for it.

Cumulative evidence, or **testimony**, is additional evidence, &c., offered to establish a fact to which witnesses have already testified.

Evidence is cumulative which merely multiplies witnesses to any or more of the facts before investigated, or only adds other circumstances of the same general character. Waller *v.* Graves, 20 *Conn.* 305.

Evidence is cumulative, when it goes to the fact principally controverted on the former trial, and respecting which the party asking for a new trial produced testimony on the trial of the cause. Grubb *v.* Kalb, 37 *Ga.* 459; compare Moore *v.* Ulm, 34 *Ga.* 565.

Cumulative evidence is additional evidence of the same kind to the same point. Glidden *v.* Dunlap, 28 *Me.* 379.

Cumulative evidence means evidence of the same kind to the same fact. Where circumstantial evidence was adduced to prove an agency unsuccessfully, and the party moved for a new trial on newly discovered evidence of declarations of the alleged principal that he had constituted the agent, held, that this was not objectionable as cumulative, for it was not evidence of the same kind. Parker *v.* Hardy, 24 *Pick.* 246.

Cumulative evidence means additional evidence to support the same point, and which is of the same character with evidence already produced. Thus, where the case turned on the question whether a bill of exchange was lodged at bank before or after noon of a certain day, and on the former trial both parties produced testimony as to the time when it was left, — the testimony of a newly discovered witness, corroborating and supporting the testimony adduced to show that the bill was left after noon, is cumulative. People *v.* New York Superior Court, 10 *Wend.* 286; Brisbane *v.* Adams, 1 *Sandf.* 195; Fleming *v.* Hollenback, 7 *Barb.* 271.

Cumulative evidence, means additional evidence of the same kind or degree as that previously given. All evidence material to the issue, after any such evidence has been given, is in a certain sense cumulative; that is, is added to what has been given before. It tends to sustain the issue. But

cumulative evidence, in legal phrase, means evidence from the same or a new witness, which simply repeats in substance and effect, or corroborates what has been before testified. Parshall *v.* Klinck, 43 *Barb.* 203.

Cumulative legacy. A legacy which is to take effect in addition to another disposition, whether by the same or another instrument, in favor of the same party, as opposed to a substitutional legacy, which is to take effect as a substitute for some other disposition.

Legacies are said to be cumulative, as contradistinguished from such as are merely repeated. Where the testator has twice bequeathed a legacy to the same person, it becomes a question whether the legatee be entitled to both; *i.e.*, whether the second legacy shall be regarded as a repetition merely of the prior bequest, or as an additional bounty and cumulative to the other benefit. On this point the intention of the testator is the rule of construction. (2 *Wms. Exors.* 1020.) *Brown.*

Cumulative remedy. When a remedy is created by statute, additional to a remedy which previously existed, and which is not abrogated, this is a cumulative remedy.

CURATOR. One legally appointed to care for the property or interests of another; a guardian or other legal representative of a person who, either on account of infancy or other defect of mind or body, is not capable of acting for himself. Used in the civil law, and in proceedings under the civil code of Louisiana.

Curator ad hoc. A guardian for this; a special guardian; a guardian appointed for a special purpose, as to act for another in a particular proceeding.

Curia advisare vult. The court wishes to deliberate. This sentence was originally the form in which entry was made in the record of a cause which had been argued, but where judgment was not given at the same term. It was afterwards used more generally to denote any suspension of judgment by the court, after argument, for further deliberation, upon a novel or difficult point, and frequently occurs in the reports in this sense, often in the abbreviated form *cur. adv. vult.*

CURRENCY. By the term currency, bank-bills or other paper money issued by authority, which pass as and for coin, are understood. Marine, &c. Ins. Co. *v.* Tincher, 30 *Ill.* 399; Osgood *v.* McConnell, 32 *Id.* 74; Marine Bank *v.* Rushmore, 28 *Id.* 463.

A note payable "in the currency of this state" (Missouri) is payable in gold or silver coin, or the notes of the Bank of Missouri. Cockrill *v.* Kirkpatrick, 9 *Mo.* 697.

But a note payable "in the current money of Missouri" is payable in gold or silver alone. *Ib.*

Currency, in a contract, must be taken to mean current money, unless there be something in the contract itself to require a different interpretation. Dugan *v.* Campbell, 1 *Ohio*, 115; Campbell *v.* Hampson, *Id.* 119.

Currency, in a promissory note, held to be synonymous with current bank-notes. Coffin *v.* Hill, 1 *Heisk.* 385.

Currency means "what passes among the people," and is made by them to answer, in some degree, the purposes of money. Lackey *v.* Miller & Froneberger, *Phill. L.* 26.

CURRENT. When applied to money, means lawful; current money is equivalent to lawful money. Wharton *v.* Morris, 1 *Dall.* 124.

The words "lawful money," "currency," in a bill or note, mean that it is payable in money current by law, and circulating at par. Wilburn *v.* Greer, 6 *Ark.* 255; Fry *v.* Dudley, 20 *La. Ann.* 368; Phœnix Ins. Co. *v.* Allen, 11 *Mich.* 501; Philps *v.* Town, 14 *Id.* 374; Butler *v.* Paine, 8 *Minn.* 324; Dorrance *v.* Stewart, 1 *Yeates*, 349.

Current bank-notes are such as are convertible into specie at the counter where they were issued, and pass at par in the ordinary transactions of the country. Pierson *v.* Wallace, 7 *Ark.* 282.

A check or bill of exchange drawn for "current funds" entitles the holder to demand coin, or its equivalent. Galena Ins. Co. *v.* Kupfer, 28 *Ill.* 332; Kupfer *v.* Marc, *Id.* 388.

Where a promissory note is written "payable in current funds," it must be construed as allowing payment in funds other than money. Conwell *v.* Pumphrey, 9 *Ind.* 135.

Current, preceding the word money, cannot change its meaning, because it is equally applicable to that kind of money made current by act of congress, which, in truth, is the only current money of Kentucky. Current money does not mean the same thing as currency. McChord *v.* Ford, 3 *T. B. Mon.* 166.

A note payable in "Mississippi currency" will be taken to mean the lawful currency of the state, *i.e.* gold and silver, in the absence of proof that the notes of the banks of that state were intended. Bullard *v.* Wall, 2 *La. Ann.* 404.

Current money, in a note upon time made in one of the seceded states during the war of 1861–65, is presumed to mean lawful money, and not confederate notes. Coco *v.* Calliham, 21 *La. Ann.* 624.

A certificate of deposit, payable in "Illi-

nois currency," cannot be satisfied by depreciated paper: it must be met by bills passing in the locality in the place of coin. Hulbert *v.* Carver, 37 *Barb.* 62; Chicago, &c. Ins. Co. *v.* Keiron, 27 *Ill.* 501.

"Current notes of the state of N" may mean either treasury notes of the state, or notes on various banks of the state. An instrument payable in such notes is not for a sum certain, payable in money and without conditions, and is therefore not negotiable. Warren *v.* Brown, 64 *N. C.* 381.

A note payable in "current bank-notes" is payable in such bank-bills only as are redeemable in gold or silver, or such as are equivalent thereto; and the court may render judgment thereon, as a liquidated demand, without the intervention of a jury. Fleming *v.* Nall, 1 *Tex.* 246.

Cursus curiæ est lex curiæ. The practice of the court is the law of the court. Where a practice has become established, it should be adhered to, unless in cases of extreme urgency and necessity, merely because it is the practice, and although no reason can be assigned for it; for an inveterate practice in the law generally stands upon principles that are founded in justice and convenience. *Broom Max.* 133. But such a practice is the law of the court merely; and a court of error does not generally notice the practice of another court. And every court is the master of its own practice, especially courts of equity, which will adapt their practice to changing circumstances, and will not, by a too strict adherence to forms and rules established under different circumstances, decline to administer justice and enforce rights for which there is no remedy elsewhere. *Broom Max.* 135.

CURTESY. An estate accorded to a husband, upon the death of his wife, in lands or tenements of which she was seised during coverture, provided they had issue born alive during the marriage, which might have inherited.

Curtesy of England is where a man taketh a wife seised in fee-simple, or fee-tail general, or as heiress in special tail, and hath issue by her, male or female, born alive, which by any possibility may inherit, and the wife dies, the husband holds the lands during his life. Though this is called the curtesy of England, it appears to have been the established law of Scotland, where it was called *curialitas;* and it is likewise used in Ireland by virtue of an ordinance of Henry III.; so that probably the word curtesy is in this sense understood rather to signify an attendance upon the lord's courts than to denote any peculiar favor. Four things are requisite to give an estate by the curtesy; viz., marriage, seisin of the wife, issue, and death of the wife. (*Co. Litt.* 30.) *Jacob.*

Curtesy is derived from *courtesie;* Latin, *curialitas.* It signifies suavity or urbanity, and denotes that the custom of tenancy by the curtesy sprung from favor to the husband, rather than from any natural right. Billings *v.* Baker, 28 *Barb.* 343, 345.

Four things are absolutely requisite to an estate by curtesy: marriage, seisin of the wife during coverture, issue, and death of the wife. Furguson *v.* Tweedy, 56 *Barb.* 168.

CURTILAGE. In law, means a fence or inclosure of a small piece of land around a dwelling-house, usually including the buildings occupied in connection with the house; and this inclosure may consist wholly of a fence, or partly of a fence and partly of the exterior side of buildings so within the inclosure. Commonwealth *v.* Barney, 10 *Cush.* 480.

The curtilage of a dwelling-house is a space, necessary and convenient and habitually used, for the family purposes, the carrying on of domestic employments. It includes the garden, if there be one, and it need not be separated from other lands by fence. State *v.* Shaw, 31 *Me.* 522.

A barn standing eighty feet from a dwelling-house, in a yard or lane with which there is a communication from the house through bars in a fence, is a part of the curtilage. People *v.* Taylor, 2 *Mich.* 250.

Curtilage does not imply any thing as to the size of the parcel of land designated. Edwards *v.* Derrickson, 28 *N. J. L.* 39.

Curtilage originally signified the land with the castle and out-houses, inclosed often with high stone walls, and where the old barons sometimes held their court in the open air, and which word we have corrupted into court-yard. Nothing could be more foreign to all ideas of a curtilage than a lot of land under tide-waters, nor could any thing be more foreign to the meaning of the term lot than a piece of ground under tide-waters. Such ground might become either a lot or a curtilage when reclaimed, and raised above the water, and made fast land, but until then it could only be known as water, and not land at all. The whole earth itself is divided into the two great domains of land and water. The term lot and curtilage belong, by all usage by everybody, to the land. Coddington *v.* Beebe, 31 *N. J. L.* 477, 485.

The curtilage is the court-yard in the front or rear of a house, or at its side, or any piece of ground lying near, inclosed and used with the house and necessary for the convenient occupation of the house. People *v.* Gedney, 17 *N. Y. Supreme Ct.* 151.

CUSTODY, in a sentence that defendant pay a fine, &c., "and be in custody till this sentence is complied with," imports actual imprisonment. The duty of the

sheriff under such a sentence is not performed by allowing the defendant to go at large under his general watch and control, but so doing renders him liable for an escape. Smith *v.* Commonwealth, 59 *Pa. St.* 320.

The clerk's custody of a chest in a vault, in which the jury-wheel was deposited, was held to be custody of the wheel, within the meaning of the Pa. act of 1867, § 2, requiring the same to be in the custody of the jury commissioners. Rolland *v.* Commonwealth, 82 *Pa. St.* 306.

CUSTOM. A usage, such as has been sufficiently long continued and uniform to operate as law, within a region or over a business or particular subject-matter. Customary: that which originates from usage, as distinguished from what is established by positive law.

Customs are styled *general* or *particular*, according as they extend over the whole country and constitute a part of its common law, or are confined to a particular district.

Customs (*plu.*) also signifies a species of taxes, being duties or charges on importation or exportation of merchandise. The connection of the two uses of the word is not very clear. Apparently, in old English law, a great variety of exactions, maintained by crown or lords upon ground of immemorial usage, were called their customs. Most of these declined and became obsolete; leaving duties on merchandise, imposed and regulated by law, the only important living example of the word in this sense.

Customs, according to the Louisiana civil code, result from a long series of actions, constantly repeated, which have by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent. Broussard *v.* Bernard, 7 *La.* 211.

General customs are such as prevail throughout a country and become the law of the country; and their existence is to be determined by the court. Particular customs are such as prevail in some county, city, town, parish, or place. Bodfish *v.* Fox, 23 *Me.* 90.

The custom of merchants comprehends the rules relating to bills of exchange, mercantile contracts, sale, purchase, and barter of goods, freight, insurance, &c. The statute law has adopted many of these customs of merchants; and, conversely, it has been suggested that a large part of mercantile customs have had their origin in forgotten statutes. *Brown.*

Custom is something that has the effect of local law; as, a custom for the inhabitants of a parish to enter upon certain land in the parish, and erect a may-pole thereon, and dance round and about it, and otherwise enjoy on the land any lawful and innocent recreation at any times in the year. Such a custom is good. Hall *v.* Nottingham, 1 *L. R. Ex. D.* 1.

Customary court-baron. See COURT-BARON.

Customary estate. An estate which has the custom of the manor for its foundation.

Customary freehold. A class of freeholds originating from the custom of the manor. See 2 *Bl. Com.* 149.

Customary service. A service due by ancient custom or prescription only.

Customary tenant. A tenant who holds by the custom of the manor.

Customary tenure. A tenure depending on the custom of a manor.

CUSTOM-HOUSE. An establishment organized by law, in ports of entry, where importers of goods, wares, and merchandise are bound to enter the same, and to pay or secure the duties or customs due to the government.

Custom-house broker. One whose occupation it is, as the agent of others, to arrange entries and other custom-house papers, or transact business at any port of entry relating to the importation or exportation of goods, wares, or merchandise. Act of July 13, 1866, § 9, 14 *Stat. at L.* 117.

A person authorized by the commissioners of customs to act for parties, at their option, in the entry or clearance of ships and the transaction of general business. *Wharton.*

CUSTOMS. Duties, imposts, or taxes levied by government upon goods exported or imported.

CUSTOS. A keeper.

Custos brevium. The keeper of the writs; a principal clerk in the English court of common pleas, whose office was to receive and keep the writs returnable in that court, and to put them upon files.

Custos morum. This expression has been applied to the court of queen's bench, as the guardian of the morals of the nation.

Custos placitorum coronæ. Keeper of the pleas of the crown.

Custos rotulorum. An English county officer having charge of the rolls or records. He is a justice of the peace within the county, but is rather a ministerial than a judicial officer. *Wharton.*

Custos spiritualium, or temporali-

um. Guardian of the spiritualities or temporalities.

CUT, imports a wound with an instrument having an edge. State *v.* Patza, 3 *La. Ann.* 512.

A striking over the face with the sharp or claw part of a hammer, was held to be a sufficient cutting within the statute of 43 Geo. III. Atkinson's Case, 1 *Russ. & R.* 104.

Cut glass (as used in the tariff act of July 30, 1846), includes glass tumblers which have the entire surface smoothed or polished, or their sides figured or ornamented by cutting or grinding. Binns *v.* Lawrence, 12 *How.* 9, 20.

CY PRÈS. As near. The doctrine of construing written instruments as near the intention of the parties as the rules of law will allow, is termed "the doctrine of *cy près*." This doctrine is within the application of the maxim, *benigne faciendæ sunt interpretationes*, &c., *q. v.*; but is, in general, applied to wills only, and not to deeds. The principle is generally stated thus: that where a testator evinces a particular intention and a general intention, and the particular intention cannot take effect, the words shall be so construed as to give effect to the general intention. *Broom Max.* 565. So where a devise might be held void, as attempting to create a perpetuity prohibited by law, if possible, the devise will not be treated as utterly void, but will be construed in such a manner as to carry into effect the testator's intention so far as the law prohibiting perpetuities will allow; and such an interpretation of the language of the devise is called a construction *cy près*. In England, and in some of the United States, the doctrine is also applied to sustain bequests and devises for charitable purposes, and is carried much further than is allowed where private interests are to be upheld. If the substantial intention of a testamentary provision is charitable, and the mode of execution provided by the will fails, some means of giving effect to the charitable intention of the testator will be found, if possible, even by applying the fund to a purpose different from that contemplated by him, provided always that it be charitable.

CYROGRAPH. See CHIROGRAPH.

D.

DAILY. A statute prescribing publication of advertisements in some daily newspaper, is satisfied by a publication in a paper issued every day of the week except one, whether the omitted one is Sunday, or one of the week-days. Richardson *v.* Tobin, 45 *Cal.* 30.

DAMAGE. Is used in jurisprudence in its vernacular sense of injury; but is to be distinguished from damages, which means pecuniary recompense for an injury.

An injury produces a right in them who have suffered any damage by it, to demand reparation of such damage from the authors of the injury. By damage, we understand every loss or diminution of what is a man's own, occasioned by the fault of another. 1 *Rutherf. Inst.* 399.

Damage feasant. Doing damage. This phrase designates animals belonging to one person, but found upon the land of another, doing damage; as by feeding upon or treading down the grass, grain, or other productions of the earth. By the common law, a distress of animals was allowed under such circumstances, and the animals so taken were said to be distrained damage feasant.

DAMAGES. 1. A pecuniary recompense awarded by judicial tribunals to indemnify one who has sustained an injury through some wrongful act or neglect; a sum recoverable as amends for a tort.

Damages are termed *general*, meaning those which, by implication of law, result from the tort, and are awarded in the sound discretion of the jury, and without calling for evidence of any particular loss; and *special*, or the indemnity allowable for the specific losses which plaintiff alleges and proves that he sustained.

They are *direct* or *immediate*, or such as result from the operation of the tort,

without the intervention of intermediate causes; and *consequential* or *remote*, or such as the tort might not produce without the concurrence of other events, — and these last are generally disallowed.

They are *compensatory*, or such as are measured by the loss sustained by plaintiff, and are allowed him as a just amends therefor; and *exemplary*, *punitive*, or *vindictive*, when allowed in excess of a simple compensation for the loss, and upon a theory of punishing the wrong-doer for the wrong inflicted upon plaintiff.

They are *liquidated*, when the amount payable has been definitely fixed by act of parties or the judgment of a court; and *unliquidated*, until so fixed.

They are *nominal*, when a trivial sum, as six and a quarter cents, is allowed in recognition that a mere right of plaintiff has been infringed, but without important loss sustained; and *substantial*, when a considerable sum is found.

They are *actual* or *single*, when the jury find the amount to be awarded, and judgment is immediately rendered therefor. Upon some wrongs, the statute authorizes the court to pass judgment for an increased amount, as for twice the sum, or three times the sum, found by the jury; and these are called increased, double, or treble damages.

They are pronounced *excessive*, where the amount is, in the judgment of the court, so much greater than ought to have been allowed, as to indicate clearly that the jury have been influenced by favor, passion, or prejudice, instead of exercising a sound judgment; and for this a verdict may be set aside, and a new trial ordered, on application of defendant. They are styled *inadequate* or *insufficient*, when the sum is, by a like test, grossly less than the plaintiff is clearly entitled to recover; and for this, in rare cases, the plaintiff may have a new trial.

2. Damages sometimes signifies the clause or passage in a declaration in which the plaintiff alleges or "lays" the sum or amount which he claims to recover; and the word is sometimes used, loosely, in the sense of injuries; causes for a recovery of damages.

Damages is taken in law in two several significations: the one properly and generally, the other relatively and properly. It is taken in cases wherein damages are founded upon the statutes where costs are included within the word damages, and taken as damages. But when the plaintiff declares for the wrong done to him, to the damage of such a sum, this is to be taken relatively for the wrong which passed before the writ brought, and is assessed by reason of the foregoing trespass, and cannot extend to costs of suit, which are future, and of another nature. *Jacob.*

Damages are given as a compensation, recompense, or satisfaction to the plaintiff, for an injury actually received by him from the defendant. They should be precisely commensurate with the injury, neither more nor less; and this whether it be to his person or estate. 2 *Greenl. Ev.* § 253.

Damages for losses which necessarily result from the wrong sued for are called *general* damages, and may be shown under the *ad damnum*, or general allegation of damage; for the defendant does not need notice of such consequences to enable him to make his defence: he knows that they must exist, and will be in evidence. But if certain losses do not necessarily result from defendant's wrongful act, but, in fact, follow it as a natural and proximate consequence in the particular case, they are called *special*, and must be specially alleged, that the defendant may have notice and be prepared to go into the inquiry. Bristol Manuf. Co. *v.* Gridley, 28 *Conn.* 201, 212.

Damages in a statute requiring a party to give a bond to pay damages and costs does not, usually, enlarge the liability, or admit proof of incidental or consequential damages. The object of the requirement is only to obtain written security for discharge of the liability imposed by law, whatever that may be. Bartholomew *v.* Chapin, 10 *Metc.* 1.

The word damages in such a statute does not embrace costs incurred in a court below, and included in a judgment for payment of which the bond is required and given. Damages and costs are distinct and separate parts of a judgment. Griffin *v.* Mortimer, 8 *Wend.* 538.

Damages does not include an award of alimony. Chase *v.* Ingalls, 97 *Mass.* 524.

It does not include a judgment imposing an amercement or fine. Abraham's Case, 1 *Rob.* 676.

Damages and compensation are sometimes to be taken, in a railroad act, as synonymous. Hays *v.* Briggs, 3 *Pittsb.* 504.

Damages, in a statute requiring a plaintiff in error or appellant to give security for damages sustained by the writ or appeal, includes the loss which the other party may sustain by the judgment not being paid. Catlett *v.* Brodie, 9 *Wheat.* 553.

The two words, damages and profits, as used in the patent laws, are not convertible. Damages are to be awarded in addition to profits. Profits refers to what the

defendant has gained by the unlawful use of the patented invention, and damages to what the claimant has lost. Goodyear Dental Vulcanite Co. *v.* Van Antwerp, 9 *Off. Gaz. Pat.* 497.

The terms damages, costs, and expenses, in a covenant of indemnity against the payment of a mortgage, do not cover a premium or bonus which the party pays to a broker for his services in procuring a person to take an assignment of the mortgage. Low *v.* Archer, 12 *N. Y.* 277.

Damages, in N. H. Gen. Stat. ch. 69, § 1, declaring towns liable for damages happening to any person, &c., by reason of defect in highway, means a compensation, recompense, or satisfaction to the plaintiff, commensurate with the injury. Injury to property upon the person of the traveller, *e.g.* loss of money from the pocket, or tearing of the clothing, is included, as well as bodily injuries. Woodman *v.* Nottingham, 49 *N. H.* 387, 392.

DAMNOSA HEREDITAS. A burdensome inheritance; that is to say, an inheritance of which the liabilities exceed the assets. By the Roman law, the heir was liable to the full extent of the deceased's liabilities, and was therefore a loser by entering upon the inheritance.

The term has also been applied to that species of property of a bankrupt which, so far from being valuable, would be a charge to the creditors; for example, a term of years where the rent would exceed the revenue. Bourdillon *v.* Dalton, *Peake*, N.S. 238; 1 *Esp. N. P.* 234.

DAMNUM. A loss; a damage. The word occurs chiefly in such phrases as:

Damnum absque injuria. Injury without wrong. This phrase is used to designate the class of injuries for which there is no legal remedy; such as damages arising from inevitable accident, or from an act lawful in itself, and not performed with any intent or desire to injure. The *injuria*, which is an essential element in a right of action, is more than mere damage or loss inflicted without malice, for which the law gives no remedy. Thus, one who commences a business or sets up a trade in the same locality where another has previously established a similar business or trade, though he draws away custom or trade from such other, is not therefore liable to an action; for, though there be loss (*damnum*) to the other, it is not coupled with such wrong (*injuria*) as will give a right of action. So if the owner of property, within the proper exercise of his right of dominion over his own property, does acts which cause loss to another, this is *damnum absque injuria*, and no action lies against him therefor. And acts of public officers or agents, within the scope of their authority, if they cause damage, cause only *damnum absque injuria*. For the principal cases on this subject, see 1 *Smith Lead. Cas.* 244 *et seq.*

Damnum fatale. Injury from a cause beyond human control. In the civil law, injury caused by a fortuitous event, or inevitable accident. The phrase was used to distinguish a class of losses for which bailees were not held liable. Among these were included losses by shipwreck, lightning, or similar casualty; even losses by fire, by pirates, by robbery; but theft was not included. The term is sometimes used by common-law writers in the same sense.

The civilians included in the phrase *damnum fatale* all those accidents which are summed up in the common-law expression, "act of God or public enemies;" though perhaps it embraced some which would not now be admitted as occurring from an irresistible force. Thickstun *v.* Howard, 8 *Blackf.* 535.

DANGEROUS WEAPON. The danger referred to in this term is danger to life. Whether an assault was with a dangerous weapon or not, may depend upon the manner of the assault. The court cannot declare, as matter of law, that an assault committed with a belaying-pin was with a dangerous weapon; but the question must be left to the jury. United States *v.* Small, 2 *Curt.* 241.

An instruction that a knife, described in the bill of exceptions merely as a "jack-knife," was a dangerous weapon, was sustained in Commonwealth *v.* O'Brien, 119 *Mass.* 342.

As to a distinction between a dangerous and a deadly weapon, see Pinson *v.* State, 23 *Tex.* 579.

DANGERS OF THE SEAS. This phrase has acquired a conventional meaning, like that of perils of the seas (*q. v.*), from long employment in bills of lading and other mercantile agreements, where it is employed in a customary clause stipulating that the carrier, &c., shall not be liable for a loss attributable to dangers of the seas.

The phrases, the dangers of the seas,

the dangers of navigation, and the perils of the seas, employed in bills of lading, are convertible terms. Baxter *v.* Leland, *Abb. Adm.* 348.

The expression dangers of the seas means those accidents peculiar to navigation that are of an extraordinary nature, or arise from irresistible force or overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence. Tuckerman *v.* Stephens, &c. Trans. Co., 32 *N. J. L.* 320; and see 33 *Id.* 543, 565.

The ordinary clause in a bill of lading excepting dangers of the seas, dangers of the lake, or river, &c., does not exempt the carrier from liability for a loss incurred through negligence. Slocum *v.* Fairchild, 7 *Hill*, 292, 19 *Wend.* 329.

That clause signifies the natural accidents incident to navigation; not such as may be avoided by the exercise of that discretion and foresight, which are expected from persons in such employment. Williams *v.* Branson, 1 *Murph.* 417; Graham *v.* Davis, 4 *Ohio St.* 362.

That clause covers the case of an accident occurring in navigable waters by reason of a hidden obstruction of recent origin not avoidable even with extraordinary care and foresight. But if a carrier learns of a new obstruction before an injury is caused by it, he must use increased caution; and if he could by any means have removed it, he will be chargeable. Redpath *v.* Vaughan, 52 *Barb.* 489; Gordon *v.* Buchanan, 5 *Yerg.* 71.

That clause covers a loss occasioned by a collision, unless it is attributable to negligence, or might have been prevented by reasonable skill and diligence. Whitesides *v.* Thurlkill, 20 *Miss.* 599.

That clause does not include injury to the goods by rats. Aymar *v.* Astor, 6 *Cow.* 267.

Nor damage sustained through bilging a canal-boat in a lock entered contrary to regulations. Atwood *v.* Reliance Co., 9 *Watts*, 87.

That clause does not apply where, merely, a river on the route became unnavigable by reason of low water; for "danger of navigation" does not mean a want of navigation. Cowley *v.* Davidson, 13 *Minn.* 92.

Fire, occurring on the wharf, after the goods are landed, is not within the exception of the dangers of the seas, in the ordinary bill of lading. Salmon Falls Manuf. Co. *v.* The Tangier, 6 *Am. Law Reg.* 504; 11 *Law Rep.* N. S. 6.

The expression is equivocal. It is capable of being interpreted to mean all dangers that arise upon the seas; or may be restricted to perils which arise directly and exclusively from the sea, or of which it is the efficient cause. In insurance policies, it may have the wider meaning; but in charter-parties, an exception introduced to limit the obligation of the charterer to return the vessel, of dangers of the seas, should be construed, since the charterer has possession, against him; and confined to the limited sense. Thus construed, it does not include destruction of the vessel by fire. Merrill *v.* Avey, 3 *Ware*, 215; 2 *Curt. C. Ct.* 8.

DARREIN. The last; the most recent. It is said to be a corruption of the French *dernier*. The only important use of it is in the phrase *puis darrein continuance*, — since the last continuance; applied to a plea which sets up some matter of defence that has arisen since the cause was last adjourned; since the immediately preceding term of the court.

DATE. Is used not only to designate the time when an event occurred, and particularly when an instrument was made or delivered, but also to signify that clause or memorandum in or affixed to a written instrument which specifies the time when it was given, or from which its operation is to be reckoned.

Burrill explains that this clause, in its old and full form, ran, *datum apud*, &c., specifying the place, and then the time; and that it was called the *datum* clause; this name being soon after shortened to date, which was adopted for more general application.

The date is not esteemed, in law, a part of the instrument, but is a memorandum or certificate that the instrument was made on the day named. It may be corrected by proof of the true day, and the instrument will then take effect accordingly.

The primary signification of date is not time in the abstract, nor time taken absolutely, but time given or specified; time in some way ascertained and fixed. When we speak of the date of a deed, we do not mean the time when it was actually executed, but the time of its execution, as given or stated in the deed itself. The date of an item, or of a charge in a book-account, is not necessarily the time when the article charged was, in fact, furnished, but rather the time given or set down in the account, in connection with such charge. And so the expression, "the date of the last work done, or materials furnished," in a mechanic's lien law, may be taken, in the absence of any thing in the act indicating a different intention, to mean the time when such work was done or materials furnished, as specified in the plaintiffs' written claim. Bement *v.* Trenton Locomotive, &c. Co., 32 *N. J. L.* 513.

Where a date is given, both as a day of the week and a day of the month, and the

two are inconsistent, the day of the month must govern. Ingersoll *v.* Kirby, *Walk.* 27.

DATION EN PAIEMENT. A term of the civil law for a transfer of property to discharge an indebtedness, in lieu of a money payment.

DAY. Is sometimes used, in jurisprudence, in its astronomical sense of the space of time in which the earth makes one revolution upon its axis; or of the time between one midnight and the next; sometimes, in the popular sense, of the time between sunrise and sunset; and sometimes, in a conventional sense, of those hours or that recurring time which is by usage or law allotted to and deemed sufficient for the discharge of some duty or performance of some business; as where one speaks of a day's work, the whole of a business day, &c. See DIES.

A statute forbidding an act to be done on a particular day, means the natural day of twenty-four hours, from midnight to midnight. Pulling *v.* People, 8 *Barb.* 384.

How to reckon days is a question of some difficulty in several cases.

1. When a contract or statute allows a person a specified number of days, for making a payment, serving a notice or pleading, taking an appeal, or performing any act authorized or imposed, the rule for construing the word days, very generally, though not universally established, is that the first day is excluded and the last included; thus, if a contract executed on the first day of the month requires one of the parties to make a payment within ten days, the first day of the month is not counted, the second day of the month is the first of the ten, and the party has to the end of the eleventh day for performing. But the rule of computation adopted in any case depends not so much upon the signification of the word day, as upon that of the words used in the particular instrument or statute to express the mode of computation, or upon the nature of the subject-matter and the reason of the thing. Thus, where time is computed from or after a certain day, that day is usually excluded, because no moment of time can be said to be after a given day, till that day is wholly past. The same principle applies in computing any number of days from or after an act done; the whole of the day on which the act is done is excluded, in most cases, especially if such exclusion will preserve a right or prevent a forfeiture. Similar questions of construction arise from the application of such words as to or until, to the termination of a period consisting of a certain number of days. But the first and the last day are not both to be reckoned inclusive, in any case; while they are sometimes both excluded, as in cases where a certain time is given to a party to do some act, which time is included between two other acts to be done by another, and both the days of doing such acts are excluded, in order to insure to him the whole of that time.

The common-law rule of computation of time is to include the first day and exclude the last; and under that rule notice given on the 19th of May of a suit brought on the 18th of June is given thirty days before suit. Thomas *v.* Afflick, 16 *Pa. St.* 14.

In Indiana, where a certain number of days are given from the time of a contract in which to do an act, the whole of the day on which the contract was made is to be taken as one of the days. Brown *v.* Buzan, 24 *Ind.* 194. See FROM.

Where time is to be computed from an act done, the day on which the act was done must be included; but when the computation is to be from the day itself, and not from the act done, then the day on which the act was done must be excluded. Hampton *v.* Erenyeller, 2 *Browne*, 18; Chiles *v.* Smith, 13 *B. Mon.* 460; Blake *v.* Crowninshield, 9 *N. H.* 304.

There is no general rule, in computing time from an act or event, that the day of the act or event is to be included or excluded. But wherever the reason of the case requires, the entire day will be excluded. Thus, in computing from the death of a testator, where there is no alternative but either to take the actual instant or the entire day as the time of his death, the entire day must be excluded; otherwise the computation would in reality begin from the preceding day. Lester *v.* Garland, 15 *Ves.* 248. Deyo *v.* Bleakley, 24 *Barb.* 9.

In computing time, in some of the adjudged cases, a distinction has been taken between the date and the day of the date of a written instrument; also, between mercantile contracts and others; and, again, it has been said that a different rule of computation prevails under contracts and under statutes. These distinctions can be of no practical use, but are well calculated to mislead. The true rule is, that not only mercantile contracts, such as bills of exchange, promissory notes, policies of insur-

ance, &c., but also wills and all other instruments, are so to be understood as that the day of the date, or the day of the act from which a future time is to be ascertained, is to be excluded from the calculation; and the modern cases, in this country, have adopted the same rule in the construction of statutes, and as governing all proceedings under them. Weeks *v.* Hull, 19 *Conn.* 376.

Under a statute requiring that certain penalties incurred by railroad companies shall be sued for "within ten days," the day on which the penalty was incurred is to be excluded. People *v.* New York, &c. Co., 28 *Barb.* 284.

A notice on the 15th of a month of a mechanic's lien filed on the 25th, is sufficient under a statute requiring that ten days' notice shall be given. Hahn *v.* Dierkes, 37 *Mo.* 574.

An appeal from a judgment rendered February 24, taken on the 25th of March following, is taken within thirty days after the rendition of the judgment. Swift *v.* Tousey, 5 *Ind.* 196.

So, an appeal from a judgment rendered March 15, which is taken April 14, is taken within thirty days. Faure *v.* United States Express Co., 23 *Ind.* 48.

And an appeal from an order entered May 27, by a notice of appeal, June 27, is taken "within thirty days," where by the statute the first day is to be excluded. Gallt *v.* Finch, 24 *How. Pr.* 193.

In computing the two days in which a prisoner indicted capitally in Alabama is entitled to have a list of the jurors before the trial, the day of delivery and day of trial are to be excluded. State *v.* McLendon, 1 *Stew.* 195.

A statutory provision requiring a notice to the defendant, which shall "leave at least ten days between the day of service and the first day of the next term," excludes both of those days in the computation of the time. Robinson *v.* Foster, 12 *Iowa*, 186.

2. When a statute limits a specified number of days for doing an act or taking a legal proceeding, intervening Sundays are frequently omitted from the computation, on the ground that Sunday is not a judicial day, and should not, therefore, be counted against one who is entitled to a prescribed number of days for doing a judicial act. The rule extends to other days on which no such act can be done, such as public holidays. A distinction is sometimes made between cases where the number of days allowed is less than a week, a Sunday occurring in which is not counted, and cases where more than a week is allowed, in which an intermediate Sunday or Sundays may be counted.

Under a statute providing that the day to be appointed, in the warrant for holding a court, shall be "not less than five, nor more than ten, days after the date thereof," the court may be held on the fifth day after the date of the warrant, though one of the five days is Sunday. Abraham's Case, 1 *Rob.* (*Va.*) 676.

Sunday is not counted as one of the days of a term of a court. Thus, in determining the "tenth day" of the term, under a notice of a step to be taken on the tenth day, Sunday is excluded. Michie *v.* Michie, 17 *Gratt.* 109.

Under a statute providing that an appeal may be entered "within four days after the adjournment of the court," &c., Sunday should not be counted as one of the four days. Neal *v.* Crew, 12 *Ga.* 93.

The three days allowed by statute for filing the appeal after the return-day are judicial days; and the appeal will be in time even if filed on the third judicial day. Bouligny *v.* White, 5 *La. Ann.* 31.

Where provision is made by statute for the publication of a notice for a certain number of consecutive days, and no exception is made of Sundays, they are to be counted. Taylor *v.* Palmer, 31 *Cal.* 240; Miles *v.* McDermott, *Id.* 271.

The word days, as used in a statute regulating proceedings in court, which requires notice to be given or an act to be done in a specified number of "days," does not include Sundays. The prescribed number of secular days is to be given. *Query*, whether the rule extends to periods exceeding a week? National Bank *v.* Williams, 46 *Mo.* 17; and see Burton *v.* Chicago, 53 *Ill.* 87.

The word days, used alone in a clause of demurrage for unlading in the river Thames, is to be understood of working or running days only, and not to comprehend Sundays or holidays, by usage of merchants in London. Cochran *v.* Retberg, 3 *Esp. N. P.* 121.

3. When the last of a specified number of days allowed for doing an act is Sunday, the act is sometimes required to be performed on the preceding day. This is always the rule in regard to days of grace when the last day of grace falls upon Sunday. But the general rule is that the last Sunday is not counted a day, and the party has the whole of the following Monday for performance. A similar rule is applied where the last day is a public holiday.

When the day of performance of contracts, other than instruments upon which days of grace are allowed, falls on Sunday, that day is not counted; and a compliance with the contract on Monday is a sufficient performance. Salter *v.* Burt, 20 *Wend.* 205; Stebbins *v.* Leowolf, 3 *Cush.* 137; Stryker *v.* Vanderbilt, 27 *N. J. L.* 68.

In New York, previous to the code of

procedure, where the period fixed by statute for doing any act expired on Sunday, the act was required to be done on the preceding day; but where the time was prescribed by the rules or practice of the courts, the party had the whole of the following Monday. Broome *v.* Wellington, 1 *Sandf.* 664.

4. A very general rule is that the law does not notice fractions of a day, but treats a day as a point of time; thus, if an instrument executed on the first day of a month requires a certain act to be done within ten days, performance at any hour on the eleventh day of the month will be held good. The law would not sustain an objection that the instrument was executed early in the morning, and therefore performance, if delayed till the eleventh day, ought to be completed equally early in it, else more than ten days were consumed. This rule is not invariable: it is applied according to the justice and convenience of the case. Where from the nature of the case justice requires it, fractions of a day are reckoned.

Our law rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of indivisible point; so that any act done in the compass of it is no more referable to any one than to any other portion of it; but the act and the day are coextensive; and therefore the act cannot properly be said to be passed until the day is passed. Lester *v.* Garland, 15 *Ves.* 248.

In general, the law does not notice fractions of a day; yet, where questions of right, growing out of deeds, judgments, and other instruments bearing the same date, are concerned, the precise time of the approval of a statute may be inquired into, to prevent it from operating retrospectively. 3 *Op. Att.-Gen.* 82.

Divisions of a day, though applicable to private transactions, are not permitted to create priorities in questions concerning public acts, or such judicial proceedings as are matters of record. *Exp.* Welman, 7 *Law Rep.* 25, 20 *Vt.* 653.

The time for completing commercial contracts is not limited to banking hours. A party has the whole business day to deliver or to pay. Price *v.* Tucker, 5 *La. Ann.* 514.

In the legal computation of time there are no fractions of a day; and the day on which an act is done must be entirely excluded or included. Jones *v.* Planters' Bank, 5 *Humph.* 619; Portland Bank *v.* Maine Bank, 11 *Mass.* 204.

Whenever the whole day and every moment of it can be counted, then it should be counted; whenever, if it were counted, the party would in fact have but a fractional part of it, then it should not be counted. Thus, since an infant becomes of age, and is competent to bring suit at any moment upon the day preceding his twenty-first birth-day, that day is to be counted in the time allowed by a statute of limitations for bringing suit after the disability of infancy is removed. Phelan *v.* Douglass, 11 *How. Pr.* 193.

5. For some legislative and judicial purposes, the whole of a session or term has been considered as constituting, by a fiction of law, one day only; but this rule is less applied at the present time than formerly. As to reckoning the twenty-eighth and twenty-ninth days of February as one day, see BISSEXTILE.

The whole of a term of court is considered as one day; and, by a legal fiction, the time between the submission and decision of a cause is also considered as but one day; so that, although a party to an action may die between the time of the decision in the cause by the supreme court of a state and the filing of the mandate of the supreme court of the United States reversing that decision, no change of parties in the state court is necessary before carrying the mandate into effect. Cunningham *v.* Ashley, 13 *Ark.* 653.

Days of grace. A certain number of days allowed to the acceptor of a bill or the maker of a note, for payment, additional to the time expressed in the bill or note itself. Originally, such days were allowed as matter of favor merely; but the custom of merchants in this respect having grown into law, and been sanctioned by the courts, all bills of exchange are deemed entitled under the law-merchant to days of grace; and the same rule was extended to promissory notes by the English statute making them negotiable, which has been generally adopted in the United States. Bills or notes payable at sight or on demand and banker's checks are not entitled to grace. The number of days allowed in the United States is three, computed by adding three days to the term of the bill or note, irrespective of the fact that the day on which the bill would be due without the days of grace is a Sunday or holiday. The days of grace are considered a part of the time the bill has to run, and interest is charged for them as such.

A note is really due when the days of grace commence, for they cannot begin until it has matured upon its face. Upon notes which bear interest after maturity the interest runs from the time they mature

on their face, not from the time they are made to mature by the days of grace. Weems *v.* Ventress, 14 *La. Ann.* 265.

Daytime. The time during which there is the light of day; as distinguished from night-time, during which there is only the light of the moon and stars, or artificial light. The principal legal use of this term is in defining various crimes, or degrees of crime, such as burglary, arson, &c., in which the time of its commission is an essential part of the particular offence. See NIGHT-TIME.

Daytime, in bonds for the liberty of the jail-yard, includes that portion of time during which a man's person and countenance are distinguishable. Trull *v.* Wilson, 9 *Mass.* 154.

DE. Of; concerning; also, out of or arising from; also, for, by, &c. This Latin preposition is the initial word in numerous Latin phrases which have been employed in jurisprudence. Some of them have lost currency, because the things they designated have become obsolete; others have been replaced by English substitutes. Below is a liberal selection of those in use in the jurisprudence of modern times. The list might be increased indefinitely by adding names of writs long disused, and phrases gathered from books of ancient learning.

De, from the French, usually translated of, sometimes to, from, by, &c., is also notable as a member of ancient law French phrases, such as *brefe de droit* (writ of right), *de pleyn âge* (of full age); *plegges de suer* (security to prosecute).

De bene esse. Of well being; of formal sufficiency for the time; conditionally; provisionally. This phrase is technically applied to acts or proceedings done or permitted, deemed for the time to be well done, and to be formally sufficient, but the validity or effect of which depends upon some subsequent act, fact, or proceeding. It is equivalent to conditionally or provisionally. Its most frequent application in practice is to examinations of a witness out of court before trial, subject to the contingency of his being able to attend at the trial. Such an examination is termed an examination *de bene esse*, and is allowed when there is danger of losing testimony of an important witness from death, by reason of age or dangerous illness, or where he is the only witness to an important fact, and in other cases generally defined by statutes. If the witness is unable to attend at the trial, such examination is good, and his deposition so taken may be read in evidence on the trial. But if he is able to attend, the examination is of no validity, and he must be examined again at the trial in the usual way. *Burrill.* The term was anciently applied in the same sense to other proceedings taken conditionally; as to a verdict subject to the opinion of the court, which still is occasionally called a verdict *de bene esse.*

The peculiar structure of the Latin phrase renders a literal translation of it into English, difficult. Cowel says that "*de bene esse* are common Latin words, but their meaning something more dark." There is no uncertainty, however, in regard to the practical import of the phrase, as explained above: it is in common use, and well understood.

De bonis asportatis. For goods taken away; for taking away goods. The action of trespass for taking away personal property was technically termed trespass *de bonis asportatis.*

De bonis non. Of the goods not. This phrase is an abbreviation of *de bonis non administratis*, — of the goods not administered, — which is also occasionally used. Where, in consequence of the death, removal, &c., of the administrator, the administration of an intestate's estate is left unfinished, a new administrator may be appointed of the goods remaining unadministered, and he is termed an administrator *de bonis non; i.e.*, an administrator of the goods of the intestate not administered by the former administrator. An administrator appointed under like circumstances to succeed an executor is termed an administrator *de bonis non cum testamento annexo.* See CUM TESTAMENTO ANNEXO.

De bonis propriis. Of his own goods. Where a judgment is rendered against an administrator or executor to be satisfied from his own property, and not from the estate of the deceased, it is termed a judgment *de bonis propriis.*

De bonis testatoris. Of the goods of

the testator. A judgment against an executor which is to be satisfied out of the goods or property of the testator, as distinguished from a judgment *de bonis propriis*, is termed a judgment *de bonis testatoris*. In some cases, judgment may be rendered against an executor, to be satisfied out of the property of the testator, if any, and, if not, out of the property of the executor. Such a judgment is termed a judgment *de bonis testatoris si*.

Another form of judgment against an executor is *de bonis testatoris cum acciderint*, — to be satisfied out of the goods of the testator when they come to hand.

De bono et malo. For good and evil. 1. In ancient criminal pleadings, the party accused, in submitting himself to a jury, employed this phrase: *ponit se super patriam de bono et malo*, — puts himself upon the country for good and evil.

2. The special writ of jail delivery formerly in use in England, which issued for each particular prisoner, of course, was termed a writ *de bono et malo*. It was superseded by the general commission of jail delivery.

De donis. Concerning gifts. The first chapter of the statute of Westminster 2 (13 Edw. I.) is commonly called the statute *de donis*, or more fully, *de donis conditionalibus*, — concerning conditional gifts or grants. By this statute fees-simple conditional were converted into fees-tail, and the power of alienating such estates being taken away, perpetuities were introduced.

De facto. In fact; in point of fact; actually. This term is used to denote a thing actually done, or a condition actually existing. It is frequently employed in contradistinction from the phrase *de jure*, of right, or by right. Thus a person who performs the duties of an office with apparent right, and under claim and color of office, as by an appointment or election not strictly legal, or by holding over after the expiration of his term, or without having duly qualified, is termed an officer *de facto;* while a person who is legally entitled to an office, but is deprived of it, is an officer *de jure* only. A like distinction is made between governments *de facto* and *de jure*. So a wife *de facto*, whose marriage is voidable by decree, is distinguished from a wife *de jure*, or lawful wife. The term is frequently used independently of any distinction from *de jure;* thus a blockade *de facto* is a blockade which is actually maintained, as distinguished from a mere paper blockade.

An officer *de facto* is one who exercises the duties of an office under color of right, by virtue of an appointment or election to that office; being distinguished, on the one hand, from a mere usurper of an office, and, on the other, from an officer *de jure*. Plymouth *v.* Painter, 17 *Conn.* 585; Rice *v.* Commonwealth, 3 *Bush*, 14; Brown *v.* Lunt, 37 *Me.* 423; Hooper *v.* Goodwin, 48 *Id.* 79; Gregg *v.* Jamison, 55 *Pa. St.* 468; Commissioners *v.* McDaniel, 7 *Jones L.* 107.

To constitute an officer *de facto*, there must be color of title. A claim, under appointment, of title to an office which by law is elective; or a claim, under election, to an office which by law must be filled by appointment, is no color of title, and cannot constitute the claimant an officer *de facto*, so that perjury can be assigned of an oath administered by him. People *v.* Albertson, 8 *How. Pr.* 363; s. p. Wilcox *v.* Smith, 5 *Wend.* 231.

The term *de facto*, as descriptive of a government, has no well fixed and definite sense. It is, perhaps, most correctly used as signifying a government completely, though only temporarily, established in the place of the lawful or regular government, occupying its capitol and exercising its power, and which is ultimately overthrown and the authority of the government *de jure* re-established. Thomas *v.* Taylor, 42 *Miss.* 651, 703.

A government *de facto* is a government that unlawfully gets the possession and control of the rightful legal government, and maintains itself there, by force and arms, against the will of such legal government, and claims to exercise the powers thereof. Chisholm *v.* Coleman, 43 *Ala.* 204.

An officer *de facto* is one whose acts, though he was not a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the public and third persons. State *v.* Carroll, 38 *Conn.* 449.

A *de facto* officer is one who goes in under color of authority, or who exercises the duties of the office so long or under such circumstances as to raise a presumption of his right. People *v.* Staton, 73 *N. C.* 546.

De homine replegiando. For replevying a man. This was the name of a writ to replevy a man out of prison, or out of the custody of any private person, upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him. The proceed-

ing has become nearly obsolete, both in England and the United States, having been superseded by the writ of *habeas corpus;* but has been revived by statute in some of the United States, in a somewhat different form. The statute of Maine allowed it for persons unlawfully imprisoned, under restraint of liberty, or held in duress. It lies only for the benefit of the person so imprisoned or restrained, and must be brought in his name, though it may be by the procurement of another. It cannot be used for the benefit of another person, even though such person may have by contract a lawful claim to his service or to the custody of his person. 32 *Me.* 560; 34 *Id.* 136. As to the use of the writ in Massachusetts, see Mass. Gen. Stat. ch. 144, § 42 *et seq.*; in New York, see 2 N. Y. Rev. Stat. 561, § 15.

De injuria. Of wrong. Technical words used to designate a particular form of replication in an action of tort, by which the plaintiff denies the effect of matters of excuse offered by the defendant. The formal words necessary in the Latin form of such a replication were *de injuria sua propria, absque tali causa,* — of his own wrong, without such cause; or, after an admission of a part of the plea, *de injuria sua propria, absque residuo causæ,* — of his own wrong, without the rest of the cause; and such a traverse of the defendant's plea was termed a replication *de injuria.* In form it is a species of traverse, and it is frequently used when the pleading of the defendant, in answer to which it is directed, consists merely of matter of excuse of the alleged trespass, grievance, breach of contract, or other cause of action. Its comprehensive character in putting in issue all the material facts of the defendant's plea has also obtained for it the title of the general replication. *Holthouse.*

Its peculiarity lay in denying in general and summary terms, and not in the words of the allegation traversed. It is, in general, proper where the plea consists of matter of excuse only; but the decisions vary as to what excuse or facts will sustain this form of replication, and as to what evidence is admissible under it. It is said generally that the replication *de injuria* puts the whole plea in issue, and compels the defendant to prove it.

De jure. Of right; by right; rightfully; lawfully. This term is used to describe a thing or condition which exists or is claimed as matter of right; most frequently as distinguished from *de facto,* q. v.; often applied to rights or remedies demanded as absolute rights, as contrasted with what is asked as matter of favor; and sometimes distinguishing what is claimed at law from an equitable right.

De la plus belle. Of the fairest. Dower *de la plus belle* was where the wife was endowed with the fairest part of her husband's estate. *Jacob.*

De lunatico inquirendo. For inquiring concerning a lunatic. The name of a writ, or commission in the nature of a writ, issued in cases of alleged lunacy, to inquire whether the party charged is a lunatic or not.

For a history of these commissions and account of the modern law governing them, and regulating the forms and modes of procedure, and the effect of a finding of lunacy, see *Ray, Med. Jur. Ins.; Ordron. Jud. Asp. Ins.* 225.

For course of proceeding and forms under recent New York laws authorizing inquisitions before state commissioner in lunacy, see cases reported, 3 *Abb. N. Cas.* 187–288.

De medietate linguæ. Of half tongue; half of one language and half of another. A term applied to a jury consisting one half of denizens or natives, and the other half of aliens.

De melioribus damnis. Of the better damages. Where, in a suit for damages against several defendants, damages were assessed against each of them, severally, the plaintiff might select the best of them against whom to take judgment, his choice was termed an election *de melioribus damnis.*

De mercatoribus. Of merchants. The title of the English Stat. 13 Edw. I., ch. 3, enacted to facilitate the collection of debts contracted in trade. An earlier statute for the same purpose, and sometimes called also the statute *de mercatoribus,* is better known as the statute of Acton Burnell, from the village where it was enacted.

De minimis non curat lex. The law does not concern itself about trifles. Although frequently cited as a maxim, this principle is not of general application, and is not to be received, at least in its literal sense, without many exceptions and reservations. As a general rule, the law does take cognizance of matters of small pecuniary value or trivial importance; and does not refuse to regard matters otherwise properly within its cognizance, merely because the question raised or the amount involved is of small consequence. Every legal right, no matter of what value or extent, may be enforced; and every wrong, however slight, has its appropriate remedy. The same principle applies in the criminal law. For example, every felonious taking of property is criminal, whatever may be the value of the property. It is obvious that if the law should assume to determine, in the first place, what cases are and what are not of sufficient importance for the application of its principles, and should decline to adjudicate upon questions deemed unimportant, positive injustice must often result. The rules of law usually cited as illustrating this maxim seem to rest upon other considerations, or to be of limited application. Thus the rule that the diminution of the quantity of running water, resulting from the reasonable use of it by a riparian proprietor, gives no right of action to a proprietor below; and the similar rules, that the diminution of the quantity of light enjoyed by another, or the impairing the natural purity of the air, by the proper and reasonable use of one's own property, or of that which is the common property of all, constitute no ground of action,—seem to proceed not so much on the principle that such injuries are trifling in their nature and extent, as that they are necessary incidents to the common enjoyment by all of the common property. Embrey *v.* Owen, 6 *Exch.* 369. And the rule that the law takes no notice of fractions of a day in the computation of time is never regarded by the courts in cases where there are conflicting rights, for the determination of which minute portions of time must be considered. *Broom Max.* 142.

The jurisdiction of appellate courts has been frequently limited by legislation to a certain minimum amount. But, in general, the superior courts of original jurisdiction hear and determine all suits, without reference to the magnitude of the amount demanded or the extent of the injury claimed; except as the right to costs may be affected by the amount of the recovery. Even upon the question of granting a new trial, this maxim is not of general application. Lord Kenyon, Wilson *v.* Rastall, 4 *Durnf. & E.* 753, remarks, "Where the damages are small, and the question too inconsiderable to be retried, the court have frequently refused to send the case back to another jury. But wherever a mistake of the judge has crept in and swayed the opinion of the jury, I do not recollect a single case in which the court have ever refused to grant a new trial."

But as to mere technical defects, trifling irregularities, or omissions of established forms not affecting substantial rights, the maxim fully applies; and the courts do not take notice of trifling deviations in matters of practice.

In equity jurisprudence, also, the maxim has a general application in cases where the common law affords no adequate remedy, and equity applies a remedy whenever the importance of the case renders equitable interference fitting and proper. Thus the power of equity to relieve against fraud, accident, and mistake would scarcely be exercised in a case where the injury apprehended was, at most, trivial in extent. In this application, the maxim corresponds with that of the civil law, from which it is probably derived, *de minimis non curat prætor;* freely translated, the prætor does not apply his equitable remedies in matters of small importance; the remedial powers of the Roman prætor being analogous to the jurisdiction of equity where no remedy was given by the common law. *Trayn. Max.* 137.

The maxim *de minimis non curat lex* is never applied to the positive and wrongful invasion of one's property. To warrant an action in such a case, the degree of damage is wholly immaterial; it is enough that there should be a plain violation of right and a possibility of damage. Seneca

Road Co. *v.* Auburn, &c. R. R. Co., 5 *Hill*, 170.

The maxim is not an appropriate answer to an action for violating a clear legal right; as for an injury to a plank-road by tearing up the planks. Ellicotville, &c. Plank-road Co. *v.* Buffalo, &c. R. R. Co., 20 *Barb.* 644.

Under the maxim *de minimis non curat lex*, while a defendant may be liable in trespass for taking ice from a pond where it covers lands in which he has no right or license, it is clearly not a case to invoke the aid of a court of equity to restrain such an act by injunction. Marshall *v.* Peters, 12 *How. Pr.* 218.

The maxim may properly be opposed to an effort to restrain by injunction the publication of a solitary letter, which, as far as the complaint shows, has no literary merit, is of no actual value, and the publication of which would not be productive of injury, nor offend the most delicate sensibility. Woolsey *v.* Judd, 4 *Duer*, 596.

If a party acting in good faith, and with a determination to do what he has contracted to do, should, unintentionally, and without any negligence, happen in some trifling and unimportant matter to vary or depart from the terms of his agreement, the law is not so severe and exacting as to deprive him of all compensation. It ever regards the substantial rights of parties, but overlooks trivial and unimportant matters. Smith *v.* Gugerty, 4 *Barb.* 614.

De non apparentibus et non existentibus eadem eat ratio. Concerning things which do not appear and things which do not exist, the rule is the same. Things which are not made to appear are regarded as if they did not exist. This is a well-established maxim, and of frequent application. A litigant who relies upon deeds or other writings as the ground of the rights he claims, must produce the documents, or prove their contents in some legal and sufficient mode; the court will not assume that a deed exists, or that its terms are as averred, if these matters are disputed. In reading an affidavit, also, the court will look only at the facts deposed to, and will not presume the existence of additional facts or circumstances to support the allegations contained in it. In general, every thing not produced or proved, and of which the court cannot take judicial notice, is regarded, for the purposes of the particular case, as not existing. By appellate courts, the rule is applied to the record on appeal or error; objections not appearing on the record not being regarded.

Where a possible claim under a lease was suggested, but no proof was made of the contents of the lease, or whether it had or had not expired, the court declined to take into consideration any supposed interest under the lease, upon the ground that *de non apparentibus et de non existentibus eadem est ratio.* Johnson *v.* Stagg, 2 *Johns.* 510.

De novo. Anew; a second time. As where a judgment is reversed after trial of an issue of fact for error by the court upon the trial, there must be a *venire de novo* that the entire case may be again submitted to a jury.

De odio et atia. Of hatred and ill-will. The name of a writ anciently used to enforce the right of an accused to give bail. It was directed to the sheriff, commanding him to inquire whether a prisoner charged with murder was committed upon just cause of suspicion, or merely *propter odium et atiam.* If upon the inquisition due cause of suspicion did not appear, then there issued another writ commanding the sheriff to admit the prisoner to bail. Bracton says that Magna Charta ordained that it should issue of course to any one, without denial, and gratis. It was abolished by Stat. 28 Edw. III. ch. 9. But Lord Coke considered it to have been revived by Stat. 42 Edw. III. ch. 1. 3 Bl. Com. 128. It has, however, altogether passed out of use, having practically been superseded by the writ of *habeas corpus.*

De perambulatione facienda. For making a perambulation. The name of a common-law writ for ascertaining the boundaries of lands. A similar proceeding is authorized by statute in some of the United States in regard to lines between towns.

De rationabili parte bonorum. For a reasonable portion of the goods. The name of a writ which lay to compel an executor to surrender to the wife and children of testator their reasonable share of the assets.

De retorno habendo. For having a return; to have a return. The technical name of a judgment for awarding to the defendant in an action of replevin a return of the goods replevied. The writ or execution issued upon such a judgment was also termed a writ *de retorno*

habendo. The term was also applied to the surety given by the plaintiff on commencing the action, for a return of the property.

De son tort. Of his own wrong. A person who takes upon himself to act as executor, without any sufficient authority, is termed an executor *de son tort*.

De son tort demesne. Of his own wrong. The law French equivalent of the Latin phrase *de injuria*, q. v.

De ventre inspiciendo. For inspecting the womb. The name of a writ for examining a woman suspected of feigning herself pregnant, in order to ascertain whether she is with child or not.

De vicineto. From the neighborhood. The name applied to a particular kind of jury, which in certain cases the sheriff was directed to summon from a particular vicinity; sometimes termed, in English, a jury of the vicinage.

DEACON. In the Church of England, deacon is the lowest degree of holy orders. (1 *Bl. Com.* 388; 2 *Steph. Com.* 660, 684.) *Mozley & W.*

DEAD FREIGHT. When a merchant who has chartered a vessel puts on board a part only of the intended cargo, but yet, having chartered the whole vessel, is bound to pay freight for the unoccupied capacity, the freight thus due is called dead freight. *McCull. Comm. Dict.*

DEAD PLEDGE. A thing pledged for a debt, but not delivered to the creditor, was formerly called a dead pledge; and one which was delivered, a living pledge, because the creditor had, incidentally, the use or enjoyment of it. But the French form of the term, *mortgage*, has superseded dead pledge; and pledge alone is now used for the expression living pledge.

DEADLY WEAPON. Signifies such weapons or instruments as are made and designated for offensive or defensive purposes, or for the destruction of life, or the infliction of injury. Commonwealth *v.* Brauham, 8 *Bush*, 387.

It is not error for a court to refuse to instruct the jury that an unloaded pistol without a cap upon it is not a deadly weapon. Flournoy *v.* State, 16 *Tex.* 31.

DEAL. To traffic; to transact business; to trade. Makers of an accommodation note are deemed dealers with whoever discounts it. Vernon *v.* Manhattan Co., 17 *Wend.* 524.

A provision in a charter of a bank of discount and deposit, that it "shall not deal or trade in any thing except bills of exchange, gold and silver," &c., is not to be construed as forbidding the bank to purchase by way of discount, or receive in payment of a debt, promissory notes of individuals; its intent is to forbid buying and selling in trade for profit, as distinguished from a banking business, which is always carried on by discounting. Fleckner *v.* Bank of United States, 8 *Wheat.* 338.

The discounting by a bank of bills of exchange, secured by a deposit of cotton to be shipped by the bank, and the proceeds credited to the borrower, is not a violation of a provision forbidding it to "deal in goods, wares, and merchandise, in any manner whatever, unless it be to secure a debt due the said bank incurred by the regular transactions of the same." The word deal, in such a clause, means to buy and sell for the purpose of gain, perhaps including receiving to sell on commission. The same rule of construction which is applied to a clause giving power to deal, &c., is not proper in the case of a clause forbidding dealing. Bates *v.* State Bank, 2 *Ala. N. S.* 451.

A prohibition to purchase or deal in land does not necessarily forbid taking a mortgage to secure a debt. Blunt *v.* Walker, 11 *Wis.* 334.

Dealer. A statute requiring "dealers in tobacco" to take out a license should be construed as applying only to persons who make such dealing a usual vocation. Carter *v.* State, 44 *Ala.* 29.

An ordinance of a city, which required dealers in second-hand goods to procure a license, declared that "any person who keeps a store, office, or place of business, for the purchase or sale of second-hand clothing, or garments of any kind, or second-hand goods, wares, or merchandise, is hereby declared to be a dealer in second-hand goods." It was held that booksellers, dealing in such stock as is usually kept in a retail book-store, who buy and sell, in connection with their other business, and as incidental thereto, second-hand books, are not "dealers in second-hand goods," within the meaning of the ordinance. Eastman *v.* City of Chicago, 79 *Ill.* 178.

Making a single sale of a stock of liquors, in gross, does not constitute the seller a dealer, or enable the buyer to resist payment of his note for the price, on the ground that the seller has not paid tax to the State as a dealer. A dealer is one who makes successive sales, as a business. Overall *v.* Bezeau, 37 *Mich.* 506.

In order to constitute one a dealer in spirituous liquors, it is not necessary that he should actually do the business in person, or even that it should be done in his presence, or by his express command. One who keeps liquors, and employs clerks to sell them, is liable for sales made by such clerks equally as if made by him in person. State *v.* Dow, 21 *Vt.* 484.

DEAN. An ecclesiastical dignitary next in rank to the bishop, and head of the chapter of a cathedral.

A dean and chapter is a spiritual corporation, and forms the council of the bishop, assisting him with advice and management in spiritual matters, and also in the temporal concerns of the diocese.

Dean of the arches. The judge of the arches court, so called because he anciently held his court in the church of St. Mary-le-Bow, — *Sancta Maria de arcubus.* (3 *Bl. Com.* 64, 65; 3 *Steph. Com.* 306.) *Mozley & W.*

DEBAUCH. To entice, to corrupt, and, when used of a woman, to seduce. Originally, the term had a limited signification, meaning to entice or draw one away from his work, employment, or duty; and from this sense its application has enlarged to include the corruption of manners and violation of the person. In its modern legal sense, the word carries with it the idea of "carnal knowledge," aggravated by assault, violent seduction, ravishment. Koenig *v.* Nott, 2 *Hilt.* 323.

DEBENTURE. An instrument in the nature of a deed-poll, securing repayment of money owing or advanced out of some specific property fund or source of income.

The word is also applied to a species of certificate issued by customs officers, showing that one who has imported goods is entitled to receive a specified sum by way of bounty or drawback.

Debenture signifies, 1. A custom-house certificate to the effect that an importer of goods is entitled to "drawback."

2. A bond in the nature of a charge on government stock, or on the stock of a public company. *Mozley & W.*

DEBET. He owes. Used in the following phrases:

Debet et detinet. He owes and detains. In the old forms employed in the common-law action of debt, if the action was between the original contracting parties to the obligation in suit, the plaintiff used to declare that defendant "owes and detains" the money due. If the action was between representatives, the allegation was "detinet" only: he detains it.

Debet et solet. He owes and is used to. Technical words anciently used in writs where suit was brought to recover a right of which the plaintiff was for the first time disseised, and where the right and the custom were both relied on as grounds of the claim. Such a writ was framed in the *debet et solet* if the plaintiff sued for something which was now for the first time withheld; but in the *debet* only where his ancestor had been disseised, and plaintiff had inherited the right. See *Termes de la Ley.*

Debitum in præsenti, solvendum in futuro. Owed now, but payable in future. A phrase descriptive of that class — a very large one — of debts or obligations which are complete and perfect, but payment of which cannot be demanded until a future day.

DEBT. The primary meaning of the word is an obligation to pay a sum of money founded on contract or established by judgment. Debtor: the person who owes a debt. Debtee (seldom used): one to whom a debt is due.

A debt is a sum of money due by contract. It is most frequently due by a certain and express agreement, which fixes the amount, independent of extrinsic circumstances. But it is not essential that the contract should be express, or that it should fix the precise amount to be paid. United States *v.* Colt, 1 *Pet. C. Ct.* 145.

The term a debt imports a sum due, arising upon a contract, expressed or implied, and not a mere claim for damages. Zinn *v.* Ritterman, 2 *Abb. Pr.* N. S. 261.

The legal acceptation of debt is a sum of money due by certain and express agreement. Whatever the law orders any one to pay is a debt; *e.g.*, a judgment for costs. Andrews *v.* Murray, 9 *Abb. Pr.* 8, 14.

Costs which accrue on conviction in a criminal cause do not form a debt, within a provision abolishing imprisonment for debt. Caldwell *v.* State, 55 *Ala.* 133.

A liability upon breach of warranty is a "debt," within the meaning of the statute which provides for suits against stockholders, in the event of dissolution of a corporation. Dryden *v.* Kellogg, 2 *Mo. App.* 87.

The expression "debt or damages demanded," in certain jurisdictional statutes, refers to the *ad damnum* in the writ, without regard to the amount claimed in the declaration, or proved. Clay *v.* Barlow, 123 *Mass.* 378.

"Debt" does not embrace taxes; and a statutory privilege of using as an off-set any debt or demand on which a right of action exists does not entitle a town to set off its claim for taxes against its indebtedness to the person owing the tax, for his services. Hibbard *v.* Clark, 56 *N. H.* 155.

Whether an obligation to pay money imposed by a contract becomes a debt, until the money is payable, see Weston *v.* City of Syracuse, 17 *N. Y.* 110; Garrison *v.* Howe,

Id. 458; Elwood *v.* Deifendorf, 5 *Barb.* 398.

Standing alone, the word debt is as applicable to a sum of money which has been promised at a future day, as to a sum of money now due and payable. To distinguish between the two, it may be said of the former that it is a debt owing, and of the latter that it is a debt due. Whether a claim or demand is a debt or not, is in no respect determined by a reference to the time of payment. A sum of money which is certainly and in all events payable, is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency, however, is not a debt, or does not become a debt until the contingency has happened. People *v.* Arguello, 37 *Cal.* 524.

For a city to give its corporate bonds for the payment of money, is within a prohibition against increasing the indebtedness of the city, notwithstanding the bonds are given for the purchase of new and valuable property. A debt is created when one person binds himself to pay money to another. The fact that property for which a debt is contracted is valuable, and a source of profit or revenue, does not remove or change the character of the indebtedness. The purchaser, having become bound to pay, has incurred an indebtedness which he may be compelled to pay. Being thus bound, he is in debt, no matter what amount of property he may have received in consideration for his obligation. He has become indebted for its purchase. Scott *v.* Davenport, 34 *Iowa*, 208.

Debt is used of money due upon a contract, without reference to the existence of a remedy for collecting it. A liability of the party borrowing money to be sued is not essential to the creation of a debt. Baltimore *v.* Gill, 31 *Md.* 375, 390.

Damages awarded for property taken for public use in virtue of the right of eminent domain, become, when assessed, a debt, in the sense in which that word is used in the section of the United States constitution forbidding the states to make any thing but gold or silver a tender in payment of debts. A state law requiring a land-owner to accept any thing else in payment of such damages is void. State *v.* Beackmo, 8 *Blackf.* 246.

Taxes are not debts in the ordinary sense of that word, but forced contributions for the support of the body politic. Green *v.* Gruber, 26 *La. Ann.* 694.

A tax is not a debt, nor of the nature of a debt. It is an impost laid by government, and not founded on contract, while a debt is a sum due by certain and express agreement. It originates in, and is founded upon, contract, express or implied. A debt universally bears interest from the time it is due. A tax never carries interest. A debt may be offset or reduced by set-off. A tax cannot be. City of Camden *v.* Allen, 26 *N. J. L.* 398.

Debts, as used in the provision of the legal-tender acts declaring the notes issued under them to be legal tender in payment of all debts, public and private, does not include taxes. Its true sense is debts originating in contract, or demands carried into judgment. Lane County *v.* Oregon, 7 *Wall.* 71; s. p. Perry *v.* Washburn, 20 *Cal.* 318.

Debt has been differently defined, owing to the different subject-matter of the statutes in which it has been used. Ordinarily, it imports a sum of money arising upon a contract, express or implied. In its more general sense, it is defined to be that which is due from one person to another, whether money, goods, or services; that which one person is bound to pay or perform to another. Under the legal-tender statutes, it seems to import any obligation by contract, express or implied, which may be discharged by money through the voluntary action of the party bound. Wherever he may be at liberty to perform his obligation by the payment of a specific sum of money, the party owing the obligation is subject to what, in these statutes, is termed debt. Kimpton *v.* Bronson, 45 *Barb.* 618.

Debts is used in the act of congress of Feb. 25, 1862, declaring United States notes a legal tender for all debts, in no narrow or restricted sense, but rather in a broad and general one. The fare payable by a railroad passenger, for his carriage on a railroad, is a debt, within the meaning of the act. Lewis *v.* New York Central R. R. Co., 49 *Barb.* 330, 336.

Whether debts, as used in the legal-tender acts, include express contracts to pay in coined dollars, see McGoon *v.* Shirk, 54 *Ill.* 408; Wilson *v.* Morgan, 4 *Robt.* 58, 1 *Abb. Pr.* N. S. 174; Kimpton *v.* Bronson, 45 *Barb.* 618; Longworth *v.* Mitchell, 26 *Ohio St.* 334.

The obligation to pay the condition of a mortgage bond is a debt within the legal-tender act. Kimpton *v.* Bronson, 45 *Barb.* 618; Dutton *v.* Pallaret, 52 *Pa. St.* 109.

A claim for freight is a debt within the legal-tender acts. Wilson *v.* Morgan, 4 *Robt.* 58, 1 *Abb. Pr.* N. S. 174.

Debt, as used in the bankrupt law, is synonymous with claim. Stokes *v.* Mason, 12 *Bankr. Reg.* 498; 10 *R. I.* 261.

Under the provision of a bankrupt law, that all persons owing debts shall be liable to be declared bankrupts, on the petition of one or more of the creditors to whom they owe debts, a creditor whose demand is not due may petition. A debt is not the less owing because not due. *Exp.* Tower, 1 *N. Y. Leg. Obs.* 8; *Exp.* King, *Id.* 276.

Debts, in the provisions of a bankrupt law authorizing a discharge from all debts, &c., does not include a fine imposed by chancery for the wilful violation of an injunction. Spalding *v.* People, 7 *Hill*, 301, 10 *Paige*, 284.

A cause of action for a tort, though a verdict or a report of referees has been had upon it, if judgment has not been had, is not

a debt, and is not affected by a bankrupt discharge. Crouch *v.* Gridley, 6 *Hill*, 250; Kellogg *v.* Schuyler, 2 *Den.* 73.

It does not include a judgment for the payment of an allowance to support a bastard child, and a judgment for damages for seduction is not within the act. A judgment which is in form a debt, and recovered in a proceeding of a civil nature, is not to be regarded as a debt from which the defendant can obtain a discharge if the cause of action was not a debt, but a violation of duty or of the rights of others. Matter of Cotton, 2 *N. Y. Leg. Obs.* 370.

The sum in which the putative father is charged with the maintenance of a bastard child is not a debt within the meaning of Ohio Const. art. 1, § 15, declaring that "no person shall be imprisoned for debt in a civil action, unless in cases of fraud." Musser *v.* Stewart, 21 *Ohio St.* 353.

As used in provisions of the Massachusetts insolvent law, Stat. 1838, ch. 163, regulating proof of debts, and return of surplus after payment of debts, the word includes interest on the demands proved, whether accruing upon contracts carrying interest by their terms, or allowed by rules of law. Brown *v.* Lamb, 6 *Met.* 203.

Debts, as used in the Iowa homestead exemption act, includes the liability of a person who has obtained money through false and fraudulent representations, in the sale of a patent-right. Warner *v.* Cammack, 37 *Iowa*, 642.

A cause of action for a tort, *e.g.* breach of promise of marriage, is not, before recovery thereon, a debt within the provisions of the New York homestead act, declaring that the exemption thereby created shall not extend to a debt contracted prior to the record of exemption. Cook *v.* Newman, 8 *How. Pr.* 523.

The homestead is not exempt from execution on a judgment for tort, or for costs in an action of tort. Schouton *v.* Kilmer, 8 *How. Pr.* 527.

Debts, in statutes imposing individual liability upon stockholders or officers for debts of a corporation, has been held to include:

Certificates of deposit. Hargroves *v.* Chambers, 30 *Ga.* 580.

An unliquidated claim for damages. Mill Dam Foundry *v.* Hovey, 21 *Pick.* 417, 454; Haynes *v.* Brown, 36 *N. H.* 545.

A judgment for costs against the corporation. Andrews *v.* Murray, 9 *Abb. Pr.* 8.

But not to include a claim for damages arising from negligence or misfeasance of servants of the corporation. Cable *v.* McCune, 26 *Mo.* 371; Cable *v.* Gaty, 34 *Id.* 573.

As used in individual liability statutes, debt means the original debt contracted by the corporation, and not a judgment which the creditor may have recovered upon it. McHarg *v.* Eastman, 35 *How. Pr.* 205.

The compensation due to an officer of the corporation, under an agreement to pay him by the year, does not become a debt within the meaning of a statute imposing an individual liability, until the expiration of a year, or until the earlier termination of the relation. Oviatt *v.* Hughes, 41 *Barb.* 541.

A statute or by-law, that no corporator shall transfer his stock until all debts due by him to the bank are paid, includes complete liabilities, although not yet payable; such as notes made, but not matured. Leggett *v.* Bank of Sing Sing, 24 *N. Y.* 283; Sewall *v.* Lancaster Bank, 17 *Serg. & R.* 285.

Such a regulation embraces notes discounted by the bank, and is not confined to debts on account of original subscription to the bank. Rogers *v.* Huntingdon Bank, 12 *Serg. & R.* 77.

Debts, as used in a statute regulating settlement of estates of deceased persons, is not limited to such as are strictly legal debts, but comprehends every claim and demand by a creditor, recoverable in law or equity. Babcock *v.* Lillis, 4 *Bradf.* 218; Sellis' Case, 4 *Abb. Pr.* 272.

It may mean demands due to a person. Pine *v.* Rikert, 21 *Barb.* 469, 475.

Debts, in the Mississippi statute subjecting the real estate of a deceased person to the payment of his debts, when the personalty is insufficient for that purpose, does not embrace the commissions allowed to the administrator. Hollman *v.* Bennett, 44 *Miss.* 322.

A bequest of "whatever debts" might be due to the testator at the time of his death, includes money at his bankers. Carr *v.* Carr, 1 *Mer.* 541.

A bequest of "all debts due and owing" to the testator will pass a bond conditioned for replacing certain stock, the condition of which has not been complied with at the time of his death, the day stipulated therefor having passed; although a residuary bequest includes "all his stocks." Essington *v.* Vashon, 3 *Mer.* 434.

Debts, in a power to sell, for payment of, includes a joint and several bond, executed by the testator as surety for his co-obligors. Berg *v.* Radcliff, 6 *Johns. Ch.* 302.

When an official bond is so expressed as to render the surety jointly liable with the principal, a default of the principal fixes the liability of the surety, and the obligation to pay becomes a debt against the surety as well as against the principal. Shane *v.* Francis, 30 *Ind.* 92.

As used in the statute providing for the collection of taxes imposed upon debts owing to non-resident creditors for purchase of real estate (Laws 1851, ch. 371), debts is to be understood in its usual legal sense, and means nothing more nor less than sums of money due from inhabitants of the state, to the non-residents mentioned by certain and express agreements or judicial sentence, and for the purchase of real estate. People *v.* Halsey, 53 *Barb.* 547, 36 *How. Pr.* 487, 37 *N. Y.* 344.

A claim arising out of the official neglect of the clerk of a court is not a debt, which

will support a foreign attachment in chancery. Dunlop *v.* Keith, 1 *Leigh*, 430.

A fine or penalty, incurred by the breach of a city ordinance, is a debt, and recoverable as such. *Exp.* Reed, 4 *Cranch C. Ct.* 582.

The phrase, any debt or demand, in a statute allowing costs, includes a cause of action for a tort. White *v.* Hunt, 6 *N. J. L.* 415.

Debts contracted in a statute relating to individual liabilities of members of manufacturing corporations was held equivalent to dues owing or liabilities incurred. Carver *v.* Braintree Manufacturing Co., 2 *Story C. Ct.* 432, 449.

A debtor is one who owes any thing, or one who is under obligations, arising from express agreement, implication of law, or from the principles of natural justice, to render and pay a sum of money to another. Stanly *v.* Ogden, 2 *Root*, 259.

2. Debt is also the name of a form of action, employed, in jurisdictions adhering to the common-law procedure, for the recovery of a sum certain, or which may be made certain by computation. Thus debt, like assumpsit and covenant (*q. v.*), is a name both for a right of action and for a remedy allowed for enforcing it.

DECEDENT. Literally, a dying person. Generally used to designate a deceased person whose assets are in course of administration.

DECEIT. 1. The employment of a cheat, or false statement, device, or pretence, to defraud another person, whereby he sustains loss.

2. The name of an English writ, now disused, which lay for one injured by a deceit; also, of a species of action afterwards allowed in like cases.

The word deceit, as well as fraud, excludes the idea of mistake, and imports knowledge that the artifice or device used to deceive or defraud is untrue. Farwell *v.* Metcalf, 61 *Ill.* 373.

The word deceit, in a statute, held equivalent to cheating by false pretences. State *v.* Christianbury, *Busb. L.* 46.

A writ of deceit used formerly to lie, and now an action on the case in the nature of a writ of deceit lies, where the plaintiff has received injury or damage through the deceit of the defendant or of his agent, where the defendant was privy thereto. *Brown.*

DECEM TALES. Ten such. The name of a writ requiring the sheriff to appoint ten like men to make up a full jury, when a sufficient number do not appear.

DECENNARY. A tithing or a civil division of England composed of ten freeholders with their families. The institution was introduced by the earliest Saxon settlers, and some say by Alfred. *Brown.*

DECIES TANTUM. Ten times as much. The name of a writ which formerly lay in English practice against a juror who had taken money of either party for giving his verdict, to recover ten times as much as the sum taken. It also lay against embraceors for intermeddling with a jury. The statutes upon which the proceeding was founded were repealed by Stat. 6 Geo. IV. ch. 50, § 62.

DECISION. The result of the deliberations of a tribunal; the judicial determination of a question or cause. The word corresponds quite nearly with judgment or decree, but is either somewhat more abstract, or somewhat more extensive.

1. In the more abstract sense, the decision is the resolution of the principles which determine the controversy; the judgment is the formal paper, applying them to the rights of the parties. The court announces its decision; the attorney draws up, and the judge signs, the judgment. Decisions are reported; but the reports do not generally present the judgments: they are recorded or docketed, while decisions are not. Decisions are followed, or are overruled; judgments are affirmed or reversed. Overruling a decision does not impair the effect of the judgment.

2. In the more extended sense, decision is used for the formal entry of determinations which cannot quite be called judgments, decrees, or orders; or may include all kinds of determinations, — those which are strictly known by these three names, and others of extra-judicial character.

A provision authorizing an appeal from decisions of county commissioners will be applied to include every ruling, final in its nature, upon any subject upon which the board of county commissioners are not authorized to take legislative action. Hanna *v.* Commissioners of Putnam County, 29 *Ind.* 170.

Wis. Laws 1860, ch. 264, § 7, requiring appeal papers to be remitted together with the judgment or decision within thirty days, applies to an order of dismissal. Estey *v.* Sheckler, 36 *Wis.* 434.

The phrase, decision of the collector, in act of June 30, 1864, § 14, concerning im-

portations, means the ascertainment and liquidation of the duties in the usual manner by the proper officers. United States *v.* Consinery, 7 *Ben.* 251.

DECLARATION. 1. Any allegation or assertion, expressly and explicitly made, in whatever form or manner communicated. Thus we speak of a person's being estopped by his declarations; of a witness being impeached by proof of his declarations out of court; of proving a testator's declarations to show his intent. And the word occurs in several phrases, mentioned below.

Declaration of independence. A state paper issued by the congress, in the name of the people of the united colonies, on July 4, 1776, in which they set forth various causes of complaint against the government of the king of Great Britain, and the grounds on which they claimed to dissolve relations with that power; and declared that the united colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown; and that all political connection between them and the state of Great Britain is, and ought to be, dissolved.

It is from the promulgation of this paper that American jurisprudence dates the independent existence of the United States; though several years of war were necessary to obtain recognition of that independence from Great Britain.

Declaration of intention. This phrase may be used of any assertion of purpose which may be drawn in question in legal proceedings. It most frequently signifies a declaration required, by the naturalization laws, to be made before a court of record by an alien desiring to become a citizen, that it is *bona fide* his intention to become a citizen of the United States, and to renounce for ever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whereof at the time he may be a citizen or subject.

This declaration, duly made in writing, and officially certified, becomes an important element in his subsequent application for admission to citizenship.

Declaration of Paris. The name of a certain declaration respecting international maritime law, promulgated by leading European powers, at the congress of Paris in April, 1856. It embodies the following rules:

1. Privateering is and remains abolished.

2. The neutral flag covers enemy's goods, except contraband of war.

3. Neutral goods, except contraband of war, are not liable to confiscation under a hostile flag.

4. Blockades, to be binding, must be effective.

Declaration of trust. A paper subscribed by a grantee of property, acknowledging that he holds it in trust for the purposes and upon the terms set forth. A trust may be created either by a conveyance which expresses that it is made upon the trust, or by giving an ordinary deed, and taking back from a grantee his declaration that he receives the property in trust.

Declaration of war. A manifesto, or proclamation, issued by the sovereign power of a nation, making known that war exists between it and another nation named.

2. In pleading, the declaration is the first pleading on the part of a plaintiff in a common-law action, corresponding to a bill in equity, or a complaint in a civil action under the reformed codes of procedure, wherein the plaintiff sets forth the particular facts constituting his cause of action against the defendant, and states his claim of damages. In origin and theory, it is an expansion of the plaintiff's original writ, wherein he expresses at large his cause of action or complaint, with the additional circumstances of time when and place where the injury was committed. Cheetham *v.* Tillotson, 5 *Johns.* 430.

The declaration generally comprises the following parts: *Title* and *date*, In the queen's bench, the 10th July, 1874; *Venue*, Middlesex, to wit; *Commencement*, A B by C D, his attorney [*or* in person], sues E F for . . .; *Body of declaration*, consisting of the following parts (which, however, are not all necessary in every form of action), viz.; *Inducement*, being introductory merely, and rarely requiring proof; *Averments*, being usually the allegation of the performance of all precedent conditions, &c., on the plaintiff's part; and *Counts*, contain-

ing statement of defendant's breach of contract or other injury; *Conclusion,* "And the plaintiff claims £——." *Brown.*

DECLARATORY. When applied to a statute or act of legislation, denotes that the act does not assume to prescribe any new rule of law, but to give a clear and certain statement of the existing law; which, it may be, was involved in uncertainty or dispute, rendering an authoritative assertion of the true rule expedient.

DECLARE. 1. Is often used in the vernacular sense as equivalent to affirm, allege, or assert; implying positiveness or distinctness; but not importing any thing as to manner or form of making the communication. Declarant: one who declares.

Where a statute required an official oath to be in the words "I promise and affirm," an oath in which the words "declare and affirm" were used was held sufficient. Bassett *v.* Denn, 17 *N. J. L.* 432.

2. When used with reference to pleading, declare means to set forth in a formal writing, served when an action according to the common law has been commenced, the cause of action and claim of recovery which plaintiff alleges against defendant.

DECREE. A decision, by a sufficient authority, determining what is to take place or to be done in a particular matter.

In English and American law, the decision or sentence of a court of equity or admiralty corresponding to the judgment of a court of common law. Decrees in equity are either interlocutory or final. An interlocutory decree is given on some plea or issue arising in the cause which does not decide the main question; a final decree disposes of the entire matter in dispute, and has the same effect as a judgment at law. They are also classed as, 1, decrees by default, against parties who do not appear, in which case the plaintiff takes such decree as he can stand by; 2, decrees by consent, in which case the form of the decree depends upon the mutual agreement of the parties; 3, decrees taking the bill *pro confesso*, in which case the decree is according to the case made by the bill; and, 4, decrees on the hearing of the cause in the presence of all parties, in which case, if the plaintiff have any equity, there is a decree embracing the objects of the suit, which varies with the nature of the suit and the relief prayed. In jurisdictions where the distinction between proceedings at law and in equity have been abolished, decree is sometimes applied, although not with technical accuracy, to the judgment in a suit equitable in its nature.

The term decree is frequently used by the legislature and courts of California to distinguish a sentence or judgment of the court in a suit in equity, or in respect to the equitable branch of an action or proceeding at law, from a judgment in an action or the branch of the action determined upon legal as contradistinguished from equitable principles; the term being employed, not as a designation of something different from a judgment, but rather as a judgment of a particular character. McGarrahan *v.* Maxwell, 28 *Cal.* 75, 85.

Decree is the judgment of a court of equity, and is, to most intents and purposes, the same as a judgment of a court of common law. A decree, as distinguished from an order, is final, and is made at the hearing of the cause, whereas an order is interlocutory, and is made on motion or petition; wherever an order, may, in a certain event resulting from the direction contained in the order, lead to the termination of the suit in like manner as a decree made at the hearing, it is called a decretal order. *Brown.*

DECREET or DECREE. Is the Scotch law term for the final judgment or sentence of a court, whereby the question at issue between the parties is decided. Decrees are said to be either *condemnator* or *absolvitor;* the former term being applied where the decision is in favor of the pursuer, the latter where it is in favor of the defender. *Bell.*

The decree, of course, partakes of both characters when the defender is absolved in part and condemned in part. *Ib.*

DECRETAL ORDER. An order made by a court of chancery, upon a motion or a petition, in its nature and effect resembling a final decree, but in form merely an order.

An order in a chancery suit made on motion or otherwise not at the regular hearing of a cause, and yet not of an interlocutory nature, but finally disposing of the cause, so far as a decree could then have disposed of it. *Hunt. Eq.; Mozley & W.*

DEDI. I have given. Employed as the technical, operative word of grant, in the Latin forms of deeds. This word, together with its English

equivalent were formerly held, in England, to imply a warranty of the title to the land or estate conveyed; but this rule has been changed by statute.

DEDICATION. An appropriation by an individual of some property or right to the use of the community; devotion to public uses. Thus there may be a dedication of lands to public use; and this may be either a common-law dedication, which does not divest the fee, but secures the public right to use the land according to the dedication, or under statutory regulations, in some of the states, pursuant to which the title passes. At common law, no particular formalities are required to a dedication. It may be made by deed, or by word of mouth, or even by a course of conduct, as where a land-owner throws open his land, and assents to its being used by the public. The essential elements are, 1, the assent of the owner; 2, that it should be to some public use; 3, acceptance by the public or public authorities, which may be manifested by mere general user. When these concur, the land-owner is concluded, and cannot afterwards withdraw the property.

Dedication is an appropriation of land by the owner for public uses. Barteau *v.* West, 23 *Wis.* 416, 420.

Dedication is the devoting or giving property for some object, and in such manner as to conclude the owner. It may be without writing, by act *in pais*, as well as by deed. Hunter *v.* Trustees of Sandy Hill, 6 *Hill*, 407.

If the owner of land consents, either expressly or by his actions, that it may be used by the public for any particular purpose, this is a dedication thereof to the public use. Mayor, &c. of Macon *v.* Franklin, 12 *Ga.* 239.

No particular form is necessary to make a dedication. A grant is not required. It may be made by parol and proved by parol. All that is necessary is the assent of the owner, and the fact that it has been used by the public for the purpose of the appropriation. The fee remains in the maker of the dedication. To nearly same effect, Hall *v.* McLeod, 2 *Metc.* 98; Institute for the Blind *v.* How, 27 *Mo.* 211; Oswald *v.* Grenet, 22 *Tex.* 94.

When the owner of lands procures them to be laid off in blocks, streets, and squares, and has a map made, on which are delineated such streets and squares, which he files among the public records of the county, and by reference to which he makes sales of lots, the streets and squares, as laid down on such map, become thereby dedicated to public use. Methodist Episcopal Church *v.* Hoboken, 33 *N. J. L.* 13; Baton Rouge *v.* Bird, 21 *La. Ann.* 244.

A merely permissive use by the public of an alley in subordination to that of the owner's tenants, though for more than twenty years, is not such an adverse use as will constitute a dedication to public use, or an acceptance of a dedication. Brinck *v.* Collier, 56 *Mo.* 160.

The essence of a dedication to public uses is that it shall be for the use of the public at large; there can be no dedication, properly speaking, to private uses. Methodist Episcopal Church *v.* Hoboken, 33 *N. J. L.* 13.

Neither the act of congress of March 3, 1849 (the organic law of the territory of Minnesota), — which declared that when the public lands in that territory shall be surveyed, certain sections, designated by numbers, shall be, and "hereby are," "reserved for the purpose of being applied to schools," — nor the subsequent act of Feb. 26, 1857, — providing for the admission of that territory into the Union, and making the same reservation for the same object, — amounts so completely to a "dedication," in the stricter legal sense of that word, of these sections to school purposes, that congress, with the assent of the territorial legislature, could not bring them within the terms of the pre-emption act of 1841, and give them to settlers who, on the faith of that act, which had been extended in 1854 to the territory, had settled on and improved them. Minnesota *v.* Bachelder, 1 *Wall.* 109.

The first publication of a work, without having secured a copyright, is a dedication of it to the public; that having been done, any one may republish it. Bartlett *v.* Crittenden, 5 *McLean*, 32; 7 *West. Law J.* 49; Pulte *v.* Derby, 5 *McLean*, 328.

DEDIMUS. The brief name of a commission to take testimony. *Dedimus potestatum* — we have given power — were the initial words of a writ or commission in English practice, which issued out of chancery, empowering the persons named therein to perform certain judicial acts, — as to administer oaths to defendants in suits in chancery, and take their answers, to examine witnesses, &c. Hence, in the United States, a commission to take testimony is often termed a *dedimus potestatum*, or a *dedimus;* and the term is seldom used in any other sense.

DEED. Deed is somewhat used in jurisprudence, in its general, vernacular sense of an act; something done. More frequently it has a technical meaning, denoting, 1, a written instrument under seal; and 2, and more specifically, a conveyance.

In the first and broader of these meanings, deed includes all varieties of sealed instruments; even bonds and executory contracts under seal may be included by the term; and still more clearly may assignments, leases, mortgages, and releases. The characteristic incidents of a deed, in this general sense, are writing upon paper or parchment, a seal, and a delivery. Early English authorities omit signature as an essential; though in practice and in American usage it seems necessary.

In the second, and more common yet narrower meaning, deed signifies a writing under seal conveying real estate. It is substantially the same in extension as conveyance, *q. v.*; except that conveyance points to the transaction, the transfer, while deed points to the form, the instrument.

The leading parts or clauses of a deed, in the usual arrangement, are the following, — Commencement: this sets forth the style and character of the deed, and names the parties and character in which they join; and here, in indentures, the date is usually given; while in deeds-poll it is stated at the close. Recitals: these briefly narrate any facts necessary to explain the motive or purpose of the deed, or the operation of its provisions. The *testatum* clause: it states the consideration, and avows that the grantor conveys, using operative words of transfer, to the grantee. The description: this sets out, usually with minute and accurate detail, the boundaries of the property conveyed. The *habendum:* this discloses what estate or interest is given; in what right the grantee is to take and hold; and includes, or is followed by, a declaration of the trust intended, if the property is conveyed upon a trust. Conditions, powers, and covenants, necessary to carry into effect the full intentions of the parties, next follow. The conclusion, or *testimonium* or *testificandum* clause, certifying the execution, closes the instrument.

A deed is a writing, sealed and delivered by the parties. It is called a deed, because it is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property. If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties, and each should be cut or indented (formerly in acute angles, *instar dentium*, like the teeth of a saw, but at present in a waving line), on the top or sides, to tally or correspond with the other; which deed, so made, is called an indenture. Formerly, when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, beginning at the middle and continuing to the contrary ends, with some words or letters of the alphabet written between them through which the parchment was cut, either in a straight or indented line, in such a manner as to leave half the word on one part and half on the other. But at length, indenting only has come into use, without cutting through any letters at all; and it seems at present to serve for little other purpose than to give name to the species of the deed. A deed made by one party only is not indented, but polled or shaved quite even; and therefore called a deed-poll, or a single deed. This is a deed testifyiog that only one of the parties to the agreement hath put his seal to the same, where such party is the principal or only person whose consent or act is necessary to the deed, and it is therefore a plain deed, without indenting, and is used when the vendor, for example, only seals, and there is no need of the vendee's sealing a counterpart, because the nature of the contract is such as to require no covenant from the vendee, &c. All the parts of a deed indented, in judgment of law, make but one entire deed; but every part is of as great force as all the parts together, and they are esteemed the mutual acts of either party, who may be bound by either part of the same, and the words of the indenture are the words of either party &c. But a deed-poll is the sole deed of him that makes it, and the words thereof bind him only. *Jacob.*

Deed is a writing on parchment or paper, sealed and delivered. Acknowledgment is not a necessary part of a deed. Wood *v.* Owings, 1 *Cranch*, 239, 241.

The word deed, in its largest sense, includes a mortgage; but when the language of a contract shows that deed was used therein in a limited sense, and as meaning an instrument conveying the title to land, it will not be held to include a mortgage, in construing the contract. Hellman *v.* Howard, 44 *Cal.* 100.

As used in Mich. Comp. Laws, § 5803, against forgery, deed includes a mortgage. People *v.* Caton, 25 *Mich.* 388.

The words "good and sufficient deed," in a contract to convey land, refer only to the form of conveyance, and not to the interest intended to be conveyed. Brown *v.* Covilland, 6 *Cal.* 566.

An agreement to make a "deed" and to "convey" requires such a conveyance as will give the vendee a sufficient title in view of the provisions of the statute which defines what is necessary to be contained in a deed. Parker *v.* McAllister, 14 *Ind.* 12.

A covenant to convey land, "the title to be a good and sufficient deed," is a covenant to convey a good title by deed. Brown *v.* Gammen, 14 *Me.* 276.

A covenant to give "a good and perfect deed" to land, is a covenant to give a perfect title to such land, free and clear of all incumbrances, including any rights of dower there may be therein. Greenwood *v.* Ligon, 18 *Miss.* 615.

The covenant in a bond for title to make a "good and perfect" deed is not complied with by making a deed good in form only; the title must be good to save the covenant. Feemster *v.* May, 21 *Miss.* 275; Wiggins *v.* McGimpsey, *Id.* 532; Mobley *v.* Keys, *Id.* 677.

A covenant to give "a good deed" does not require conveyance of a good title; a good deed means a conveyance sufficient to pass whatever right the party has in the lands, without warranty or personal covenants. As the phrase, a good deed, has a meaning which is neither doubtful nor ambiguous, the courts have no right to depart from the plain meaning of the word deed, and stretch it to mean *title*, which is of so much larger and more comprehensive import, unless there is something else in the same instrument, or in the attendant circumstances, to demonstrate that the parties intended title. Barrow *v.* Bispham, 11 *N. J. L.* 110.

A covenant to execute a good and sufficient warranty deed of conveyance refers to the instrument only, and not to the title. Parker *v.* Parmele, 20 *Johns.* 130; Tinney *v.* Ashley, 15 *Pick.* 546; see Everson *v.* Kirtland, 4 *Paige*, 628; Aiken *v.* Sanford, 5 *Mass.* 494.

Under an agreement to give a "deed for the premises," the tender of a deed without covenants or warranty is a sufficient performance; nor is it necessary that the wife of the vendor should join in the deed. Ketchum *v.* Evertson, 13 *Johns.* 359.

An agreement to sell a farm, and to execute and deliver a warranty deed thereof, is not complied with by a deed from the husband only: the wife must join. Pomeroy *v.* Drury, 14 *Barb.* 418.

By a lawful deed of conveyance may be fairly understood a deed conveying a lawful or good title. Dearth *v.* Williamson, 2 *Serg. & R.* 498.

A covenant "to give a good and warrantee deed of land" refers to the kind of deed to be executed, and not to the quality of the title to be conveyed. It is not therefore broken by the inability of the covenantor to convey a perfect title, on account of the existence of a prior mortgage. Joslyn *v.* Taylor, 33 *Vt.* 470.

The words, "a good and sufficient deed, with covenant of warranty," in an agreement for the sale of land, will be held to mean "a good and sufficient title," if it appears in the agreement, or its attendant circumstances, that such was the intention of the parties. Tindall *v.* Conover, 20 *N. J. L.* 214.

A contract to convey by a "good and sufficient deed of general warranty" does not by itself include a covenant against incumbrances, nor bind the vendor to procure a release of his wife's dower. It amounts to no more than an engagement that it should bar the vendor and his heirs from claiming the land, and that he and his heirs should defend it when assailed by a paramount title. Bostwick *v.* Williams, 36 *Ill.* 65.

A covenant to make "a good and lawful deed, free from all incumbrances," is satisfied by a deed of special warranty, where the parties intend and express their meaning to be "a warranty deed, subject to all the demands of the commonwealth." Withers *v.* Baird, 7 *Watts*, 227.

DEFALCATION. 1. The reduction of a claim or demand, by deducting a counter-claim; or, substantially the same as set-off. Thus notes are sometimes expressed to be payable without defalcation or discount.

2. The failure of one who has received money in trust or in a fiduciary capacity to account and pay over as he ought. It is particularly applied to public and corporate officers.

DEFAMATION. Diminution of reputation; the wrong of maliciously injuring the good name of another person.

It is either libel (*q. v.*), when done by writing, printing, or signs; or slander (*q. v.*), when by oral communications.

DEFAULT. The neglect or omission of a duty, or failure to perform an obligation; also, the failure to appear and answer, in response to a writ or summons. 13 W.N. 150; 14 Id 214

Default cannot properly be predicated of a mere failure to appear on the day to which a cause has been continued by a justice of the peace, where the defendant has once appeared and answered. Douglass *v.* Langdon, 29 *Iowa*, 245.

DEFEASANCE. A collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated, or totally undone. (*Cowel*; 2 *Bl. Com.* 327; 1 *Steph. Com.* 526, 527.) So, a defeasance on a bond or recognizance, or judgment recovered, is a condition which, when performed, defeats or undoes it. It is inserted in a separate deed in the same manner as the defeasance of an estate above mentioned. (2 *Bl. Com.* 342.) *Mozley & W.*

Defeasance is of two sorts: 1. A collateral deed made at the same time with a feoffment or other conveyance, containing

certain conditions, upon the performance of which the estate then created may be defeated or totally undone. 2. A defeasance on a bond, recognizance, or judgment recovered, is a condition which, when performed, defeats that, in the same manner as the foregoing defeasance of an estate. This differs only from the common condition of a bond, in that the one is always inserted in the deed or bond itself, the other is made between the same parties by a separate, and frequently by a subsequent, deed. A defeasance may generally be indorsed on the back of the deed.

To make a good defeasance, it must be, 1. By deed; for there cannot be a defeasance of a deed without deed; and a writing under hand doth not imply it to be a deed. 2. It must recite the deed it relates to, or at least the most material part thereof; or, in case of indorsement, refer thereto. 3. It is to be made between the same persons that were parties to the first deed. 4. It must be made at the time, or after the first deed, and not before. 5. It ought to be made of a thing defeasible. *Jacob.*

If that which may defeat a deed is in the same deed, it is called a condition; that in another deed, it is called a defeasance. *Com. Dig.* tit. Defeasance.

The proper definition of defeasance does not embrace the case of a bond given by the grantee named in an absolute deed of conveyance of lands, that he will convey the estate to a third person. This is quite a different transaction from one in which the absolute conveyance is simply defeated. Shaw *v.* Erskine, 43 *Me.* 371.

Defeasances of land are now of rare occurrence, the practice in modern times being to include in the same deed both the conveyance of the land to the alienee, and the conditions, if any, to which it is to be subject, and by which its effect may be defeated. 1 *Steph. Com.* 545.

DEFENCE. 1. The forcible resistance of an attack made with violence. This is justifiable, within limits, in various cases of an unlawful use of violence. See SELF-DEFENCE.

2. That which is sufficient to defeat a suit, or that which is offered to defeat one, either by denying the cause of action alleged, or by justifying it, or by confessing and avoiding it.

In early English practice, the term seems to have been used to signify the mere technical denial in the plea of the cause of action, rather than the substantial ground set up to defeat it; but this employment of it is no longer common.

Defence, in strictness, signifies an opposing or denying of the truth or validity of a complaint. But it is used in the New York code (§§ 149, 153) in its more popular sense, and applies to any facts which defeat the action either wholly or partially. Stewart *v.* Travis, 10 *How. Pr.* 148; Houghton *v.* Townsend, 8 *Id.* 441.

It applies to matters which go to the partial as well as the total extinguishment of the plaintiff's claim. Foland *v.* Johnson, 16 *Abb. Pr.* 235.

It does not include mitigating circumstances. Newman *v.* Otto, 4 *Sandf.* 668.

Defensive allegation. See ALLEGATION.

DEFENDANT. A person required to make answer in an action or suit.

Defendant does not in strictness apply to the person opposing or denying the allegations of the demandant in a real action; he is properly called the tenant. The distinction, however, is very commonly disregarded; and the term is further frequently applied to denote the person called upon to answer, either at law or in equity, and as well in criminal as civil suits. *Bouvier.*

The word defendant, in a judgment, embraces all those who, by the record, are liable to the judgment. Clagget *v.* Blanchard, 8 *Dana*, 41.

Defendant may include parties who have a real and substantial interest adverse to the plaintiff, and against whom substantial relief is sought in an action, as well as a person named on the record as defendant. Allen *v.* Miller, 11 *Ohio St.* 374.

Ordinarily, a statute which, in general terms, speaks of plaintiffs and defendants, applies to persons only, and not to states, counties, or municipal corporations. Schuyler Co. *v.* Mercer Co., 9 *Ill.* 20.

But it may include corporations. Morgan *v.* New York & Albany R. R. Co., 10 *Paige*, 290.

A garnishee is a "defendant in an action" within Rev. Stat. ch. 129, § 2, and an injunction to restrain him from disposing of goods in his hands may issue against him. Malley *v.* Altman, 14 *Wis.* 22; Almy *v.* Platt, 16 *Id.* 169.

Defendant, in Mass. Gen. Stat. ch. 146, § 38, regulating procedure "upon the petition of the defendant" for a review, means the party against whom the judgment sought to be reversed is rendered, and not the defendant in the original action. Leavitt *v.* Lyons, 118 *Mass.* 470.

DEFINITE. A definite failure of issue is when a precise time is fixed by the will for the failure of issue, as in the case where there is a devise to one, but if he dies without issue, or lawful issue living at the time of his death, &c. An indefinite failure of issue is the period when the issue or descendants of the first taker shall become extinct, and when there is no longer any issue of the line of the grantee, without reference to any particular time or any particular event. Huxford *v.* Milligan, 50 *Ind.* 542.

DEFINITIVE. Bouvier, Burrill,

and Wharton define this word, in its application to judgments or decrees, as meaning one which determines a cause; as being equivalent to final, and opposed to interlocutory or provisional. But the opinion of the United States supreme court, in United States *v.* The Peggy, 1 *Cranch*, 103, indicates a distinction between final and definitive, of this general nature, that a judgment is termed final, in the sense of exhausting the powers of the particular court in which it is rendered, but definitive in the sense of being above any review or contingency of reversal. The distinction is certainly convenient and worthy of attention.

DEFORCEMENT. In modern usage, is the holding of any lands or tenements wrongfully as against any person who has the right thereto, but who has not as yet at any time been in the possession thereof. The deforciant must have come in by right in the first instance; for if the person wrongfully holding came in by wrong in the first instance, he is not a deforciant, but either an intruder, a disseisor, or an abator.

In Scotch law, deforcement signifies the offence of opposing a public officer in the execution of his duty. *Bell.*

A species of injury by ouster or privation of the freehold, where the entry of the present tenant or possessor was originally lawful, but his detainer is now become unlawful. (3 *Bl. Com.* 172.)

For that at first the withholding was with force and violence, it was called a deforcement of the lands or tenements; but now it is generally extended to all kind of wrongful withholding of lands or tenements from the right owner. In its most extensive sense it signifies the holding of any lands or tenement to which another person hath a right (*Co. Litt.* 277); and includes as well abatement, intrusion, disseisin, discontinuance, and other species of wrong whatsoever, whereby he that hath right to the freehold is kept out of possession. But, as contradistinguished from these, it is only such a detainer of the freehold from him that hath the right of property, but never had any possession under that right, as falls not within any of those terms. *Jacob.*

DEFORCEOR, or DEFORCIANT. A person chargeable with deforcement.

DEFORCIARE. To withhold lands or tenements from the rightful owner. This was said to be a technical word, for which no substitute could be received. *Co. Litt.* 331 *b.*

DEFRAUD. To cheat; to deprive of some interest, right, or property by a deceitful device; to perpetrate a fraud. See FRAUD.

DEGRADATION. 1. An ecclesiastical censure, whereby a clergyman is divested of his holy orders. There are two sorts of degrading by the canon law: one summary, by word only; the other solemn, by stripping the party degraded of those ornaments and rights which are the ensigns of his order or degree. (*Seld. Titles*, 787.) The canonists have distinguished between a deposition and a degradation; the latter being used as a greater punishment than the other.

2. There is likewise a degradation of a lord or a knight, &c., at common law, when they are attainted of treason; or by act of parliament. *Jacob.*

Degradation, as applied to a peer, must not be confounded with disqualification by bankruptcy, under Stat. 34 & 35 Vict. ch. 50. (See 2 *Steph. Com.* 612; *Robson, Bkcy.*) *Mozley & W.*

DEGREE. 1. In the law of descent, degree is the relation between one person and the next in the line of descent, or one remove in the chain of relationship. See DESCENT.

2. Used with respect to crimes, degree signifies different grades of guilt and punishment attributed to the same offence, committed under different circumstances. Thus murder, originally defined as comprising unlawful and intentional killing, is divided in some jurisdictions into the first and second degrees, according as the killing is by poison, lying in wait, &c., indicating long and deliberate premeditation, or is upon a sudden provocation and determination.

3. In English law, degree signifies the civil condition of a person; his rank or position, as whether he is yeoman, gentleman, &c.

Under Stat. 1 Hen. V. ch. 5, degree and estate mean the same thing, — defendant's rank in life. State *v.* Bishop, 15 *Me.* 122.

DEHORS. From beyond or outside; foreign to or unconnected with. A word of French origin, used in much the same way as the Latin *aliunde*, q. v.

DEI GRATIA. By the grace of God. An expression used in the titles of sovereigns, denoting a claim of authority derived from divine right. It was anciently a part of the titles of

inferior magistrates and other officers, civil and ecclesiastical, but was afterwards considered a prerogative of royalty.

DEL CREDERE. Of trust; of credit. A term used to denote the agreement of an agent or factor, who, in consideration of an additional premium or commission where he sells goods of his principal on credit, guarantees to him the solvency of the purchaser. The additional compensation given is called a *del credere* commission, and the factor who receives it a *del credere* factor. The contract is in its nature that of a surety or guarantor; the *del credere* factor becoming liable only in case of the default of the purchaser.

DELECTUS PERSONÆ. Choice of person. A term applied to express the right of choice of one or more persons to the exclusion of others, which exists in those relations where mutual confidence and trust are necessary to the carrying out of the purpose for which the relation was formed. Thus, under the contract of partnership, no one can be admitted to a firm as a partner who has not been selected or agreed to by all the existing partners; even the heir of a deceased partner cannot insist on being admitted to the firm of which his ancestor was a member. A similar principle applies to the relation of principal and agent, attorney and client, and other personal relations, and to contracts for personal services, where the skill or other personal qualifications of the particular individual is a requisite to the performance of the contract; and even, to a limited extent, to the relation of landlord and tenant, the landlord being supposed to have selected the tenant or granted him the lease in view of his personal qualifications.

Delegata potestas non potest delegari. A delegated authority cannot be redelegated. An agent or other person to whom any authority, duty, or office is delegated, cannot lawfully appoint another to perform his functions, or devolve his duty or office upon another, unless expressly authorized so to delegate his authority. This maxim rests to a great extent upon the principle that authority is conferred on considerations personal to the one to whom it is delegated, and that such *delectus personæ* would be entirely defeated if the person so chosen on account of his own particular qualifications were entitled to transfer the authority so delegated to another person of his own selection. The maxim applies equally whether the delegated power has been conferred by public or private authority, the reason above given having application to both classes. As to powers delegated by private authority, it is a familiar rule that an agent cannot lawfully nominate or appoint another to perform the subject-matter of his agency. Thus a notice to quit, given by an agent of an agent, is not sufficient, without a recognition by the principal. So in the case of a broker, who is presumed to be employed from the opinion of his personal skill and integrity entertained by his principal, and who cannot therefore, without authority from his principal, transfer a consignment made to him, in his character of broker, to another broker for sale. And an arbitrator cannot lawfully devolve the duty of deciding the questions submitted to him to another, unless expressly authorized so to do; he must apply his own mind to the matters submitted. And, with respect to persons clothed with judicial functions by public authority, they must themselves in person perform the duties intrusted to them, except as they may be expressly authorized by law to delegate their powers. The ordinary rule is, that although a ministerial officer may appoint a deputy, a judicial officer cannot. Lord Campbell, in Regina *v.* Dulwich College, 17 *Q. B.* 600, remarks, "The crown cannot enable a man to appoint magistrates." Even the power of a ministerial officer — as a sheriff — to appoint a deputy extends to his ministerial powers only; he cannot delegate to his substitute any power or duty expressly conferred on him personally, and therefore within the reason of the maxim.

The power to redelegate delegated functions may, however, in some circumstances, and to a limited extent, be implied, where not expressly given; as from a recognized usage of trade or customary method of performing the acts authorized.

DELEGATE, *v.* To authorize; to commit power to another; to intrust to an agent or representative. Delegate, *n.*: a person to whom authority or power has been committed, to be exercised in a representative capacity; particularly, one elected to represent others in an occasional or temporary assembly, as a nominating convention.

Under the government of the United States, the people of an organized territory send a delegate to congress, who has a seat, and joins in debate, but has no vote.

DELEGATION. 1. At common law, the transfer of authority by one person to another; the act of making or commissioning a delegate. Also, popularly, several delegates acting together are called a delegation.

2. In the civil law, delegation signifies a substitution of one debtor for another; a species of novation, by which a debtor procures another person to be liable in his stead. It is called perfect or imperfect delegation, according as the original creditor is released or not.

Delegation is where a debtor obtains a release from his creditor by the substitution and acceptance of another who obliges himself to the creditor. Adams *v.* Powers, 48 *Miss.* 451.

DELICTUM. Guilt; fault. 1. A crime; an offence; a violation of law, of any nature.

2. A wrong; a tort, as distinguished from a contract; a private wrong, as distinguished from a crime or public offence. The word is most frequently used in this sense; as in the phrase *ex delicto* (q. v.), employed to distinguish obligations and causes of action arising out of tort from those arising out of contract, designated as *ex contractu*.

3. Fault; blame; guilt. The word is sometimes used in this milder sense. Thus, parties who are equally in fault are said to be *in pari delicto*.

DELIVERY. The transfer of the body or substance of a thing; the surrender of physical control.

Delivery of a deed is considered one of the essential requisites of the validity and operation of the instrument. It is termed an *absolute* delivery, when the deed is surrendered to the grantee or one who receives it for him, with unconditional intention that it shall take effect; it is a *conditional* delivery, or a delivery as an *escrow*, when the deed is placed in the custody of a person who will deliver it to the grantee upon his performance of some condition, or upon the happening of some contingent event. Delivery, in the same general sense, is applied to other instruments than deeds, though such use is of less importance.

Deeds take precedence according to the time of their delivery, except where registration laws give them precedence according to their time of registration.

The delivery may be effected by merely handing the deed to the grantee or his agent; or by saying, "I deliver this writing as my act and deed," or similar words; or by any understood token that the grantor intentionally surrenders the instrument to take effect.

Delivery of movable chattel property is of importance in performance of contracts of sale; in the dealings between consignor and carrier, and between carrier and consignee; in executing gifts, &c. Here *actual* or real delivery is the manual transfer of the commodity sold to the recipient. *Constructive* or symbolical delivery may be made with equal effect, at least as between buyer and seller, by the transfer of some article which is a symbol or evidence of ownership; such as the delivery of the key of a warehouse containing the goods sold, or of the bill of lading of goods at sea, or of the bill of sale of a vessel at sea.

Delivery of a deed is held to be performed by the person who executes the deed placing his finger on the seal, and saying, "I deliver this as my act and deed." A deed takes effect only from this tradition or delivery. *Brown.*

Delivery signifies, as a popular word, mere tradition; in legal phraseology, the final, absolute transfer to the grantee of a complete legal instrument, sealed by the grantor, covenantor, or obligor. Black *v.* Shreve, 13 *N. J. Eq.* 455.

A delivery of a deed is its tradition from the maker to the person to whom it is made, or to some person for his use. Kirk *v.* Turner, 1 *Dev. Eq.* 14.

Any act or words evincing the grantor's intention to deliver a deed is, presumptively, a delivery. Mallett *v.* Page, 8 *Ind.* 364.

To constitute delivery of a deed, there must be an intention to part with control over the deed as its owner. Berry *v.* Anderson, 22 *Ind.* 36.

The law does not prescribe any particular form of words or actions as necessary to consummate a delivery of a deed. Any thing done by the grantor, from which it is apparent that a delivery is thereby intended, either by words or acts, or by both combined, is sufficient. Somers *v.* Pumphrey, 24 *Ind.* 231.

In respect to sales, delivery is the transferring the thing sold into the power and possession of the buyer. The civilians all consider that it is essential that the thing shall be under the control and in the power of the purchaser. If the effects be movable, the thing passes by actually giving it into the care of the buyer. If it is kept in a building, there may be a delivery of the key. If the thing cannot be transported at the time of sale, the consent of parties will be sufficient. Lambeth *v.* Wells, 12 *Rob.* 51.

To constitute a delivery to a common carrier, the latter must have accepted the goods in his character as such a carrier, and assumed the exclusive custody and control over them; and the consignor must have at the same time parted with and entirely surrendered his possession and control over the goods. Reed, &c. *v.* Phil., &c. R. R., 3 *Houst.* 176.

As between carrier and consignee, delivery implies mutual acts of the two. Landing the property on the wharf, at the end of the voyage, is not a good delivery, without, at the least, giving notice to the consignee. Ostrander *v.* Brown, 15 *Johns.* 39; Price *v.* Powell, 3 *N. Y.* 322.

When goods are delivered to a common carrier, to be by him delivered to a second one, for further transportation, the common-law liability remains on the former until the delivery has been made to the latter. Hence, the section in the charter of the Michigan Central Railroad Company, providing that the company will not be responsible for goods on deposit in any of their depots, awaiting *delivery*, does not include goods waiting for *transportation*, but only such as have reached their final destination. Railroad Co. *v.* Manuf. Co., 16 *Wall.* 319.

Merely placing goods in such a position that a person (in this case the receiving clerk in a common carrier's office) can take them, but without calling his attention to them, is not a delivery. O'Bannon *v.* Southern Exp. Co., 51 *Ala.* 481.

See also *U. S. Dig.* tit. Carriers; Express Companies; Railroad Companies.

Where the subject-matter to be given is capable of delivery, a delivery, actual or symbolical, is essential to constitute a valid gift by parol; and this must be a transfer of possession, or a giving of means of obtaining possession. Noble *v.* Smith, 2 *Johns.* 52. And see 3 *Abb. N. Y. Dig.* tit. Gift, ¶ 2.

The delivery need not be to the donee in person. A delivery to a third person to hold for the donee is sufficient. Hunter *v.* Hunter, 19 *Barb.* 631; Coutant *v.* Schuyler, 1 *Paige*, 316.

DEMAND, *v.* To ask performance or payment of something as of right; to claim what is due. Demand, *n.*: the act of asking performance or payment as of right, or of claiming what is due; also, the right or title in virtue of which delivery of property, payment of money, or performance of an act may be claimed; as in the expressions, holding a demand against one, a receipt in full of all demands.

Demand is a calling upon a man for any thing due. There are two manner of demands: the one in deed, the other in law. In deed, as in a *præcipe quod reddat*, there is an express demand. Every entry on land, distress for rent, taking of goods, &c., which may be done without words, is a demand in law. It is also said there are three sorts of demands: one in writing, without speaking, and that is in every *præcipe;* one without writing, being a verbal demand of the person who is to do or perform the thing; and another made without either word or writing, which is a demand in law, in cases of entries on lands, &c. *Jacob.*

Demand is the largest word in law, except claim (*Co. Litt.* 291 *b;* 8 *Rep.* 299), and embraces all sorts of actions, rights, and titles, conditions before or after breach, executions, appeals, rents of all kinds, covenants, annuities, contracts, recognizances, statutes, commons, &c. A release of all demands to date bars an action for damages accruing after the date, from a nuisance previously erected. Vedder *v.* Vedder, 1 *Den.* 257.

Demand is more comprehensive in import than "debt" or "duty." Sands *v.* Codwise, 4 *Johns.* 536; Matter of Denny, 2 *Hill*, 220.

Demand, or claim, is properly used in reference to a cause of action. Saddlesvene *v.* Arms, 32 *How. Pr.* 280.

A submission of all demands to arbitration includes questions concerning real as well as personal property. Marks *v.* Marriott, 1 *Ld. Raym.* 114.

A judgment is a contract of record, and is a demand, within the meaning of an instrument embracing all demands of one party against another. Henry *v.* Henry, 11 *Ind.* 236.

Damages "in full satisfaction of all demands," by reason of the pulling down certain buildings, means in full satisfaction of all loss or injury sustained in consequence of such pulling down. Mayor, &c. of N. Y. *v.* Lord, 17 *Wend.* 285; 18 *Id.* 126.

A charter made the stockholders liable for all debts contracted by the company, and declared that any person having a "demand" against it might recover from any stockholder, providing, however, that the stockholder should not be liable to pay, in all, more than the amount of stock held by

him when the "debt" accrued. Held, that the word demand, in its connection, was to be construed as importing a demand arising upon contract, and that a stockholder was not liable for damages arising from a neglect of the corporation to repair a bridge. Heacock *v.* Sherman, 14 *Wend.* 58.

DEMANDANT. The designation of the plaintiff in a real action.

DEMENTIA. Unsoundness of mind. The condition of a person who is deprived of his mental faculties, or whose mental powers are impaired; as distinguished from a madman or lunatic, or a person wholly insane.

Dementia denotes an impaired state of the mental powers, a feebleness of mind caused by disease, and not accompanied by delusion or uncontrollable impulse, without defining the degree of incapacity. Dementia may exist without complete prostration of the mental powers. Dennett *v.* Dennett, 44 *N. H.* 531.

DEMESNE. Originally, one's own. Demesnes or demesne lands in the feudal law were lands unqualifiedly one's own; those which the tenant held in his own absolute right, as distinguished from lands held upon service, from another; also, lands which the lord retained for his own use, for the supply of his own table, &c., as distinguished from those which he owned, but were in occupancy of a tenant.

Other forms of the word are *demeine*, *demaine;* domain, *domaine*, *domainium*, &c. See *Jacob*.

Demesne lands were those parts of a manor which the lord kept to himself, as necessary for his own use. Of such lands one portion was retained in the actual occupation of the lord for the purposes of his family, another portion seems to have been held in villenage, and the residue, being uncultivated, served for public roads and for common of pasture to the lord and tenants. *Holt.*

Son assault demesne. His own assault. A defence in an action of trespass for violence to the person, that plaintiff provoked it by his own assault upon defendant.

DEMISE. 1. Death. Thus the phrase demise of king or queen denotes the decease of the reigning sovereign, and consequent transfer of the property and power of the crown to a successor.

2. A species of conveyance of lands; usually a lease, or conveyance of an estate for years.

Demise is applied to an estate either in fee, for term of life, or years, but most commonly the latter; it is used in writs for any estate. (2 *Inst.* 483.) The word *demisi*, in a lease for years, implies a warranty to the lessee and his assignee; and upon this word action of covenant lies against the heir of the lessor, if he oust the lessee; it binds the executors of the lessor, who has fee-simple or fee-tail, where any lessee is evicted, and the executor hath assets; but not the lessor for life's executors, without express words, that the lessee shall hold his whole term. (*Dyer*, 257; *Jenk. Cent.* 35.) *Jacob.*

Demise was formerly applicable to the grant of a freehold estate, but it is not now so applied. (*Cowel;* 1 *Steph. Com.* 509, 512; *Fawcett L. & T.* 229.) *Mozley & W.*

Demise is synonymous with lease, or let, except that demise *ex vi termini* implies a covenant for title, and also a covenant for quiet enjoyment, whereas lease, or let, implies neither of these covenants. *Brown.*

Demise does not necessarily import a sealed instrument. Magee *v.* Fisher, 8 *Ala.* 320.

The use of demise in a lease for years implies a covenant of power in the lessor to give the lease. Grannis *v.* Clark, 8 *Cow.* 36; see Sumner *v.* Williams, 8 *Mass.* 201.

It imports a covenant of good right and title to make the lease, and for quiet enjoyment. Crouch *v.* Fowle, 9 *N. H.* 219.

At least during the lifetime of lessor. Folts *v.* Huntley, 7 *Wend.* 210.

But not so in a lease which contains a stipulation that nothing therein contained shall be construed to imply such a covenant. Maeder *v.* Carondelet, 26 *Mo.* 112.

The words "grant" and "demise" in a lease for years create an implied warranty of title and a covenant for quiet enjoyment. Stott *v.* Rutherford, 92 *U. S.* 107.

Where there is an express covenant for quiet enjoyment, the words "grant, demise, and lease," do not imply a general warranty. Tooker *v.* Grotenkemper, 1 *Cin.* 88.

Demise, as used in section 4 of the act of 1801, for incorporation of religious societies, means a lease for years, in consideration of rent. The technical meaning is a lease for a term of years. Voorhees *v.* Presbyterian Church of Amsterdam, 5 *How. Pr.* 58, 71.

Demise and redemise. The name of a species of conveyance where there are mutual leases made from one person to another on each side, of the same land, or something out of it. It was used upon the grant of a rent-charge, &c.

DEMOCRACY. That form of government in which the people possess and directly exercise the political power.

DEMUR. To object to the sufficiency in point of law of a cause of action, defence, or pleading; to interpose a demurrer, *q. v.*

DEMURRAGE. A pecuniary compensation recoverable for a wrongful delay of a vessel, whereby her owners are for a time deprived of her use or freights; also, sometimes, but less frequently, the delay itself.

It is usually stipulated in charter-parties and bills of lading that a certain number of days, called running or working days, shall be allowed for receiving or discharging the cargo, and that the freighter may detain the vessel for a further specified time, or as long as he pleases, on payment of so much *per diem* for such overtime. This payment is demurrage. Another form in which it arises is in collision causes, where a vessel injured by a collision is delayed for repairs; an allowance for losing the use of her during the time may be decreed in addition to the reparation of the injury.

It is usual in charter-parties to insert an agreement that a specified number of days shall be allowed for loading and unloading, or for one of those operations, and that it shall be lawful for the freighter to detain the vessel for these purposes a further specified time, on payment of a daily sum. (*Abb. Shipp.* 308.) A contract to the same effect is often inserted in the bill of lading, where goods are sent in a general ship. (*Holt's N. P.* 95.) This delay and the payment agreed upon are called demurrage. Cross *v.* Beard, 26 *N. Y.* 85.

Demurrage is only an extended freight or reward to the vessel, in compensation for the earnings she is improperly caused to lose. Every improper detention of a vessel may be considered a demurrage, and compensation under that name be obtained for it. (2 *Hagg. Adm.* 317.) Donaldson *v.* McDowell, 1 *Holmes*, 290.

Demurrage is the allowance or compensation due to the master or owners of a ship, by the freighter, for the time the vessel may have been detained beyond the time specified or implied in the contract of affreightment or the charter-party. *Bell.*

DEMURRER. The name applied at law, in both civil and criminal cases, in equity practice, and under the codes of reformed procedure, to a pleading the substantial nature of which is that it admits the facts of the previous pleading in the cause to exist as alleged, and questions their sufficiency or validity as a cause of action or defence.

Demurrers are *general*, when the sufficiency of the pleading demurred to is disputed only in general terms. They are *special*, when particular defects are pointed out; this is necessary with respect to some grounds of objection.

Demurrer is a pause or stop put to any action, upon a point of difficulty which must be determined by the court before any further proceedings can be had therein. For if the point of controversy consists in law, it is determined by the court.

A demurrer, therefore, is an issue upon matter of law. It confesses the facts to be true, as stated by the opposite party; but denies that, by the law arising upon those facts, any injury is done to the plaintiff, or that the defendant has made out a lawful excuse. *Jacob.*

In English practice at law, demurrers, before the common-law procedure act, 1852, were either general or special; but that act abolished special demurrers, leaving in existence only the general demurrer, and this allowed only where the pleading is bad in substance. Argumentativeness, generality, inconsistency, &c., must be objected to by motion. *Brown.*

Demurrer, in an action at law, signifies a legal objection taken by either party to the other's pleading; but in equity the word is applied only to the objection taken by the defendant to the bill or information. *Mozley & W.*

A demurrer is an admission of the fact, submitting the law arising on that fact to the court. *Exp.* Vermilyea, 6 *Cow.* 555.

Although the rule of pleading is that a demurrer admits facts well pleaded, for the purpose of determining their legal sufficiency, yet it cannot be used as an instrument of evidence on an issue of fact. It presents only an issue of law to the court; the jury have no concern with it. Pease *v.* Phelps, 10 *Conn.* 61; Havens *v.* Hartford, &c. R. R. Co., 28 *Id.* 69.

Demurrer-book. See BOOK.

Demurrer to evidence. The name applied in the common-law practice to an objection by a party to an action at law, to the evidence produced by the opposite party on the trial, that, admitting it to be true in fact, it is in law insufficient to maintain or overthrow the issue, referring to the court to determine what the law is upon the facts as shown in evidence. Stephen considers it to be analogous to a demurrer in pleading, the party from whom it comes declaring that he will not proceed, because the evidence offered on the other side is not sufficient to maintain the issue. Upon joinder in demurrer, the jury are to be discharged without rendering a verdict, and the demurrer is heard and determined by the court.

This proceeding has fallen into disuse in modern practice, the same object being accomplished in other ways.

A demurrer to the evidence may arise where a record or other matter is produced in evidence, concerning the legal consequences of which there is a doubt in law; in which case the adverse party may, if he pleases, demur to the whole evidence; and such demurrer admits the truth of every fact which has been alleged, but denies the sufficiency of them all, in point of law, to maintain or overthrow the issue. *Jacob.*

A party who introduces no evidence upon a trial before a jury, may, as a matter of right, demur to the evidence of his adversary; the more especially if the evidence demurred to is not loose, indefinite, or circumstantial. Such a demurrer admits the truth of the facts proved, together with the conclusions fairly inferable therefrom, and asks the judgment of the court as to their legal effect. Pharr *v.* Bachelor, 3 *Ala.* 237.

Denarius Dei. God's penny; earnest-money. A small coin formerly given and received by the parties to a contract, which served to bind the bargain between them. The piece of money so used was called *denarius Dei*, because it was given to God; that is, to the church or the poor. Any sum of money paid as earnest-money has been so termed.

DENIZEN. Is used in England to signify a person who, being an alien by birth, has obtained letters-patent making him an English subject. The king may denizenize but not naturalize a man; the latter requiring the consent of parliament, as under the naturalization act, 1870 (33 & 34 Vict. ch. 14). A denizen holds a position midway between an alien and a natural-born or naturalized subject, being able to take lands by purchase or devise (which an alien could not until 1870 do), but not able to take lands by descent (which a natural-born or naturalized subject may do).

Denizenize signifies to constitute one a denizen; and denizenation, the act of so doing.

The American editor of Wharton's Dict. says that denizens are not known in the United States, and cites Walker's Am. Law; but Bouvier says this condition has been created by statute in South Carolina.

The word denizen is used in the common law in a double sense. It sometimes means a natural-born subject, and sometimes a person who, being an alien, has been denizenized by letters-patent of the crown. (*Co. Litt.* 129 *a*; *Id.* 8 *a*; *Com. Dig. Alien, D*; *Bann.* 433.) Levy *v.* M'Cartee, 6 *Pet.* 101, 116, note.

DEODAND. Any personal chattel which is the immediate occasion of the death of any reasonable creature, was formerly forfeited to the king, to be applied to pious uses, and distributed in alms by his high almoner; but this rule of law was abolished in 1846 by Stat. 9 & 10 Vict. ch. 62. 2 *Steph. Com.* 551, 552.

DEPART. 1. To go away; to leave; to start for some other place. Departure: the act of leaving or going away. In this sense, the words are of frequent use in commercial law and transactions; as when arrival and departure of vessels is mentioned.

Under Neb. Code Civ. Pro. § 20, providing that if, after a cause of action accrues, the debtor depart from the state, &c., the time of his absence shall not be computed as part of the period within which action must be brought, — the mere temporary absence of a debtor from the state, when such debtor has a usual place of residence therein where service of summons can be had upon him, does not suspend the statute of limitations. The words, depart from the state, do not mean a mere temporary absence from the state while the debtor's usual place of residence continues there, but they are intended to apply to such an absence from the state as entirely suspends the power of the plaintiff to commence his action. Blodgett *v.* Utley, 4 *Neb.* 25.

A statute forbidding a vessel to "depart from port," without permit, is not violated by her leaving the wharf with intent to go to sea, while she yet remains within the port. If seized before she gets out of the port, the offence is not consummated The Active *v.* United States, 7 *Cranch*, 100, 1 *Paine*, 247.

2. In pleading, depart is sometimes used, and departure frequently, when a party abandons the particular right of action or defence set up by a former pleading, and, in a subsequent pleading in the same action, sets up a different one. Thus the replication, if it does not adhere to the right declared upon, but seeks to sustain the action upon new grounds, is said to involve a departure. It is not allowable.

A departure, in pleading, is when a party quits or departs from the case or defence which he has first made, and has recourse to another. Kimberlin *v.* Carter, 49 *Ind.* 111; Allen *v.* Watson, 16 *Johns.* 205; White *v.* Joy, 13 *N. Y.* 83, 89.

In pleading, a departure is a confession of an answer, without allegations of facts sufficient to avoid it. McAroy *v.* Wright, 25 *Ind.* 22.

DEPARTMENT. 1. Civil divisions of a state or country are sometimes styled departments. In this sense, the word does not materially differ from district; one term is employed for the divisions created for one purpose, the other for those having another object. Thus there has been a division of the United States into districts for the judicial organization, and another division into districts for election of representatives, and a division into departments for military purposes. The division of France into departments, nearly corresponding to our counties, is a familiar instance of this use of the word.

2. The executive business of the government of the United States is, under a permission rather than a mandate of the constitution, distributed to seven executive departments; besides which the office charged with the superintendence of the agricultural interests is styled the department of agriculture, though not of equal grade with the executive departments.

The department of state is charged with the conduct of foreign affairs, correspondence and business with and through public ministers and consuls; custody and publication of the acts of congress. The secretary of state is the head of this department.

The department of war is charged with the conduct of all military affairs; the general management of the army, and of its supplies and pay; the regulation of military stations; and, incidentally, the observations and signals conveniently made at military posts. The secretary of war is its head.

The department of the treasury has charge of the fiscal affairs of the government, the collection of its revenue, the keeping its accounts, and the payment of its debts. The secretary of the treasury is its head.

The department of justice, which has been known by that name only since 1870, being an expansion of the office of the attorney-general, has charge of the law business in which the government is concerned; the prosecution and defence of suits in which the government is a party, or has an interest; the regulation of the business and doings of district attorneys and marshals, and matters germane to these. The attorney-general is the head.

The post-office department, at the head of which is the postmaster-general, has charge of all postal affairs.

The department of the navy has charge and control of the navy, and of naval affairs, and of explorations and observations by vessels of the United States. The secretary of the navy is the head.

The department of the interior has charge of the census, the public lands, including mines, the Indians, pensions, and bounty lands, patents for inventions, custody and distribution of certain publications, and education. The secretary of the interior is the head.

All these departments have places of business established by law at Washington. The head of each department is a member of the cabinet (*q. v.*), and also has the appointment of subordinate clerks and employes in his department. The heads of departments and the principal assistants are appointed by the president, with the advice and consent of the senate.

DEPENDENT. Contracts or covenants are called dependent when the party upon whom they devolve is not under obligation to perform them until the other party has performed some connected stipulation or covenant resting upon him.

DEPONENT. One who deposes; one who testifies under oath; and usually one who testifies in writing. See DEPOSE. 5 UC Rob (OS) 337

The word depone, from which is derived deponent, has relation to the mode in which the oath is administered (by the witness placing his hand upon the book of the holy evangelists), and not as to whether the testimony is delivered orally or reduced to writing. Deponent is included in the term witness, but witness is more general. Bliss *v.* Shuman, 47 *Me.* 248.

DEPOSE. Signifies, originally, to give testimony under sanction of an oath, without implying that it is given in writing. It is sometimes used in this

general sense as equivalent to testify, but importing more definitely an oath. But more often, in modern usage, it is employed in the sense of to give testimony, which is officially written down for future use or reliance as written evidence. See DEPONENT; DEPOSITION.

DEPOSIT. A species of bailment; being that contract in which one person places movable property in the charge of another upon his engagement to keep it safely, and return it upon demand. Most of the early definitions express that the engagement of the bailee, in deposit, is gratuitons, *Jones Bailm.* 36, 117; *Story Bailm.* § 41; but this does not seem to be an invariable element in the word, as ordinarily used. Deposit is also employed to designate the thing which is the subject of the bailment.

Depositor: the person who makes a deposit. Depositary: the party who receives it.

In respect to the case of money deposited with a banker, the convenience of commerce, and the very objects of such dealings, require that the banker should be at liberty to use the identical money deposited, and to discharge his obligation to return, by repayment of the same sum in any equivalent coin or bills. A deposit made upon this understanding is termed, in authorities using the language of the civil law, an irregular deposit. In American usage, it is familiarly called a deposit; but, if special occasion arises for discriminating, the paying in of money to a banker, upon the ordinary engagement that he may use and repay in kind, is called a general deposit; while the delivery of coin, bills, or valuables, upon the strict understanding that the identical things are to be kept and returned, is termed a special deposit.

The act of intrusting money to a bank is called a deposit in a bank; and the amount of the money deposited is also called the deposit. 3 *Steph. Com.* 81–86.

Also, deposit is a species of bailment, by which a person intrusts another with a chattel to keep safely, without reward. In this sense, the Latin form of the word, *depositum*, is more frequently adopted. *Story Bailm.*; *Mozley & W.*

Where the very silver or gold deposited is to be restored, the transaction is a special or pure deposit. Where the party is to restore, not the identical coin, but only an equivalent on demand, the transaction is a loan, or *mutuum* or irregular deposit. State *v.* Clark, 4 *Ind.* 315.

A deposit is general, unless the depositor makes it special, or deposits it expressly in some particular capacity. Keene *v.* Collier, 1 *Metc.* (Ky.) 415; Brahm *v.* Adkins, 77 *Ill.* 263.

Deposits made with bankers may be divided into two classes: those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and that kind peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker, and the latter, in consideration of the loan of the money, and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand. Money collected by one bank for another, placed by the collecting bank with the bulk of its ordinary banking funds, and credited to the transmitting bank in account, becomes the money of the former. It is a deposit of the latter class. Marine Bank *v.* Fulton Bank, 2 *Wall.* 252.

Deposit, in respect to dealings of banks, includes not only a bailment of money to be returned in the same identical specie, but also all that class of contracts where money is placed in the hands of bankers to be returned, in other money, on call. Curtis *v.* Leavitt, 15 *N. Y.* 9, 166, 168.

That engaging to transmit a draft does not involve a deposit, see United States *v.* City Bank, 6 *McLean*, 130.

That the certificate of a bank that $4,000 has been deposited in such bank implies that it has been deposited in cash, see People *v.* Contracting Board, 27 *N. Y.* 378.

Where P delivered a sum of money to the firm of S G & H, which they credited to P on their books, &c., for which they gave him a written receipt, stating that the money was to P's credit on books of the firm at six per cent interest, it was held that, under the attendant circumstances, this transaction constituted a deposit, and not a loan; and the relative rights of the parties in respect to a demand were the same as arise in the case of deposits with banks. Payne *v.* Gardiner, 29 *N. Y.* 146, 39 *Barb.* 634.

Presenting bills of the E bank to that bank for payment, and leaving them to be counted and paid, though they were retained by the bank and mingled with its circulation, without payment, was held, under the circumstances, not a deposit of the amount with the bank, and not enough to entitle the owner of the bills to share the security of depositors. Catlin *v.* Savings Bank, 7 *Conn.* 487.

In Louisiana, the former distinction between a perfect and imperfect deposit is abrogated by Civ. Code, art. 2934, which recognizes as the only real deposit a thing to

be restored identically. But parties may, by their contracts or course of dealing, create irregular deposits. Bloodworth *v.* Jacobs, 2 *La. Ann.* 25.

The difference between a deposit and a mandate is, that while the object of a deposit is that the thing bailed be kept, simply, the object of a mandate is that the thing may be transported from point to point, or that something be done about it. Montgomery *v.* Evans, 8 *Ga.* 178.

Deposit of title-deeds. In England, the title-deeds of an estate are often deposited as a security for the repayment of money advanced. This operates as an equitable mortgage.

DEPOSITION. 1. The principal use of this term in jurisprudence is to signify the testimony of a witness when given in answer to interrogatories propounded by a person authorized for the purpose, and officially taken down in writing. See DEPOSE; DEPONENT.

Depositions are customarily taken in the following cases:

In courts of chancery, the usual mode of taking evidence has been for the master to take the depositions of the witnesses, and these were laid before the chancellor at the hearing. But in some jurisdictions oral testimony is heard by the chancellor. As to the practice in the United States circuit courts in this respect, see Blease *v.* Garlington, 92 *U. S.* 1.

The laws of congress for the courts of the United States (Rev. Stat. §§ 863–875), and the laws of most of the States for the state courts, provide for taking depositions, to be used in civil causes, of witnesses whose personal attendance cannot, by reason of non-residence, sickness, infirmity, &c., be secured upon the trial. These depositions may be, in the cases prescribed by the statute applicable, taken and used against the will of the adverse party; but must be taken in strict accordance with the directions of the statute; and, in general, can only be used after proof is made at the trial that personal attendance of the witness cannot then be secured.

In criminal cases, depositions are taken by examining magistrates as a foundation of a committal of the accused to await indictment. But they are not, in general, competent to be read upon the trial of the indictment, unless upon behalf or by consent of the accused. Constitutional provisions have given a person upon trial for crime the right to be confronted with the witnesses against him. Bouvier says that some of the states have enacted laws enabling the accused to introduce depositions of witnesses whose attendance he cannot secure. In England, the depositions taken before a committing magistrate have been allowed in case the deponent should die before the trial, or be too ill to attend, to be used in evidence, subject to certain restrictions mentioned in Stat. 11 & 12 Vict. ch. 42.

A deposition is evidence given by a witness under interrogatories, oral or written, and usually written down by an official person. In its generic sense, it embraces all written evidence verified by oath, and includes affidavits; but, in legal language, a distinction is maintained between depositions and affidavits. Stimpson *v.* Brooks, 3 *Blatchf.* 456.

Deposition is sometimes used as synonymous with "affidavit" or "oath." But, in its proper technical sense, it is limited to the written testimony of a witness given in the course of a judicial proceeding, either at law or in equity. It should be construed in this restricted sense in a definition of perjury, given in an act for the punishment of that crime. To give, when so used, the more comprehensive sense, would extend the crime of perjury even to official oaths, which ought not to be done by construction. State *v.* Dayton, 23 *N. J. L.* 49.

2. Depose and deposition, when spoken of a sovereign, signify, respectively, to deprive him of his authority and dignity, or overthrow his power; and the act of so doing. They import a revolutionary, unlawful deprivation.

3. These words are used in ecclesiastical law to signify depriving a clergyman of his orders, done in the course of ecclesiastical discipline, and by authority and regular proceedings. *Ayl. Parerg.* 206. Deprivation (*q. v.*) seems the more common word, and more extended in signification.

DEPOT. Seldom occurs in American law-books, except in the sense of a building or establishment where goods, merchandise, or supplies may be deposited to await transportation, or, after transportation, to await delivery to a consignee or consumer; usually, a building incident to a railroad.

In the French law, depot is the *depositum*

of Roman and the deposit of English law. It is of two kinds, being either *dépôt* simply so called, and which may be either voluntary or necessary; or *séquestre*, which is a deposit made either under an agreement of the parties, and to abide the event of pending litigation regarding it, or by virtue of the direction of the court or a judge, pending litigation regarding it. *Brown.*

Depot, applied to a railroad, does not necessarily mean a single building. Pittsburg, &c. R. R. Co. *v.* Chicago R. R. Co., 24 *Ohio St.* 219.

In a contract for the transportation of military supplies, "posts, depots, and stations" are to be taken in their military sense. Caldwell's Case, 19 *Wall.* 264.

DEPRIVATION. A depriving or taking away; as when a bishop, parson, vicar, &c., is deposed from his preferment. Deprivation is of two sorts: *deprivatio a beneficio*, whereby a man is deprived of his promotion or benefice; and *deprivatio ab officio* is that whereby a man is deprived of his orders, which is also called deposition or degradation, and is commonly for some heinous crime meriting death, and performed by the bishop in a solemn manner. (*Cowel;* 1 *Bl. Com.* 382, 393; 2 *Steph. Com.* 673, 693.) *Mozley & W.*

DEPRIVED. The meaning of deprived, as used in N. Y. Const. art. 1, § 6, relative to compensation for property taken by eminent domain, is the same as the word taken, in the same section; and when property is not seized and directly appropriated to public use, though it be subjected, in the hands of the owner, to greater burdens than before, it is not taken contrary to section 6. Grant *v.* Courter, 24 *Barb.* 232.

DEPUTY. One who acts officially by appointment in place of another; one who exercises the office of another man in his place; the substitute of an officer.

A deputy differs from an assignee in that an assignee has an interest in the office itself, and does all things in his own name, for whom his grantor shall not answer, except in special cases; but a deputy has not any interest in the office, and is only the shadow of the officer in whose name he acts. And there is a distinction in doing an act by an agent and by a deputy. An agent can only bind his principal when he does the act in the name of the principal. But a deputy may do the act and sign his own name, and it binds his principal; for a deputy has, in law, the whole power of his principal. *Wharton.*

Two kinds of deputies of a sheriff are well known. 1. A general deputy, or undersheriff, who, by virtue of his appointment, has authority to execute all the ordinary duties of the office of sheriff. He executes process without special power from the sheriff, and may even delegate authority in the name of the sheriff for its execution to a special deputy. 2. A special deputy, who is an officer *pro hac vice;* to execute a particular writ on some certain occasion. He acts under a specific, not general, appointment and authority. Allen *v.* Smith, 12 *N. J. L.* 159, 162.

Deputy-sheriff and under-sheriff are used as synonymous terms; and while the sheriff is in the execution of his office, the undersheriff has no more power than any other general deputy. Tillotson *v.* Cheetham, 2 *Johns.* 63.

DERAIGN. Seems to mean, literally, to confound and disorder, or to turn out of course, or displace; as deraignment or departure out of religion, in Stat. 31 Hen. VIII. ch. 6. In the common law, the word is used generally in the sense of to prove; viz., to deraign a right, deraign the warranty, &c. (*Glanv.* lib. 2, c. 6; *Fitz. N. B.* 146.) Perhaps this word deraign, and the word deraignment, derived from it, may be used in the sense of to prove and a proving, by disproving of what is asserted in opposition to truth and fact. *Jacob.*

DERELICT. The term derelict is applied to maritime property entirely deserted or abandoned, under the compulsion of some extreme peril. The results of such an abandonment are important to be considered in two aspects. 1. Such an abandonment does not wholly divest the owner of his property. This is the result of a voluntary abandonment by the owner with his free consent; but not of a relinquishment as force, necessity, or danger compels. Thus, a vessel wrecked, or goods thrown overboard to lighten a ship, are recoverable on payment or tender of salvage. Although little prospect of recovering goods thrown overboard to lighten a vessel could exist, yet the right of recovery is not necessarily lost; but, on proof of property, the goods are recoverable, on payment or tender of salvage, if either driven on shore or taken afloat. Warder *v.* La Belle Creole, 1 *Pet. Adm.* 31. 2. The fact of the property being found derelict materially strengthens, in most cases, the claim of the salvor to the favorable consideration of the court in determining the amount to be awarded him.

In determining whether, under the circumstances of a particular case, a vessel is to be deemed derelict, it must appear that she was absolutely abandoned by those in charge of her. Tyson *v.* Pryor, 1 *Gall.* 133; Rowe *v.* The Brig ——, 1 *Mas.* 372; Evans *v.* The Charles, 1 *Newb.* 329; Montgomery *v.* The T. P. Leathers, *Id.* 421, 425; Mesner *v.* Suf-

folk Bank, 1 *Law Rep.* 249; The Attacapas, 3 *Ware*, 65; Cromwell *v.* The Island City, 1 *Cliff.* 221. If she was not abandoned finally, she is not to be deemed derelict; but, if a final abandonment is shown, whether the desertion arose from accident or necessity, or was voluntary, is immaterial. In one instance, a steamboat, while proceeding to her destination, was so injured by a collision with a schooner, sailing in an opposite direction, as to be deemed in immediate danger of sinking; and, under that apprehension, was left by all on board. The passengers and part of the crew went on board the schooner; but the master, with other officers and the residue of the crew, remained in small boats about the wreck, employed in saving articles found floating; and, after a brief interval, judging it safe so to do, again went on board for the purpose of saving, and did save baggage of passengers, money, and other property to a large amount. It was held that the steamboat, under these circumstances, and at the time when the alleged services of the libellants were performed, was not derelict. Mesner *v.* Suffolk Bank, 1 *Mo. Law Rep.* 249. In a like case, where a steamboat on the Mississippi, being on fire, was surrendered by her master and crew to the master and crew of the sailing-vessel, under the conviction that nothing could be effectually done for her safety without the aid of the latter vessel, a similar decision was made. Montgomery *v.* The T. P. Leathers, *Newb.* 421. But where the master and crew left their vessel in a sinking condition, and took to the long-boat, and were picked up by another vessel while yet in sight of the wreck, the vessel and cargo thus left were considered as derelict. The Boston, 1 *Sumn.* 328. And a vessel may be held derelict where the master, and all others on board, had deserted her in peril, notwithstanding the master had expressed an intention of endeavoring to send relief. The Laura, 14 *Wall.* 336. The fact that human beings continue on board seems not to prevent the conclusion that the property is derelict, if they are not persons legally considered as continuing in the responsible charge of the property; for a vessel with slaves on board, but without any white person, has been held derelict. Flinn *v.* The Leander, *Bee Adm.* 260. But where a part of the crew of a vessel at sea were dead, and all the rest physically and mentally incapable of providing for their own safety, this was said to be not what is known as "derelict," but "*quasi* derelict." Sturtevant *v.* The George Nicholaus, 1 *Newb.* 449, 452.

Derelict is a term applied to any thing that has been forsaken or left, or wilfully cast away. Derelict lands left by the sea, suddenly, belong to the king, but when the sea shrinks back so slowly that the gain is by little and little, *i. e.*, by small and imperceptible degrees, it goes to the owner of the land adjoining. *Jacob.*

Derelict is any thing thrown away or abandoned with the intention of quitting the ownership thereof. *Brown.*

The word dereliction is also used for the retiring of the sea, whereby land is gained. *Holthouse.*

A finding of a jury that property was derelict might not import that the title of the owner had been divested. But "derelict and abandoned" imports that the owner had relinquished all intention to recover the property; and, if so, it might belong to the first finder reducing it to possession. Wyman *v.* Hurlburt, 1 *Ohio*, 81.

DESCENDANT. A person who is descended from another; any one who proceeds from the body of another, however remotely, is a descendant of the latter. The word is the converse or opposite of ascendant, rather than of ancestor, taking all these words in the legal, technical sense.

Descendants, used in a will made by the head of a family, means all those who proceeded from his body. Crossly *v.* Clarke, 1 *Amb.* 396.

As used in a will, descendants means only lineal heirs, in the absence of clear indications of an intention on the part of the testator to enlarge its meaning. Baker *v.* Baker, 8 *Gray*, 101, 119.

Descendants includes every person descended from the stock referred to; is coextensive with "issue;" does not embrace as much as "relations." Barstow *v.* Goodwin, 2 *Bradf.* 413.

In general, the term descendants is broad enough to let in grandchildren with children; but, under a devise to such of testator's brothers and sisters as should survive him, and the descendants of such as should then be dead, equally; adding that the descendants of any deceased brother or sister are to take the share that would have belonged to the parent, — the descendants take *per stirpes*, not *per capita*. *Ib.*

A sister's child is not a descendant of the testator. Armstrong *v.* Moran, 1 *Bradf.* 314.

Brothers and sisters cannot take under the term descendants. That word does not mean next of kin, or heirs-at-law generally, as these phrases comprehend persons in the ascending as well as in the descending line, and collaterals; but it means the issue of the body of the person named, of every degree, such as children, grandchildren, and great-grandchildren. Hamlin *v.* Osgood, 1 *Redf.* 409.

Descendant, as used in 3 N. Y. Rev. Stat. (5th ed.) 146, § 4, relative to devises, extends to all issue of the testator, however remote, but does not embrace collateral relatives. Van Beuren *v.* Dash, 30 *N. Y.* 393. S. P. as to Georgia statutes. Bryan *v.* Walton, 20 *Ga.* 480; Walker *v.* Walker, 25 *Id.* 420.

Descendants must not be construed in one portion of a statute of descents, as in that of Rhode Island of 1857, § 1, to mean descendants nearest in degree, unless consistent with other portions, such as section 5, giving the right of representation. Daboll *v.* Field, 9 *R. I.* 266, 289.

DESCENT. The act of descending or passing downwards. In law, the transmission of an estate by inheritance, usually, but not necessarily, in the descending line. Whether an inheritance passes upwards or downwards in the line of consanguinity, upon the death of its possessor, such transmission is technically termed descent. The words ascend and ascent, although more accurate, are but seldom applied to the former case; and the term ascendant, as the converse of descendant, is used rather to express the relation of persons than the course of transmission of estates. This use of the word descent resulted from the ancient canon of the common law, derived from the feudal law, prohibiting lineal succession in the ascending line. This restriction has long since been removed throughout the United States, and was abolished in England by Stat. 3 & 4 Wm. IV. ch. 106, which declares that every lineal ancestor shall be capable of being heir to any of his issue. That statute defines descent as the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation as where he shall be a child or other issue. And such is the sense in which the word is now understood in English and American law.

The rules of descent are applicable where a person on the death of an ancestor acquires an estate by right of representation as heir at law; or, in other words, where the law casts the title on the recipient immediately on the death of the ancestor, without looking to any instrument as a medium of transfer. The term is not appropriate where estates for life or years are involved.

Descent is frequently used to distinguish the vesting of title in any one by mere operation of law, from purchase, which may be either devise or grant. In the former case, the person is said to take by descent, or as heir; while a grantee or devisee is said to take by purchase, or as purchaser.

The rules governing the course of descent in England remained unchanged for a long period prior to the statute 3 & 4 Wm. IV., already referred to. They were expressed in a number of canons, said to have been framed by Lord Chief Justice Hale; and the term canons of descent is frequently applied both to them and the more modern rules. The characteristic features of the English system are the preference of male to female heirs; the preference of the eldest male issue to the exclusion of the others, or the doctrine of primogeniture; and, where there is no male issue, the treating all the female issue together as the heir, they taking an estate in coparcenary. The American law of descents depends upon the statutes of the several states, which, differing greatly in minor details, yet are generally the same as to the more important rules and those which are of frequent application. They have departed widely from the English canons in giving the succession of estates to all legitimate children in equal shares without distinction, and disregarding all considerations of primogeniture; following in this the doctrine of the civil law. As to descent to collaterals, no common principle seems to have been followed. In regard to the right of representation, the rule more usually adopted by the state statutes of descents is that lineal descendants in an equal degree from the common ancestor share equally *per capita;* but under some statutes each lineal branch of descendants takes only the portion which their parent would have

taken had he been living, the division being *per stirpes*, and not *per capita*.

The following stages in the growth of the present English law of descents may be indicated:

Fee-simple estates were originally confined to the issue or lineal descendants of the ancestor;

By the reign of Henry II., collateral descendants were admitted to the succession upon the failure of lineals;

By the time of Henry III., primogeniture, *i.e.* descent to the eldest son in exclusion of the others, was established; also the doctrine of representation, whereby the issue of the eldest son who was dead stood in his place, to the exclusion of the other sons;

In the year 1833, the lineal ancestors were, as such, rendered capable of being heirs, and the half-blood of the purchaser became admissible to succeed as heir; and

In the year 1859, the widow of the purchaser became admissible to succeed as heir. *Brown.*

The canons which at present regulate the descent of land in England are the following:

First. The inheritance is to descend to the lineal descendants of the purchaser *in infinitum;*

Second. And to the male issue in preference to females;

Third. And to the eldest male issue in exclusion of the others; but if there are no male issue, then to the female issue altogether as coparceners;

Fourth. Lineal descendants *in infinitum* are to represent their ancestor;

Fifth. Failing lineal descendants of the purchaser, the inheritance is to go to the nearest lineal ancestor, the father succeeding before the brother or sister of the purchaser, and every more remote ancestor succeeding before his issue other than any less remote ancestor or ancestors, and his or their issue.

Sixth. In the application of the fifth canon, the succession is to be according to the following order:

The father and all male paternal ancestors and their descendants *in infinitum;*

All the female paternal ancestors and their heirs.

The mother and all male maternal ancestors, and her and their descendants *in infinitum;* and

All the female maternal ancestors and their heirs.

Seventh. The half-blood of the purchaser shall inherit,—

Where the common ancestor is a male, next after a kinsman in the same degree of the whole blood, and the issue of such kinsman *in infinitum;* and

Where the common ancestor is a female, next after that female.

Eighth. In the application of the sixth canon,—

In the admission of female paternal ancestors, the mother of the more remote male paternal ancestor and her heirs are to be preferred to the mother of the less remote and her heirs; and

In the admission of female maternal ancestors, the mother of the more remote male maternal ancestor and her heirs are to be preferred to the mother of the less remote one and her heirs.

Ninth. Failing the discovery of an heir after the application of all the preceding eight canons, the land is to descend to the heir of the person last entitled, although he was not the purchaser thereof; and such heirs will, of course, have to be ascertained by the renewed application of the preceding eight canons, starting only from a different point of departure. *Brown.*

Descents are of two sorts: lineal, as from father or grandfather to son or grandson; or collateral, as from brother to brother, or cousin to cousin. They are also distinguished into mediate and immediate descents. But these terms are used in different senses. A descent may be said to be a mediate or immediate descent of the estate or right; or it may be said to be mediate or immediate, in regard to the mediateness or immediateness of the pedigree or consanguinity. Thus, a descent from the grandfather, who dies in possession, to the grandchild, the father being then dead; or from the uncle to the nephew, the brother being dead,— is in the former sense, in law, immediate descent, although the one is collateral and the other lineal; for the heir is in the *per*, and not in the *per* and *cui*. On the other hand, with reference to the line of pedigree or consanguinity, a descent is often said to be immediate, when the ancestor from whom the party derives his blood is immediate, and without any intervening link or degrees; and mediate, when the kindred is derived from him *mediante altero*, another ancestor intervening between them. Thus a descent in lineals from father to son is in this sense immediate; but a descent from grandfather to grandson, the father being dead, or from uncle to nephew, the brother being dead, is deemed mediate; the father and the brother being, in these latter cases, the *medium deferens*, as it is called, of the descent or consanguinity. Levy *v.* McCartee, 6 *Pet.* 102.

DESCRIPTIO PERSONÆ. Description of the person. Words following the name of a person, in the body or signature of a person, are often construed as operating only to describe the person intended, and not to qualify his obligations or liabilities. For example, the publisher of a newspaper had adopted the style of "The Churchman" as his business designation, and gave H authority as his agent to bind him under that name. This being the course of business, H made a note, in the usual form, "I

promise to pay," and signed it H——, agent of "The Churchman." He very probably intended to bind the proprietor of "The Churchman," and not himself. But the court held that the proprietor was not liable: the note was the individual note of H. The words "agent of 'The Churchman'" were only operative as a *descriptio personæ:* they served to show which of the various persons named H—— was the signer of the note; but did not restrict his liability as maker. De Witt *v.* Walton, 9 *N. Y.* 571; S. P. Pentz *v.* Stanton, 10 *Wend.* 271; Rathbon *v.* Budlong, 15 *Johns.* 1. The same principle often applies when such descriptions as executor, administrator, assignee, trustee, are appended to the name of a party; they are treated as identifying the individual, not as showing that he acts only in a representative capacity. If this is intended, it must be explicitly stated. See Regnor *v.* Webb, 36 *How. Pr.* 353. But the application of the rule depends very much upon the character and tenor of the instrument, and the circumstances under which it was made.

DESERTION. The abandonment of a relation or service in which one owes duties; the quitting, wilfully and without right, one's duties; the withdrawal, unexcused, from the obligations of some condition or status.

The term is chiefly used of soldiers or sailors who quit service in the army or navy, this being a punishable offence; of sailors in the merchant service, who leave the ship, this being a cause of forfeiture of wages; and of husbands or wives, or parents, who abandon their spouses or children. By the laws of many of the states, prolonged desertion between husband and wife is ground of divorce.

In respect to the military service, there is a distinction between desertion and simple absence without leave. In order to constitute desertion, there must be both an absence and an intention not to return to the service. Hanson *v.* South Scituate, 115 *Mass.* 336.

Desertion, in the sense of the maritime law, is a quitting of the ship and her service, not only without leave, and against the duty of the party, but with an intent not again to return to the ship's duty. If a seaman quits the ship without leave, or in disobedience of orders, but with an intent to return to duty, however blamable his conduct may be, it is not the offence of desertion. Cloutman *v.* Tunison, 2 *Sumn.* 373.

By desertion, in the maritime law, is meant, not a mere unauthorized absence from the ship without leave, but an unauthorized absence from the ship, with an intention not to return to her service, or, as it is often expressed, *animo non revertendi;* that is, with an intention to desert. Coffin *v.* Jenkins, 3 *Story,* 108.

Absence of a wife from her husband, by his consent, does not constitute desertion within a statute declaring desertion a ground of divorce. In legal phraseology, the word is uniformly used to denote a wilful abandonment of an employment or duty, in violation of a legal or moral obligation. A soldier is said to desert his post, a sailor his ship, an apprentice his master, when they depart from the service to which they are bound, without permission or contrary to orders. The word implies a separation which is not with the assent of the person deserted. Lea *v.* Lea, 8 *Allen,* 418.

Desertion, as used in the Massachusetts divorce law, means the wilful denial of companionship, with the intentional and permanent abandonment of all matrimonial intercourse, against the libellant's consent. The intentional abandonment by a husband, against his wife's consent, for five consecutive years of all matrimonial intercourse and companionship, and his denial to her of the protection of his home, will sustain her libel on the ground of desertion, although during the five years he has regularly contributed towards supporting his wife and children. Magrath *v.* Magrath, 103 *Mass.* 577.

Refusal of sexual intercourse for five years consecutively, although not justified by considerations of health, is not desertion. Southwick *v.* Southwick, 97 *Mass.* 327.

DESIGN. When used as a term of art, design means the giving of a visible form to the conceptions of the mind, or, in other words, to the invention. Binns *v.* Woodruff, 4 *Wash. C. Ct.* 48, 52.

Design, as used in an indictment for having in possession materials and plates for the making of counterfeit bank-notes, may point out the purpose or object for which such materials and plates were originated, but not any criminal intent on the part of the defendant so to use them. Commonwealth *v.* Morse, 2 *Mass.* 128.

DESIRE. A testator devised land to some of his children, charged with a payment, and added that he "desired" the devisees to let his other children have it at the same price. It was held that this gave the latter a right to purchase. The word desire, in a will, raises a trust, where the objects of that desire are specified. Van Dyck *v.* Van Beuren, 1 *Cai.* 84.

DESPOT. In its original sense, des-

pot means governor, master, or ruler; and its early employment was as a dignity or title, as the despots of Sparta, created by the Emperor Alexius. But, from the oppression and tyranny practised by many who acquired the position and power of despot, it has come to be used as a generic term for one who possesses and abuses unlimited power; a tyrant. A despotism is that form of government in which the whole political power is vested in one person; an autocracy; except that despotism carries a stronger suggestion of abuse of authority than does autocracy. One might, perhaps, speak of a benevolent or patriotic autocrat, but could scarcely prefix those adjectives to despot.

DESTINATION. The phrases "port of destination" and "port of discharge" are not equivalent. To make the port of destination the port of discharge, either some cargo must be unladen, or there must be an actual termination of the voyage there. United States *v.* Barker, 5 *Mass.* 404.

DESTROY. The legal meaning of destroy, as used in the act of congress punishing with death a party destroying vessels, is to unfit the vessel for service, beyond the hope of recovery by ordinary means. United States *v.* Johns, 1 *Wash.* 363, 4 *Dall.* 412.

DETAINER. 1. The act, usually a wrong, of keeping a person against his will, or of withholding possession of real or personal property from a person entitled to it. In this sense, it is substantially equivalent to detention, but has a more technical use. Forcible entry and detainer is the name descriptive of the wrong or offence of entering upon lands and excluding the rightful owner.

2. In English practice, detainer was the name of a species of writ or process, prescribed by Stat. 2 Wm. IV. ch. 39, § 1, but superseded by 1 & 2 Vict. ch. 110, §§ 1, 2, for commencement of a personal action against a person already under imprisonment. It authorized the sheriff who had a defendant already in custody, at the suit of some other plaintiff, to detain him, notwithstanding any discharge from that suit, until the new suit should be raised. *Wharton.*

DETERMINE. 1. To ascertain or decide; as to determine the compensation to be awarded for property taken, or to determine a question or controversy. Determination: the act of deciding; also, sometimes, the decision itself, as when one speaks of determinations reviewable upon appeal.

2. To bring to an end; to close; to terminate; as to determine a contract. Also, to come to an end; to stop; as in the expression, an estate for life will determine on a certain death. Determination: the ending or close of some privilege, proceeding, or right. Determinable: that which may be ended or closed.

DETINET. He detains. A technical word, anciently used in the declaration in actions of debt in certain cases where the action was brought by or against a party other than the person who originally gave the credit or incurred the obligation, as an action by or against an executor for a debt due to or from the testator. The term has given a name to the mode of declaring in such cases, the declaration being said to be in the *detinet.* In other actions of debt, the declaration is in the *debet* and *detinet*, q. v.

The term is also applied to the action of replevin, where it is founded on a continued detention. See REPLEVIN.

DETINUE. The name of one of the common-law forms of action, which lay for the recovery of the possession of a personal chattel wrongfully detained by the defendant from the plaintiff, where the taking was lawful. The gist of the action is the wrongful detaining, not the original taking; and the defendant must have acquired the possession by lawful means, as by bailment, finding, &c. To maintain the action, the plaintiff must have a right to immediate possession, although it is not necessary that he should ever have had actual possession. The chattels must be such as are capable of being distinguished from all others, and must be described with certainty in the declaration, so that a judgment for a return *in specie* may be enforced. The judgment is in the alternative, — that the plaintiff recover the goods, or, if the goods cannot be had, for their value, and his damages. This form of action was in a great measure superseded, even in the common-law practice, by the action of trover, the lat-

ter being found to be a less technical and more practical remedy; and, in states where the common-law practice has been abolished, the action of replevin, or some similar remedy, has been substituted. In some of the states, while *detinue* continued in use, it was used as the appropriate remedy in every case of unlawful detention of personal property, without regard to the manner in which possession of it was acquired by the defendant.

The action of *detinue* is defined in the old books as a remedy founded upon the delivery of goods by the owner to another to keep, who afterwards refuses to redeliver them to the bailor; and it is said that, to authorize the maintenance of the action, it is necessary that the defendant should have come lawfully into the possession of the chattel, either by delivery to him or by finding it. In fact, it was once understood to be the law that *detinue* does not lie where the property had been tortiously taken. But it is, upon principle, very unimportant in what manner the defendant's possession commenced, since the gist of the action is the wrongful detainer, and not the original taking. It is only incumbent upon the plaintiff to prove property in himself, and possession in the defendant. At present, the action of *detinue* is proper in every case where the owner prefers recovering the specific property to damages for its conversion, and no regard is had to the manner in which the defendant acquired the possession. Pierce *v.* Hill, 9 *Port.* (*Ala.*) 151.

DETINUIT. He detained. A technical word, used in declarations in replevin in he same manner as the present tense, *detinet*, q. v.

DEVASTAVIT. He has wasted. 1. The technical name of waste by an executor or administrator.

2. Also, if plaintiff, in an action against an executor or administrator, has obtained judgment, the usual execution runs *de bonis testatoris;* but if the sheriff returns to such a writ *nulla bona testatoris nec propria*, the plaintiff may, forthwith, upon this return, sue out an execution against the property or person of the executor or administrator, in as full a manner as in an action against him, sued in his own right. Such a return is called a devastavit. *Brown.*

3. An entry or suggestion, on record, of waste by an executor or administrator, made on the part of a plaintiff, as the foundation of a new writ, or of an action of debt.

DEVENERUNT. The name of an obsolete English writ, formerly directed to the escheator on the death of the heir of the king's tenant under age and in custody, commanding the escheator that, by the oaths of good and lawful men, he inquire what lands and tenements, by the death of the tenant, came to the king. *Termes de la Ley; Cowel; Dyer*, 360.

DEVEST. To deprive; to take away; to withdraw. Usually spoken of an authority, power, property, or title; as the estate is devested.

Devest is opposite to invest. As to invest signifies to deliver the possession of any thing to another, so to devest signifieth to take it away. *Jacob.*

It is sometimes written divest; but devest has the support of the best authority. *Burrill.*

DEVIATION. In insurance law, means a departure from the course of the voyage contemplated by a policy, or, more technically, such a departure as impairs the insurer's liability.

Originally, of course, the word was used in the first-mentioned, vernacular sense of a departure from the intended line of the voyage, irrespective of its effect upon the policy. But it seems to have acquired the restricted, technical meaning of such a departure as impairs the insurance. The language of the cases very often is, that such and such a departure is or is not a deviation; meaning, it does or does not discharge underwriters.

A deviation is a voluntary departure from or delay in the usual and regular course of a voyage insured, without necessity or reasonable cause; this discharges the insurer, from the time of the deviation. Coffin *v.* Newburyport Ins. Co., 9 *Mass.* 436.

A deviation is not merely the going out of the track or course usually taken; but it is a departure from the express or implied terms of the contract. Within this rule, unjustifiable delay constitutes a deviation. Warder *v.* La Belle Creole, 1 *Pet. Adm.* 31.

In determining whether a diversion from the direct course of a voyage is such a deviation as in law vacates a policy, the motives, end, and consequences of the act enter into the true criterion of judgment. Thus if delay in port be insisted upon as amounting to a deviation, the question should be put to the jury whether such delay was in the exercise of good faith and sound discretion, or was by necessity or for reasonable cause. Foster *v.* Jackson, &c. Ins. Co., 1 *Edm. Sel. Cas.* 290.

As liberty to touch at a particular port, reserved in a policy of insurance, does not imply liberty to remain there for the pur-

pose of trading, trading at such port (involving delay) may amount to a deviation. Maryland Ins. Co. *v.* Le Roy, 7 *Cranch*, 26; United States *v.* The Paul Sherman, *Pet. C. Ct.* 98.

Where liberty is given to touch at M, a stoppage at M, and discharge of cargo there, which produces no delay and no increase of risk, is not a deviation. Hughes *v.* Union Ins. Co., 3 *Wheat.* 159; s. p. Hughes *v.* Union Ins. Co., 8 *Id.* 294.

For a vessel to turn aside from her course, or delay, for the purpose of relieving another vessel, is not a deviation which avoids a policy, if the object is to save human life. To do so with the object of saving property merely, is a deviation. The Henry Ewbank, 1 *Sumn.* 400; Bond *v.* The Cora, 2 *Wash. C. Ct.* 80, 2 *Pet. Adm.* 361; The George Nicholaus, 1 *Newb.* 449; Crocker *v.* Jackson, *Sprague*, 141, 10 *Mo. Law Rep.* 70.

Where a voyage was described in a policy as at and from A to B or C, to go to both is a deviation, unless sustained by usage generally known. Bulkley *v.* Protection Ins. Co., 2 *Paine*, 82.

If, after sailing, a vessel stops at a port for more men, it is a deviation, unless such a general usage is shown that the parties must have intended a reference to it. Folsom *v.* Mercantile Mutual Marine Ins. Co., 38 *Me.* 414.

For a steamboat to take a brig in tow, there being nothing in the policy expressly authorizing it, is a deviation. Natchez Ins. Co. *v.* Stanton, 10 *Miss.* 340.

If the termini of a voyage are preserved, it is a deviation to stop at an intermediate point, though such deviation be decided on before sailing. Henshaw *v.* Marine Ins. Co., 2 *Cai.* 274.

It is not a deviation for a vessel to take measures to repel a hostile attack; nor, if the insured vessel captures the attacking one, is it a deviation for her to take possession and man the prize, if her own crew is not injuriously weakened. Haven *v.* Holland, 2 *Mas.* 230.

Pursuing a vessel that has been piratically taken by its crew is a deviation. Hood *v.* Nesbitt, 1 *Yeates*, 114.

Devisavit vel non. Did he devise or not? Did he make a will or not? The technical name of an issue directed by a court of equity to be tried in a court of law, upon some matter of fact alleged as an objection to the validity of a will; such as fraud, or undue influence, or incapacity on the part of the testator.

DEVISE, *v.* To dispose of real property by will. Devise, *n.*: a disposition of real property by will; also, sometimes, the clause of the will making, a gift of real property. Devisor: a testator, in respect to gifts of real property. Devisee: one to whom real property is given by will.

Devise should be restricted to the disposal of real property. It is sometimes used of gifts of other kinds of property; but this use is unadvisable, unless, perhaps, when both real and personal property are necessarily embraced. To speak of a residuary devise seems not rendered inadmissible by the fact that the estate includes personalty. Compare BEQUEST; LEGACY.

Devise means a gift of lands, &c., by a last will and testament. A devise is, in construction of law, no deed, but an instrument by which lands are conveyed. To devise is to give by will. The word was, formerly, particularly applied to bequests of land, but is now generally used for the gift of any legacies whatever. *Jacob.*

Devise is a bequest by a man of his lands and goods by his last will and testament in writing. (*Termes de la Ley; Cowel.*) At present, devise is principally used with reference to landed property, and bequeath and bequest with reference to personalty. *Mozley & W.*

Devise properly relates to the disposal of real property, not of personal. Dickerman *v.* Abrahams, 21 *Barb.* 551, 561.

Devise is properly applied to gifts of real property by will, but may be extended to embrace personal property, to execute the intention of the testator. McCorkle *v.* Sherrill, 6 *Ired. Eq.* 173.

The words "devise," "legacy," and "bequest" may be applied indifferently to real or personal property, if such appears by the context of a will to have been the testator's intention. Ladd *v.* Harvey, 21 *N. H.* 514.

Devisee, accompanying a bequest of personalty, will be held to mean legatee. Wright *v.* Trustees of Meth. Epis. Ch., *Hoffm.* 202, 212.

A devise of lands is in all cases considered a specific devise; whether made by a specific or general description, to a particular devisee, or to the residuary legatee. Wyman *v.* Brigden, 4 *Mass.* 151.

A devise of all the remainder of the testator's estate, after paying the legacies and deducting specific devises, is not specific. Hays *v.* Jackson, 9 *Mass.* 149; Stutton *v.* Cole, 3 *Pick.* 232.

DICTATE. In the provision of the Louisiana civil code, that a will may be dictated by the testator, the term dictate is properly defined: to pronounce, word by word, what is designed to be written by another. But the meaning of the provision is that the testator must express his intention orally, not by signs, but by words; and that these words must be uttered spontaneously, and not upon interrogation or suggestion. The unqualified proposition that the slightest variation from the words of

the testator is prohibited, cannot be adopted. Hamilton *v.* Hamilton, 6 *Mart.* (*La.*) N. S. 143.

There is a manifest difference between dictating a will, and causing it to be written. To dictate, used in a technical sense, means to pronounce orally what is destined to be written at the same time by another. But when the code, after providing in what cases there must be a dictation, goes on stating that it will suffice, if, upon complying with some additional formality, the testator causes the instrument to be written by another person, it is obvious that the purpose is to dispense with the technical dictation. Prendergrast *v.* Prendergrast, 16 *La. Ann.* 219.

DICTUM. A saying; a remark. 1. A mere assertion or voluntary statement, which a party is not bound to make.

2. An opinion expressed by a judge, in deciding a cause or question, either aside from the point to be decided, and hence said to be extra-judicial, or *obiter dicta*, or given without deliberation, as a hasty opinion at *nisi prius*. Dicta are not considered binding upon courts as precedents, and have only the authority due to the opinion of the individual judge by whom they are announced. Some difference of opinion has existed as to the rule of distinction between questions necessarily involved and decided in a cause, and those which are merely collateral, and therefore to be regarded as mere dicta.

According to the more rigid rule, an expression of opinion, however deliberate, upon a question, however fully argued, if not essential to the disposition that was made of the case, may be regarded as a dictum; but it is, on the other hand, urged that it is difficult to see why, in a philosophical point of view, the opinion of the court is not as persuasive on all the points which were so involved in the cause that it was the duty of counsel to argue them, and which were deliberately passed over by the court, as if the decision had hung upon but one point. (1 *Abb. N. Y. Dig.* iv.) *Bouvier.*

Dicta are opinions of a judge which do not embody the resolution or determination of the court, and made without argument, or full consideration of the point, are not the professed deliberate determinations of the judge himself. *Obiter dicta* are such opinions uttered by the way, not upon the point or question pending, as if turning aside for the time from the main topic of the case to collateral subjects. Rohrback *v.* Germania Fire Ins. Co., 62 *N. Y.* 47, 58.

The fact that a decision might have been put upon a different ground, existing in the case, does not place it in the category of a dictum. Clark *v.* Thomas, 4 *Heisk.* 419.

DIE. Policies of life-insurance often contain a provision exempting the company from lisbility in case the assured dies by his own hand. The cases are generally to the effect that this means voluntary suicide, Moore *v.* Connecticut Mut. Life Ins. Co., 1 *Am. L. T. Rep.* N. S. 319; that if a person brings his life to a close by poison, this, though not involving any violent use of his own hands, is included, Hartman *v.* Keystone Ins. Co., 21 *Pa. St.* 466; and that, upon the other hand, although he literally dies by his own hand, yet if the act was committed while the subject was insane to such degree as to prevent him from forming a rational judgment respecting his act, the company is not released, Terry *v.* Life Ins. Co., 1 *Dill.* 403; Eastabrook *v.* Union, &c. Ins. Co., 54 *Me.* 224; Breasted *v.* Farmers' Loan Co., 4 *Hill*, 73, 8 *N. Y.* 299; though, if he retained sufficient reason to understand the nature of his act, it is discharged, Dean *v.* American, &c. Ins. Co., 4 *Allen*, 96.

DIES. A day. This Latin word occurs in many phrases frequently used, the more important of which are these:

Diem clausit extremum. He closed his last day; *i. e.*, he died. The name of English writs issued to enforce certain rights of the crown on the death of its tenant or debtor.

Dies amoris. A day of favor; a time allowed by favor or indulgence. A delay granted by the court to a party, as a matter of indulgence.

Dies a quo. The day from which. The day from which a transaction or computation of a period of time begins; the commencement of it; the conclusion being termed the *dies ad quem*, — the day to which.

Dies communes in banco. Common days in court. A term applied in English practice to stated days of appearance in the courts; called also common return days.

Dies datus. A day given.

Dies Dominicus. The Lord's day. Sunday.

Dies Dominicus non est juridicus. The Lord's day is not a juridical day. Sunday is not a day for judicial proceedings. No judicial act is, in general,

performed on Sunday; and any ordinary legal proceeding attempted to be taken on that day would be null and void. Such acts are the issue, service, and return of process, except in criminal cases; the service of notices, pleadings, and other papers; holding court for the trial of a cause; assessment of damages upon a writ of inquiry, &c. But where a cause has been tried and submitted to a jury before Sunday, their verdict may generally be returned and received on that day.

The maxim does not, in terms, apply to private acts or contracts on Sunday; but many statutory provisions prohibit the carrying on of ordinary labor or business on Sunday, and, as a consequence, render invalid any act or contract prohibited. See SABBATH; SUNDAY.

In the computation of time, where the last day of the time within which any act is required to be done falls upon Sunday, that day is excluded as *dies non*, and the succeeding day becomes the last day; but, otherwise, an intervening Sunday is included in the computation. This rule applies in determining the time for the performance of contracts, except instruments upon which days of grace are allowed; with regard to which, if the last day of grace falls on Sunday, payment must be made on the preceding Saturday.

Dies fasti. Auspicious days. Days on which, in the Roman law, courts might be held and judicial and other business transacted; the days deemed auspicious for such purposes being designated as *dies fasti* in the public calendars of each year by the Pontifex Maximus.

Dies gratiæ. A day of grace. Used in old English practice to designate a day allowed to a party by grace, courtesy, or favor. See DIES AMORIS and QUARTO DIE POST.

Dies juridicus. A juridical day; a court day. A day for judicial proceedings or legal purposes; a day on which courts may properly transact business.

Dies nefasti. Unauspicious days. Days which, in the Roman law, were considered unauspicious, and upon which the courts were closed and no judicial business was transacted. See DIES FASTI.

Dies non juridicus. A non-juridical day. A day on which no judicial proceedings can be taken; such as Sunday, or any legal holiday. Such days are frequently termed, by abbreviation, *dies non.*

Dies utiles. Useful days; available days. Applied, in the Roman law, to the days upon which an heir, having knowledge that an inheritance was open to him, might apply therefor to the judge.

DIGEST. A compilation presenting the substance of the contents of many books in one, under an arrangement (usually alphabetic) especially intended to facilitate reference.

In the use of the word in jurisprudence, a digest differs from an abridgment in that it reproduces the rules of the decisions by mere quotation or extract, while abridgment is usually applied to works involving somewhat more consolidation and originality. It differs from a concordance or index, in that it purports to give the matter in an available form, while they merely indicate where the matters mentioned may be found. It differs from a treatise, in that it presents merely the adjudications of the courts, or precepts of the statutes, as they are found in the original books; while a treatise sets forth the law as the author has learned or understands it, fortified by references to books as authorities, but given upon his learning and responsibility. But the words are not strictly discriminated in actual use.

When reference is made to the Digest, the Pandects of Justinian are intended, they being the authoritative compilation of the civil law. *Bouvier.*

The Digest of the Emperor Justinian (otherwise called the Pandects) was a collection of extracts from the most eminent Roman jurists. In A.D. 530, Justinian authorized Tribonian, with the aid of sixteen commissioners, to prepare such a collection, and allowed ten years for the work. It was, however, completed in three years, and published under the title of Digest, or Pandects, on the 16th of December, 533, and declared to have the force of law from the 30th of that month. (1 *Bl. Com.* 81; 1 *Steph. Com.* 63; *Mack. Rom. Law*, 22; *Sand. Just. Introd.* § 30.) *Mozley & W.*

DIGGING. In a contract for a street improvement, has been held synonymous with excavating. It is not confined to removal of earth, as distinguished from

rock. Sherman *v.* Mayor, &c. of N. Y., 1 *N. Y.* 316.

DIGNITARY. In the canon or ecclesiastical law, seems to be used in a general sense, as including all those ecclesiastics whose positions give them authority or pre-eminence over others; and also, in a stricter sense, as denoting particular classes.

Jacob says, it embraces a bishop, dean, archdeacon, prebendary, &c., but that there are simple prebendaries, without cure or jurisdiction, which are not dignitaries. Brande says, it now includes all the prebendaries and canons of the church. Shipley defines it as one of the *quatuor personæ* of a cathedral, viz., dean, precentor, chancellor, and treasurer. Staunton (citing Stephens on Book of Common Prayer, 54, note) says, it includes a bishop and some other ecclesiastical officers holding a peculiar rank and dignity in the church; that the title, though popularly used for any one filling a high ecclesiastical office, is, in strictness, only applicable to bishops, deans, archdeacons, and some below them who hold jurisdiction.

DIGNITY. In English law, signifies a species of incorporeal hereditament, in which a man may have a property or estate. Dignities were originally annexed to the possession of certain estates in land, and were usually created by a grant of those estates. They have, in modern times, become little more than personal distinctions, but have continued to be classed under the head of real property; and, as having relation to land, in theory, at least, may be entailed, or limited in remainder.

In the United States, dignities, in the legal sense of the term, do not exist.

DILAPIDATION. In its technical use, dilapidation is the name for ecclesiastical waste committed by the incumbent of a living; which is either voluntary, by pulling down; or permissive, by suffering the chancel, parsonage-house, and other buildings thereunto belonging, to decay. (3 *Bl. Com.* 91, 92; 3 *Steph. Com.* 313, 408.) *Mozley & W.*

DILATORY PLEA, or DEFENCE. A ground of defence, or a plea, which does not purport to meet the merits of the plaintiff's claim, but only resists his recovery by interposing a temporary objection, or question in the propriety of the remedy to which he has resorted, is called dilatory.

A dilatory plea is a plea by a defendant in an action, founded on some matter of fact not connected with the merits of the case, but such as may exist without impeaching the right of action itself. It is either: A plea to the jurisdiction, showing that, by reason of some matter therein stated, the case is not within the jurisdiction of the court. A plea of suspension, showing some matter of temporary incapacity to proceed with the suit. A plea in abatement, showing some matter for abating the action. The effect of it, if established, is, that it defeats the particular action, leaving the plaintiff at liberty to commence another in a better form. It is opposed to a peremptory plea, otherwise called a plea in bar, which is founded on some matter tending to impeach the right of action. (3 *Bl. Com.* 301, 302; 3 *Steph. Com.* 502, 503.) *Mozley & W.*

DILIGENCE. Careful attention and effort to accomplish a purpose or perform a duty. In the law of bailment, the word is the opposite of negligence, and synonymous with care, *q. v.*; and, like the latter term, three degrees of diligence are distinguished, viz., slight, ordinary, and great. To charge the indorser of a negotiable bill or note upon non-payment by the maker or acceptor, "due diligence" is required by the law-merchant; but what constitutes due diligence in any case depends largely upon the facts of that case.

DIMINUTION. Is used in a technical sense in reference to the practice upon a writ of error, or other remedy, involving the carrying the record of the proceedings of an inferior court before a court of superior jurisdiction for review. When a party to such a proceeding finds that the record as brought before the appellate court is deficient, lacks any paper or matter material to his case, he must not proceed to an argument of the cause until he has taken steps to supply the deficiency. This is done by alleging a diminution of the record; in other words, setting forth that the true record has been diminished by the abstraction or omission of the matter in question. Upon this showing a *certiorari* is issued to the court below, requiring the defect to be supplied.

DIOCESE. In ecclesiastical law, the circuit or territorial extent of a bishop's jurisdiction. *Cowel; Jacob; Wharton.*

Diocesan: a bishop, considered as he stands related to the clergy subordinate to him. *Wharton.*

Diocesan courts, are the consistorial courts of each diocese, exercising general jurisdiction of all matters arising locally within their respective limits, with the exception of places subject to peculiar jurisdiction; deciding all matters of spiritual discipline,— suspending or depriving clergymen, and administering the other branches of the ecclesiastical law. 3 *Steph. Com.* 14.

DIPLOMA. Is from a Greek word, signifying to fold double, and is used, 1, in the sense of a royal charter, or letters-patent from the sovereign; and, 2, to denote a document issued by an incorporated society or institution of learning, certifying to the attainments and qualifications of persons who have pursued courses of study under the auspices of the corporation, and, in the case of the learned professions, often declaring the recipient entitled to practise the profession.

Diplomatic agent, is a general term for various public officers who have been commissioned to superintend and transact the affairs of the government which has employed them, in a foreign country. Bouvier says that legatees, nuncios, internuncios, ambassadors, ministers, and plenipotentiaries are considered to be included; also, envoys, residents, ministers, chargés d'affaires, and consuls.

Diplomatics, signifies the art of judging of ancient charters, public documents or diplomas, &c., and discriminating the true from the false. *Ency. Lond.*

DIRECT, *v.* To command; to instruct, in respect to future action or conduct; to give orders.

Direction, in one of its senses, means a command or instruction as to future action, and has a special use in this meaning, referring to the explanations given by a judge to the jury, touching their duties. These are sometimes called directions; more often instructions. Direction is also applied to the governing body of a corporation; the directors considered jointly.

Director. The management of the affairs of a private corporation aggregate is usually intrusted to a small body of persons chosen by the members or stockholders from among their own number; and these are called, in the various kinds of corporations, directors, managers, or trustees. No rule can be laid down as to the particular appropriateness of these terms to particular classes of corporations; but directors appears the most usual term, where the executive conduct and oversight of a large and active business enterprise is the chief element involved, and trustees, where the care, custody, and administration of fixed property is the leading duty. It is very usual to speak of the directors of a bank, insurance company, or railroad company; but of the trustees of an academy, college, religious society, or savings-bank. Yet the terms are used interchangeably. The term directors is sometimes used to include all the kinds. 1 *N. Y. Rev. Stat.* 599, § 53. The body of directors, managers, or trustees, taken jointly, is often styled the direction, or the directory.

Directory statute. A statute which merely directs what shall be done, without avoiding acts in contravention of its provisions, or imposing a penalty for them, is called directory, as opposed to a mandatory statute, *q. v.*

DIRECT, *adj.* This word has several *quasi* technical uses in jurisprudence, which are, however, nearly connected with its vernacular meaning of immediate; by the natural, regular, or short course; straightforward; without circuity or interruption.

The word direct, in a provision in a charter-party that the vessel "shall proceed thence direct to ———," means that the vessel is to take a direct course from the port named to the loading port, without deviation or unnecessary delay, and not that she must leave the port named immediately. The Onrust, 6 *Blatchf.* 533.

Direct evidence, is opposed to circumstantial (*q. v.*), or indirect, and consists in inspection; or testimony of those who have personal knowledge of the fact in question; or written evidence, showing its existence immediately and without circuitous argument or resort to inference.

Direct examination. The first examination of a witness, in the orderly course, upon the merits; the opening examina-

tion on behalf of the party calling him is thus called, as opposed to any preliminary examination merely to test his competency, which is an examination *in pais*, or on the *voir dire*, q. v.; or to the examination on behalf of the adverse party, called cross-examination, *q. v.*

Direct interest. A direct interest, such as would render the interested party incompetent to testify in regard to the matter, is an interest which is certain, and not contingent or doubtful. A matter which is dependent alone on the successful prosecution of an execution cannot be considered as uncertain, or otherwise than direct, in this sense. Lewis *v.* Post, 1 *Ala.* 65.

Direct interrogatories, or questions. In the popular sense, these expressions mean inquiries that are explicit, pointed, admit of no evasion. But, in law, they more usually denote interrogatories framed or questions put to a witness on behalf of the party calling him, as opposed to cross-interrogatories or questions, which are those administered on behalf of the adverse party.

Direct a jury. The expressions to direct the jury, directions to the jury, &c., are equivalent to instruct, &c.

Direct line. Property is said to descend or be inherited in the direct line, when it passes in lineal succession; from ancestor to son, grandson, great-grandson, and so on.

Direct payment. The provision of the California practice act, allowing attachment in actions upon contracts "for the direct payment of money," applies to cases of contract where the liability of the defendant can be ascertained with certainty, and is not in doubt until after a trial; or, in other words, where the amount to be paid is fixed by the terms of the contract, or can be readily ascertained from the information which it affords. In such cases, the payment which has been promised in a certain sense may be said to be direct. While this view is not very satisfactory, it is more so than any other which finds color in the ambiguous words of the statute. Hathaway *v.* Davis, 33 *Cal.* 161.

Direct tax, as used in the provision of the United States constitution, prescribing apportionment of such taxes, does not include a tax upon the business of an insurance company. Pacific Ins. Co. *v.* Soule, 7 *Wall.* 433.

Historical evidence shows that personal property, contracts, occupations, and the like, have never been regarded as the subjects of direct tax. The phrase is understood to be limited to taxes on land and its appurtenances, and on polls. Veazie Bank *v.* Fenno, 8 *Wall.* 533.

Direct tax does not include an income tax or a succession tax. The succession tax, imposed by the acts of congress of June 30, 1864, and July 13, 1866, on every "devolution of title to any real estate," was not a direct tax, within the meaning of the constitution, but an impost or excise, and was constitutional and valid. Scholey *v.* Reu, 23 *Wall.* 331, 347.

The tax upon incomes imposed by the act of June 30, 1864, is not a "capitation or other direct tax," within the meaning of the constitution. Clark *v.* Sickel, 14 *Int. Rev. Rec.* 6.

DISABILITY. Incapacity; want of legal power to act or take.

Jacob specifies several kinds of disabilities, according to their origin: disability by act of an ancestor, as where an ancestor is attainted of treason which (in England) corrupts the blood of his descendants, so that they cannot inherit from him; disability by act of the party himself, as where a man, by granting away the reversion of his lands under lease, puts it out of his power to make a renewal of a lease (this, we think, would scarcely be deemed a disability as the term is now ordinarily used); by act of God, as where a person becomes insane; by act of the law, as the incapacity of an alien to hold lands; also, the disabilities of idiocy, infancy, and coverture.

At the present day, disability is generally used to indicate an incapacity for the full enjoyment of ordinary legal rights; thus married women, persons under age, insane persons, and felons convict are said to be under disability. Sometimes the term is used in a more limited sense, as when it signifies an impediment to marriage, or the restraints placed upon clergymen by reason of their spiritual avocations. (2 *Steph. Com.* 240, 663.) *Mozley & W.*

Disabilities are of two classes: absolute, which wholly disable the person; such are outlawry, excommunication, attainder, and alienage; and partial, as infancy, coverture, idiocy, lunacy, and drunkenness. *Wharton.*

Disability implies want of power, not want of inclination. People *v.* Supervisors of Ulster Co., 32 *Barb.* 473.

The objection that suit cannot be brought by an heir or *cestui que trust*, because the right of action is, for the time being, vested in the representative or trustee, is not a disability to sue. Disability means the want of legal capacity to do a thing. It may relate to the power to contract, or to bring suits, and may arise out of want of sufficient understanding, as idiocy, lunacy, infancy; or want of freedom of will, as in the case of a married woman, and persons

under duress, or out of policy of the law, as alienage, when the alien is an enemy, outlawry, attainder, *præmunire*, and the like. The disability is something pertaining to the person of the party, — a personal incapacity, — and not to the cause of action, or his relation to it. There must be a present right of action in the person, but some want of capacity to sue. Meeks *v.* Vassault, 3 *Sawyer*, 206.

The word disability, in a statute providing what shall be done in the event of death or disability of a public officer, is extensive enough to cover any cause which prevents the officer from acting. A resignation operates to produce a disability. State *v.* Mayor, &c. of Newark, 27 *N. J. L.* 185, 197.

DISBAR. To deprive an attorney, barrister, or counsellor, &c., of his status and privileges as such; to strike off the roll.

DISBURSEMENT. Paying out or expending money; also, the sum of money paid out or expended; expenditure. Where an executor, guardian, or trustee pays out money on account of the estate or fund which he holds, such expenditures are termed disbursements; if properly made, they are allowed as credits in his account; and usually his compensation is in the form of a commission upon his receipts and disbursements.

The term is also applied to expenditures necessarily incurred in the regular course of proceedings in an action, which are allowed to be included in the costs recovered by the successful party under the codes of procedure and practice acts of some of the states.

The word disbursements, in the provision of the Alabama code regulating the compensation of administrators, means money or currency paid out in extinguishment of the liabilities of the decedent, or the expenses of administration. Wright *v.* Wilkerson, 41 *Ala.* 267.

The disbursements allowed to be recovered as costs by the successful party in an action under the New York code of procedure do not extend beyond the due and regular proceedings in the action. The ordinary expenditures of the parties are not included. Case *v.* Price, 9 *Abb. Pr.* 111.

DISCHARGE. Has various uses in jurisprudence additional to, or varying slightly from, its vernacular meanings.

As applied to the person, discharge, *v.*, very frequently means to release, legally, from confinement; to set free, by authority. A prisoner set at liberty by a mob is rescued, not discharged. Actual corporal confinement is not always implied; to say that an employer discharges a workman is usual, but it is not so to say that a master discharges a slave. As applied to things, to discharge signifies to disembarrass or relieve; to throw off or remove a burden, as a vessel discharges her cargo. As applied to demands or rights in action, to discharge signifies to cancel, extinguish, or satisfy, irrespective of whether it is done by payment or otherwise, so that the liability is lawfully removed; as to discharge debts, incumbrances, or legacies.

Discharge, *n.*: signifies the act or proceeding of setting a person free, relieving a thing of some burden, or cancelling a demand. And if this is done or evidenced by a legal document, that document is also termed a discharge.

Discharging a jury is spoken of the act or order of the court dismissing the jury from any further consideration of a cause. This is done when the continuance of the trial is, by any cause, rendered impossible; also, when the jury, after deliberation, cannot agree on a verdict.

Discharge is used in various senses:

Of the discharge of a bankrupt under section 48 of the bankruptcy act, 1869, by which he is freed of all debts and liabilities provable under the bankruptcy, with certain specified exceptions. (2 *Steph. Com.* 161, 162; *Robson Bkcy.*) Of the discharge of a surety, whereby he is released from his liability as surety. (2 *Steph. Com.* 107.) Of the release of a prisoner from confinement. Of the payment of a debt, whereby the debtor is freed from further liability. Of the release of lands, or money in the funds, from an incumbrance, by payment of the amount to the incumbrancer, or otherwise, by consent of the incumbrancer. Of an order of a court of justice dismissing a jury on the grounds that they have performed their duties, or are unable to agree in a case before them. Of the reversal of an order of a court of justice; thus we say, such an order was "discharged on appeal," &c. *Mozley & W.*

In equity practice, discharge signifies a statement of disbursements, and an offset of counter-claims, brought in and filed, on accounting before a master in chancery, after the complainant's charge. See CHARGE AND DISCHARGE.

The term discharge for money, in a statutory enumeration of instruments which may be the subjects of forgery, includes an ordinary receipt for money paid, not being an accountable receipt. Commonwealth *v.* Talbot, 2 *Allen*, 161.

Discharged, in a statute limiting the time for suing a guardian's bond to four years from the time when the guardian shall be discharged, means any mode by which the guardianship is effectually determined and brought to a close; as by the removal, resignation, or death of the guardian, the marriage of a female guardian, the arrival of a minor ward at the age of twenty-one, or otherwise. Loring *v.* Alline, 9 *Cush.* 68.

Discharged, in a statute directing that if a defendant is not tried within a certain time he shall be discharged, if considered by itself, might mean discharged from imprisonment without trial, or from the further prosecution of the indictment, or from the legal penalty of the crime. When considered with reference to other statutes of the same nature, and to the probable intent of the legislature, it should be construed as directing that the defendant, for want of due prosecution of the indictment, shall be discharged from imprisonment or from his recognizance, and not from the indictment or from the legal penalty of the crime. State *v.* Garthwaite, 23 *N. J. L.* 143, 148.

DISCLAIM. To deny, disavow, or renounce a claim, interest, or right. Disclaimer: the act, declaration, or document by which one denies, disavows, or renounces some claim, interest, or right which he has formerly alleged, or which has been imputed or offered to him.

Under the United States patent laws (Rev. Stat. § 4917), whenever, through inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, a patentee has claimed more than that of which he was the original inventor, he may make a disclaimer, in writing, to be recorded in the patent office, of such parts of the thing patented to him as he does not choose to hold by virtue of his patent; and this disclaimer is treated as a part or a qualification of the original specification.

In pleading, disclaimer is the formal renunciation of claim to the subject-matter in suit, or of some claim relative to it. This has been employed sometimes in equity and in the common-law pleading.

Disclaimer is used:

Of an answer of a person made defendant to a bill in chancery in respect of some interest he is supposed to claim, whereby he disclaims all interest in the matters in question. Of course, a defendant will not be allowed by disclaiming to avoid giving to the plaintiff any discovery or relief which may be justly due to him. (*Hunt Eq.*)

Of any act whereby a person refuses to accept an estate which is attempted to be conveyed to him; as, for instance, where land is conveyed to an intended trustee without his consent, and he refuses to accept it. This is called the disclaimer of an estate. (1 *Steph. Com.* 479, 480.)

Of the refusal by the trustee in a bankruptcy to accept a burdensome lease or other onerous property of the bankrupt. (*Robson Bkcy.*; *Fawcett L. & T.* 257; *Rule* 28 *of Bankruptcy Rules*, 1871.)

Of disclaimer of tenure,— that was where a tenant, who held of any lord, neglected to render him the due services, and, upon an action brought to recover them, disclaimed to hold of the lord: which disclaimer of tenure in any court of record was a forfeiture of the lands to the lord. (2 *Bl. Com.* 275, 276; 1 *Steph. Com.* 465, 466.) This is called disclamation in Scotch law. (*Bell.*) *Brown.*

The object of a disclaimer is to prevent an estate passing from the grantor to the grantee. It is a formal mode of expressing the grantee's dissent to the conveyance before the title has become vested in him. But if the grantee once assents, and the title thereby becomes vested in him he cannot, by any disclaimer, revest the estate in the grantor. If he could, the disclaimer would have the effect of a deed, which it cannot have: the object of the latter being to transfer property; of the former, to prevent a transfer. Watson *v.* Watson, 13 *Conn.* 83.

It is essential to a valid disclaimer that the case be such that the estate or thing disclaimed would pass or vest but for the disclaimer, unless it be made an express condition of the grant that the grantee shall elect. Jackson *v.* Richards, 6 *Cow.* 616.

DISCONTINUANCE. 1. In its most common use, in American law, signifies the termination of a suit by the plaintiff's neglect or omission to keep it properly in court; which was, originally, by his failure to keep up a proper record of successive continuances.

2. In English real-property law, discontinuance signifies an interruption to the possession, such as arose when a tenant in tail made a conveyance for longer than he had right to, whereby those entitled to the property on the determination of his estate could not enter, but were driven to an action.

3. In common-law pleading, discontinuance has been applied to the break or interruption in the due course of pleading, when the defendant puts in a plea which omits to answer some part of the declaration, and the plaintiff fails to take action upon the omission.

A power to discontinue mail service was

held to be exercised by an order for a "suspension" of the service. Reeside *v.* United States, 8 *Wall.* 38.

In practice, discontinuance and dismissal import the same thing; viz., that the cause is sent out of court. Thurman *v.* James, 48 *Mo.* 235.

A discontinuance of an estate, otherwise called discontinuance of possession, is defined in Bacon's Abridgment as "such an alienation of possession, whereby he who has a right to the inheritance cannot enter" (without bringing an action), "but is driven to his action;" as where a tenant in tail made a feoffment in fee-simple, or for the life of the feoffee, or in tail,—all which were beyond his power to make, for that by the common law extended no further than to make a lease for his own life. In such case, the possession by the feoffee after the death of the feoffor was termed a discontinuance; the ancient legal estate being gone, or at least suspended, and for a while discontinued. For the heir in tail, remainderman, or reversioner was deprived of his right of entry, and driven to his action to recover the land. (3 *Bl. Com.* 171; 3 *Steph. Com.* 388, 389.) But, from the fifteenth century to 1833, a tenant in tail could ordinarily bar entirely all future interests in the land by a common recovery, and, since the year 1833, by a disentailing deed. Discontinuances, therefore, prior to their express abolition, had long become obsolete and unmeaning; and they are now abolished by Stat. 3 & 4 Wm. IV. ch. 27, passed in 1833, and 8 & 9 Vict. ch. 106, § 4, passed in 1845. (1 *Steph. Com.* 510, note.) *Mozley & W.*

A discontinuance in common-law pleading thus arises: If a defendant plead only to part of a declaration, and say nothing as to the remainder, the plaintiff is entitled to sign judgment against him by *nil dicit*, as to the unanswered part of the declaration. But if the plaintiff demur or reply to the plea, without signing judgment for the part not answered, the whole action is said to be discontinued. A discontinuance is cured, however, after verdict, by the statute of jeofails, 32 Hen. VIII. ch. 30; and, after judgment by *nil dicit*, confession, or *non sum informatus*, by Stat. 4 Anne, ch. 16. *Wharton.*

DISCOUNT. May, in a general sense, be understood as a counting off, an allowance or deduction from a gross sum on any account whatever. Dunkle *v.* Renick, 6 *Ohio St.* 527.

In a statute providing that, in certain actions by assignees, the defendant shall be allowed the benefit of "all payments, discounts, and set-offs," previous to notice of the assignment, the word discount must be understood to mean every detention or abatement of the claim, or, more properly speaking, every equity against the claim. Ferguson *v.* Hill, 3 *Stew.* 485.

The term discount, as a substantive, signifies the interest allowed in advancing upon bills of exchange or negotiable securities; and to discount a bill is to buy it for a less sum than that which upon its face is payable. Saltmarsh *v.* Planters', &c. Bank, 14 *Ala.* 668.

Although the discounting of notes or bills, in its most comprehensive sense, may mean lending money and taking notes in payment, yet, in its more ordinary sense, the discounting of notes or bills means advancing a consideration for a bill or note, deducting or discounting the interest which will accrue for the time the note has to run. Philadelphia Loan Co. *v.* Towner, 13 *Conn.* 248.

Discount, in its general sense, is applicable to either business or accommodation paper, and to loans or sales by way of discount, when a sum is counted off or taken from the face of the paper at the time the money is advanced upon it; but, when used with reference to dealings of banks, it means a deduction or drawback made on advances or loans of money upon negotiable paper, or other evidences of debt, payable at a future day, which are transferred to the bank. Niagara County Bank *v.* Baker, 15 *Ohio St.* 87.

By the language of the commercial world, and the settled practice of banks, a discount by a bank means, *ex vi termini*, a deduction or drawback made upon its advances, or loans of money, upon negotiable paper or other evidences of debt payable at a future day, which are transferred to the bank. Fleckner *v.* Bank of the United States, 8 *Wheat.* 338.

Discounting by a bank means lending money upon a note, and deducting the interest or premium in advance. City Bank of Columbus *v.* Bruce, 17 *N. Y.* 507, 515; State *v.* Boatsmen's Savings Bank, 48 *Mo.* 189.

That the buying exchange by a bank is, in effect, discounting paper, see People *v.* Oakland Co. Bank, 1 *Dougl.* (*Mich.*) 282.

Discount includes "to buy;" for discounting, in most cases, is but another term for buying at a discount. Tracy *v.* Talmadge, 18 *Barb.* 456, 462. To the contrary, Farmers', &c. Bank *v.* Baldwin, 23 *Minn.* 198.

Discount does not necessarily imply a purchase and sale; it is quite as consistent with a loan upon the security of the notes of a third party as with the sale of them. *Re* Weeks, 13 *Bankr. Reg.* 263.

The purchase of uncurrent bank-bills, payable at a distant place, and not, therefore, immediately available, is analogous to a purchase of a note not due; and if such a purchase is made at a legal rate of discount, the transaction is to be deemed discounting, within the New York act to authorize the business of banking. People *v.* Metropolitan Bank, 7 *How. Pr.* 144.

An advance upon a note of a sum of money equal to the face of it, without deducting any interest or receiving any payment of interest, is not a discount of a note within the meaning of a statute restraining foreign corporations from discounting

notes within the state. Noble *v.* Cornell, 1 *Hilt.* 98.

A set-off is not a discount. Trabue *v.* Harris, 1 *Metc.* (*Ky.*) 597.

The rule for calculating discount on correct principles is as follows: As the amount of £100 for the given rate and time is to the given sum or debt, so is £100 to the present worth, or so is the interest of £100 for the given time to the discount of the given sum. *McCull. Comm. Dict.*

The usual method of discount is inaccurate; *i.e.*, deducting £5 per cent at the commencement of the credit. The true discount for any given sum, for any given time, is such a sum as will in that time amount to the interest of the sum to be discounted: the proper discount, therefore, to be received for the immediate advance of £100 due twelve months hence is not £5, but £4 15*s.* 2¼*d.*; for this sum will, at the end of the year, amount to £5, which is what the £100 would have produced. *Wharton.*

DISCOVERT. Not married; not subject to the disabilities of coverture. It applies equally to a spinster and a widow.

DISCOVERY. 1. Ascertaining something previously unknown. Thus we speak of the discovery of America; of discoveries in nature and science. And often, in the latter application of the word, the thing or truth newly ascertained is called a discovery.

The constitution empowers congress to secure for limited times to inventors the exclusive right to their discoveries, *U. S. Const.* art. 1, § 8, cl. 8; and under this grant congress has enacted (act of July 4, 1836, 5 *Stat. at L.* 112, § 6; *Rev. Stat.* § 4886) that any person who has discovered or invented any new or useful art, machine, improvement, &c., may obtain a patent therefor. Under this legislation, it is well settled that a discovery of an abstract principle, a theory, or a fact, cannot be protected by a patent: to entitle himself to a patent, the applicant must reduce to practice what he has discovered; must embody it in some practical machine or method for rendering it available or useful. Burr *v.* Duryee, 1 *Wall.* 531; Lowell *v.* Lewis, 1 *Mas.* 182; Barrett *v.* Hall, *Id.* 447; Blanchard *v.* Sprague, 3 *Sumn.* 535; Stone *v.* Sprague, 1 *Story*, 270; Wyeth *v.* Stone, *Id.* 273; 4 *Mo. Law Rep.* 54; Grant *v.* Mason, 1 *Law Inst. & Rev.* 22; Sickels *v.* Borden, 3 *Blatchf.* 535; Evans *v.* Eaton, *Pet. C. Ct.* 322, 341; Whitney *v.* Emmett, *Baldw.* 303. A principle in the abstract, a fundamental truth, an original, cannot be patented; as no one can claim in them an exclusive right. Nor can an exclusive right exist to a new power, should one be discovered, such as steam, electricity, or any other power of nature. In all such cases, the processes used to extract, modify, and concentrate the natural agencies constitute the invention. The elements of the power exist; the invention is not in discovering them, but in applying them to useful objects. Leroy *v.* Tatham, 14 *How.* 156. A discovery, by experiment or otherwise, that a particular natural substance will, in appropriate methods of administration, produce an assigned physiological or pathological effect on the human body, is not patentable. 8 *Op. Att.-Gen.* 269. In the consideration of this last principle, in Morton *v.* The New York Eye Infirmary, which was a suit for infringement of a patent granted to Morton for a discovery of the anæsthetic properties of ether, Judge Shipman observed that very little light could be shed on the question of the patentability of such a discovery, by attempting to draw a distinction between the words discovery and invention. In its naked, ordinary sense, a discovery is not patentable. It is only where the explorer has gone beyond the mere domain of discovery, and has laid hold of the new principle, force, or law, and connected it with some particular medium or mechanical contrivance, by which or through which it acts on the material world, that he can secure the exclusive control of it, under the patent act. It is then an invention, although it embraces a discovery. Sever the force or principle discovered from the means or mechanism through which he has brought it into the domain of invention, and it immediately falls out of that domain; it is then a naked discovery, and not an invention. Discovery, as used in the patent laws, depends upon invention. Every invention may, in a certain sense, embrace more or less of discovery, for it must always include something that is new; but it by no means follows that every discovery is an invention. 5 *Blatchf.* 121.

Discovery constitutes the original foundation of title to lands on the American continent, as between the different European nations; the title thus derived was the exclusive right of acquiring the soil from the natives, and establishing settlements upon it; the title was to be consummated by possession. Upon the discovery of America, the rights of the original inhabitants were, to a considerable extent, impaired, but in no instance entirely disregarded. The Europeans respected the right of the natives as occupants, but asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequent to this ultimate dominion, a power to grant the soil while yet in the possession of the natives. Johnson *v.* McIntosh, 8 *Wheat.* 543.

2. In equity jurisprudence, discovery is the disclosure by a defendant, in answer to a bill filed to compel it, of matters important to enable a complainant to maintain his rights. The bill filed for this end is called a bill of discovery, *q. v.* By the common law, neither party to an action was required to disclose to the other either documents or circumstances which might be useful to the latter in evidence, in advance of such examination of witnesses as might be obtainable on the actual trial. Hence resort was often had to the court of chancery, which would in certain cases, upon a bill of discovery being filed, decree that the defendant thereto should make a particular disclosure to the plaintiff. But, at the present day, bills of discovery are less necessary. In the English court of chancery, discovery of documents may be obtained under the jurisdiction act, 1852, by summons at chambers; and, under Stat. 14 & 15 Vict. ch. 99, and 17 & 18 Vict. ch. 125, discovery may now also be had at law; and those statutes contain numerous provisions for obtaining discovery by means of interrogatories. Most of the states, particularly those which have adopted codes of reformed procedure, have also enacted statutes under which a party to an action may have an examination of the adverse party before the trial, or may obtain an inspection of books and documents necessary to enable him to prepare his case.

Discovery is a word generally applied to answers given by one party in an action at law or suit in equity to interrogatories filed by the other. It is also used in reference to the disclosure by a bankrupt of his property for the benefit of his creditors. *Mozley & W.*

DISCREDIT. To discredit a witness is to adduce considerations which diminish his credibility. It is substantially the same as impeach, unless it is somewhat milder; does not so distinctly import introduction of testimony that the witness is unworthy of belief.

DISCREPANCY. A difference or variance between two things which ought to correspond; as between two counterparts of a contract or indenture; between the testimony given by a witness at two different times concerning the same fact.

DISCRETION. 1. The decision of what is equitable, judicious, or right, in view of and guided by the circumstances of the case and the wisdom of the magistrate, unfettered by specific rules of positive law.

When any thing is left to any person to be done according to his discretion, the law intends it must be done with sound discretion, and according to law; and the court of king's bench hath a power to redress things that are otherwise done, notwithstanding they are left to the discretion of those that do them. (1 *Lill. Abr.* 477.) Discretion is to discern between right and wrong; and, therefore, whoever hath power to act at discretion is bound by the rule of reason and law. (2 *Inst.* 56, 298.) And though there be a latitude of discretion given to one, yet he is circumscribed, that what he does be necessary and convenient, without which no liberty can defend it. (*Hob.* 158.) *Jacob.*

Discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humor: it must not be arbitrary, vague, and fanciful, but legal and regular. Rex *v.* Wilkes, 4 *Burr.* 2539.

When applied to public functionaries, discretion means a power or right conferred upon them by law, of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. This discretion undoubtedly is to some extent regulated by usage, or, if the term is preferred, by fixed principles. But by this is to be understood nothing more than that the same court cannot, consistently with its own dignity, and with its character and duty of administering impartial justice, decide in different ways two cases in every respect exactly alike. The question of fact whether the two cases are alike in every color, circumstance, and feature is of necessity to be submitted to the judgment of some tribunal. Judges *v.* People, 18 *Wend.* 79, 99.

When it is said that something is left to the discretion of a judge, it signifies that he

ought to decide according to the rules of equity and the nature of circumstances, and so as to advance the ends of justice. Whenever a clear and well-defined rule has been adopted, not depending upon circumstances, the court has parted with its discretion as a rule of judgment. Discretion may be, and is to a very great extent, regulated by usage or by principles which courts have learned, by experience, will, when applied to the great majority of cases, best promote the ends of justice; but it is still left for the courts to determine whether a case is exactly like in every color, circumstance, and feature to those upon which the usage or principle was founded, or in which it has been applied. Platt *v.* Munroe, 34 *Barb.* 291.

2. The capacity to distinguish between what is right and wrong, lawful or unlawful, wise or foolish, sufficiently to render one amenable and responsible for his acts, is also called discretion; and the age at which it is ordinarily attained is called years of discretion. But this is a vernacular rather than a legal sense of the term, though of some importance in criminal law.

DISCUSSION. By the Roman law, sureties were not primarily liable to pay the debt for which they became bound as sureties; but were liable only after the creditor had sought payment from the principal debtor, and he was unable to pay. This was called the benefit or right of discussion. Under those systems of jurisprudence which adopt the Roman law, and under the present law of France, the rule is similar; and the obligation contracted by the surety with the creditor is, that the latter shall not proceed against him until he has first discussed the principal debtor, if he is solvent. This right the surety enjoys, as the *beneficium ordinis vel excussionis;* or, if other persons are joined with him in the obligation as sureties, he is not in the first instance to be proceeded against for the whole debt, but only for his share of it, if his co-sureties and co-obligees are solvent. This is commonly known as the benefit of division, or *beneficium divisionis.* *Wharton.*

In Scotch law, discussion signifies, 1. A process against the principal debtor for whom another is surety; 2. The ranking of the proper order in which heirs are liable to satisfy the debts of the deceased. *Bell.*

DISENTAILING ASSURANCE, or DEED. A species of conveyance, authorized by Stat. 3 & 4 Wm. IV. ch. 74 (which abolished the old system of fines and recoveries), for the purpose of barring an estate tail. By this assurance, which is in the form of a simple indenture, but which requires to be enrolled within six months of its execution in the court of chancery, the tenant in tail (with or without the consent of the protector, when there is any such) conveys the lands to a nominal grantee, to the use of himself, the tenant in tail, his heirs and assigns; by which means, and under the statute of uses, he becomes a tenant in fee; or for a less estate, if the deed is so drawn. It is usual to add that the object of the assurance is to dock and bar the entail and all remainders, &c. Where there is a protector, and he refuses to concur, the disentailing deed has the effect of a fine only, but otherwise it has the effect of a common recovery.

DISFRANCHISE. To deprive one of franchises, privileges, or rights; more specially and usually, to divest one of political rights. Originally, when all political rights were exercised in virtue of membership in some particular corporation, disfranchisement was used of the removal of a member from his rights and privileges as such; corresponding to expulsion, applied to members of non-political corporations.

DISGUISE. A person lying in ambush, or concealed behind bushes, is not in disguise, within the meaning of a statute declaring the county liable in damages to the next of kin of any one murdered by persons in disguise. Dale County *v.* Gunter, 46 *Ala.* 118, 142.

DISHERISON. An old word, equivalent to disinheriting; debarring from inheritance.

DISHONOR. Is applied (as verb and sometimes as noun) to commercial paper, meaning to refuse or neglect, or a refusal or neglect to accept or pay a a bill, check, note, or draft, when due.

DISINTERESTED. Free of any prospect of pecuniary advantage or loss, from the result of the matter depending. See INTEREST.

Disinterested, as used in an insurance policy with reference to arbitrators, is not applicable to an agent of the insurance company. Ætna Ins. Co. *v.* Stevens, 48 *Ill.* 31.

A justice selected by a poor debtor to hear his disclosure may be considered disinterested, if he is not related by consanguinity or affinity, and has no pecuniary interest in the result; and his official act will not be rendered void because he counselled and aided the debtor in preparing for his disclosure, although this should have deterred

him from acting as one of the justices. Lovering *v.* Lamson, 50 *Me.* 334.

DISJUNCTIVE. Allegations in an indictment or pleading which charge a party in the alternative, as that he sold *or* gave goods, forged *or* caused to be forged, are called disjunctive allegations. This mode of pleading is defective.

DISMES. Tenths; tithes, *q. v.* The original form of dime, the name of the American coin.

DISMISS. To send away; to reject, as unworthy of consideration or attention; to send out of court. In law, the word was originally used in equity practice only, applying to the removal of a cause out of court without further hearing. The dismissal of a bill in equity, upon a hearing on the merits, unless expressed to be without prejudice, is a bar to another bill for the same cause; but if granted for defect of form or structure, for failure to prosecute, or on other ground not going to the merits, is no bar to a new suit for the same subject-matter. By the practice acts and codes of procedure of some of the United States, a dismissal of the complaint or proceeding of the plaintiff is allowed, in actions legal as well as equitable in their nature, on various grounds; as for neglect to prosecute the cause, or to comply with an order in the action, failure to make out a case on the trial, &c. Much difference of opinion has existed as to the effect of such dismissals; some decisions holding that a dismissal, at least in actions at law or of a similar nature, has merely the effect of a nonsuit, *q. v.*; others, that a dismissal operates as an absolute bar to another action in all cases, especially those equitable in their nature. The question is put at rest in New York as to future cases by the provision of section 1209 of the code of civil procedure, taking effect Sept. 1, 1877, that "a final judgment dismissing the complaint, either before or after a trial, rendered in an action hereafter commenced, does not prevent a new action for the same cause of action, unless it expressly declares that it is rendered upon the merits."

A bill in equity may be dismissed by the court at the hearing; also by the plaintiff before the decree, when he is not able to prosecute his suit effectually, either as against all the defendants, or as against such of them as he thinks he can dispense with. After decree, the bill can only be dismissed upon rehearing or appeal; and by the defendant, either for want of prosecution, or upon an abatement of the suit by the death of the plaintiff or otherwise. (*Smith Eq. Pr.* 364.) *Wharton.*

DISORDER. As used in compounds common in jurisprudence, seems to signify breach of good conduct and good morals, in life, affecting the community.

Disorderly house. This is a somewhat general term for an abode, building, dwelling, or establishment kept for uses which are contrary to decent conduct and good morals. Independent of statutes giving particular definitions of what shall be deemed a disorderly house within the jurisdiction, the term seems properly to include various kinds; bawdy-houses, gaming-houses, and the liquor-shops prohibited by law, as well as houses made obnoxious by the habitual recurrence of fighting, noise, and violence.

Disorderly persons. This phrase is often used in statutes to describe a class of persons amenable to police regulation, in view of their habits of misconduct. Who may be dealt with as disorderly persons depends on the statute provisions of the locality.

DISPAUPER. When a poor person has been admitted to sue *in forma pauperis*, and through the subsequent acquisition of property, or any other sufficient cause, it is proper that he should be deprived of the privilege of suing in that quality, and he is deprived of the privilege accordingly, he is said to be dispaupered.

DISPENSE. To set aside or suspend the general law, in respect to a particular case. Dispensation: an exemption granted by the sovereign power to an individual from the operation of a law.

The power of dispensation, in this sense, has been exercised in ecclesiastical and imperial governments; also, in early times in England; but is not known in the United States.

DISPLACE. As used in shipping articles, should be construed to mean disrate, and not to import authority of the master to discharge a second mate; and evidence

of a usage in the whaling trade never to disrate an officer to a seaman, but discharge him, when his displacement becomes necessary, cannot be allowed to vary such interpretation. Potter *v.* Smith, 103 *Mass.* 68.

DISPONE. In Scotch law, signifies to grant, convey, or dispose of property. Disponee: the person to whom a disposition is granted. Disposition: a unilateral deed of alienation, by which a right to property, either heritable or movable, is granted. *Bell.*

DISPOSE. 1. To dispose of property is to alienate it; assign it to a use; bestow it; direct its ownership. Disposal or disposition: an act bestowing property, or directing its future ownership; as disposition by will.

2. The words "dispose" and "disposition" are sometimes used of controversies or suits, in the sense of to decide or determine them; of decision or determination. See *Exp.* Russell, 13 *Wall.* 664.

A conveyance by way of advancement, in good faith, is a disposal of property, within the meaning of a coveoant in a lease that the lessor will renew, "should he not dispose of" the premises during the term. Elston *v.* Schilling, 42 *N. Y.* 79.

Disposing capacity or mind. These are alternative phrases in the law of wills for sound mind, and testamentary capacity, *q. v.*

DISPOSSESS. To eject or oust; to deprive of possession; chiefly used of real property. Dispossession: the wrong of excluding the person rightly entitled to occupy real property from the occupation and enjoyment.

Dispossession is distinguished from disseisin; the one relates to occupancy, the other to the right.

Dispossess case, proceeding, or warrant. This is a phrase which has crept into some use, but cannot be justified etymologically, signifying the proceedings taken when a landlord invokes a statutory remedy, such as is known in New York as summary proceedings to obtain possession of real property against a tenant who holds over, or makes default in payment of rent.

DISSEISIN. Deprivation of seisin; a wrongful putting out of him that is seised of the freehold; a wrongful disturbance and ouster of one in freehold possession of land. To constitute disseisin, originally, an actual dispossession was necessary; but afterwards many acts were held to amount to disseisin, if the injured party chose to consider them as such; and this was called disseisin by election, — disseisin by actual dispossession being distinguished by the term "actual disseisin," or "disseisin in fact." 2 *Crabb Real Prop.* 1063, 1064, § 2455. A person who so enters and puts a party out of possession of the freehold is termed a disseisor; he who is disseised is termed the disseisee.

Disseisin is important, chiefly as the foundation or commencement of a new title by adverse possession; and it is in that aspect that the question, what acts constitute a disseisin, has been most frequently considered.

When one man invades the possession of another, and by force or surprise turns him out of the occupation of his lands, this is termed a disseisin, being a deprivation of that actual seisin or corporal possession of the freehold which the tenant before enjoyed. In other words, a disseisin is said to be when one enters intending to usurp the possession, and to oust another from the freehold. To constitute an entry a disseisin, there must be an ouster of the freehold, either by taking the profits, or by claiming the inheritance. *Brown.*

The accurate definition and description of disseisin has been the subject of much discussion. The term is somewhat equivocal, and the same facts may prove a disseisin for some purpose and in some aspects, and not in others. Sumner *v.* Stevens, 6 *Met.* 337.

The history of the English system of jurisprudence abundantly shows that the meaning attached to the term has varied with the state of society, and the rules applicable to the enjoyment of real estates; but it was in every stage of it, in substance, the act of divesting the owner of his seisin and possession of the land, and substituting in its place the ownership and possession of the disseisor. In its origin, when the seisin constituted the title of the owner to his freehold, it was the forcible expulsion by the tenant, or the wrongful entry upon him, and the forcible holding by the intruder, which was called a disseisin; and in those days force would naturally be employed to effect a change of possession by a wrong-doer. But in after times, when the titles to land became more complex, and possessions more diversified, other acts were held to be disseisins. The wrong-doer does not, in our times, forcibly, and without the claim of right, expel his neighbor from the tenements he covets, nor hold the owner out with the strong hand of power; yet if he silently enters upon the possession

of a stranger, and either under pretence of right which he knows to be groundless, or without color of title, usurps and claims it as his own, keeps out and sets at defiance the former possessor and all others, and holds exclusively, claiming the fee, the act partakes too largely of all the properties of the ancient disseisin to be distinguished from it. In modern times, an ouster by any means short of actual force is generally identified with adverse possession, which is understood to embrace every possession held by the possessor in exclusion of others. But an ouster effected without the employment of force often is, in effect and all practical purposes, a disseisin. Clapp *v.* Bromagham, 9 *Cow.* 530, 552.

A man is not necessarily disseised because another is in possession of his property. If a tenant for a term of years holds over, and the landlord is driven to an ejectment to turn him out, the landlord by such holding over is not disseised: it is only by acts of a peculiar character that the relation of disseisor and disseisee is brought about. Of actual disseisin, — disseisin in despite of the owner, — there are four kinds: three by a stranger, and one by the tenant in possession connected in privity of estate. 1. Where a man enters upon the immediate freeholder, and turns him out by force, this is generally and emphatically called a disseisin. 2. Where a stranger enters upon the seisin in law, which the heir takes on the death of his ancestor, it is then called an abatement. 3. Where a similar entry is made upon the estate of the reversioner or remainder-man, this is called an intrusion. 4. Where a discontinuance or devesting of the estate in remainder or reversion is affected by the acts of the particular tenant or tenant of the freehold, whether he be tenant in tail, by the curtesy, or for life. A disseisin in fact is a tortious expulsion of the true owner; it is an estate gained by wrong and injury, and therein it differs from dispossession, which may be by right or wrong. A bare entry on another, without an expulsion, makes such a seisin only that the law will adjudge him in possession that has the right. Varick *v.* Jackson, 2 *Wend.* 166.

Disseisin by election differs from actual disseisin, not only in the acts by which it is created, but also in the consequences which result from it. It arose out of the extension of the remedy by writ of assise, originally applicable only to cases of abatement, and of novel or recent disseisin, to almost every injury that could be done to corporeal as well as incorporeal hereditaments, if the plaintiff would admit himself to have been disseised. The superiority of the remedy over the old actions induced parties to acknowledge themselves disseised when in strictness they were not; and such disseisin was called a disseisin by election, to distinguish it from actual disseisin. *Ib.*

To make a disseisin that will be the commencement of a new title, producing that change by which the estate is taken from the rightful owner and placed in the wrongdoer, the possession taken by the disseisor must be hostile or adverse in its character, importing a denial of the owner's title in the property claimed; otherwise, however open, notorious, constant, and long-continued it may be, the owner's action will not be barred. It is not every unlawful entry into lands that will work a disseisin. Such entry will never have that effect, so long as the true owner still retains his possession; for, by intendment of law, when two persons are in possession at the same time, the seisin must be adjudged to be in the rightful owner. But neither is dispossession necessarily disseisin. Whether there is or is not actual disseisin must depend upon the character of the act done, and the intention of the doer. Many acts are justly held to operate a disseisin, or not, at the election of the true owner. To make a disseisin in fact, there must be an intention on the part of the party assuming possession to assert title in himself to the definite and particular parcel, or there must be overt acts which leave no room to inquire about intention, and which amount to actual ouster in spite of the real owner. A man claiming title only to a specified line, capable of being ascertained, cannot, by ignorantly having possession up to another line, acquire a title by disseisin to land lying between the two which he does not intentionally claim. Worcester *v.* Lord, 56 *Me.* 265.

The general rule that a disseisor cannot qualify his own wrong, but must be considered as a disseisor in fee, is introduced only for the benefit of the disseisee, for the sake of electing his remedy. To constitute one a disseisor in fee, it must appear that he entered without right; for if his entry were congeable, or his possession lawful, his entry and possession will be considered as limited by his right. For the law will never construe a possession tortious, unless from necessity; on the other hand, it will presume every possession lawful. When, therefore, a naked possession is in proof, unaccompanied with evidence of its origin, it will be deemed lawful and coextensive with the right set up by the party. If the party claim only a limited estate, and not a fee, the law will not, contrary to his intentions, enlarge into a fee. It is only when the party is proved to be in by disseisin that the law will construe it a disseisin of the fee, and abridge the party of his right to qualify his wrong. Ricard *v.* Williams, 7 *Wheat.* 59.

If a mere trespasser, without any claim or pretence of title, enters into land, and holds the same adversely to the title of the owner, it is an ouster or disseisin of the owner. But in such case the possession of the trespasser is bounded by his actual occupancy, and consequently the owner is not disseised, except as to the portion so occupied. Clarke *v.* Courtney, 5 *Pet.* 319.

Where a person enters under a convey-

ance from a third party who has no title, he is a disseisor. Bradstreet *v.* Huntington, 5 *Pet.* 402.

Where a person enters into possession under a recorded deed, claiming title to the entirety, and exercises acts of ownership, it is a disseisin of all persons who claim title to the same land, to the extent of the boundaries in the deed. Prescott *v.* Nevers, 4 *Mas.* 326.

To constitute disseisin, the disseisor must have the actual and exclusive occupation of the land, claiming to hold it against him whom he ousted, or who was formerly seised. Bates *v.* Norcross, 14 *Pick.* 224.

The disseisor must show a substantial inclosure, an actual occupancy, definite, positive, and notorious. Cŏburn *v.* Hollis, 3 *Metc.* 125.

To constitute disseisin under the statutes of Maine, it is not necessary that the land be surrounded with fences, or rendered inaccessible by water; but it is sufficient if the possession and improvement are open and notorious, and comporting with the ordinary management of a farm, although that part of the same which composes the woodland shall not be inclosed. Tilton *v.* Hunter, 24 *Me.* 29.

Disseisin must either be an occupancy of a part under a deed of conveyance recorded, or such an open and visible occupancy that the proprietor may at once be presumed to know the extent of the claim and occupation of him who has intruded himself unlawfully into his lands, with intent to obtain title to them by wrong. Foxcroft *v.* Barnes, 29 *Me.* 128.

Disseisin, as used in the Missouri statute concerning forcible entry and detainer, is not used in its ancient technical sense, but implies actual dispossession. McCartney *v.* Alderson, 45 *Mo.* 35.

According to the modern authorities, there seems to be no legal difference between the words seisin and possession, although there is a difference between the words disseisin and dispossession; the former meaning an estate gained by wrong and injury, whereas the latter may be by right or by wrong; the former denoting an ouster of the disseisee, or some act equivalent to it, whereas by the latter no such act is implied. Slater *v.* Raulson, 6 *Met.* 439.

DISSENT. Disagreement; disapproval; refusal or withholding of assent.

The most frequent use of the term in American law is to denote that one member of a court by which a decision is rendered does not concur in it. It is generally understood that if a non-concurring judge announces, in connection with the decision, that he dissents, he is at liberty, should the same question come before the court another time, to urge and vote for a different determination of it.

Dissenter. In English ecclesiastical law, a non-conformist; a person who disputes the authority or tenets of the church of England, and adheres to another church.

The word is usually confined to Protestant seceders from the established church and their descendants. (2 *Steph. Com.* 706.) *Mozley & W.*

Dissenting opinion. The opinion in which a judge who does not concur in a decision pronounced by a majority of the court makes known his views.

DISSOLVE. 1. To sunder a contract or relation, as to dissolve partnership.

2. To annul corporate existence.

3. To discharge, open, or release a legal proceeding involving a lien or seizure, as to dissolve an attachment or injunction.

Dissolution: the act of dissolving.

The phrase, dissolving a corporation, is sometimes used as synonymous with annulling the charter or terminating the existence of the corporation, and sometimes as meaning merely a judicial act which alienates the property and suspends the business of the corporation, without terminating its existence. A corporation may, for certain purposes, be considered as dissolved so far as to be incapable of doing injury to the public, while it yet retains vitality so far as essential for the protection of the rights of others. *Re* Independent Ins. Co., 1 *Holmes*, 104.

Upon what is meant by dissolution of a corporation, and the difference between a dissolved or extinct corporation, and one which is merely dormant or inactive, see Mayor, &c. of Colchester *v.* Seaber, 3 *Burr.* 1866; Commercial Bank *v.* Lockwood, 2 *Harr.* (*Del.*) 8.

A dissolution is the civil death of the parliament, and is effected in three ways: By the sovereign's will, expressed either in person or by representation, which is a branch of the royal prerogative. By the demise of the crown; but Stat. 7 & 8 Wm. III. ch. 15, 6 Anne, ch. 7, and 37 Geo. III. ch. 127, enact the continuance of the parliament in being for six months. By length of time; *i.e.* seven years. (1 *Geo. I.* st. 2, ch. 38.) *Wharton.*

DISTANCE, in a former rule of court as to service, held to mean the space between two points by the usually travelled road; not the mail-route. Smith *v.* Ingraham, 7 *Cow.* 419.

Distance is to be measured in a straight line as the crow flies. Lake *v.* Butler, 5 *El. & B.* 92.

Where the trustees of a turnpike road were prohibited by a local act of parliament from erecting any toll-gate within

three miles of Bargate, in the town of Southampton, it was held that the distance was to be measured by a straight line and not by the road. Jewell *v.* Stead, 6 *El. & B.* 350.

DISTIL. A rectifier of spirits distilled from domestic materials was held not a distiller of spirituous liquors within the meaning of the act of July 24, 1813, § 98. United States *v.* Tenbrook, *Pet. C. Ct.* 180.

Any person, firm, or corporation who distils or manufactures spirits, or who brews or makes mash, wort, or wash for distillation, or the production of spirits, is a distiller. Act of July 13, 1866, § 9, 14 *Stat. at L.* 117.

The strict meaning of distillery is, a place or building where alcoholic liquors are distilled or manufactured; not every building where the process of distillation is used. Atlantic Dock Co. *v.* Libby, 45 *N. Y.* 499.

DISTRAIN. Is the verb corresponding to the noun distress, and signifies to take by distress. Distraint: the act or proceeding of seizing personal property by distress.

DISTRESS. An ancient common-law remedy, by which a party might take the personal property of another into his possession, and hold it as a pledge or security until he obtained satisfaction by the payment of a debt, the discharge of some duty, or reparation for an injury done; with the right, in certain cases, to sell it to obtain satisfaction. The impounding of cattle damage feasant, or the taking by the landlord the goods and chattels of the tenant upon the premises for the non-payment of rent, are familiar examples. It was distinguishable from the taking of property by execution to satisfy a judgment, and from the taking of a personal chattel, without legal process, from the possession of a wrong-doer into the hands of the party injured; and it was limited to certain kinds of personal property, and could be exercised only in certain cases, and in a certain manner. Distress, particularly distress for rent, is less widely used at the present day than formerly.

Distress is the taking of a personal chattel out of the possession of the wrong-doer into the custody of the party injured, to procure a satisfaction for the wrong committed. The term is also applied to the thing taken or distrained. *Jacob.*

Distress infinite. A distress that has no bounds with regard to its quantity, and may be repeated from time to time, until the stubbornness of the wrong-doer is overcome. (3 *Bl. Com.* 231; 3 *Steph. Com.* 253, note *s.*) *Mozley & W.*

DISTRIBUTE. Generally, to apportion; to divide among several; to separate into shares, and deliver them to the persons entitled to receive them.

Distribution: the act or proceeding of dividing among several persons, by shares; and distributee: a person who receives a share upon such a division, are specially used, in jurisprudence, of the division of assets of an intestate estate among the widow and children, or among the next of kin. This is regulated, in England, by the statute of distributions, 22 & 23 Car. II. ch. 10, amended by Stat. 29 Car. II. ch. 3. (2 *Bl. Com.* 515; 2 *Steph. Com.* 208, 212); and throughout the United States, by statutes of the several states, usually known as statutes of distribution.

Distributee is admissible to denote one of the persons who are entitled, under the statute of distributions, to the personal estate of one who is dead intestate. Henry *v.* Henry, 9 *Ired. L.* 278.

Under the statute of distributions, distributees is a word of limitation, and not a word of purchase; and, in its use under the statute, the rule in Shelley's case has a like operation with respect to personalty as the word heirs has at common law with respect to land. Boyd *v.* Small, 4 *Jones Eq.* 39.

It has been held that when the same clause of a will gives real and personal estate to the testator's children, "to be distributed when required, at mature age or majority, in equal parts," and present words of bequest are used, the word distributed, with reference to the personal property, will be construed as synonymous with divided, and as postponing, not its distribution, but its division among the legatees, until the period fixed by the testator. Chighizola *v.* Le Baron, 21 *Ala.* 406.

DISTRICT. A division of territory. Originally, the circuit within which a man might be compelled to appear, or the place in which one hath the power of distraining, *Jacob;* but, in modern usage, divisions of territory may be called districts, irrespective of the purpose for which they are made. See DEPARTMENT. Thus, *collection* districts are the districts organized for the administration of the United States laws for the collection of duties; *congressional* districts are the districts into which the United States are divided, for the election of representatives to congress; *election* districts are districts assigned for the purpose of conducting elections;

judicial districts are districts created for judicial purposes, for defining jurisdiction of courts, and distributing judicial business; *land* districts are districts created for regulating sales of public lands. There have been many other kinds.

District attorney. A title usual throughout the United States, designating the law officer of either the state or national governments, within a particular district or county; as distinguished from the attorney-general, whose powers are commensurate with the entire domain.

Under the United States government there is a district attorney for each of the numerous judicial districts (fifty-eight in 1876) in which the country is divided. Their duties are delineated in title 8 of the Rev. Stat. ch. 14. The general nature of a district attorney's duties is to act as attorney for the United States in his district, to prosecute in such district all delinquents for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the supreme court.

He is not, however, regarded as having a general authority to commence suits in the name of the United States, except in extraordinary cases, where the remedy or lien of the United States may be lost or endangered by delay. In other cases, he awaits the directions of the president, some head of a department, or the solicitor of the treasury. It has been held that the courts can recognize the United States as a plaintiff on the record, only when the record shows that the United States appear as plaintiffs by the district attorney of the district. United States *v.* Doughty, 7 *Blatchf.* 424; United States *v.* Blaisdell, 3 *Ben.* 132; United States *v.* McAvoy, 4 *Blatchf.* 418.

In several of the states, the local officer who represents the state within a particular county or other district is also called district attorney.

District court. This name is sometimes used in the United States to designate a court or class of courts forming part of a judicial system, sometimes having a general original jurisdiction as to subject-matter, but usually limited as to territorial authority. As compared with the name circuit court, when both terms are employed in one system, district court often denotes a tribunal of inferior jurisdiction, exercised within narrower territorial limits than the circuit court. District courts, in various cities, sometimes exercise a jurisdiction similar to that of justices of the peace over a portion or the whole of the particular city; as in the cities of Newark, New Orleans, and New York.

The name is applied to particular state courts in California, Connecticut, Iowa, Kansas, Louisiana, Minnesota, Nebraska, Nevada, Ohio, and Texas.

In the judicial system of the United States, one or more district courts are established in every state, held by a single judge resident in the district. These courts have original jurisdiction over all admiralty and maritime causes and all proceedings in bankruptcy, and over all penal and criminal matters cognizable under the laws of the United States, exclusive jurisdiction over which is not vested either in the supreme or circuit courts.

A cause originally tried on the territorial side of the old district court, and under territorial laws, goes back to the new state district court, under a mandate from the United States supreme court, that it "be remitted to the district court." Irvine *v.* Marshall, 3 *Minn.* 72.

District of Columbia. A portion of the territory upon the Potomac river, in the United States, originally ten miles square, which was ceded to the United States by the states of Virginia and Maryland, to constitute the seat of government of the United States. It is not a state nor a territory, but is by the constitution subject to the exclusive jurisdiction of congress. The laws passed by congress in the exercise of this power, as in force Dec. 1, 1873, have been revised and republished by authority of congress.

DISTRINGAS. That you distrain. The name of a writ in English practice, which was directed to the sheriff, commanding him to distrain a person by his goods and chattels; the emphatic words of the writ being *præcipimus tibi quod distringas*, — we command you that

you distrain. The object of the writ was to enforce compliance by the person named with something required of him; usually to compel an appearance by a defendant upon whom process could not be personally served. It was also used in equity practice to compel an appearance by a corporation aggregate.

Distringas juratores. That you distrain the jurors. The name of a writ in English practice, commanding the sheriff to distrain the jurors by their goods, so that he may have them before the court upon the day appointed, which issues at the same time as the *venire*, although in theory it follows the *venire*, and is founded on the supposed neglect of the jurors to attend.

Distringas nuper vice comitum. That you distrain the late sheriff. The name of a writ in English practice to distrain the goods of a sheriff who has gone out of office, for the purpose of compelling the performance by him of some act which he ought to have done while in office; such as the bringing in the body of a defendant under a rule to have the defendant's body in court, or the selling of goods taken under a *fieri facias*.

DISTURBANCE. 1. This word has had a technical sense, in England, denoting a species of injury to real property, commonly consisting of a wrong done to some incorporeal hereditament, by hindering or disquieting the owners in their regular and lawful enjoyment of it. Five principal varieties of this injury are mentioned: disturbance of franchise, disturbance of common, disturbance of ways, disturbance of tenure, and disturbance of patronage.

2. In many of the United States, laws have been passed punishing the offence of disturbing religious meetings; or, sometimes, of other lawful public assemblies. Some cases have arisen determining what amounts to disturbance of, or disturbing, a meeting, within the intent of such laws.

The offence intended to be prohibited by the statute is sufficiently defined by the words "molest or disturb:" they have a well-determined signification. State *v.* Oskins, 28 *Ind.* 364; compare Marvin *v.* State, 19 *Id.* 181.

In a Roman Catholic church, at the close of the sermon, and while the pastor was engaged in taking up a collection, one of the members of the congregation stood up in his pew, and in a loud voice demanded of the clergyman an explanation of some remarks he had made in the course of his sermon relative to the conduct of a member of the congregation. It was held that this was such a disturbance of a religious meeting as justified the clergyman, or any member of the congregation, in using as much force as was necessary to expel him from the house. Wall *v.* Lee, 34 *N. Y.* 141.

That the acts of disturbance must be wilfully committed with intent to disturb, was held in Harrison *v.* State, 1 *Ala. Sel. Cas.* 61; that they need not be, was held in Wall *v.* Lee, 34 *N. Y.* 141.

Disturbing a single member of the congregation was held enough to constitute the offence, in Cockreham *v.* State, 7 *Humph.* 11; and not enough to sustain an action, in Owen *v.* Henman, 1 *Watts & S.* 548.

DITCH. See DRAIN.

DIVEST. Equivalent to devest, *q. v.*

DIVIDEND. This word is used, 1, in reference to corporations, to signify profits as apportioned among shareholders; 2, in bankruptcy or insolvency practice, to denote assets as apportioned among creditors; and, 3, in old English law, as equivalent to one counterpart of an indenture, *q. v.*

Dividend imports a distribution of the funds of a corporation among its members, pursuant to a vote of the directors or managers. Williston *v.* Michigan Southern & Northern Indiana R. R. Co., 13 *Allen*, 400.

Dividend does not necessarily imply a *pro rata* distribution. Hall *v.* Kellogg, 12 *N. Y.* 325, 335.

Dividend commonly means a sum which a corporation sets apart from its profits to be divided among its members. So held of a guaranty. Lockhart *v.* Van Alstyne, 31 *Mich.* 76; Taft *v.* Hartford, &c. R. R. Co., 8 *R. I.* 310.

It commonly means a sum of money distributed *pro rata* among stockholders, without reference to the source from which it was derived. Osgood *v.* Laytin, 3 *Abb. App. Dec.* 418.

Where an act of the legislature, authorizing a bank to retain a certain share of the dividends upon the stock owned by the state, towards certain unpaid stock of the state, it was held that a portion of the capital stock, divided among the stockholders, was not dividends within the act. Attorney-General *v.* State Bank, 1 *Dev. & B. Eq.* 545.

Where depositors in a savings bank do not receive a fixed rate of interest independently of what the bank itself makes or loses in lending their money, but receive a share of such profits as the bank, by lending their money, makes, after deducting

expenses, &c., such share of profits is a dividend within the meaning of the internal revenue act of 1864, as amended by the act of 1866, and not interest. Cary *v.* Sav. Union, 22 *Wall.* 38.

Dividend is a word of very general and indefinite meaning. It has not, in law, any particular and technical signification. As used in N. C. Const. art. 9, § 6, appropriating to the university all property accruing to the State "from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons," it is used as convertible with distributive shares. The meaning is all dividends or distributive shares of estates of deceased persons. University *v.* N. C. Railroad Co., 76 *N. C.* 103.

Divided equally, as used in a devise to a nephew, two nieces, and two children of another nephew, was held to mean a *per capita* division. Purnell *v.* Culbertson, 12 *Bush* (*Ky.*), 369.

DIVINE SERVICE. That this expression does not include sabbath schools, see Gass' Appeal, 73 *Pa. St.* 39.

Divine service was also the name of a feudal tenure, by which the tenants were obliged to do some special divine services in certain; as to sing so many masses, to distribute such a sum in alms, and the like. (2 *Bl. Com.* 102; 1 *Steph. Com.* 227.) It differed from tenure in *frankalmoign* in this, that, in case of the tenure by divine service, the lord of whom the lands were holden might distrain for its non-performance, whereas, in case of *frankalmoign*, the lord has no remedy by distraint for neglect of the service, but merely a right of complaint to the visitor to correct it. *Mozley & W.*

DIVISUM IMPERIUM. A divided jurisdiction; a jurisdiction belonging to more than one power or tribunal, or exercised by them alternately. Applied to the jurisdiction exercised alternately by courts of common law and admiralty between high and low water mark; also to the concurrent jurisdiction exercised over a subject-matter by common-law courts and courts of equity.

DIVORCE. The separation of husband and wife by law; the judicial dissolution or relaxation of a marriage. See A MENSA ET THORO.

We think it is generally used, in the United States, as implying a valid marriage, and, therefore, as excluding an adjudication that no valid marriage ever existed; and as including both the mere separation of the parties and the entire dissolution of the marriage: these two being distinguished as absolute and limited divorces. But Bouvier's dictionary advises that it should be confined to dissolution of a valid marriage; excluding separation *a mensa et thoro* as well as decree of nullity. See also the views expressed by Mozley & Whiteley, below.

Divorce is the separation of husband and wife by the operation of the law. There are two kinds of divorce, — the one total, the other partial; the one *a vinculo matrimonii*, the other merely *a mensa et thoro*. *Holthouse.*

Divorce is a separation of man and wife, and is of three kinds:

1. *A mensa et thoro*, which is where the marriage is just and lawful *ab initio;* but, for some supervenient cause, it has become improper or impossible for the parties to live together. This kind of divorce is now generally called a judicial separation. Its effect is to place the parties in the position of single persons, except that neither party can lawfully marry again in the lifetime of the other.

2. Divorce *a vinculo* for some cause subsequent to the marriage. This, by the law of England, may take place for adultery, combined, if the adultery be that of the husband, with some other circumstance of aggravation, as a wife cannot obtain a dissolution of the marriage for the simple adultery of the husband. The effect of this kind of divorce is to dissolve the marriage, and allow the parties to marry again; but it does not bastardize the issue. Previously to the divorce act, 1857 (20 & 21 Vict. ch. 85), this kind of divorce was obtainable by private act of parliament; it is now granted by the divorce court.

3. Divorce *a vinculo* for some cause of impediment existing prior to the marriage. This is a declaration that the marriage is a nullity, as having been absolutely unlawful from the beginning. This kind of divorce not only enables the parties to contract marriage at their pleasure, but bastardizes the issue, if any. (1 *Bl. Com.* 440–442; 2 *Steph. Com.* 277–282.) *Mozley & W.*

DO. I give.

Do ut des. I give, that you may give.

Do ut faciaa. I give, that you may do.

The Roman jurists divided all contracts not distinguished by special names — hence termed innominate contracts — into four classes, each class represented by one of the following formulæ: 1. *Do ut des*, — I give, that you may give. 2. *Do ut facias*, — I give, that you may do. 3. *Facio ut des*, — I do, that you may give. 4. *Facio ut facias*, — I do, that you may do. In the first, something is given, that something may be received in return; in the second, something is given, that something may be done in return; in the third, something is done,

that something may be given in return; in the fourth, something is done, that something may be done in return. The list is not exhaustive; it might be extended by adding, for example, *do ut non facias*, — I give, that you may refrain from doing something; and *facio ut non facias*, — I do, that you may refrain from doing something.

DOCK, *v.* To curtail; to diminish; to shorten; as to dock an entail. Dock, *n.*: 1. An inclosed space, commonly appropriated, in English criminal courts, to the accused during trial. 2. A space between two wharves fitted for mooring vessels, or a structure adapted for inclosing vessels while they lie in port.

Dockage. The compensation chargeable for use of a dock.

Dockage in a dry-dock is in the nature of rent, and subject to the will of the proprietor of the dock. Ives *v.* The Buckeye State, 1 *Newb.* 69.

Dockage or wharfage charges are not tonnage duties, even though measured or rated by the capacity of the vessel using the dock or wharf. A city is not forbidden from imposing them by the provision of the federal constitution that no state shall lay tonnage duties. Packet Co. *v.* Keokuk, 95 *U. S.* (5 *Otto*) 80; 45 *Iowa*, 196.

A city may prescribe, by ordinance, fees not unreasonable, which must be paid for use of wharves; and such an ordinance is not unconstitutional, even though it exacts a payment from vessels moored at places where no wharves have been provided. Keokuk *v.* Keokuk, &c. Packet Co., 45 *Iowa*, 196.

A city, though it cannot lay tonnage duties, may exact wharfage compensation for use, by vessels, of wharves built and maintained by the city; and rating wharfage by the size of the vessel, to be ascertained by its tonnage, does not necessarily render the enactment void. North Western, &c. Packet Co. *v.* St. Louis, 4 *Dill.* 10; and see *Id.* 17, n.

The presumption is that a dock or wharf erected by a city is for public use; and in the absence of an ordinance prescribing wharfage dues, a vessel is not liable to make payment to the city for using a dock or a wharf. Muscatine *v.* Keokuk, &c. Packet Co., 45 *Iowa*, 185.

Dock-master. An officer invested with powers within the docks, and a certain distance therefrom, to direct the mooring and removing of ships, so as to prevent obstruction to the dock entrances. *Mozley & W.*

Dock-warrant. A document given to the owner of goods imported and warehoused in the docks, as a recognition of his title to the goods, on the bills of lading and other proofs of ownership being produced Like a bill of lading, it passes by indorsement and delivery, and transfers the absolute right to the goods described in it. Dock-warrants are drawn on paper, having the water-mark of the dock company upon them, and are negotiated from hand to hand, or pledged with bankers and others for loans as mercantile securities, representing the value of the goods described in them. *Pulling Cust. of Lond.*; see also *Levi's Int. Comm. Law*, 505.

DOCKET. Originally, seems to have signified a memorandum of the substance of a document indorsed upon it, so that its nature and general effect might be known without opening and perusing it at length. But these memoranda came to be usually, especially in the case of judgments, transcribed in a book; and the name followed them in that form. In modern use, the word, used as a noun, signifies an entry, in brief, in a proper book, of the important acts done in court in the progress of a cause; also, the registry of judgments or decrees; also, sometimes, the book containing such registry; and, also, a list of causes liable to be called at a given term of court. See CALENDAR. Used as a verb, it means to enter or inscribe in a docket. Docquet and dogget are mentioned as old forms of spelling this word.

The docket of judgments is a brief writing or statement of a judgment made from the record or roll, generally kept in books, alphabetically arranged, with clerk of the court or county clerk. Stevenson *v.* Weisser, 1 *Bradf.* 343.

DOCTOR. Means, simply, practitioner of physic, without respect to system pursued. A certificate of a homœopathic physician is a "doctor's certificate." Corsi *v.* Maretzek, 4 *E. D. Smith*, 1.

DOCTORS' COMMONS. An institution near St. Paul's Churchyard, in London, where, for long time previous to 1857, the ecclesiastical and spiritual courts used to be held.

DOLE. A part or portion of a meadow is so called: and the word has the general signification of share, portion, or the like; as "to dole out" any thing among so many poor persons, meaning to deal or distribute in portions to them. (*Cowel.*) *Holthouse.*

DOLLAR. In a bequest, can only mean dollar in the legal currency of the United States, not dollars invested in lands or stocks, estimated either at the market or par value, or at the original cost to the

testator. Halsted *v.* Meeker, 18 *N. J. Eq.* 136.

The word dollars, in a check, means dollars in the lawful money of the United States; and it cannot be explained by verbal agreement or custom to have a different meaning. Howes *v.* Austin, 35 *Ill.* 396; Lawrence *v.* Schmidt, *Id.* 440.

Where the amount of a debt is ascertained, the courts cannot recognize any difference between the gold dollar and the legal-tender note of the denomination of one dollar. Bank of the State *v.* Burton, 27 *Ind.* 426.

A written instrument for the payment of money expressed to be payable in dollars, is, in legal effect, payable in whatever the laws of the United States declare to be legal tender. To allow the debtor to show by parol that payment in confederate money was intended is erroneous. Miller *v.* Lacy, 33 *Tex.* 351.

A bond conditioned to pay seventy-one dollars "in current bank money," is satisfied by the payment of seventy-one current bank money dollars; *i.e.*, bills, in distinction from coin. Gardner *v.* Hall, *Phill. L.* 21.

A note for so many dollars "in gold and silver," is a note for the direct payment of money, and for the satisfaction of which a tender of bullion, gold and silver bars, old spoons, rings, &c., is not sufficient. Hart *v.* Flynn, 8 *Dana*, 190.

DOLUS. Deceit; evil intention. 1. In the civil law, this term included every kind of craft, falsehood, or device used to circumvent, deceive, or mislead another. Various distinctions were made between *dolus* and *fraus;* the essence of *dolus* being the intention to deceive, while *fraus* imported actual damage in consequence of the deceit. A distinction was also drawn between *dolus malus* and *dolus bonus*, the former term being applied to deceit, with the intention thereby to injure another; while *dolus bonus* designated that justifiable deceit which was considered allowable in certain cases; such as the craftiness, skill, or adroitness employed by a seller to effect a sale, not amounting to false representations. Accordingly, the eulogies bestowed by a trader upon his goods, or his taking advantage of the buyer's ignorance of a change in the market price, of which he should have been aware, in order to obtain a better price, and such acts, amount merely to *dolus bonus*, and do not vitiate the contract. But a false statement as to the character or quality of the goods, made with the intention of deceiving, on which the buyer is expected to rely, and in reliance on which he makes the purchase, amounts to *dolus malus*.

2. The word *dolus* was also used in the civil law, in the sense of criminal intention, evil design, or malice; often in distinction from *culpa*, which imported merely fault from want of care or error of the understanding, without will to do wrong. The phrase *doli capax* — capable of criminal intention — was frequently used in defining the liability of infants to punishment for crimes; and is employed in the same connection in modern law, as expressing the capacity of distinguishing right from wrong.

Dolus versatur in generalibus. Fraud deals in generalities. A person intending to deceive uses general terms. This maxim is taken from the civil law, but is of universal application, being founded upon human nature rather than any artificial system of law. It is applied to the terms of a contract, which, if expressed in broad and general terms, give the party who may wish to take advantage of another an opportunity to contend that the language of the contract should be construed as is most for his advantage. Hence a party who intends to deceive or act unfairly will adopt vague and general terms in expressing his obligations, so that he may more easily escape, afterwards, the performance of what he pretends to undertake. The converse of this is expressed by the maxim, that a person using general terms only may be presumed to intend fraud. So as to statements or representations made to induce another to do or refrain from some act: if specific, they may easily be tested; if vague and general, they are probably fraudulent, and intended to mislead.

DOMAIN. Dominion, ownership, or property; used particularly of lands, or sometimes of property, irrespective of the distinction between real and personal, as in the phrase eminent domain, and seldom applied to personalty alone. Also, the land itself, when spoken of with especial reference to the personal right of control over it.

DOME-BOOK. An ancient English book of judgments. It must be distin-

guished from domesday-book, *q. v.* It was compiled under authority of Alfred, and is said to have been extant so late as the reign of Edward IV., but is now lost. It probably contained the principal maxims of the common law, the penalties for misdemeanors, and the forms of judicial proceedings. Domebook, or domboc, was probably a general name for book of judgments.

DOMESDAY-BOOK. According to Spelman and Jacob, there were several books which received this name. Domebook seems to have been almost a general name for a book of judgments; and the addition of day to the leading one was not meant for any allusion to the final day of judgment, as some have conceived, but was to strengthen and confirm it, and signifies the judicial decisive record, or book of dooming justice and judgment. But the word generally refers to a particular book compiled in the reign and by the direction of William the Conqueror. It was in two volumes, and contained the details of a great survey of the kingdom, throughout all its counties. Five men in each county (called justices) were assigned in 1081 for the purpose of collecting the necessary statistics, and, they having completed their statement in 1086, their returns were compiled together, forming the book in question. It is a final authority on questions of tenures and titles to lands as then existing.

DOMESTIC. Domestics, or, in full, domestic servants, are servants who reside in the same house with the master they serve. The term does not extend to workmen or laborers employed out of doors. *Exp.* Meason, 5 *Binn.* 167.

The Louisiana civil code enumerates as domestics those who receive wages and stay in the house of the person paying and employing them, for his own service or that of his family; such as valets, footmen, cooks, butlers, and others who reside in the house. Persons employed in public houses are not included. Morehouse *v.* Dodge, 6 *La. Ann.* 276.

A party hired for one day "to butcher and cut up beef" is not a domestic servant within the meaning of the Texas code; and theft from the shop committed by him of his employer's property pending such employment is theft from a house under the law. Richardson *v.* State, 43 *Tex.* 456.

Domestic attachment. A process of attachment of a debtor's property, allowed by the laws of several of the United States against a resident of the state, upon some special ground, such as fraud in contracting the debt, deemed a reason why a stringent remedy should be allowed; and distinguished from foreign attachment, which is one allowed on the ground of non-residence. See ATTACHMENT.

Domestic manufactures, in a state statute means, generally, manufactures within its jurisdiction. Commonwealth *v.* Giltinan, 64 *Pa. St.* 100.

DOMICILE. Abode; home; place where one's dwelling or habitation is fixed. How distinguished from residence, see RESIDENCE; also ABODE; HOME; DWELLING.

In its ordinary acceptation, a person's domicile is the place where he lives or has his home. In a strict and legal sense, that is properly the domicile of a person where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. Anderson *v.* Anderson, 42 *Vt.* 350; Horne *v.* Horne, 9 *Ired. L.* 99.

In general, the place where an unmarried man has his business and exercises his political right is his domicile; but not conclusively so. Maloney *v.* Lindley, 1 *Phila.* 192.

One's domicile is the place where one's family permanently resides. Daniel *v.* Sullivan, 46 *Ga.* 277.

A man may have a wife and family resident in one state, while he himself is domiciled in another. Exchange Bank *v.* Cooper, 40 *Mo.* 169.

To give a definition of domicile is difficult. To determine as matter of fact where the domicile is in a given case, is generally easy; ceases to be so, indeed, only when the actual facts of residence are made ambiguous by the want of any distinct and permanent abode, and the intention of the party cannot be ascertained. In such cases, the question often requires inquiry into the habits, character, pursuits, domestic relations, and, indeed, the whole history of the individual; and depends, in the end, upon a preponderance of the evidence in favor of one or two or more places. Hallet *v.* Bassett, 100 *Mass.* 167.

Vattel defines domicile as the habitation fixed in any place, with an intention of always staying there. This is approved by Savage, C. J. (1 *Wend.* 43); by Chancellor Walworth (8 *Paige*, 519); and, with slight variation, by Wilde, J. (10 *Pick.* 77). But an intention of remaining for a term of years, may, under some circumstances, establish a domicile. Gilman *v.* Gilman, 52 *Me.* 165.

To define, as Vattel does, a person's domicile as the habitation fixed in any place, with an intention of always staying there, is too strict, if taken literally. In this new and enterprising country it is doubtful whether one-half of the young men, at the time of their emancipation, fix

themselves in any town with an intention of always staying there. They settle in a place by way of experiment, to see whether it will suit their views of business and advancement in life, and with an intention of removing to some more advantageous position if they should be disappointed. Nevertheless, they have their home in their chosen abode, while they remain. Probably the meaning is, that the habitation fixed in any place, without any present intention of removing therefrom, is the domicile. At least, this definition is better suited to the circumstances of this country. Putnam *v.* Johnson, 10 *Mass.* 488.

Domicile is the place where a person has fixed his habitation and has a permanent residence, without any present intention of removing therefrom. Crawford *v.* Wilson, 4 *Barb.* 504, 520.

The place to which a person has removed, with intent to remain there an indefinite time, and as a place of present domicile, is the place of his domicile, although he may entertain a floating intention to remove elsewhere at some future period. Harris *v.* Firth, 4 *Cranch C. Ct.* 710; Anderson *v.* Anderson, 42 *Vt.* 350.

By the term domicile, in its ordinary acceptation, is meant the place where a person lives, or has his home. In this sense the place where a person has his actual residence, inhabitancy, or commorancy, is sometimes called his domicile. In a strict and legal sense, that is probably the domicile of a person where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. Two things, then, must concur to constitute domicile: first, residence, and, second, the intention of making it the home of the party. There must be the fact and the intent.

Domicile is of three sorts: domicile by birth, domicile by choice, and domicile by operation of law. The first is the common case of the place of birth, *domicilium originis;* the second is that which is voluntarily acquired by a party, *proprio marte;* the last is consequential, as that of the wife, arising from marriage. (*Story Confl. Laws*, ch. 3.) The best definition, as applied to an acquired domicile, is, that place in which a man has voluntarily fixed the habitation of himself and family, not for a mere special or temporary purpose, but with the present intention of making it a permanent home, until some unexpected event shall occur to induce him to adopt some other permanent home. (7 *W. R.* 250.) *Wharton.*

Domicile and residence mean the same thing; and the domicile of an infant is the same as that of his father. Kennedy *v.* Ryall, 67 *N. Y.* 379.

In international law, domicile means a residence at a particular place, accompanied with positive or presumptive proof of intending to continue there for an unlimited time. State *v.* Collector of Bordentown, 32 *N. J. L.* 192; *Phillimore, Law of Domicile,* 13; compare the Venus, 8 *Cranch,* 253, 278.

Domicile, although in familiar language used to signify a man's dwelling-house, has, in cases arising under international law, a technical meaning. It fixes the character of the individual with reference to certain rights, duties, and obligations, while dwelling-place and home have a more limited, precise, and local application. Jefferson *v.* Washington, 19 *Me.* 293.

In order to ascertain this domicile, it is proper to take into consideration the situation, the employment, and the character of the individual; the trade in which he is engaged, the family that he possesses, and the transitory or fixed character of his business, are ingredients which may properly be weighed. Livingston *v.* Maryland Ins. Co., 7 *Cranch,* 506.

Every person must have a domicile somewhere. Abington *v.* North Bridgewater, 23 *Pick.* 170; Crawford *v.* Wilson, 4 *Barb.* 504.

Where a person has two places of residence, that will be held to be his domicile where he first resided. Gilman *v.* Gilman, 52 *Me.* 165.

For some purposes, a man may have two domiciles. Greene *v.* Greene, 11 *Pick.* 410.

But a person can have only one domicile for one purpose, at one and the same time. Abington *v.* North Bridgewater, 23 *Pick.* 170; see Thorndike *v.* City of Boston, 1 *Metc.* 242; Crawford *v.* Wilson, 4 *Barb.* 504.

Every person has a domicile of origin, which he retains until he acquires another; and the one thus acquired is in like manner retained. Abington *v.* North Bridgewater, 23 *Pick.* 170; Thorndike *v.* City of Boston, 1 *Metc.* 242; Kilburn *v.* Bennett, 3 *Id.* 199; Graham *v.* Public Administrator, 4 *Bradf.* 127.

A domicile once acquired continues till a new one is gained. While a person is in transit, the old domicile remains. Littlefield *v.* Brooks, 50 *Me.* 475; Jennison *v.* Hapgood, 10 *Pick.* 77; Islam *v.* Gibbons, 1 *Bradf.* 69; Clark *v.* Likens, 26 *N. J. L.* 207.

The existing domicile always continues until another is acquired; so that by the acquisition of another the former is relinquished. To effect a change of domicile, there must be intention and act united. Crawford *v.* Wilson, 4 *Barb.* 504; Wayne *v.* Greene, 21 *Me.* 357.

One's original domicile clings closely, and cannot be changed by mere intent. The fact and the intent must concur. Hart *v.* Horn, 4 *Kan.* 232; Hallowell *v.* Saco, 5 *Me.* 143; Richmond *v.* Vassalborough, *Id.* 396; Ringgold *v.* Barley, 5 *Md.* 186.

An intention to change the domicile, without an actual removal with intention of remaining, does not cause a loss of the domicile. State *v.* Hallett, 8 *Ala.* 159; Smith *v.* Croom, 7 *Fla.* 81; Brewer *v.* Linnæus, 36 *Me.* 428; Sears *v.* City of Boston, 1 *Metc.* (*Mass.*) 250; Sacket's Case, 1 *Mass.* 58; Abington *v.* Boston, 4 *Id.* 312; Com-

monwealth *v.* Walker, *Id.* 556; Granby *v.* Amherst, 7 *Id.* 1; Lincoln *v.* Hapgood, 11 *Id.* 350; Williams *v.* Whiting, *Id.* 424; Harvard College *v.* Gore, 5 *Pick.* 370; Horne *v.* Horne, 9 *Ired. L.* 99.

The acquisition of a new domicile does not depend simply upon the residence of the party, or the time of his residence; but such residence must be accompanied by an intention of permanently residing in the new domicile, and of abandoning the former. Plummer *v.* Brandon, 5 *Ired. Eq.* 190; Wayne *v.* Greene, 21 *Me.* 357.

Two things must concur to constitute a domicile: first, residence; and, secondly, the intention to make it a home. And if these two concur, it makes no difference how short the party's residence may be in the new domicile. Horne *v.* Horne, 9 *Ired. L.* 99.

One who is residing in a place with the purpose of remaining there for an indefinite period of time, and without retaining and keeping up any *animus revertendi* to the former home which he has abandoned, will have his domicile in the place of his actual residence. Wilbraham *v.* Ludlow, 99 *Mass.* 587.

The fact of residence alone, does not constitute the place the domicile of a party: it is the fact of residence, coupled with the intention of remaining permanently, which constitutes it. McKowen *v.* McGuire, 15 *La. Ann.* 637; S. P. Leach *v.* Pillsbury, 15 *N. H.* 137; State *v.* Daniels, 44 *Id.* 383; Boardman *v.* House, 18 *Wend.* 512; Ely *v.* Lyons, *Id.* 644; Frost *v.* Brisbin, 19 *Id.* 11; Graham *v.* Public Administrator, 4 *Bradf.* 127; Hegeman *v.* Fox, 31 *Barb.* 475; Brown *v.* Ashbough, 40 *How. Pr.* 260; Henrietta *v.* Oxford, 2 *Ohio St.* 32; McIntyre *v.* Chappel, 4 *Tex.* 187.

Domicile and residence are not synonymous. The domicile is the home, the fixed place of habitation; while residence is a transient place of dwelling. Bartlett *v.* Mayor, &c. of N. Y., 5 *Sandf.* 44.

Domicile means something more than residence: it includes residence with an intention to remain in a particular place. Isham *v.* Gibbons, 1 *Bradf.* 69; Haggart *v.* Morgan, 5 *N. Y.* 422; Matter of Thompson, 1 *Wend.* 45; Frost *v.* Brisbin, 19 *Id.* 13; Foster *v.* Hall, 4 *Humph.* 346.

Domicile is but the established, fixed, permanent, or ordinary dwelling-place or place of residence of a person, as distinguished from his temporary and transient, though actual, place of residence. It is his legal residence, as distinguished from his temporary place of abode; or his home, as distinguished from a place to which business or pleasure may temporarily call him. Salem *v.* Lyme, 29 *Conn.* 74.

Domicile includes residence with an intention to remain; without such intention, no length of residence will constitute a domicile. Smith *v.* Dalton, 1 *Cin.* 153.

Domicile is the habitation fixed in any place, with the intention of always staying there; while residence is much more temporary in its character. Mayor, &c. of N. Y. *v.* Genet, 4 *Hun*, 487.

Residence has technically a more restricted meaning than domicile; but the words "not a resident" and "domicile," in the Missouri attachment law, must be held to be used with reference to the same subject-matter, and to denote opposite conditions with reference to habitancy, but not differing in degree. One who has a domicile in Missouri cannot be a non-resident while temporarily absent. Chariton County *v.* Moberly, 59 *Mo.* 238; see also *Re* Watson, 4 *Bankr. Reg.* 613.

The domicile of a citizen may be in one state, and his actual residence in another. Frost *v.* Brisbin, 19 *Wend.* 11.

Domicile and residence are not necessarily the same under the laws relating to taxation. Bartlett *v.* City of N. Y., 5 *Sandf.* 44.

Legal residence or inhabitancy, and domicile, in general, mean the same thing. Crawford *v.* Wilson, 4 *Barb.* 504; Lee *v.* Stanley, 9 *How. Pr.* 272.

Ordinarily, the domicile of the husband is the domicile of the wife. Davis *v.* Davis, 30 *Ill.* 180; Green *v.* Green, 11 *Pick.* 410; Hackettstown Bank *v.* Mitchell, 28 *N. J. L.* 516; Hanberry *v.* Hanberry, 29 *Ala.* 719; Williams *v.* Saunders, 5 *Coldw.* 60.

But a wife may acquire a domicile different from that of her husband, especially for the purposes of a suit between her and her husband. Irby *v.* Wilson, 1 *Dev. & B. Eq.* 568; Green *v.* Windham, 13 *Me.* 227.

An infant takes the domicile of his parents, and retains it until some change is established. Hart *v.* Lindsey, 17 *N. H.* 235; Brown *v.* Lynch, 2 *Bradf.* 214.

He cannot, in general, during minority, acquire a new domicile. Hiestand *v.* Kuns, 8 *Blackf.* 345; Warren *v.* Hofer, 13 *Ind.* 167; Wheeler *v.* Burrows, 18 *Id.* 14; Parsonsfield *v.* Kennebunkport, 4 *Me.* 47; Lacy *v.* Williams, 27 *Mo.* 280.

After he has attained his majority, his removal elsewhere to reside, with no determinate intention of departure, will fix his domicile in such new place; and the same will not be altered by his afterwards going away temporarily with the intent to return. Hart *v.* Lindsey, 17 *N. H.* 235.

A citizen may have his home in one town, with all the privileges of an inhabitant, and yet have his legal settlement in another town. Putnam *v.* Johnson, 10 *Mass.* 488.

In discussions upon the poor-laws, the term domicile is frequently used. Its introduction has tended to confuse and mislead, rather than aid. In its ordinary sense, it has not the same restricted meaning as the words "residence," "dwelling-place," and "home" have. Warren *v.* Thomaston, 43 *Me.* 406, 418; compare Jefferson *v.* Washington, 19 *Id.* 293; Littlefield *v.* Brooks, 50 *Id.* 475.

The domicile of a sailor is the place

where he voluntarily spends most of his time on shore. Guier *v.* O'Daniel, 1 *Binn.* 349, note; and see, to nearly same effect, Sherwood *v.* Judd, 3 *Bradf.* 267; Matter of Scott, 1 *Daly*, 534; Matter of Hawley, *Id.* 531.

In the case of a fisherman who usually lived in his boat in the summer, his domicile was held to be in the place to which he most usually resorted in the winter for board. Boothbay *v.* Wiscasset, 3 *Me.* 354.

Domicile, defined according to the laws of France. Woodworth *v.* Bank of America, 19 *Johns.* 392.

Where it was urged, in contesting the validity of a will, that there was a distinction between domicile and residence, and that the statement in the certificate of attestation that the witnesses were domiciliated in the city, was not a compliance with the law, which says "witnesses residing in the place," the word domiciliated was construed as synonymous with residing, and the legal distinction invoked was disregarded. Martin *v.* Kissinger, 26 *La. Ann.* 338.

The term domicile of succession, as contradistinguished from a commercial, a political, or a forensic domicile, may be defined to be the actual residence of a man within some particular jurisdiction, of such character as shall, in accordance with certain well-established principles of the public law, give direction to the succession of his personal estates. Smith *v.* Croom, 7 *Fla.* 81.

DOMINANT. The tenement whose owner, as such, enjoys an easement over an adjoining tenement is called the dominant tenement; while that which is subject to the easement is called the servient one.

DOMINUS LITIS. The owner of a suit. The master or principal in a suit, as distinguished from an agent or attorney; the person having the real interest in the decision of a suit, who will derive the benefit of a favorable judgment, and will suffer the consequences of an adverse judgment.

DOMITÆ NATURÆ. Of a tamed nature. A term applied to animals in which a man may have an absolute property, as distinguished from animals *ferœ naturœ* (q. v.), which have not been captured or made the subjects of private property. Besides the domestic animals, — such as horses, cattle, poultry, &c., — the term *domitœ naturœ* includes wild animals that have been actually tamed, — as deer, swans, &c.

DOMUS PROCERUM. The house of lords. One of the houses of the British parliament. Generally expressed by the abbreviation *dom. proc.*, and sometimes by the initial letters D. P.

Domus sua cuique est tutissimum refugium. His own house is every man's safest refuge; every man's house is his castle. A man's private dwelling is a fortress for his personal protection and the protection of his family and property; and not only may he defend it against violence and injury by wrongdoers, but it is even a protection to some extent against legal process. In the leading case in England on the application of this maxim (Semayne's Case, 5 *Rep.* 91), which involved particularly the right of an officer to enter a house to execute process, the following rules are laid down:

1. The house of every one is to him as his castle and fortress, as well for his defence against injury and violence as for his repose; and although the life of a man is a thing precious and favored in law, yet if thieves come to a man's house to rob or murder, and the owner or his servants kill any of the thieves, in defence of himself and his house, it is not felony.

2. When any house is recovered by any real action, or by ejectment, the sheriff may break the house, and deliver the seisin or possession to the demandant or plaintiff.

3. In all cases when the king is party, the sheriff, if the doors be not open, may break the party's house, either to arrest him, or to do other execution of the king's process, if otherwise he cannot enter. But, before he breaks it, he ought to signify the cause of his coming, and to make request to open doors.

4. In all cases where the door is open, the sheriff may enter the house, and do execution at the suit of any subject, either of the body or of the goods; and so may the lord in such case enter the house, and distrain for his rent or service.

5. The house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house, or the goods of any other which are brought and conveyed into his house to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his

house extends only to him and his family, and to his own proper goods, or those which are lawfully and without fraud and covin there; and, therefore, in such case, after denial on request made, the sheriff may break the house.

These principles, in substance, are still recognized as the common law of England and the United States upon this subject; the general doctrine being that the immunity of a man's dwelling should not be violated, except where the public safety absolutely requires it; and, in particular, that outward doors of a dwelling-house should not be broken open to execute any civil process, — criminal process being excepted, on the ground that the public safety should supersede the private protection.

Chancellor Walworth, in deciding the case of Curtis *v.* Hubbard, 4 *Hill*, 437, remarks, in reference to Semayne's Case: By this decision, the right to close the outer door of the dwelling-house upon the sheriff when he came with an execution, at the suit of a private person, to levy upon goods, was placed upon the same basis as the right to prevent a similar entry when he came with like process to arrest the person of the defendant; and that appears to have been considered the settled law of England ever since. It has also been constantly recognized as the common law of the several states of the Union where the English common law prevails.

In the case of Curtis *v.* Hubbard, cited above, the outer door of a dwelling-house being latched merely, the sheriff entered it, contrary to the known will of the owner, and levied upon his goods therein by virtue of a *fi. fa.* This was held illegal, though the owner was not in the house at the time. The levy gave the sheriff no right to remove the goods; and even a guest in the house might lawfully resist the sheriff's attempt to remove goods thus seized, using no more force than was necessary. Recent English cases hold, however, that an officer may, in the execution of civil process, enter a house by lifting the latch of a door not otherwise fastened, on the ground that entry through the door is the usual mode of access, and that a license from the occupier to any one to enter who has lawful business may be implied from his leaving the door unfastened. As entry through a window is not the usual mode of entry, no such license can be implied from leaving the window unfastened. Nash *v.* Lucas, *L. R.* 2 *Q. B.* 593.

When admission has been lawfully obtained, a sheriff may break open inner doors, if necessary, in order to execute his process; or may break the outward door outwardly to take away goods on which he has levied, doing no unnecessary damage; or may break in the outer door to rescue his bailiffs who have entered lawfully, and are disturbed in their execution; or if, having peaceably entered, before he can execute his writ, he is forcibly expelled, and the door fastened against him.

Dona clandestina sunt semper suspiciosa. Clandestine gifts are always to be regarded with suspicion. This maxim applies, in some measure, to all secret conveyances of property, as well as to what are strictly termed gifts; although it has peculiar force where want of valuable consideration and concealment of the transfer exist together. From such circumstances, suspicions of the good faith of the transaction as to third parties, or of its validity as a gift between the parties, where a donation is alleged, will naturally arise.

DONATIO. A gift. A transfer of property, either lands or chattels, and including both title and possession, made without consideration, and accepted by the donee. This is the meaning attached to the term in the civil law, and in the old English law, as well as in several modern phrases. But the word and its English equivalent "gift" have in modern times been limited in their application to real estate, to the conveyance of estates tail. Several kinds of *donatio* are enumerated: *donatio simplex et pura*, — a simple and pure gift, — one made without any compulsion or consideration; *donatio conditionalis*, — a conditional gift, — one subject to some condition or qualification; *donatio absoluta et larga*, — an absolute and unlimited gift, such as an estate in fee-simple; *donatio stricta et coarctura*, — a restricted

and limited gift, such as an estate in fee-tail. Others are defined below.

Donatio inter vivos. A gift between the living. The ordinary kind of gift by one person to another, when the giver is not in any immediate apprehension of death; designated as *inter vivos*, by way of distinction from the *donatio mortis causa*, q. v.

Donatio mortis causa. A gift in expectation of death. A gift of personal property, made by a person in contemplation of his own death, by delivery of the property to another to keep as his own in case of the donor's decease. The subject of such a gift can be personal property only; and, to constitute a valid *donatio mortis causa*, it must be made in actual peril of the death, and to take effect only in case of the death of the donor; and there must be an actual delivery of the property to or for the use of the donee, if such delivery can be made, according to the manner in which it is capable of being delivered. The gift is conditional, dependent on the contingency of expected death, and is revocable during the life of the donor, therein differing from a gift *inter vivos*. It differs from a legacy in that it does not require any proceeding in the court of probate, or any assent or action on the part of the executor, to perfect the title of the donee.

It has been held that the phrase does not include lands. White *v.* Wager, 32 *Barb.* 250, 260. The cases are not agreed whether an executory obligation, as a bond or note, can be the subject of a *donatio mortis causa*. See *U. S. Digest*, tit. Gift.

Donatio propter nuptias. A gift on account of marriage. In the civil law, this phrase designated the provision made by the husband as the counterpart of the dowry or marriage portion, termed *dos* (q. v.), brought him by his wife. The *donatio propter nuptias* was given by the husband, partly by way of jointure for the wife in case she should survive him, and partly as security for the return of her *dos* to her heirs in case of her decease leaving him surviving. The husband had the management and administration of both the wife's *dos* and his own *donatio* during the existence of the marriage, but had no power to alienate either; and, on the death of the wife, the *donatio propter nuptias* reverted to the husband, and the *dos* returned to the heirs of the wife, unless the husband was, by the marriage contract, entitled to retain it. Hence the *donatio* was also termed a mutual gift. It was introduced by the later Roman emperors, and was at first termed *donatio ante nuptias*, — a gift before marriage, — it being made upon condition that it should take effect upon the celebration of the marriage, and not allowed after marriage. Justinian allowed it to be made after as well as before marriage, and changed its name to *donatio propter nuptias*.

DONATION. Usually means a gift; but where the electors of a town resolved, at town meeting, to "donate" one thousand dollars to the plaintiffs for the use of a bridge over a river at a certain point in the town, provided the plaintiffs would, by a day named, erect a substantial bridge over the river at that point, it was held that both electors and plaintiffs must have understood it to mean an agreement to give for a consideration. Goodwin *v.* Beloit, 21 *Wis.* 636.

A statute authority to a college, to receive donations, may empower them to take subscriptions, such as a bond for the future payment of money to the college. Donation does not necessarily import a gift executed. Hooker *v.* Wittenberg College, 2 *Cin.* 353.

DONATIVE. A benefice merely given and disposed of by the patron to a man, without either presentation to or institution by the ordinary, or induction by his order. Donatives are so termed, because they began only by the foundation and erection of the donor. *Jacob.*

DONOR; DONEE. These words have technical significations in real-property law; meaning, respectively, one who gives and one who receives lands in tail (*Termes de la Ley*), and, in more recent usage, one who confers and one who is invested with a power. 4 *Kent Com.* 316. They are also used at the present day to designate the giver and recipient of personal property.

Donor is he who gives lands or tenements to another in tail, &c.; and the person to whom given is the donee. *Jacob.*

DORMANT. Sleeping; in abeyance; inactive; suspended.

Dormant execution. An execution delivered to the sheriff with direction to levy only, not to sell at once. An execution which has thus become dormant

is liable to be postponed to subsequent executions, under which the same property may be levied on and sold, and the proceeds applied upon the judgments on which such subsequent executions issued. Storm *v.* Woods, 11 *Johns.* 110; Kimball *v.* Munger, 2 *Hill*, 364.

Dormant judgment. A judgment which, without having become extinguished or satisfied, has been allowed to lie without attempt to enforce it, until the time allowed for issuing execution as of course has expired.

Dormant partner. A silent partner. A general partner, whose name does not appear in the style of the firm, and who takes no part in conducting the business. A dormant partner should be distinguished from a concealed or secret partner, for his membership may be avowed and well known; yet the term is often used as equivalent to secret partner. He is also to be distinguished from a special partner, under the laws of recent introduction authorizing limited partnerships; for he may be liable to third persons as a full partner, though perhaps not such as towards his fellows.

In strict legal acceptation, every partner is considered dormant, unless his name is mentioned in the firm, or embraced under some such general term as "& Co." Mitchell *v.* Dall, 2 *Har. & G.* 159.

To constitute one a dormant partner within the rule which excuses the plaintiff from joining a dormant partner as defendant, in an action upon a contract of his firm, it is not necessary that he should wholly abstain from participation in the business, or be universally unknown as connected with it. Nor does the term imply a studied concealment of the fact of partnership. A plaintiff is not bound to join with the ostensible members of the firm one whose connection with it would not be naturally inferred from their mode of business, and was not generally known. North *v.* Blass, 30 *N. Y.* 374.

A dormant partner is one who takes no part in the business, and whose connection with the business is unknown. Both secrecy and inactivity are implied by the word. National Bank *v.* Thomas, 47 *N. Y.* 15.

DOS. Dowry. A marriage portion. The proper meaning of the word undoubtedly is a sum of money given to a husband to aid him in sustaining the burdens of marriage; or the portion given with a woman to her husband in marriage.

But it is often used, especially in older English books, as a term interchangeable with "dower," or the portion which a widow has in the estate of her husband after his death; also, as the portion bestowed upon the wife at her marriage, by the husband.

Dos, in the Roman law, was the dowry or tocher brought by the wife to the husband on the occasion of the marriage. By that law the *dos* returned to the wife on the dissolution of the marriage, but during the subsistence of the relation, the rents or profits of the *dos* went to the husband. *Bell.*

Dos de dote peti non debet. Dower of dower ought not to be demanded.

Dos rationabilis. A reasonable marriage portion; sometimes a reasonable dower. See Dos.

Dote assignanda. A writ which lay for a widow, when it was judicially ascertained that a tenant to the king was seised of tenements in fee or fee tail at the day of his death, and that he held of the king in chief. In such case the widow might come into chancery and then make oath that she would not marry without the king's leave, and then she might have this writ. These widows were called the king's widows. *Jacob; Holthouse.*

Dote unde nihil habet. A writ of dower which lay for the widow against a tenant who had bought land of her husband, in his lifetime, whereof he was seised, solely, in fee simple or fee tail, in such a way that the issue of the two might have inherited. *Jacob; Holthouse.*

DOUBLE. This vernacular word occurs in a somewhat technical sense in several phrases.

Double costs. By statute, in certain actions, in England, double costs were allowed; but the phrase meant regular common costs and half as much again. The costs were not literally doubled. By Stat. 5 & 6 Vict. ch. 97, the right to double costs was taken away; but the statute does not seem to vary the meaning of the phrase.

It is applied to taxes to signify the objection which exists to levying taxes twice on the same property by the same government. Double taxation is deemed, as a general rule, oppressive and unjust; though it has been said that if it is not prohibited by the constitution the courts cannot relieve against it when clearly enacted; the question is for the legislature. Constitutional prohibitions are comparatively recent, and their operation is not settled. It seems not to be considered double taxation for two states, or a state and the United States, to tax the same property; nor to tax distinct interests, *e. g.*, mortgagee and owner of redemption; corporation and shareholders. *Burr. Tax.* 57; *Id.* 170.

In New York and South Carolina, the English rule is adopted, by which common costs are first taxed, and fifty per cent added. Stephens *v.* Ligon, *Harp.* 439; Patchin *v.* Parkhurst, 9 *Wend.* 443.

But, in Pennsylvania, contrary to the English rule, double and treble costs are held to mean twice and thrice the single costs. Welch *v.* Anthony, 16 *Pa. St.* 254; Shoemaker *v.* Nesbit, 2 *Rawle*, 201.

Double damages. Upon some rights of action, or in favor of some parties, statutes allow recovery of double damages. In these cases, the jury are to find the just or proper damages, according to the merits of the case, and irrespective of the statute; and the court is to render judgment for the increase. Double damages means twice the damages found by the jury; the verdict is literally doubled.

Double insurance, means a second or repeated insurance upon the same property or interest, against the same perils, and in favor of the same person; and is to be distinguished from reinsurance, which is an insurance effected by an underwriter for his indemnity.

Double pleading. This is not allowed either in the declaration or subsequent pleadings. Its meaning with respect to the former is, that the declaration must not, in support of a single demand, allege several distinct matters, by any one of which that demand is sufficiently supported. With respect to the subsequent pleadings, the meaning is, that none of them is to contain several distinct answers to that which preceded it; and the reason of the rule in each case is, that such pleading tends to several issues in respect of a single claim. *Wharton.*

Double voucher, was where a common recovery was effected by first conveying an estate of freehold to an indifferent person, against whom the *præcipe* was brought, who then "vouched" the tenant in tail, and he the common vouchee. (2 *Bl. Com.* 359; 1 *Steph. Com.* 569, 570.) *Mozley & W.*

DOWER. A provision made by law for the maintenance of a widow; consisting, as the term is understood at the common law and generally throughout the United States, of the enjoyment for life of one-third part of all the lands and tenements in fee-simple or fee-tail of which her husband was seised at any time during the coverture, and of which any issue she might have had might by possibility have been heir.

Dowress: a widow entitled to dower; a tenant in dower.

Besides dower as thus defined, four kinds were formerly known in England. Jacob describes them substantially as follows:

Dower by custom, which is that part of the husband's estate to which the widow is entitled after the death of her husband, by the custom of any manor or place, so long as she lives sole and chaste; and this may be more than a third part, or less; and in some manors the widow shall have the whole during her life.

Dower ad ostium ecclesiæ. This was given by the husband himself immediately after the marriage, who then named such particular lands of which his wife should be endowed.

Dower ex assensu patris. This was only a species of the *dower ad ostium ecclesiæ;* being of certain lands named by a son who was the husband, but the property of the father, and with his consent.

Dower de la plus belle, which was where the wife was endowed with the fairest part of her husband's estate.

The three last-named kinds have ceased to exist in England since the dower act, Stat. 3 & 4 Wm. IV. ch. 105.

Dower, in modern use, is and should be distinguished from dowry. The former is a provision for a widow on her husband's death; the latter is a bride's portion on her marriage. See Dos.

The word dower, both tecbnically and in popular acceptation, has reference to real estate exclusively. Dow *v.* Dow, 36 *Me.* 211.

It cannot be applied to personal property. A statute that the widow's dower shall not be deemed effected by any will of her husband does not embarrass his disposing of his personal estate by will. Matter of Davis, 36 *Iowa*, 24.

Dower may stand so connected in a will as to mean the lawful third of the personal as well as of the real estate. Adamson *v.* Ayres, 5 *N. J. Eq.* 349.

Where one devised to his wife "her full and reasonable dower in all his estate, according to the laws of this state," it was held that the term dower must be taken in its legal acceptation, and be limited exclusively to the realty. Brackett *v.* Leighton, 7 *Me.* 383.

DOWRY. Formerly applied to mean that which a woman brings to her husband

in marriage; this is now called a portion. This word is sometimes confounded with dower. *Bouvier.*

Dowry, in the civil code of Louisiana, means the effects which the wife brings to the husband to support the expenses of the marriage; and the income of the dowry, although belonging to the husband, is intended to help him support the charges of the matrimony, such as the maintenance of the spouses, that of their children, &c. For that purpose the code preserves the income of the dotal property from being seised by creditors. Buard *v.* De Russy, 6 *Rob.* (*La.*) 111; Gates *v.* Legendre, 10 *Id.* 74.

By dowry, in the Louisiana civil code, is meant the effects which the wife brings to the husband to support the expenses of marriage. It is given to the husband, to be enjoyed by him so long as the marriage shall last, and the income of it belongs to him. He alone has the administration of it during marriage, and his wife cannot deprive him of it. The real estate settled as dowry is inalienable during marriage, unless the marriage contract contains a stipulation to the contrary. De Young *v.* De Young, 6 *La. Ann.* 786.

DRAFT. The word draft is *nomen generalissimum*, and includes all orders for the payment of money drawn by one person on another. Wildes *v.* Savage, 1 *Story C. Ct.* 22, 30.

DRAIN. Has no technical legal meaning. Any hollow space in the ground, natural or artificial, where water is collected and passes off, is a ditch or drain. Goldthwait *v.* Inhabitants of East Bridgewater, 5 *Gray*, 61.

DRAMATIC. A mere exhibition, spectacle, or scene is not a dramatic composition within the meaning of the copyright laws. Martinetti *v.* Maguire, 1 *Abb. U. S.* 356.

DRAWBACK. A remission or repayment upon the exportation of merchandise of duties which have been previously paid upon it.

A principal application of the principle of drawback in the United States duty laws is in respect to goods which, when brought into the country, have paid duties, but are re-exported for sale abroad; or to goods manufactured out of imported materials which paid duty, when such goods are exported for sale abroad. In such cases, the law allows the exporter a drawback in cases and under regulations prescribed by Rev. Stat. tit. 34, ch. 9.

A drawback is a device resorted to for enabling a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed at all. It differs in this from a bounty, that the latter enables a commodity to be sold abroad for less than its natural cost, whereas a drawback enables it to be sold exactly at its natural cost. *Wharton.*

DROIT. A French law term for a right, or for law in its aspect of the foundation of rights. It is equivalent to *jus* in the Roman law.

The writ of right is called in the old books *droit*. *Jacob.*

Droit of admiralty. A word applied, in English law, to ships of the enemy taken by a subject in time of war without commission from the crown; also, to ships seized in port, on the breaking out of war. Any such prize would, by the effect of the prerogative, become an admiralty *droit*, or a right of the admiralty.

Droit d'aubaine. A right or prerogative formerly claimed by the sovereigns of some European countries, by which all the property of a deceased foreigner was confiscated to the use of the state, excluding his heirs and kin, whether claiming by inheritance or under a will.

Droits civils. This phrase in French law denotes private rights, the exercise of which is independent of the status (*qualité*) of citizen. Foreigners enjoy them; and the extent of that enjoyment is determined by the principle of reciprocity. Conversely, foreigners may be sued on contracts made by them in France. *Brown.*

Droit-droit. A double right; that is, the right of possession and the right of property. (*Cowel*; 2 *Bl. Com.* 199.) These two rights were, by the theory of our ancient law, distinct; and the above phrase was used to indicate the concurrence of both in one person, which concurrence was necessary to constitute a complete title to land. *Mozley & W.*

Droitural, has been used to distinguish actions brought upon a writ of right, as distinguished from that other group of actions called possessory, which were brought upon the fact of, or right to, the possession merely. *Brown.*

DRUNKARD. He is a drunkard whose habit it is to get drunk; whose sobriety has become habitual. The terms "drunkard" and "habitual drunkard" mean the same thing. Commonwealth *v.* Whitney, 5 *Gray*, 85.

Drunkenness, as used in ordinary statutes providing for the restraint or punishment of drunkards should be construed as meaning a condition induced by drinking an excessive quantity of intoxicating liquor, and not as including effects of inhaling ether or chloroform. A person who habitually uses chloroform to excess does not become subject to be treated as a com-

mon drunkard. Commonwealth *v.* Whitney, 11 *Cush.* 477.

DUBITANTE. Doubting. Is affixed to the name of a judge, in the reports, to signify that he doubted the decision rendered.

DUBITATUR. It is doubted. A word frequently used in the reports to indicate that a point is considered doubtful. The word query is used by modern reporters in their syllabi of cases in a somewhat similar sense.

DUCES TECUM. That you bring with you. A term applied to certain writs by which a party required to appear in court is also commanded to bring with him some piece of evidence or other thing to be produced to the court. The *subpœna duces tecum* (q. v.) is a familiar example.

DUE. 1. Payable; owing and demandable; sometimes owing, simply.

2. Correct; lawful; regular; sufficient; as in the phrases due process of law; due service.

Due is sometimes used to express the mere state of indebtment, and then is an equivalent to owed or owing; sometimes to express the fact that the debt has become payable. Allen *v.* Patterson, 7 *N. Y.* 476; Scudder *v.* Scudder, 10 *N. J. L.* 340.

When employed participially or adjectively after debt, without adding some verb or participle denoting future time, it is equivalent to "payable at the present time." Leggett *v.* Bank of Sing Sing, 25 *Barb.* 326.

A loss becomes "due" when the property insured is destroyed, or, at furthest, when the requisite proofs of loss are furnished. Allen *v.* Hudson River Mut. Ins Co., 19 *Barb.* 442.

A provision in the articles of a banking association that "no shares shall be transferable unless the shareholder shall previously discharge all debts due by him to the association," includes not only debts which have matured and are already payable, but also liabilities not yet matured. Leggett *v.* Bank of Sing Sing, 24 *N. Y.* 283.

Due, in a provision in an attachment law requiring proof that the indebtedness in suit is due, means that the day when payment ought to be made has arrived. An affidavit that the defendant "is indebted," &c., is insufficient to show this. Bowen *v.* Slocum, 17 *Wis.* 181.

A note is not a debt justly due, under Mass. Rev. Stat. ch. 90, § 83, until assented to by the promisee. Baird *v.* Williams, 19 *Pick.* 381.

The word due in a stipulation in a chattel mortgage, providing for insurance for the mortgagee's benefit, in a sum equal to the full amount due on the mortgage, should be construed to be synonymous with owing, and to contemplate insurance to the extent of the amount remaining unpaid. Fowler *v.* Hoffman, 31 *Mich.* 215.

A clause in a deed of assignment for benefit of creditors, providing for payment to the trustee of "the several and respective debts, notes, bonds, obligations, and sums of money due, or to grow due," from the assignor, must be construed to cover only existing liabilities, whether matured or to mature; and does not vitiate the assignment. Van Hook *v.* Walton, 28 *Tex.* 59.

An assignment of choses in action to a creditor "for the payment of my indebtedness to him due and to become due," may be construed to include, as one of the debts to be paid, the contingent liability of the creditor on a note indorsed by him for the debtor, not due at the time of the assignment, but subsequently paid by the creditor as indorser. Kellogg *v.* Barber, 14 *Barb.* 11.

A stipulation in a mortgage, reserving all due rights under a mortgage and decree of foreclosure, means that which law or justice requires to be done. Due rights are just rights; legal rights. The plain meaning of the clause is, that, if the payments are not made as stipulated, the decree is to stand in full force; all rights under it are to remain unimpaired; and the whole mortgage debt, as secured by the decree, to remain due and payable. Ryerson *v.* Boorman, 8 *N. J. Eq.* 701.

Due care. This term as usually understood in cases where the gist of the action is the defendant's negligence, implies not only that a party has not been negligent or careless, but that he has been guilty of no violation of law in relation to the subject-matter or transaction which constitutes the cause of action. Evidence that a party is guilty of a violation of law supports the issue of a want of proper care; nor can it be doubted that in these and similar actions the averment in the declaration of the use of due care, and the denial of it in the answer, properly and distinctly put in issue the legality of the conduct of the party as contributing to the accident or injury which forms the groundwork of the action. No specific averment of the particular unlawful act which caused or contributed to produce the result complained of should, in such cases, be deemed necessary. Jones *v.* Andover, 10 *Allen*, 18; see also Butterfield *v.* Western R. R. Corp., *Id.* 532.

Due course of law; Due process of law. These phrases in the constitution do not mean the general body of the law, common and statute, as it was at the time the constitution took effect; for that would seem to deny the right of the legislature to amend or repeal the law. They refer to certain fundamental rights, which that system of jurisprudence, of which ours is a derivative, has always recognized. Brown *v.* Levee Commissioners, 50 *Miss.* 468.

The words due process of law, or the law

of the land, were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. Bank of Columbia *v.* Oakeley, 4 *Wheat.* 235.

Due process of law, as used in the constitution, cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property. Embury *v.* Conner, 3 *N. Y.* 511, 517; Taylor *v.* Porter, 4 *Hill*, 140; Burch *v.* Newbury, 10 *N. Y.* 374, 397.

The phrase means, a trial had according to the course of the common law, and not by mere legislation. Taylor *v.* Porter, 4 *Hill*, 140; see also Wynehamer *v.* People, 13 *N. Y.* 378. It requires more than a special act authorizing the deprivation. Clark *v.* Mitchell, 64 *Mo.* 564.

It means, in the due course of legal proceedings, according to those forms which have been established for the protection of private rights. Westervelt *v.* Gregg, 12 *N. Y.* 209.

It means the same as "law of the land." Sears *v.* Cottrell, 5 *Mich.* 251; State *v.* Staten, 6 *Coldw.* 233.

It means, in each particular case, such an exertion of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. *Exp.* Ah Fook, 49 *Cal.* 403.

The phrase due course of law, when applied to penal offences, does not necessarily imply a trial by jury, but rather means a proceeding carried on according to the law of the land, either with or without a trial by jury. Reagh *v.* Spann, 3 *Stew.* 100.

If the condition of a guaranty is that the creditor shall proceed by due course of law, for the collection of the debt, it is enough that he prosecutes all ordinary legal measures, with good faith and reasonable diligence, in point of time; the loss of a term does not, of necessity, discharge the guarantor. Thomas *v.* Woods, 4 *Cow.* 173.

The expression means no more than a timely proceeding to judgment and execution. Backus *v.* Shipherd, 11 *Wend.* 629.

A discharge from the prison rules, under the insolvent act of a state, although obtained by fraud, is a discharge in due course of law; and upon such discharge no action can be sustained for an escape, against the sheriff, nor upon the prison-bounds bond. Simms *v.* Slacum, 3 *Cranch*, 300.

DUEL. A combat with deadly weapons, fought between two persons by agreement, upon a previous quarrel.

Duel, in ancient law, is a fight between persons in a doubtful case for the trial of the truth. But this kind of duel is disused, and what we now call a duel is a fighting between two, upon some quarrel precedent. *Jacob.*

The offence of duelling consists in the invitation to fight, and the misdemeanor is complete by the delivery of the challenge. State *v.* Taylor, 1 *Treadw. Const.* 107.

Any agreement to fight with loaded pistols, and actually fighting in pursuance, constitutes a duel, under the act of South Carolina; and it does not depend upon the time when the agreement was made, but upon the fact of the agreement. Herriott *v.* State, 1 *McMull.* 126.

DUKE. In English law, is a title of nobility, ranking immediately next to the Prince of Wales. It is only a title of dignity: conferring it does not give any domain, territory, or jurisdiction over the place whence the title is taken. Duchess: the consort of a duke. *Wharton.* Daly - 35 Ca 371: 27 Accord

DUM. While. A word of limitation used in the Latin forms of conveyances, and in several phrases, among them the following:

Dum bene se gesserit. While he conducted himself well; during good behavior. A condition implied in ancient grants of a feud or fee.

Dum fuit in prisona. While he was in prison. The name of a writ in old English practice which lay to restore a man to the possession of lands aliened by him under duress of imprisonment. Abolished by statute.

Dum fuit infra ætatem. While he was within age. The name of a writ of entry in old English practice, to recover lands aliened by an infant. It could be sued out by him after he became of full age, or by his heirs after his death. It was superseded by the action of ejectment, and finally abolished.

Dum fuit non compos mentis. While he was of unsound mind. The name of a writ of entry, in old English practice, to recover lands aliened by a person of unsound mind. It might also be obtained by his heirs. Abolished by statute.

Dum sola. While sole; while unmarried. Words of limitation in old conveyances or devises to single women. The phrase is also applied to any thing done, or that may be done, in regard to a woman while unmarried. Thus debts contracted by or judgments recovered against an unmarried woman are termed

debts contracted or judgments recovered *dum sola*.

Dummodo. Provided; provided that. A word of limitation in the Latin forms of conveyances, of frequent use in introducing a reservation; as in reserving a rent.

Duplex querela. Double complaint. An ecclesiastical proceeding, which is in the nature of an appeal from an ordinary's refusal to institute, to his next immediate superior; as, from a bishop to the archbishop. If the superior adjudges the cause of refusal to be insufficient, he will grant institution to the appellant. *Phill. Eccl. Law*, 440.

DUPLICATE. A counterpart; a transcript of a writing equivalent to the original.

The word duplicate, written across a draft which was given to replace a previous one of same tenor which had been lost, has been held to import, under the circumstances, that the draft was made as a substitute for, and to take the place of, the original, and that no new liability was to be created by it. Benton *v.* Martin, 40 *N. Y.* 345.

DUPLICITY. A fault in pleading, consisting in the union of more than one cause of action in one count in a writ, or more than one defence in one plea, or more than a single breach in a replication; and not in the union of several facts, constituting together but one cause of action, or one defence, or one breach. Jackson *v.* Rundlet, 1 *Woodb. & M.* 381; Harker *v.* Brink, 24 *N. J. L.* 333; Patcher *v.* Sprague, 2 *Johns.* 462; Tucker *v.* Ladd, 7 *Cow.* 450; Strong *v.* Smith, 3 *Cai.* 160; Beckley *v.* Moore, 1 *McCord*, 464; Potter *v.* Titcomb, 10 *Me.* 53; Waddams *v.* Burnham, 1 *Tyler*, 233; Bank *v.* Hinton, 1 *Dev. L.* 397; Toney *v.* Field, 10 *Vt.* 353. See DOUBLE PLEADING.

The rule of the common-law system of pleading is strict, that duplicity must be avoided, as it begets confusion. Every plea must be simple, entire, connected, and confined to one single point; it must never be entangled with a variety of distinct, independent answers to the same matter, which must require as many different replies, and introduce a multitude of issues upon one and the same point. *Jacob.* The stringent application of the rule is relaxed somewhat under the codes of reformed procedure and other legislation authorizing defects in pleading to be disregarded; though the codes have by no means authorized double pleading.

DURANS. During. Used in the ablative form, *durante*, as a word of limitation in conveyances, and in several phrases:

Durante absentia. During absence. In some jurisdictions, administration of a decedent estate is said to be granted *durante absentia* in cases where the absence of the proper proponents of the will, or of an executor, delays or imperils the settlement of the estate.

Durante beneplacito. During good pleasure. A phrase expressing a tenure of office. English judges formerly held their commissions *durante beneplacito*.

Durante minore ætate. During minority. A term applied to administration granted when the executor named in a will is a minor, and which continues until he attains the age at which he can lawfully act.

Durante viduitate. During widowhood. Words of limitation in conveyances or devises. Of similar use are the following:

Durante virginitate. During virginity.

Durante vita. During life.

DURESS. Coercion; compulsion; constraint of personal action by force or fear.

Duress is termed duress *of imprisonment*, or duress *per minas*, according as actual restraint of the person or threats of violence are employed. In general, acts induced by it may be annulled; and it may be shown in defence of a prosecution founded on them. The later cases speak of duress *of goods*, meaning an influence exerted over an individual by seizing or withholding his property, or threatening to do so. This may be important as a ground for holding a payment made by the party not to have been voluntary, or for excusing him from a promise made under its influence; but it can scarcely have the full effect of duress in the fuller sense of coercion of the person directly, and it is doubtful whether the word duress properly extends to it.

By duress, in its more extended sense, is meant that degree of severity, either threatened or impending, or actually inflicted, which is sufficient to overcome the mind and will of a person of ordinary firmness. Duress *per minas* is restricted to fear of loss of life, or of mayhem, or loss of limb, or other remediless harm to the person. Fellows *v.* School District, 39 *Me.* 559.

An abuse of process against the person, to compel a party to do an act against his will, is a duress. Breck *v.* Blanchard, 22 *N. H.* 303.

An arrest for improper purposes, without just cause; or for just cause, but without lawful authority; or for just cause, with lawful authority, but for unlawful purposes, — may be construed a duress. Strong *v.* Grannis, 26 *Barb.* 122; Severance *v.* Kimball, 8 *N. H.* 386.

But the arrest must have been originally illegal, or have become so by subsequent abuse of it. Stouffer *v.* Latshaw, 2 *Watts*, 167; Crowell *v.* Gleason, 10 *Me.* 325; see Watkins *v.* Baird, 6 *Mass.* 511; Richardson *v.* Duncan, 3 *N. H.* 508; Meek *v.* Atkinson, 1 *Bailey*, 84.

A lawful imprisonment does not constitute duress, in legal acceptation of that term. *Exp.* Wells, 18 *How.* 307; Latapee *v.* Pecholier, 2 *Wash. C. Ct.* 180, 182.

Fear, to excuse a person guilty of an alleged crime, must be fear of death, — such a fear as a man of ordinary courage and fortitude might yield to. United States *v.* Haskell, 4 *Wash. C. Ct.* 402.

The fact of duress of goods depends upon the right of a party to demand them as his property. Where one has, in fact, no right to demand goods, except upon performance of terms and conditions imposed by law, it is not duress for a treasury agent to refuse to deliver them, except upon those conditions. A compliance with the conditions by the owner, although thus exacted, must be deemed voluntary. Block *v.* United States, 8 *Ct. of Cl.* 461.

Threats of attaching a tenant's crop for the payment of rent, made by a person who has entered for the purpose of collecting or securing the rent before its maturity, and who is accompanied by a constable, but has no legal process, do not constitute duress. Lehman *v.* Shackleford, 50 *Ala.* 437.

A threat to burn and destroy a vessel which has been captured for probable cause does not constitute such a duress as will avoid a contract of ransom. Maisonnaire *v.* Keating, 2 *Gall.* 325.

DUTY. 1. Obligation; what one ought to perform.

2. A tax; a pecuniary charge for the support of government. In this sense, the word is generally used in the plural, — duties; and commonly signifies customs or imposts, charges upon the importation or exportation of merchandise.

The word duty, in the common use of language, when applied to pecuniary obligations, is synonymous with debt. It has not the signification of trespass, tort, or damage. Fox *v.* Hills, 1 *Conn.* 294; S. P. Fowler *v.* Frisbie, 3 *Id.* 320.

Duties are things due and recoverable by law. The term, in its widest signification, is hardly less comprehensive than taxes. It is applied, in its most restricted meaning, to customs; and, in that sense, is nearly the synonyme of imposts. *Tomlin;* 1 *Story Const.* § 952.

DWELL. To have an abode; to inhabit; to live in a place. Dwelling, *n.*: that in which a person lives or has his abode. Dwelling, *part.*: the condition of living or inhabiting. See ABODE; DOMICILE; HABITATION; RESIDENCE.

The dwelling of a corporation, within the meaning of statutes regulating the jurisdiction of courts, is the place which is occupied as their home; that is to say, where their profits come home to them, whence orders emanate, and where the chief officers are to be found. Adams *v.* Great Western Railway Co., 6 *Hurlst. & N.* 404, 30 *L. J.* N. S. *Ex.* 124, 3 *L. T. Rep.* N. S. 631.

By the words "dwells and has his home," in the Me. Stat. 1821, ch. 122, § 2, the legislature meant to designate some permanent abode, or residence, with an intention to remain, or, at least, without any intention of removing. Turner *v.* Buckfield, 3 *Me.* 229; S. P. Putnam *v.* Johnson, 10 *Mass.* 488; Hairston *v.* Hairston, 27 *Miss.* 704.

But a person may be considered as "dwelling and having his home" in a certain town, though he has no particular house there, as the place of his fixed abode. Parsonsfield *v.* Perkins, 2 *Me.* 411.

Dwelling-house. This term has received judicial interpretation in many decisions; particularly in those upon the crimes of arson and burglary, where one element has been that a dwelling-house was burned or broken. See BURGLARY.

A storehouse not within the curtilage, but in which the owner's servant or agent usually sleeps, is, in law, the dwelling-house of the owner, and burglary may be committed therein. A person may have two dwelling-houses, in either of which burglary may be committed. (1 *Hale P. C.* 556; *Cr. Cir. Comp.* 207, 480.) The sleeping in a house at night fixes its character, whether or not it is a dwelling-house; for a house which is only occupied and resided in during the day is not considered a dwelling-house. (1 *Hawk.* ch. 38, §§ 10-20.) United States *v.* Johnson, 2 *Cranch C. Ct.* 21.

Dwelling-house embraces the dwelling itself, and such houses as are used as part or parcel thereof, — such as are used with the dwelling, considered as a dwelling-house, and tending to render it convenient and comfortable to the dweller as a housekeeper. State *v.* Langford, 1 *N. C.* 253.

If a part of a building is occupied as a dwelling, or if one of two structures intimately connected in construction and use is so occupied, the whole is a dwelling-house, within the law of burglary. People *v.* Orcutt, 1 *Park. Cr.* 252; People *v.* Snyder, 2 *Id.* 23; though there was no communication between them, Sammanni *v.* Commonwealth, 16 *Gratt.* 543.

A building within the curtilage of a residence, and regularly used as a sleeping-room, such as a storehouse, is a dwelling-house. State *v.* Mordecai, 68 *N. C.* 207.

So is a storehouse used regularly as a sleeping apartment, although for the sole purpose of protecting the premises. State *v.* Outlaw, 72 *N. C.* 598.

The word dwelling-house, in its common-law signification, may include a barn, though eight rods distant from the house. Pitcher *v.* People, 6 *Mich.* 142.

A building in course of construction for a habitation, but which has never been occupied, and is not quite completed, is not a dwelling-house, within the law of arson. State *v.* McGowen, 20 *Conn.* 245. To nearly same effect, State *v.* Warren, 33 *Me.* 30. To the contrary, Commonwealth *v.* Squire, 1 *Metc.* (*Mass.*) 258.

A building erected for a habitation, and which has been occupied, but is temporarily unoccupied, is not a dwelling-house within the law of arson. State *v.* Clark, 7 *Jones L.* 167; Hooker *v.* Commonwealth, 13 *Gratt.* 763. To the contrary, State *v.* McGowen, 20 *Conn.* 245.

By New York statute defining arson, every house, prison, jail, or other edifice which shall have been usually occupied by persons lodging therein at night, shall be deemed a dwelling-house of any person so lodging therein; but no warehouse, barn, shed, or other out-house is to be deemed a dwelling-house, unless a part of a dwelling-house. 2 *Rev. Stat.* 657, §§ 9, 10.

Dwelling-house, in a statute authorizing a homestead exemption of a village lot, and dwelling-house thereon, should not be deemed to extend to buildings adapted to business purposes, such as a saloon, stores, a public hall, &c., although (for the purpose of strengthening his claim to the exemption) the owner resides with his family within the buildings in question. *Re* Lammer, 14 *Bankr. Reg.* 460.

Dwelling-house, in a statute prohibiting pulling down dwelling-houses to alter highways, does not include a building adjoining a hotel, and occupied exclusively as a billiard saloon. State *v.* Troth, 24 *N. J. L.* 377.

A dwelling-house, within the meaning of the exception of dwelling-houses in a statute prohibiting the erection of frame buildings within the fire limits of a city (N. Y. Laws 1849, ch. 84), means a building inhabited by man. Buildings originally erected for dwelling-houses, but which have ceased to be used and occupied for such a purpose, are not within the exception. Such a statute plainly imports such buildings only as were used and occupied as dwelling-houses at the time the raising took place, and such as were in good faith to be so used and occupied. Fire Department *v.* Buhler, 33 *How. Pr.* 378.

Dwelling-place, is not synonymous with a place of pauper settlement. Lisbon *v.* Lyman, 49 *N. H.* 553.

Dwelling-place, or home, means some permanent abode or residence, with intention to remain; and is not synonymous with domicile, as used in international law, but has a more limited and restricted meaning. Jefferson *v.* Washington, 19 *Me.* 293.

DYING. Occurs in some phrases which have a technical meaning:

Dying by one's own hand. Policies of life insurance often contain a provision exempting the company from liability in event of the assured dying by his own hand. The cases are generally to the effect that this means voluntary suicide, Moore *v.* Connecticut Mut. Life Ins. Co., 1 *Am. L. T. Rep.* N. S. 319; that if a person brings his life to a close by poison, this, though not involving any violent use of his own hands, is included, Hartman *v.* Keystone Ins. Co., 21 *Pa. St.* 466; and that, upon the other hand, although he literally dies by his own hand, yet if the act was committed while the subject was insane to such degree as to prevent him from forming a rational judgment respecting his act, the company is not released, Terry *v.* Life Ins. Co., 1 *Dill.* 403; Eastabrook *v.* Union, &c. Ins. Co., 54 *Me.* 224; Breasted *v.* Farmers' Loan Co., 4 *Hill*, 73, 8 *N. Y.* 299; though, if he retained sufficient reason to understand the nature of his act, and intended to take his life, the company is discharged, Dean *v.* American, &c. Ins. Co., 4 *Allen*, 96.

Dying declaration. Upon prosecutions for homicide, the declarations made by the deceased, when at the point of death, after he knew he was about to die, and had no longer any hope of recovery, are received in evidence to establish the circumstances of the death, and are called dying declarations.

The ground of the rule is that the solemnity of the dying person's situation is equivalent in its influence, in predisposing him to tell the truth, to the sanctions of an oath; hence, it is said that dying declarations of an infant of very

tender years are not included, for the child's mind is not affected by the prospect of death, as the adult's is supposed to be.

Dying without children, heirs, or issue. The words, dying without issue, have acquired a technical meaning, when applied to real estate, directly contrary to the plain grammatical sense of the words, which is simply a failure of issue at the death of the person whose issue, if living, would take. But, when applied to real estate, they import an indefinite failure of issue; that is, not a failure at the death of the person, but the total extinction of his family, — the deaths of all his descendants, to the remotest generation. Courts have uniformly given to them this construction, when there are no expressions in the will controlling the legal meaning of the words, or pointing to a definite, rather than an indefinite, failure of issue. The rule has been too long established to be now questioned. It was established centuries ago in England, when estates tail were favored. Wardell *v.* Allaire, 20 *N. J. L.* 6.

The words "die without issue," and "die without leaving issue," in a devise of real estate, import an indefinite failure of issue, and not the failure of issue at the death of the first taker. And no distinction is to be made between the words "without issue," and "without leaving issue." Wilson *v.* Wilson, 32 *Barb.* 328, 20 *How. Pr.* 41; S. P. Simmons *v.* Augustin, 3 *Port.* 69; McGraw *v.* Davenport, 6 *Id.* 319.

The words, dying without issue, in a will executed in England since Jan. 1, 1838, are held, by the wills act of 1837 (7 Wm. IV. and 1 Vict. ch. 26, § 26), to refer only to the case of a person dying and leaving no issue behind him at the date of his death. Prior to that time, the words were held to refer to the case of death and subsequent failure of issue at an indefinite time afterwards, however remote; by which interpretation many dispositions were held void for remoteness, and testators' intentions defeated in many ways. (1 *Steph. Com.* 609–612; *Wms. R. P.*) *Mozley & W.*

In Connecticut, it has been repeatedly held that the expression, dying without issue, and like expressions, have reference to the time of the death of the party, and not to an indefinite failure of issue. Clarke *v.* Terry, 34 *Me.* 176.

Dying without children imports not a failure of issue at any indefinite future period, but a leaving no children at the death of the legatee. Fairchild *v.* Crane, 13 *N. J. Eq.* 105.

Dying without heirs, construed as equivalent to dying without issue. Kent *v.* Armstrong, 6 *N. J. Eq.* 637.

A devise of real estate, to the devisee "and his heirs for ever," with a limitation over if the devisee "die without heir," carries the fee. The words, die without heir, as applied to a devise of real estate, import an indefinite failure of heirs: the contingency is therefore too remote to support the limitation over. But the rule is otherwise in respect to devises of personal property. As applied to them, the words will be construed to mean dying without heirs living at the death of the devisee; and, as the contingency must happen, if at all, within a life in being, the limitation over is good as an executory devise. Wallis *v.* Woodland, 32 *Md.* 101.

A clause in a will, "if I should die leaving a child or children," was held to contemplate birth of a child subsequent to the execution of the will. A verdict setting the will aside was therefore adjudged erroneous, a child having been born within the period of gestation, after the testator's death. Freeman *v.* Layton, 41 *Ga.* 58.

E.

E. From; out of. It occurs in Latin phrases. *Ex*, which is another form of the same word, is more frequently used. Among the phrases beginning with *e* oftener than with *ex* are the following:

E contra. From the opposite side; on the contrary; conversely. This phrase is equivalent to *e converso*.

E converso. From the converse; on the other hand; conversely. This phrase is commonly used to introduce an argument or proposition which is the opposite or converse of one previously stated.

E pluribus unum. From many, one; one out of many. This is the motto of the United States of America, expressing the union of the several states in one government.

EARL. A title of nobility, formerly the highest in England, now the third, ranking between a marquis and a viscount, and corresponding with the French *comte*, and the German *grave*. The title originated with the Saxons, and is the most ancient of the English peerage. William the Conqueror

first made this title hereditary, giving it in fee to his nobles; and allotting them for the support of their state the third penny out of the sheriff's court, issuing out of all pleas of the shire, whence they had their ancient title, shiremen. At present, the title is accompanied by no territory, private or judicial rights, but merely confers nobility and an hereditary seat in the house of lords. *Wharton.*

EARLDOM. The status of an earl; originally, the jurisdiction of an earl. *Mozley & W.*

EARNEST. A sum paid as part of the price for property sold, or of money due upon an agreement, for the purpose of binding the bargain; also, sometimes, a portion of the goods when delivered and accepted for like purpose.

The English statute of frauds, 29 Car. II., ch. 3, § 17, enacted that no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made, &c.

As used in the statute of frauds of Massachusetts, Gen. Stat. ch. 105, § 5, earnest means a payment of part of the price. Money deposited by the buyer of goods with a third person, to be forfeited to the seller if the buyer does not complete his purchase, is not earnest, and such deposit does not take the case out of the statute. Howe *v.* Hayward, 108 *Mass.* 54.

EARNINGS. Was used in Mass. Stat. 1865, ch. 43, § 2, declaring an unrecorded assignment of future earnings invalid against a trustee process, for the purpose of embracing a larger class of credits than would be included in the more common term wages. It involves the idea of compensation for services rendered, but is not limited to gains from merely personal labor. Money due from time to time from an employer to a third party, for board and lodging of his workmen, is in the nature of compensation for services rendered to such employer. It involves expenditures for other matters than labor. But the result of the whole is a service rendered, for which the compensation is measured by the time of its continuance. The return due for such service may properly be called earnings. Jenks *v.* Dyer, 102 *Mass.* 235.

Earnings involves more than compensation for mere labor, and may include expenditures incident to services. Where one engages to render the service of building a house, furnishing all the materials, at an agreed price for the whole, the payments agreed for are earnings. Somers *v.* Keliher, 115 *Mass.* 165.

EASEMENT. A right, privilege, or service in land, distinct from but not inconsistent with the general ownership of the soil. Generally, perhaps necessarily, an easement belongs to a man only as being himself the owner of some particular land or building; and is then his right, by reason of such ownership, to use the land of another for a special purpose not inconsistent with the general property of the latter in his land. The land against which the privilege exists is called the servient tenement, and its proprietor the servient owner; he in whose favor the privilege exists is called the dominant owner, and his land the dominant tenement. These terms are, however, properly used with reference to easements existing in favor of individuals, or private easements, and have no application to public easements, such as the right to use a public highway. But to the existence of a private easement, two tenements, the dominant and the servient, owned by different proprietors, are essential.

Easements exist only in favor of, and are imposed only on, corporeal property; but they are incorporeal in their nature. They are thus distinguishable from what was formerly called a *profit à prendre*, which is a right to take part of the soil or produce of land; as they confer no right to any profits arising from the servient tenement. Neither do they impose any duty upon the servient owner, except a duty not to change his tenement to the prejudice or destruction of the privilege.

The term easement is also sometimes made to include the class of rights already referred to as *profits à prendre;* such as rights of pasture upon land of another; of fishing in water of another; of taking game on another's land; or taking wood, minerals, or other produce of the soil from another's land.

An easement is to be distinguished from a license, which is an authority to do a particular act or series of acts upon another's land, personal in its nature, and not amounting to an estate in the land.

The different varieties of easements may be conveniently enumerated according to the rights of property which they restrict or affect. Thus, with reference to ways, the owner of the soil or general occupier having naturally an exclusive right of way over the land he owns or occupies, the corresponding easement is a right of way (see WAY), which may be either private, when it is the right of an adjoining private owner or occupier in respect of his ownership or occupancy, or public, when it is the right of the public generally in respect of their general occupation of the country. With reference to the right of support from contiguous land, whether adjacent or subjacent, the easements corresponding are the right of support for land built upon, or for the buildings themselves (compare PARTY-WALL), and the right to cause a subsidence of the land, as by mining or other excavating. With reference to water, the natural rights to which are the right to the natural purity of the water, to its natural flow, and to take the whole or a portion for natural use, the corresponding easements are the right to pollute the water, to divert a watercourse, and to dam a stream and cause it to flood another's land. With reference to air, there being a natural right, recognized by the law, to purity of air, there may be an easement to pollute the air, to some extent; and as the law does not recognize any natural right to the free passage of air, an easement of that nature might arise, if allowed by law; and so might a right to send noise through the air. And with reference to light, no natural right to the free passage of light is recognized by law, but an easement of that nature may exist; and such easements are sustained in England, and in some of the United States. See ANCIENT LIGHT.

Easements are divided into classes, according to various characteristics. Thus easements of necessity are distinguished from easements of convenience. An easement of necessity is one without which the person having it could not enjoy his property or carry on his trade at all; while an easement of convenience is one by which such person enjoys his property or pursues his trade in a more comfortable or readier way, but which he might also do without, although not so well. An easement may change from one of these classes to the other, with a change in the circumstances of the case.

An easement must usually be created by grant or agreement of the owner of the servient tenement, or by prescription from which such a grant is implied. The instrument by which it is created may be a will, a statute, or even a custom; but such easements are of the same nature as those created by grant. In cases of easements of necessity, a grant is assumed from the necessity. The mode of creation of easements, and the rights which may be thus acquired and the extent to which they may be enjoyed, are largely regulated by statute.

Easements may be extinguished by direct conveyance or release; by merger; by necessity; and, when acquired by prescription, by cessation of enjoyment.

Easement is the equivalent of the term servitude. It is a service or convenience which one neighbor has of another, by charter or prescription, without profit. (*Tomlins.*) *Bell.*

Easement, in strictness, does not include a personal right to take the profits of land. An easement is a liberty, privilege, or advantage in land without profit, existing distinct from the ownership of the soil, and is an incorporeal right. The right to profits, or *profit à prendre*, consists in a right to take part of the soil or produce of the land, and is in its nature corporeal and capable of livery. Pierce *v.* Keator, 70 *N. Y.* 419.

That which is claimed to be an easement or servitude must not only be appendant, in utility and fitness for use, to the principal or dominant estate, but there must be a unity of title or right in the same person to both the superior estate and the easement claimed. Meek *v.* Breckenridge, 29 *Ohio St.* 642.

A *quasi* easement, such as a right of way, arises where there has been an easement proper with a dominant and servient tenement, and the ownership of such tenements has been unified, and the ownership is again severed by a conveyance of the dominant tenement. It will not pass by the general word appurtenances. Parsons *v.* Johnson, 68 *N. Y.* 62.

EAST INDIA COMPANY. A body

originally incorporated by the name of "The United Company of Merchants of England trading to the East Indies," but afterwards known by the shorter name of the East India Company. Though first instituted for purposes purely commercial, they gradually acquired immense territorial dominions, by which they became effectively (though subject to the undoubted supremacy of the British crown) the sovereigns of India. Their exclusive right of trading to India was abolished, in 1833, by Stat. 3 & 4 Wm. IV. ch. 85, and they were debarred from engaging, in the future, in commercial transactions. In 1858, by Stat. 21 & 22 Vict. ch. 106, the political powers and rights of the East India Company were transferred to the crown; and by Stat. 36 & 37 Vict. ch. 17, passed in 1873, the company was dissolved as from June 1, 1874. *Mozley & W.* See *Jacob*, for a full account of this company.

EASTER. A festival of the Christian church, appointed in commemoration of the Saviour's resurrection, and recurring (to give a general designation) on the Sunday which falls upon or next after the first full moon after the vernal equinox, — the 21st of March.

Easter dues, or offerings. Small sums of money paid to the parochial clergy in England, by the parishioners, at Easter, as a compensation for personal tithes or the tithe for personal labor.

Easter term. One of the four terms of court in which the business of the English courts has been, for many years, until recently, apportioned. It commenced April 15, and continued, ordinarily, until May 8; but might for special reasons be prolonged till May 13. But, by the judicature act, the division of the year into terms is abolished, so far as concerns the administration of justice.

Eat inde sine die. That he go thence without day. The form of words used in English practice, while proceedings were in Latin, in recording a judgment for a defendant; signifying that he was permitted to go out of court without any further day appointed, by way of adjournment or continuance. The corresponding English words continued to be used when proceedings were conducted in that language.

EATING-HOUSE. Any place where food or refreshments of any kind, not including spirits, wines, ale, beer, or other malt liquors, are provided for casual visitors, and sold for consumption therein. Act of congress of July 13, 1866, § 9, 14 *Stat. at L.* 118.

ECCLESIA. A church or place set apart for the worship of God. Sometimes, also, a worshipping assembly, and a parsonage. *Cowel; Wharton.* It is used for the church, as denoting either the body of Christians or the building set apart for divine worship. *Shipley's Glossary.*

ECCLESIASTIC, *n.* A clergyman; a priest; a man consecrated to the service of the church. Ecclesiastic, *adj.*, or ecclesiastical: that which pertains to or is consecrated or set apart for the service of the church.

Ecclesiastical commissioners. A body of men constituted under English statutes, charged with the general management of the estates of the established church and the proper application of her revenues, and particularly the more equable distribution of the duties and compensation of the clergy.

Ecclesiastical corporation. In English law, a corporation of which the members are entirely spiritual persons, such as bishops, parsons, deans and chapters, archdeacons, &c. 1 *Bl. Com.* 470; 3 *Steph. Com.* 5, 6; *Jacob; Shipley's Glossary.*

In the United States, it has been sometimes used for a corporation organized for the promotion of religion; but the term religious corporation, more extensively in use to express this meaning, is preferable.

Ecclesiastical courts. The name of a class of courts held in England by the authority of the sovereign, as supreme head of the church, having jurisdiction chiefly over matters relating to religion. The lowest in rank were the archdeacon's courts, held before an archdeacon or a judge appointed by him; and the consistory court, held in the cathedral of every diocese before the chancellor or commissary of the bishop of the diocese. The jurisdiction of these is sometimes concurrent, and sometimes that of the former is exclusive of that of the latter. The higher courts of original jurisdiction are the court of arches, court of peculiars, and prerogative court (*q. v.*); and the court

of delegates (*q. v.*) was the great court of appeal. The court of faculties and convocation are sometimes enumerated among ecclesiastical courts, but perform few judicial functions. Under a commission of review, sometimes granted in extraordinary cases, to revise the sentence of the court of delegates when it was apprehended they had been led into a material error, a court was formerly held, called court of commissioners of review, now disused.

The causes chiefly cognizable in these courts were usually classed as pecuniary, matrimonial, or testamentary. Pecuniary causes were such as arose either from the withholding ecclesiastical dues, or the doing or neglecting some act relating to the church, and whereby some damage accrued to the plaintiff; matrimonial causes were such as had reference to marriage, as suits for the restitution of conjugal rights, for divorces, and the like; testamentary causes were such as related to wills and testaments, &c. Jurisdiction over the last two classes was, on the creation of the courts of probate and for divorce and matrimonial causes, transferred to those courts, respectively, and is now vested in the supreme court of judicature. The appellate powers of the court of delegates were transferred to the privy council.

Ecclesiastical law. That body of law, derived largely from the civil and canon law (*q. v.*), which is administered by the English ecclesiastical courts. As it has been restricted in modern times, it embraces little more than administering the judicial authority and discipline incident to maintaining a national church.

EDICT. A public command or ordinance by the sovereign power. The word differs from proclamation in presenting rather the idea of a law made by the very act of announcement; whereas proclamation is the often mere announcement of something previously in force. Edict is appropriate to a law imposed by an individual sovereign, not to an act of legislation by such a body as parliament or congress.

EDUCATE. As used in Tenn. Code, § 2521, empowering the county court to remove a guardian for neglecting to "educate or maintain" his ward, includes proper moral, as well as intellectual and physical, instruction. A guardian may be removed for having contaminating habits, principles, and domestic associations. Ruobs *v.* Backer, 6 *Heisk.* 395.

EFFECT. The manner in which a contract, instrument, or law will operate, as ascertained by construction, is often called its effect.

The phrases "take effect," "be in force," "go into operation," &c., have been used interchangeably ever since the organization of the state. Maize *v.* State, 4 *Ind.* 342.

EFFECTS. That effects may be used as embracing every species of property, real and personal, including things in action, see 1 *N. Y. Rev. Stat.* 599, § 54.

A power of attorney to sell claims and effects cannot be construed to include real property. De Cordova *v.* Knowles, 37 *Tex.* 19.

A ship at sea is included in the general term effects, and will pass, in a conveyance, under the words "goods, merchandise, and effects." Welsh *v.* Parish, 1 *Hill*, (*S. C.*) 155.

A bond is embraced by the words "property, or money, or effects," and therefore may be the subject of a garnishee process. Banning *v.* Sibley, 3 *Minn.* 389.

Stores of provisions, though laid up for household use, were held not embraced within a gift of all the testator's "furniture and other household effects." Foxall *v.* McKenney, 3 *Cranch C. Ct.* 206.

A bequest of "all my effects," in a will executed abroad, was held so far controlled by the context and attending circumstances as not to include assets in the United States. Ennis *v.* Smith, 14 *How.* 400, 420.

A testator devised all the remainder and residue of his "effects both real and personal," and held that the word effects in this connection meant property, and, when joined with the words real and personal, passed the testator's entire estate. Hogan *v.* Jackson, 1 *Cowp.* 299; Shell *v.* Pattison, 16 *East*, 222.

Ei incumbit probatio qui dicit, non qui negat. Upon him who affirms rests the burden of proof, not upon him who denies. This is merely a different form of the rule expressed in the maxim, *affirmanti, non neganti, incumbit probatio*, q. v.

EIGN, EIGNÉ, or EISNÉ. This word, meaning eldest, is usually found in connection with bastard; a *bastard eigné* is a son born before the intermarriage of his parents, in contradistinction to a *mulier puisne*, who is the second or other son born of the same parents subsequently to their intermarriage. It is also spelled *aîné* and *aisné*.

EITHER. Is used in the sense of one *and* the other of two things, as well as in

that one *or* the other. Thus it is common to say, "on either hand," "on either side," meaning on each hand or side. Chidester *v.* Springfield, &c. Railway Co., 59 *Ill.* 87.

EJECT. To cast out; dispossess; evict; oust. Ejection: the act of casting out, dispossessing, evicting, or ousting.

Ejectione custodiæ. Ejectment of ward. The name of a writ in old English practice, issued for the recovery by a guardian of the possession of land of his ward or of the person of the ward, or both, where he had been deprived of the possession.

Ejectione firmæ. Ejectment of farm. The name of a writ at common law, issued in favor of a tenant for a term of years, who had been ejected or ousted by the lessor, reversioner, or remainder-man, or even by a stranger. At first the writ was only for the recovery of damages for the trespass; but it afterwards became a remedy for the recovery of the term itself, or the remaining portion of it, with damages. This writ was the foundation of the modern action of ejectment, in which the question of title to lands is tried, the fictions of a lease, entry, and ouster of a nominal plaintiff being employed merely to make out a case proper for a writ of this nature.

This action was brought against the wrong-doer, whether he were the lessor of the land or not. The lessee had originally no remedy against the ejector but in damages; but, when the courts of equity began to oblige the ejector to make a specific restitution of the land to the party injured, the courts of law often adopted the same method of doing complete justice, and introduced a judgment to recover the term, and a writ of possession thereupon. *Mozley & W.*

EJECTMENT. The name of an action at common law to recover the possession of real property, with damages for the wrongful withholding of it. It was adopted as the usual method of trying titles to land, growing out of the old personal action of *ejectione firmæ* (q. v.), to recover a term for years. Nominally ejectment is merely an action to recover a term for years; but as, in order to recover, the lessor's title must first be made out, a recovery necessarily involves the establishment of the title, and thus effectually, though incidentally, accomplishes the object of the suit. An ordinary controversy in regard to title to land, however, seldom or never presented the facts upon which the strictly personal action of *ejectione firmæ* was founded; a series of fictions was therefore made to supply their place, and formed the distinguishing characteristics of the action of ejectment.

Before bringing the original action, the claimant made a formal entry on the premises, and there, being in possession, delivered a lease to some person (say John Doe) as lessee, and left him in possession, and there he (Doe) stayed till the prior tenant or some other person (say Richard Roe) turned him out. For this injury, Doe, the lessee, was entitled to his action against the prior tenant, or this casual ejector, Roe, whichever it was that ousted him, to recover back his term and damages. But where the action was brought against Roe, the casual ejector, the court would not suffer the actual prior tenant to lose his possession, without an opportunity to defend it; so that, in order to recover the land, it was necessary to make the prior tenant a defendant, if he wished it. In order to maintain the action, the plaintiff must make out four points: title, lease, entry, and ouster; that is, a good title in the lessor, the real claimant; a good lease in the lessee, the nominal plaintiff; entry by Doe, the lessee; and ouster by Roe, the defendant. Then the plaintiff should have judgment to recover his term, and damages.

The action of ejectment was made to rest on fictions corresponding to these facts. It was brought in the name of a fictitious plaintiff, usually John Doe, against a fictitious defendant, usually Richard Roe; the declaration setting forth that, a lease for a term of years having been made to Doe by the claimant, and Doe having entered thereupon, the defendant Roe ousted him, for which Doe claimed damages. Subjoined to the declaration was a notice to appear, addressed to the tenant in possession, informing him that Roe was sued as a casual ejector only, and would make no defence, and advising the tenant in possession to defend his own title; otherwise he, Roe, would suffer judgment to

be taken, and the tenant would be turned out of possession. In the next term, the real claimant, called the lessor of the plaintiff, moved the court in the name of Doe, the fictitious plaintiff, for a judgment against the casual ejector; upon which motion, supported by affidavit of due service of the declaration, the court made a rule as of course for such judgment, unless the tenant in possession should appear and plead to issue, within the time therein mentioned. But the tenant in possession was not allowed so to appear, without having first signed, by his attorney, a consent rule, binding him to confess, at the trial of the cause, the lease made by the lessor of the fictitious plaintiff, the entry of the fictitious plaintiff, and the ouster by himself, the tenant in possession. Having done this, the tenant was allowed by the court to enter an appearance in his own name, and to plead not guilty. After this, the issue was made up and sent down to trial, as in an action on the demise of A B, the lessor of the plaintiff, against C D, the tenant in possession. Under these circumstances, the lease, entry, and ouster being admitted by the tenant in possession, the only question remaining to be tried was the title of the lessor of the plaintiff. Thus the action of ejectment, which in its origin was one for the disturbance of the possession of a lessee, came ultimately to be the recognized method of trying titles to land. (3 *Bl. Com.* 201–206; 3 *Steph. Com.* 392–394, 617–620.) *Mozley & W.*

These fictions have been much criticised, and were finally abolished in England by the common-law procedure act 1852, which prescribed a more simple and direct proceeding for the recovery of the possession, still retaining, however, the name ejectment; and a further and more sweeping change is effected by the judicature acts of 1873 and 1875. In some of the United States, the action has never been adopted; in others, it has been materially modified by statute, generally retaining the name; and, in a few, it still exists in its original form.

Ejectment is a proper remedy for the recovery of corporeal property, not of incorporeal hereditaments, such as a right of way, right of dower. Thus it may be brought upon a right to an estate, either in fee-simple, fee-tail, for life, or for years. The title must be a legal one, and the recovery must be upon the strength of the plaintiff's title, not merely the weakness of the defendant's. The usual plea is not guilty, raising the general issue. The judgment for the plaintiff is in form that the plaintiff recover his term and damages, or, where the fictitious form is abolished, for the possession of the land and damages.

The damages were originally nominal only; and an action of trespass lay to recover the actual damages, *i.e.* the amount of the yearly value of the premises, termed trespass for mesne profits. Such an action might be brought by a plaintiff who had recovered in ejectment, as soon as he had obtained actual possession of the premises. But, in several of the United States, full damages may be recovered as well as the possession, in the original action.

Ejectment originated as far back as the reign of Edw. III., and was then a species of personal action brought to recover damages, only, for the ouster. But towards the end of the 15th century the possession, it was decided, might be recovered by means of it. From that time until the common-law procedure act, 1852, the action was, to a large extent, incumbered with fictions. On the merits, the question tried was, in substance, whether the lessor was, on the day of the alleged demise, entitled to the property in question, if he was, the plaintiff recovered possession. *Brown.*

Ejus est interpretari cujus est condere. It is his to interpret whose it is to enact; the right to interpret belongs to him who has the power to enact. This was a maxim of the civil law, expressing the principle that the emperor, who during the later period of the Roman empire had the exclusive power of enacting laws, had alone the right to interpret the laws. This principle has never been regarded as a rule in the law of England or the United States, in both which countries a careful separation of the power to enact and the power to construe statutes has been maintained. The province of the legislature is not to construe, but to enact; and their opinion, not expressed in the form of law, as a declaratory provision would be, is not

binding upon courts, whose duty it is to expound the statutes they have enacted. Russell *v.* Ledsam, 14 *Mees. & W.* 574; Union Iron Co. *v.* Pierce, 4 *Biss.* 327. Cases where the legislature has declared that a particular term shall have a certain meaning in a statute are not properly exceptions to this rule, such provisions being themselves substantive enactments.

The maxim is sometimes sought to be applied to the acts of individuals, in connection with the doctrine that any one who executes a deed may put any interpretation he pleases upon the terms used by him, provided he makes clear what meaning he attaches to terms which he uses in any other than their ordinary sense. It is true there is, in general, no restriction upon any one using what terms he pleases with whatever meaning he chooses to attach to them; but, to affect others by his peculiar expression or meaning, he must make clearly to appear what the expression used is intended to convey. He cannot subsequently declare a different interpretation of the language of an instrument executed by him, merely on the principle expressed in this maxim.

Ejusdem generis. Of the same class; of the same kind or nature. A term used in expressing the rule that in construction, where an enumeration of certain specific things is followed by a general word or phrase, the word or phrase of general description is to be deemed intended to mean things of the same kind; and cannot include things of a nature wholly different from those specifically mentioned.

ELECT. Generally, to choose; to select a person or thing. Election: choosing; selecting; and sometimes the condition of having been chosen or selected. Elected: chosen; selected.

1. These words have been long and extensively in use to signify the right to choose, or act of choosing, between alternative claims, demands, rights, or obligations; between different pieces of property; between cumulative remedies, &c. At law, a right to elect may arise in many cases. Where a debtor is under obligation to pay either in money or goods, he may elect which he will proffer. So, where a widow is offered a provision by will in lieu of her right of dower, she may elect which she will take. Election, in this general sense, is an important head of equitable jurisprudence, being in some aspects peculiarly subject to equitable principles.

Election is when a man is left to his own free will to take or do one thing or another which he pleases. (*Cowel.*) But it is more frequently applied to the choosing between two rights by a person who derives one of them under an instrument in which an intention appears (or is implied by a court of law or equity) that he should not enjoy both. (*Sm. Man. Eq.; Haynes Eq.; Chute Eq.*) *Mozley & W.*

The doctrine of election, strictly so called, is derived from the civil law, and is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both. Every case of election, therefore, presupposes a plurality of gifts or rights, with an intention, expressed or implied, of the party who has a right to control one or both, that one should be a substitute for the other. The party who is to take has a choice, but he cannot enjoy the benefits of both. It has been said that the doctrine constitutes a rule of law, as well as of equity; and that the reason why courts of equity are more frequently called upon to consider the subject is, that, in consequence of the forms of proceeding at law, the party cannot be put to elect. 2 *Story Eq. Jur.* ch. xxx.

2. In England to a considerable extent, and still more frequently in the United States, elect and election signify to choose, and the choosing of officers, by public vote or by votes of a board or body of persons. Appoint (*q. v.*), when used in contradistinction to election, implies an individual power to select, as by the president or governor.

The right of either house of congress, or of the British house of commons, to be the exclusive judge of election of members, seems derived from the declaration of rights put forth by the house of commons in 1604. See *Brown.*

Election, as used in Alabama statutes concerning the time of filing official bonds, means the act of casting and receiving the ballots, the day and time of voting; it does not refer to the date of the certificate of election. State *v.* Tucker, 54 *Ala.* 205.

Elected. This word, in its ordinary signification, carries the idea of a vote, generally popular, sometimes more restricted,

and cannot be held the synonyme of any other mode of filling a position. Clarke *v.* Irwin, 5 *Nev.* 111, 121.

No one is elected at a popular election, unless there are more ballots cast for him than for any other person, whether there is or is not, in fact, any such other person in existence who can take the office. People *v.* Molitor, 23 *Mich.* 341; compare Switzler *v.* Rodman, 48 *Mo.* 197.

Election district, means a subdivision of territory marked out by known boundaries, prearranged and declared by public authority, though perhaps not defined by the constitution. These are recognized as among the civil institutions of the state which can neither be created nor controlled by the military power. Chase *v.* Miller, 41 *Pa. St.* 403.

Election district, as used in the constitution and laws of Pennsylvania, may be defined to be any part of a city or county, the boundaries of which are fixed by law, either by legislative enactments or by the adjudication of a court, or other authorities to whom the power is delegated, when the citizens within the boundaries thus established assemble to vote for public officers, whether their authority is local, or they act in governing the affairs of the state or nation. McDaniels' Case, 2 *Pa. L. J. R.* 82.

Election officer. The governor of a state is not within the meaning of the act of congress of May 31, 1870, 16 Stat. at L. 145, § 22, which makes it criminal for any election officer fraudulently to make any false certificate of the result of any congressional election. United States *v.* Clayton, 2 *Dill.* 219.

Elector. The use of this word relates almost exclusively to the second of the above-mentioned senses of elect. One who makes choice between alternative rights or obligations is never, or very seldom, termed an elector; the word almost always signifies a person who has the right to cast a vote for a public officer.

A statute requiring a vote of the majority of the electors of a county at a general election, as a prerequisite to a change of the county seat, must be construed as requiring merely a majority of those actually voting. They who vote must be considered to be the electors: a different construction would lead to absurd consequences. Taylor *v.* Taylor, 10 *Minn.* 107.

Electors of president, or presidential electors. These are persons upon whom, by the constitution of the United States, the formal legal choice of a president and vice-president is made finally to depend. The constitution, art. 2, § 1, provides that each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the congress. At the present day, the designated mode of choosing these electors is, in every state, a popular election.

ELEEMOSYNARY. Applied to corporations, this term distinguishes as a class those corporations which are constituted for charitable purposes; or, as they have often been described, those constituted for the perpetual distribution of free alms, or of the bounty of the founder.

Eleemosynary corporations are such as are constituted for the perpetual distribution of the free alms and bounty of the founder, in such manner as he has directed; and in this class are ranked hospitals for the relief of poor and impotent persons, and colleges for the promotion of learning and piety, and the support of persons engaged in literary pursuits. These corporations are lay, and not ecclesiastical, even though composed of ecclesiastical persons, and although they in some things partake of the nature, privileges, and restrictions of ecclesiastical bodies. 1 *Bl. Com.* 471.

Eleemosynary corporations are for the management of private property according to the will of the donors. They are private, lay corporations, such as colleges, hospitals, &c. They differ from civil corporations in that the former are the mere creatures of public institution, created exclusively for the public advantage, and subject to governmental control and visitation; whereas a private corporation, especially one organized for charitable purposes, is the creature of private benefaction, endowed and founded by private individuals, and subject to their control, laws, and visitation, and not to those of the government. (Washington, J., in Dartmouth College *v.* Woodward, 4 *Wheat.* 518, 660.)

A corporation for religious and charitable purposes, which is endowed solely by private benefactions, is a private eleemosynary corporation, although it was created by a charter from the government. Society for the Propagation of the Gospel *v.* Town of New Haven, 8 *Wheat.* 464, 480.

ELEGIT. He has chosen. The name of a writ of execution upon judgments for debt or damages, or upon recognizances, commanding the sheriff to seize and deliver to the judgment creditor all the debtor's goods and chattels (beasts of the plough excepted), and, if these were not sufficient, a moiety of the judgment debtor's lands, to hold until, out of the rents and profits thereof, the

debt be levied, or till the debtor's interest be expired. This writ was authorized in England by the statute of Westminster 2 (13 Edw. I. ch. 18), which gave to a plaintiff his election to have either the ordinary *fieri facias* or this form of execution; whence the name is derived. Previous to that statute, a man could only have the profits of lands of a debtor in satisfaction of his judgment, but not the possession of the lands themselves. Under this writ the judgment debtor's goods and chattels were appraised and delivered to the creditor in satisfaction of his debt. If they should prove insufficient, then one-half of the debtor's lands of freehold tenure was further to be delivered over to the judgment creditor, to hold until the debt was levied, or the debtor's interest therein had expired. By Stat. 1 & 2 Vict. ch. 110, § 11, it was provided that, under an *elegit*, the sheriff should deliver execution of all the debtor's lands, including those of copyhold or customary tenure. The writ is in use in some of the United States, with various modifications introduced by statute.

The creditor, while in the enjoyment of an estate under a writ of *elegit*, was called tenant by *elegit*, and his estate an estate held by *elegit*.

The writ of *elegit*, when issued pursuant to the statute of Alabama, recites the recovery of a judgment, and the plaintiff's election of that mode of execution; it then commands the sheriff that he cause to be delivered all the goods and chattels of the defendant, saving the oxen and beasts of the plough, and also a moiety of all his lands and tenements, in the county whereof he, at the day of obtaining the judgment, was seised, or at any time afterwards, by reasonable price and extent; to have and to hold the said goods and chattels and the said moiety as his freehold, to him and his assigns, until he shall have levied thereof the debt and damages. It also commands the sheriff to certify, under his own seal, and the seals of those by whose oath he makes the extent and appraisement, how he executes the writ. In making the inquisition and appraisement, a jury is sworn, who ascertain what goods and chattels the defendant possessed on the day of the caption of the inquisition, which goods and chattels are delivered to the plaintiff; but, as to the lands and tenements, the inquisition extends back to the time of rendering the judgment, as well as to those of which the defendant was seised at the time of the inquisition. Morris *v.* Ellis, 3 *Ala.* 560.

ELIGIBLE. A provision in a state constitution that no person holding a lucrative office under the United States, or any other power, shall be eligible to any civil office of profit in the state, excludes any person who is not eligible at the time of his election. The subsequent removal of a then existing ground of ineligibility will not be sufficient. Searcy *v.* Grow, 15 *Cal.* 117; State *v.* Clarke, 3 *Nev.* 566.

The term eligible to office relates to the capacity of holding, as well as the capacity of being elected to, an office. Carson *v.* McPhetridge, 15 *Ind.* 327.

ELONGATA. Eloigned; carried beyond the jurisdiction. The name of a return made by a sheriff to a writ of replevin, that the chattels have been removed, so that he cannot execute the writ; upon which return a *capias in withernam* issues.

ELONGATUS. Eloigned; conveyed beyond the jurisdiction. The name of a return made by a sheriff to a writ *de homine replegiando*, that the person to be replevied has been conveyed beyond the jurisdiction of the officer.

ELSEWHERE. At or in another place.

Where one devised all his land in A, B, and C, three distinct towns, and elsewhere, and had lands of much greater value than those in the towns named in another county, it was held that the lands in the other county should pass by the word elsewhere; which was adjudged to be the same as if the testator had said he devised all his lands in the three towns particularly mentioned, or in any other place whatever. Chester *v.* Chester, 3 *P. Wms.* 56.

As to the effect of the word elsewhere, in the case of lands not purchased at the time of making the will, see Guidot *v.* Guidot, 3 *Atk.* 254.

Where a seaman shipped on a trading voyage to the Pacific Ocean, or elsewhere, and from thence back to Boston, with a stipulation that two months' wages should be paid at Canton, it was held that the outward voyage terminated at Canton, and a return to the north-west coast from Canton was not authorized; and that therefore it was not a desertion in the mariner to leave the ship at Canton, the ship being about to return to the north-west coast. The words or elsewhere, in such shipping articles, if not void from uncertainty, must be construed in subordination to the principal voyage stated in the articles. Brown *v.* Jones, 2 *Gall.* 477.

EMANCIPATION. Setting a person free from the power of another. In the Roman law, the term *emancipatio*

denoted the enfranchisement of a son by his father; as the result of which he was freed from the *patria potestas*. This was anciently effected by the formality of a triple sale, under the law of the twelve tables: "if a father sells a son thrice, let the son be free from the father." By Justinian, the simpler proceeding of a manumission before a magistrate was substituted for this imaginary sale.

In the modern civil law, emancipation of minors is recognized and frequently practised. Thus, in France, under the Code Napoleon, the father, or the mother, if a widow, may, by a simple declaration, emancipate a child at the age of fifteen years; and the marriage of a child, at whatever age, operates an emancipation. An orphan of the age of eighteen years may be emancipated by a decision of the *conseil de famille*. The effects of emancipation are to render the child competent to act generally on his own account in all matters of a purely administrative character; but he remains subject to all former disabilities in respect of the alienation of capital, of real estate, of loan transactions, and the like. If a trader, his capacity is nearly unlimited. So, under the civil law as it exists in Louisiana, the emancipation of minors is expressly recognized and regulated, *La. Civ. Code*, art. 367 *et seq.*; and confers upon the minor rights and powers very similar to those obtained by him under the provisions of the Code Napoleon.

In English law, the doctrine of filial emancipation is recognized in determining the parochial settlement of paupers. The term emancipation is also frequently applied, in popular use in England and the United States, to the manumission or enfranchisement of slaves. Compare MANUMISSION.

EMBARGO. An edict, or order of the sovereign power, prohibiting vessels lying within specified ports of the nation from departing. Such an order is a *quasi* belligerent measure, and is only issued in time of war, or in anticipation of it, or by way of reprisal. The term is not appropriate for a restriction upon the sailing of vessels incident to the ordinary enforcement of the customs laws. It contrasts with blockade, being a measure which prevents vessels in the home ports from leaving; while blockade forbids vessels at sea from entering the specified ports in enemy's country.

Embargo is the hindering or detention by any government of ships of commerce in its ports. If the embargo is laid upon ships belonging to citizens of the state imposing it, it is called a civil embargo; if, as more commonly happens, it is laid upon ships belonging to the enemy, it is called a hostile embargo. The effect of this latter embargo is that the vessels detained are restored to the rightful owners if no war follows, but are forfeited to the embargoing government if war does follow, the declaration of war being held to relate back to the original seizure and detention. *Brown.*

The term embargo is borrowed from the Spanish law procedure, and signifies arrest or sequestration; and it is applied to the seizure or detention of persons or property which happen to be within the territory of the nation at the time of seizure. *Mozley & W.*

Embargo, as used in the embargo act of congress of Jan. 9, 1808, means a probibition to sail. The William King, 2 *Wheat.* 148, 153.

Embargo is a temporary suspension of trade. McBride *v.* Mar. Ins. Co., 5 *Johns.* 299. Embarrassing 12 Wall 1

EMBEZZLEMENT. The name of a statutory offence which consists in the fraudulent appropriation of property by a person to whom it has been intrusted.

The definitions given by the English law dictionaries do not extend the term beyond misappropriations by agents, clerks, and servants; but as we understand the usage of the word in the United States, misappropriations by public officers are included.

It must not be understood that every fraudulent appropriation of property received in trust is a criminal embezzlement. That is the general nature of the offence. But whether such appropriation is a crime, or only a breach of the trust, depends on the statute of the jurisdiction. Embezzlement is an offence of statutory creation; what persons may be guilty of it, and what property is subject of it, cannot be discriminated with precision, except by reference to the statutes of the jurisdiction. See 2 *Bish. Cr. L.* § 325.

With respect to the character of the wrongful appropriation involved, embezzlement is one of four crimes affecting property which require to be carefully distinguished; the other three being

robbery, larceny, and extortion. All four include the criminal acquisition of the property of another. In robbery, this is accomplished by means of force or fear, and by overcoming or disregarding the will of the rightful possessor: there is a taking from him *against* his consent, his physical power to resist being overcome by force, or his moral power to refuse being prostrated by fear. In larceny, there is still a taking; but it is accomplished by fraud or stealth: the property is taken, not against the consent of the owner, but *without* it. In extortion, there is still a taking: it is *with* the consent of the person injured; but this is a consent induced by threats under color of some official power. In embezzlement, there is no taking in the technical sense; that is, no taking from the possession of another; but the offender, being in possession of the property in virtue of some trust which the law deems worthy of special sanction, applies it by fraud or stealth to his own use. Thus extortion partakes in an inferior degree of the nature of robbery; while embezzlement shares that of larceny. *Rep. N. Y. Penal Code*, § 584, note.

Embezzlement is the fraudulent appropriating to one's own use the money or goods intrusted to one's care and control by another. Fagnan *v.* Knox, 40 *N. Y. Superior Ct.* 41.

There may be, under Iowa Rev. § 4244, an embezzlement of commercial securities or evidences of debt, as of a United States treasury draft; even though drawn in favor of the state, and payable to the governor, and not yet indorsed by him. State *v.* Orwig, 24 *Iowa*, 102.

In Massachusetts, there may be embezzlement of a mortgage. Commonwealth *v.* Concannon, 5 *Allen*, 502.

Embezzled, as used in Gen. Stat. ch. 118, § 107, — providing for the examination on oath, in a court of insolvency, of persons charged with having fraudulently received, concealed, embezzled, &c., the property of an insolvent debtor, — is not to be construed as referring to a criminal embezzlement. Its meaning is rather to be found in the words with which it is connected, and as importing an act which is a violation of a civil right, and not the technical offence of embezzlement under the statute. Sawin *v.* Martin, 11 *Allen*, 439.

To convict an agent on a charge of embezzlement, four propositions must be proved: that he was an agent; that he received the money in the course of his employment; that it was money belonging to his principal; and that he converted the money to his own use, with the intent to steal and embezzle it. *Exp.* Hedley, 31 *Cal.* 108.

A stage-driver, intrusted by his employers to carry money, may be chargeable with embezzlement. People *v.* Sherman, 10 *Wend.* 298.

So may a servant taking to his own use the money, goods, &c., of his master, and those of other persons coming under his care by reason of his employment. People *v.* Hennessy, 15 *Wend.* 147.

So may a bar-keeper fraudulently converting to his own use a letter containing money, with which he was sent to the post-office. People *v.* Dalton, 15 *Wend.* 581.

If a servant appropriates to his own use bank-bills, obtained by him at a bank, on a check drawn by his master, it is an embezzlement, and not a larceny. Commonwealth *v.* King, 9 *Cush.* 284.

The treasurer of a railroad corporation is an "officer, agent, clerk, or servant of an incorporated company," within Mass. Rev. Stat. ch. 126, § 29, relating to embezzlement by such persons. Commonwealth *v.* Tuckerman, 10 *Gray*, 173.

The state treasurer is an "officer" included within Mich. Comp. Laws, § 5771, making any officer, clerk, or other person employed in the treasury of the state liable to punishment for embezzlement; and the word treasury refers to no particular building or locality; but money is "in the treasury" when within the custody or control of the treasurer. People *v.* McKinney, 10 *Mich.* 54.

A person who is employed to collect bills for the proprietors of a newspaper establishment, and converts to his own use the money which he collects for them, is not such an agent or servant in respect of the money he collects, as to be punishable for embezzlement for converting it. Commonwealth *v.* Libbey, 11 *Metc.* (*Mass.*) 64.

Neither is a constable who is employed to collect demands. People *v.* Allen, 5 *Den.* 76.

Neither is a person casually employed by an individual to receive money in a single message and pay it out. Lewis *v.* Kendall, 6 *How. Pr.* 59.

Neither is a tenant in common with an intestate, who removes the property, but without denying the right of the estate, or refusing to account. Batchelder *v.* Tenney, 27 *Vt.* 578.

A mechanic receiving materials to be made into shoes at his own shop is not an agent or servant of the person furnishing the leather, within the law of embezzlement. Commonwealth *v.* Young, 9 *Gray*, 5.

Fraudulent conversion to one's own use of money paid to him by mistake is not embezzlement, within Mass. Stat. 1857, ch. 233. Commonwealth *v.* Hays, 14 *Gray*, 62.

Under Ky. Rev. Stat. ch. 28, art. 12, § 1, the agent of a corporation is liable for em-

bezzlement if he fraudulently converts to his own use money "placed under his care or management as such officer;" but the rule is different as to the agent of an individual. Such an agent does not commit a felony, unless he converts to his own use money intrusted to him for delivery at some place, or to some person. Barclay *v.* Breckenridge, 4 *Metc.* (*Ky.*) 374.

EMBLEMENTS. Crops; standing and ripening grain, the product of annual sowing. Also, an incorporeal right of one not the general owner of the soil to reap or gather such crops, in virtue of his having sown it while in lawful occupation.

Bouvier defines the word to mean the privilege of reaping the crop; Burrill and Jacob say it means the "profits" of the crop, which perhaps involves the same idea. Our observation is, that it is often used for the crops or grain themselves; though, strictly, it may mean the privilege of reaping or gathering. Wharton and Mozley & Whiteley distinctly define the word as meaning the crops themselves.

Emblements are the away-going crop; in other words, the crop which is upon the ground and unreaped when the tenant goes away, his lease having determined; and the right to emblements is the right in the tenant to take away the away-going crop, and for that purpose to come upon the land, and do all other necessary things thereon. *Brown.*

Emblements: the growing crops of those vegetable productions of the soil which are annually produced by the labor of the cultivator. They are deemed personal property, and pass as such to the executor or administrator of the occupier. *Wharton.*

The vegetable chattels called emblements are the growth of the earth produced annually, not spontaneously, but by labor and industry. Reiff *v.* Reiff, 64 *Pa. St.* 134.

EMBRACERY. The offence of proffering to jurors money, entertainments, entreaties, promises, or threats, or other improper inducements, with intent corruptly to influence their action. Embraceor, or embracer: a person guilty of attempting, by improper inducements, to influence a jury.

Embracery is any attempt or effort corruptly to influence a jury, whether it is successful or not. There is no such crime recognized by law as an attempt to commit embracery. State *v.* Sales, 2 *Nev.* 268.

Embracery consists in an attempt to influence a jury corruptly; whether this be done by persuasion or bribery is immaterial. Grannis *v.* Brandon, 5 *Day*, 260.

Embraceor is one who, when a matter is in trial between party and party, comes to the bar with one of the parties, having received some reward so to do, and speaks in the case; or privately labors the jury, or stands in the court to survey and overlook them, whereby they are awed or influenced, or put in fear or doubt of the matter. (*Stat.* 19 *Hen. VII.* ch. 13.) But lawyers, attorneys, &c., may speak in the case for their clients, and not be embraceors; also, the plaintiff may labor the jurors to appear in his own cause; but a stranger must not do it: for the bare writing a letter to a person, or parol request for a juror to appear, not by the party himself, hath been held within the statutes against embracery and maintenance. (*Co. Litt.* 369; *Hob.* 294; 1 *Saund.* 391.) If the party himself instruct a juror, or promise any reward for his appearance, then the party is likewise an embraceor. And a juror may be guilty of embracery where he, by indirect practices, gets himself sworn on the tales, to serve on one side. (1 *Lill.* 513.) *Jacob.*

EMINENT DOMAIN. A superior right inherent in society, and exercised by the sovereign power, or upon delegation from it, whereby the subject-matter of rights of property may be taken from the owner and appropriated for the general welfare.

Able jurists and writers have considered eminent domain as a residuum or reserved portion of the right of property; as if society in the aggregate were conceived as the original owner of all subjects of property, and as parting with its ownership to individuals, reserving a right to recall the gift, in event of a public exigency requiring it to be resumed. Such a thought may be useful in systematizing human ideas of the subject, but it is in the last degree theoretic. There are no facts to sustain or to contradict such reasonings: one has as good grounds for imagining that in the origin of things individuals owned all appropriated property, and that they gradually constituted society, and vested in it such general authority over property as seemed necessary, as there is for supposing that society was the primary owner, and gave property to individuals, reserving a right of recall.

The latter theory is, however, the basis of many ideas and terms in the established law, and might well warrant defining eminent domain as a reserved portion of the property in things. But, as the words "eminent domain" and

"property" are ordinarily employed, we think the latter suggests a right complete in an owner. The whole property in land is usually deemed to be vested in the owner of the unlimited fee; and eminent domain presents itself to the mind as a right of government superior to property. Thus the language of N. Y. Const. 1846, § 13, — "all lands within this state are declared to be allodial, so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners according to the nature of their respective estates,"— better accords with an idea that eminent domain is a right outside of and superior to property, than with a theory that it is a portion of property, reserved by the state.

Eminent domain must be distinguished from public domain. The latter is a concrete term, signifying the corporeal landed property owned by the state or nation. The former is an abstract right, — a right to take property of individuals for public use.

Eminent domain is the right which a government retains over the estates of individuals to resume them for public use. *Wharton.*

It is the ultimate right of the sovereign power to appropriate not only the public property, but the private property of all the citizens within the territorial sovereignty, to public purposes. Charles River Bridge *v.* Warren Bridge, 11 *Pet.* 420, 641; Symonds *v.* City of Cincinnati, 14 *Ohio*, 147, 173.

The right of society, or of the sovereign, to dispose, in case of necessity, and for the public safety, of all the wealth contained in the state, is called eminent domain. Jones *v.* Walker, 2 *Paine*, 688.

Eminent domain is the highest and most exact idea of property remaining in the government, or in the aggregate body of the people in their sovereign capacity. It gives a right to resume the possession of the property in the manner directed by the constitution and the laws of the state, whenever the public interest requires it. Beekman *v.* Saratoga, &c. R. R. Co., 3 *Paige*, 45, 73.

The right of eminent domain confers upon the legislature authority to take private property for public purposes, when the public exigencies require it, subject only to the constitutional exaction of just compensation. Wells *v.* Somerset, &c. R.R. Co., 47 *Me.* 345.

Eminent domain is distinguished from public domain, which is property, such as public lands, buildings, &c., owned exclusively hy the state in the same manner as an individual holds his property. 2 *Kent Com.* 339; Memphis *v.* Overton, 3 *Yerg.* 387; West River Bridge *v.* Dix, 6 *How.* 507.

There is a manifest distinction between the taxing power and that of eminent domain. Though both are means of appropriating private property to public use, yet taxation exacts money from individuals as their share of a public burden, the compensation being the benefits conferred by the government in the proper application of the tax; while, by the exercise of the power of eminent domain, private property is taken, not as the owner's share of a public burden, but as so much in excess of his share. Special compensation is therefore to be made. *Blackw. Tax Titles*, 1; and see TAXES.

EMIT. Emit is never employed in describing those contracts by which a state binds itself to pay money at a future day for services actually received, or for money borrowed for present use. Nor are instruments executed for such purposes, in common language, denominated "bills of credit." "To emit bills of credit," as used in the United States constitution, conveys to the mind the idea of issuing paper intended to circulate through the community, for its ordinary purposes, as money; which paper is redeemable at a future day. This is the sense in which the terms have always been understood. Craig *v.* State of Missouri, 4 *Pet.* 410, 431; compare Briscoe *v.* Bank of Kentucky, 11 *Id.* 257.

EMPHYTEUSIS. An estate in lands, under the Roman law, very analogous to a fee farm, or perpetual lease, in English law. It gave an occupant of lands the perpetual use, upon payment of rent.

EMPLOYE, is more extensive than "clerk" or "officer." It signifies any one in place, or having charge or using a function, as well as one in office. Stone *v.* United States, 3 *Ct. of Cl.* 260.

The police of the capitol at Washington have been held to be "civil officers" or "employes," within the meaning of the joint resolution of congress of Feb. 22, 1867 (14 Stat. at L. 569), giving increased compensation to certain civil employes of the government at Washington. Mallory *v.* United States, 3 *Ct. of Cl.* 257.

EMPLOYED. To be employed in any thing, means not only the act of doing it, but also to be engaged to do it; to be under contract or orders to do it. United States *v.* Morris, 14 *Pet.* 464, 475; United States *v.* The Catherine, 2 *Paine*, 721, 745.

A statute that no person shall be employed as a teacher, unless he has received a certificate, is not infringed because at the time when the teacher became engaged he had no certificate, if he subsequently, and before entering upon the discharge of his duties as teacher, procured the requisite

certificate. The teacher is not "employed" within the meaning and intent of this provision, until he engages in the discharge of his duties as teacher. The mischief intended to be guarded against was the teaching of a school by an incompetent person, and not the making of the contract by an incompetent person. School District No. 2 *v.* Dilman, 22 *Ohio St.* 194.

Emptor emit quam minime potest, venditor vendit quam maxime potest. The buyer purchases for the lowest price he can, the seller sells for the highest price he can. The law recognizes the right of both the buyer and seller to make each for himself the best bargain he can, by fair means, and does not interfere where no imposition is practised. The maxim is also cited as sustaining the rule that a person who sells property of another, acting as the agent or on behalf of such other, cannot properly become himself the purchaser.

EN. In. The French equivalent of the English and Latin preposition in, used as a component of many words and phrases of frequent occurrence in law; as to which, in their English or Latin form, see IN. Phrases which are commonly or exclusively found in the French form are the following:

En auter droit. In another's right. See AUTER DROIT.

En demeure. In default. Used in Louisiana of a debtor who fails to pay on demand according to the terms of his obligation. See Bryan *v.* Cox, 3 *Mart.* (*La.*) N. S. 574.

En gros. In gross. Total; by wholesale.

En ventre sa mère. In its mother's womb. A term applied to a child before birth. For some purposes — as of inheritance — a child yet *en ventre sa mère* is considered as in being.

ENABLING ACT, or STATUTE. An enactment conferring power to do something which, before it was passed, the persons affected could not do, is often called an enabling statute.

ENAJENACION. In a conveyance under Mexican law, the words *enajenacion . . . del terreno*, without any limiting term, convey the fee of the premises, and not a usufruct therein. Mulford *v.* Le Franc, 26 *Cal.* 88.

ENCLOSURE. Is not so broad a term as close. Porter *v.* Aldrich, 39 *Vt.* 326.

Enclosure, in a statute limiting one's right to distrain beasts to those doing damage within his enclosure, means a tract of land surrounded by an actual fence, together with such fence, and does not include that part of a public highway of which the fee belongs to the owner of such adjoining enclosure. Taylor *v.* Welbey, 36 *Wis.* 42.

What fence surrounding is necessary to constitute such an enclosure that "any person may impound any beast found in his enclosure doing damage," under Vt. Gen. Stat. ch. 100, § 4, see Keith *v.* Bradford, 39 *Vt.* 34.

ENCROACH. To intrude upon, occupy, or use the lands or authority of another, as if by a gradual or partial assumption of right on the part of a neighbor. Compare ACCROACH.

Encroachment: an unlawful gaining upon the rights or possessions of another. *Cowel.*

En déclaration de simulation. This is a form of action derived from the civil law, and in use in Louisiana. Its object is to cause to be judicially declared simulated acts, the appearance of which is contrary to truth. It should be distinguished from the revocatory action, the object of which is to avoid serious but fraudulent contracts. Erwin *v.* Bank of Kentucky, 5 *La. Ann.* 1.

The action *en déclaration de simulation* is an action to have a contract declared judicially a simulation and a nullity, to remove a cloud from the title, and to bring back, for any legal purpose, the thing sold to the estate of the true owner. Edwards *v.* Ballard, 20 *La. Ann.* 169.

ENDOW. 1. To confer a right of dower. Endowing, or endowment: the assuring or bestowing dower upon a woman.

2. To make permanent provision for the support of a corporation or institution, by appropriating lands or funds as a source of regular and reliable income. Endowment, in this connection, often signifies the fund or property thus bestowed.

Endowment is wealth applied to any person or use. The assuring dower to a woman; the setting forth a sufficient portion for a vicar towards his perpetual maintenance, when the benefice is appropriated. *Cowel.*

It means the bestowing or assuring of dower on a woman. It is sometimes used metaphorically for the settling a provision upon a parson, or building of a church or chapel; and the severing a sufficient portion of tithes, &c., for a vicar, towards his perpetual maintenance, when the benefice is appropriated. *Jacob.*

The term is commonly applied to any provision for the officiating minister of a church, the provision usually consisting in

the setting apart of a portion of lands for his maintenance. *Brown.*

Endowment, according to common right, is where the widow has assigned to her one-third out of each tract or parcel of the land. Where, by her consent, the whole of one or more of the several tracts or parcels is assigned to her, in lieu of one-third of each tract, this is called endowment against common right. French *v.* Pratt, 27 *Me.* 381.

The words "endowment" and "fund," in a statute exempting from taxation the real estate, the furniture and personal property, and the "endowment or fund" of religious and educational corporations, are *ejusdem generis*, and intended to comprehend a class of property different from the other two, not real estate or chattels. The difference between the words is, that fund is a general term, including the endowment, while endowment means that particular fund, or part of the fund, of the institution, bestowed for its more permanent uses, and usually kept sacred for the purposes intended. The word endowment does not, in such an enactment, include real estate. State *v.* Lyon, 32 *N. J. L.* 360.

Endowment does not necessarily mean that land and tithes must be annexed to the living, in exclusion of any other provision or means of support; but a stipend, rents, emoluments, and advantages of any kind, given and secured to the minister or pastor of a church during the time he shall officiate as minister of such church, as a compensation for his services, is an endowment. Runkel *v.* Winemiller, 4 *Har. & M.* 429, 451.

Endowed schools. In England, certain schools having endowments are distinctively known as endowed schools; and a series of acts of parliament regulating them are known as "the endowed schools acts." *Mozley & W.*

ENEMY. In public law, signifies either the nation which is at war with another, or a citizen or subject of such nation. It is sometimes applied where hostilities are in preparation only. And, in its application to individuals, it may mean a person in the service of a nation at war, though not its subject.

Where a policy insured a vessel against perils by "enemies, pirates, and assailing thieves," and "all such losses which shall come to the damage of said steamer, according to the true intent and meaning of the policy," and the vessel was captured by an armed force acting under the authority of the so-called confederate states of America, it was held that the loss was within the policy. Though the term enemies, when rigidly construed, means public enemies, so that the policy in strictness would hardly cover the loss, yet as indemnity is the object of insurance, and as it is a rule in marine policies that where the loss is of a like nature with the specified peril, or substantially within its meaning, the underwriters are liable, the loss should be deemed covered by the peril of "enemies" insured against. Monongahela Ins. Co. *v.* Chester, 43 *Pa. St.* 491.

Indians at peace with the United States are in no received sense of the word an enemy, and cannot be judicially considered as embraced within it. 4 *Op. Att.-Gen.* 81.

ENFEOFF. Is the verb corresponding to the noun feoffment (*q. v.*), and means to vest a freehold estate in lands, by means of feoffment.

ENFORCE. Power conferred by statute on state's attorneys to "enforce the collection of fines," &c., implies a power to receive the fine, or the amount of any judgment rendered for a fine, and to give a receipt which will discharge the party; and the attorney may authorize the payment of the money into a bank or to a county treasurer, for his use, instead of receiving it directly. People *v.* Christerson, 59 *Ill.* 157.

ENFRANCHISE. To make free of a city; to confer membership in a public corporation, involving political privileges and rights. To give political capacity and power, such as is exercised by members of the community in distinction from officers. Enfranchisement: the gift of political freedom and capacity.

The term was formerly connected with those features of the political system of England in early times, under which any right of an individual to vote upon election of officers or administration of public affairs was a franchise arising out of and dependent on his membership of some public corporation. It is now often used to mean a grant of such rights, without any implication of corporate membership.

Enfranchise is to make free, or incorporate a man into any society, &c.

Enfranchisement takes place when a person is incorporated into any society or body politic; and it signifies the act of incorporating. He that by charter is made a denizen or freeman of England, is said to be enfranchised, and let into the general liberties of the subjects of the kingdom; and he who is made a citizen of London, or other city, or free burgess of any town corporate, as he is made partaker of those liberties that appertain to the corporation, is, in the common sense of the word, a person enfranchised. A villein was said to be enfranchised, when he was made free by his lord, and rendered capable of the benefits belonging to freemen.

Enfranchisement is a word which is now used principally in three different senses:

Of the manumission of slaves by their

masters, or by an act of the supreme legislature within whose jurisdiction they are.

Of giving to a borough or other constituency a right to return a member or members to parliament

Of the conversion of copyhold into freehold, giving the lord of the manor a compensation in money, secured, if necessary, by a mortgage, in lieu of his manorial rights. *Mozley & W.*

Enfranchisement of copyhold, signifies the conversion of a copyhold estate into a freehold.

The mode of enfranchisement is regulated at the present day by Stat. 4 & 5 Vict. ch. 35, and the copyhold acts, 1852 and 1858, under which acts great facilities are afforded for the commutation of the lord's customary rights; moreover, enfranchisement is rendered compulsory at the wish either of the lord or of the copyhold tenant, with this difference in the two cases, namely, that if the compulsory enfranchisement is made at the wish of the tenant, the commutation of the lord's rights consists in a gross sum of money, either paid at the time of the completion of the enfranchisement, or secured by a mortgage of the lands; whereas, when the compulsory enfranchisement is made at the wish of the lord, the commutation of his rights consists in an annual rent-charge issuing out of the lands enfranchised. The effect of enfranchisement is, to discharge the lands of all customary incidents, *e.g.* the custom of descent to the customary heir, and to annex to them all the incidents of freehold lands. *Brown.*

ENGAGE. One definition is, "to bind by appointment or contract." In common parlance, it is often used as synonymous with promise. "I engage to do or omit to do an act," is nothing more than a promise to do or omit it. Rue *v.* Rue, 21 *N. J. L.* 369, 379.

ENGRAVE. Does not include the process of reproducing pictures by means of photography. Wood *v.* Abbott, 5 *Blatchf.* 325.

ENGROSS. 1. To write in a gross or large, fair hand; to transcribe for permanent use. Engrosser: a scribe who copies documents in permanent form. Engrossing: the act or business of making formal permanent copies.

The word, in this sense, is most frequently applied to deeds and to statutes, particularly the latter, which at one stage of legislative proceedings are "passed to be engrossed."

2. Engrossing is also the name of an offence at common law, consisting in the practice of buying up large quantities of provisions with intent to enhance the market price by creating a scarcity, and thereby to sell at a profit.

The modern law scarcely recognizes this as a crime; though employment by speculators of fraudulent means to enhance the price of merchandise which they hold in large quantities may be punishable.

ENITIA PARS. The eldest's part. A term applied in English law to the share which, upon a voluntary partition among coparceners, the eldest took by her right of first choice.

ENJOIN. Is used in two senses apparently contradictory. Most frequently it signifies to prohibit by decree of a court of equity. See INJUNCTION. Sometimes it means to command, as in such expressions as to enjoin silence.

ENLARGE. Has some technical uses, but they do not involve any meaning of the word itself different from the vernacular sense, but are instances of meaning dependent on connection. To enlarge an order or rule of court is to extend or increase the time for complying with it. To enlarge an estate is to increase the tenant's interest, as where the tenant in remainder conveys to the tenant of the first estate, thus increasing his estate to a fee. To enlarge a prisoner is to set him at large or at liberty. An enlarging statute is one which extends a right or remedy given by the common law.

Enlarge is commonly used in connection with rules calling upon either party to an action or suit to do a certain thing by a specified day; the judges in such a case will, on sufficient grounds being shown for so doing, enlarge the time originally specified for doing the act, in which case the rule is said to be enlarged, meaning that the time specified in it has been enlarged, *i.e.* extended. *Brown.*

ENLIST. The words "enlist" and "enlistment," in law, as in common usage, may signify either the complete fact of entering into the military service, or the first step taken by the recruit towards that end. When used in the former sense, as in statutes conferring a right to compel the military service of enlisted men, the enlistment is not deemed completed until the man has been mustered into the service. Tyler *v.* Pomeroy, 8 *Allen,* 480.

Enlisted applies to a drafted man as well as a volunteer whose name is duly entered on the military rolls. Sheffield *v.* Otis, 107 *Mass.* 282.

A seaman who has passed his examina-

tion at the naval rendezvous only, and has not yet been examined and passed on the receiving ship, is not enlisted within the meaning of section 11 of the act of March 2, 1855 (10 Stat. at L. 628), providing for the punishment of any person who shall entice any seaman or, &c., who may have enlisted into the naval service, to desert. United States *v.* Thompson, 2 *Sprague*, 103.

Enlistment does not include the entry of a person into the military service under a commission as an officer. Hilliard *v.* Stewartstown, 48 *N. H.* 280.

ENORMIA. Wrongs; unlawful or wrongful acts. See ALIA ENORMIA.

ENROLL. To enter upon rolls of court, as to enroll a decree; to record; to register. Enrolment: recording or registration of documents.

Enrolment of vessels. Under the United States laws regulating merchant shipping, vessels engaged in the foreign trade are registered, and those engaged in the coasting and home trade are enrolled; and the words "register" and "enrolment" are used to distinguish the certificates granted to those two classes of vessels. Enrolment applies only to vessels employed in domestic commerce, — in voyages along the coast, or upon inland waters. The subject is regulated by Rev. Stat. tit. 50. See The Mohawk, 3 *Wall.* 566.

ENS LEGIS. A being created by law; an artificial person. Applied to corporations, considered as deriving their existence entirely from the law.

ENTAIL, *v.* To restrict the inheritance of lands to a particular class of issue; to create an estate of inheritance limited to a particular class of heirs. Entail, *n.*: an estate in fee limited to a particular class of issue; also termed an estate in tail. See FEE TAIL.

Entail, in legal treatises, is used to signify an estate tail, especially with reference to the restraint which such an estate imposes upon its owner, or, in other words, the points wherein such an estate differs from an estate in fee-simple. And this is often its popular sense; but sometimes it is, in popular language, used differently, so as to signify a succession of life-estates, as when it is said that "an entail ends with A," meaning that A is the first person who is entitled to bar or cut off the entail, being in law the first tenant in tail. *Mozley & W.*

ENTER. See ENTRY.

ENTICE. The enticement to travel and find new homes, which is held out by a children's aid society, being necessary to the conduct of the society, and sanctioned by the statute incorporating it, is not an unlawful enticement or solicitation. The words "entice," "solicit," "persuade," or "procure," as used in the pleadings in an action, and acted upon by the courts, have been well defined: they import an initial, active, and wrongful effort. There is, indeed, a sense in which the operations of a children's aid society, with its means of liberal aid, the opportunities it offers to travel, to visit new scenes, and find new homes, — very seductive to the youthful imagination, — may amount to a solicitation; but the enticement or solicitation thus implied springs from the very nature of, and is incident to, the enterprise, has its sanction in the act incorporating the society, is legitimate, and may fairly be contrasted with the wrongful enticement or solicitation, of which, either for correction or punishment, the courts take cognizance. Nash *v.* Douglas, 12 *Abb. Pr.* N. S. 187.

ENTIRE. Indivisible; unbroken; undivided; whole.

Entire contract. Where a contract consists of many parts, which may be considered as parts of one whole, the contract is entire. When the parts may be considered as so many distinct contracts, entered into at one time, and expressed in the same instrument, but not thereby made one contract, the contract is a separable contract. But if the consideration of the contract is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items. 2 *Pars. Cont.* 517.

Entire day, signifies an undivided day, not parts of two days. An entire day must have a legal, fixed, precise time to begin, and a fixed, precise time to end. A day, in contemplation of law, comprises all the twenty-four hours, beginning and ending at twelve o'clock at night. Robertson *v.* State, 43 *Ala.* 325.

Entire interest. Where a person in selling his tract of land sells also his entire interest in all improvements upon public land adjacent thereto, this vests in the purchaser only a quitclaim of his interest in the improvements. McLeroy *v.* Duckworth, 13 *La. Ann.* 410.

Entire use, benefit, &c. These words in the *habendum* of a trust-deed for the benefit of a married woman are equivalent to the words "sole use," or "sole and separate use," and consequently her husband takes nothing under such deed. Heathman *v.* Hall, 3 *Ired. Eq.* 414.

ENTIRETY. In general, the whole. It is applied to estates in which the entire or sole possession is in one person, as distinguished from a joint or several possession by two or more persons; in other words, tenants by entireties are seised *per tout*, and not also *per my*,

whereas joint tenants are seised *et per my et per tout*. The effects of such a tenancy are, that neither tenant can convey the whole of his estate without the other, and neither can sever without the other; and, upon the death of either tenant, the other takes the whole under the original grant, and not, as in joint tenancy, by the new or independent title of survivorship. This species of estate arises, in particular, upon a conveyance, where common-law rules obtain, to husband and wife as grantees. Each is deemed seised of the whole estate; and a conveyance by the husband alone will be inoperative against the wife, in the event of her surviving.

ENTRY. I. As an Act relating to Property.

The act of passing into or upon. Enter: to go or come into or upon. In legal use, the words enter and entry are applied, in this sense, chiefly to lands and buildings.

1. Entry upon lands, in general, means the actual taking possession of lands by going upon them. In a strict use of the terms, the entry for the purpose of taking possession and the taking possession are distinct acts, but practically both are, in the ordinary legal use of the word, included in the meaning of entry.

A right of entry is, by the common law, given to a person who has a right of possession, as a remedy by which he may peaceably assert his right, without the formality of a legal action; and, once having peaceably entered and obtained the possession, he may retain it. Such a notorious act of ownership was always considered equivalent to a feudal investiture by the lord. The remedy by entry was allowed in all cases where the entry by the wrong-doer was unlawful. But where the original entry was lawful, and an apparent right of possession was thereby gained, the owner of the estate cannot retake the possession by mere entry: he must resort to his action. An entry upon lands in this sense also was necessary, at common law, before a valid sale of land could be made: the vendor must have lawfully entered, in order to make livery of seisin — actual delivery of possession — to the purchaser. This rule was intended to prevent the evils arising from the sale of pretended titles to land, and was based upon the same policy as the modern rule which declares void grants of lands which are at the time held adversely to the grantor. A similar entry was, in theory, necessary to sustain an action of ejectment; but this was, in practice, supplied by a fictitious entry, assumed as a fact to support the action.

Entry is a remedy which the law affords to an injured party ousted of his lands by another person who has taken possession thereof without right. This remedy (which must in all cases be pursued peaceably) takes place in three only out of the five species of ouster, viz., abatement, intrusion, and disseisin; for as in these three cases the original entry of the wrong-doer is unlawful, so the wrong may be remedied by the mere entry of the former possessor. But it is otherwise upon a discontinuance or deforcement, for in these latter two cases the former possessor cannot remedy the wrong by entry, but must do so by action, inasmuch as the original entry being in these cases lawful, and therefore conferring an apparent right of possession, the law will not suffer such apparent right to be overthrown by the mere act or entry of the claimant. *Brown.*

An entry at common law is nothing more than an assertion of title by going on the land; or, if that was hazardous, by making continual claim. Anciently, an actual entry was required to be made and a lease executed on the land to sustain the action of ejectment; but now nothing of that kind is necessary: the entry and the lease, as well as the ouster, are fictions; and nothing is required but that the lessor should have the right to enter. A proceeding precisely analogous obtained in the civil law. Innerarity *v.* Mims, 1 *Ala.* 660.

2. In a broader sense, but one of less frequent use, to enter upon land signifies to go upon it for some particular purpose. The ownership of land is exclusive, and, in general, an entry thereon without leave of the owner is a trespass. But the law gives authority to enter upon the premises of another in many cases. Instances are, the right to enter upon another's land to abate a nuisance; the right of a proprietor of goods or chattels to enter and retake them from the land of another; the right of a landlord to enter on the demised premises to make repairs, to demand rent, to distrain, &c.; the right of a traveller to enter an inn. A like authority to enter for some particular purpose is often given by license.

3. In criminal law, a violent actual entry into a house or upon land, as distinguished from a peaceable entry, is termed a forcible entry. Such entry constitutes an offence against the public peace at common law; and the term is frequently used to designate similar offences defined by statutory provisions. See FORCIBLE ENTRY.

4. In criminal law, also, some act of entering into a dwelling-house or other building is essential to complete the offence of burglary, in addition to the breaking. For this purpose, the least entry with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony, is sufficient to complete the crime. But while putting a finger or a pistol over a threshold or through a window may be an entry, making an opening with a bit or a crowbar is not, even where the door or window is penetrated, if these instruments are intended for breaking only.

II. AS A MATTER OF RECORD OR WRITING.

The act of setting down, or causing to be set down, in writing; recording, or causing to be recorded, in due form. In a like sense, to enter signifies to set down in writing; to inscribe; to record; to cause to be put down in writing, or recorded.

1. In popular use, enter means to set down in writing the particulars of a transaction in books of account or record; as the particulars of a sale of goods in a merchant's account-books. Original entries of this description are, in general, admissible evidence of the transaction so recorded in the ordinary course of business. Different modes of keeping such accounts are distinguished, in the science of book-keeping, by the terms single entry and double entry.

To enter a bill short is when a banker, having received an undue bill from a customer, does not carry the amount to the credit of the latter, but notes down the receipt of the bill in the customer's account, with the amount and the time when due. Whether, however, any given bill is to be regarded as "a short bill" (that is, not to be treated as cash) must depend not so much upon whether it has been "entered short" as upon the surrounding circumstances, and the general mode of dealing between the parties. (*Exp.* Sargeant, 1 *Rose*, 153, 154; *Grant on Bankers.*) *Moxley & W.*

2. Under the customs laws of the United States, to enter imported goods is to submit a statement or description of such goods, with the original invoices, to the collector, or other officer designated by law, for the purpose of estimating the duties to be paid on such goods, and procuring their withdrawal from the custom-house, for consumption, transportation, or storage in warehouse, &c., as the case may be. The term is also used in the United States internal revenue acts to designate the making similar statements to the officers of internal revenue. The manner of making such entries is regulated by the statutes.

The word entry, in section 1 of the act of congress of 1863, prescribing forfeiture of goods attempted to be imported by any false entry, includes all the different kinds of entries known in the practice and regulations of the custom-house, — the entry for warehouse, the entry for consumption, withdrawal entry, entry for transportation, &c. If any owner of goods knowingly makes or attempts to make either of these entries by means of a false practice, the transaction is within the statute. The word entry means the entire transaction by which the importer obtains the entrance of his goods into the body of the merchandise of the country. Until the entire transaction between him and the government is closed, by a withdrawal of, and payment of, the duties upon all the goods covered by the original paper called the "entry for warehouse," the entry contemplated by the statute is not completed; and any false practice anywhere, from beginning to end, may work a forfeiture. United States *v.* Baker, 5 *Ben.* 25.

3. Under the provisions of the United States statutes relating to the public lands, any person entitled to a right of pre-emption or of homestead in such lands is authorized to enter a limited quantity with the register of the land-office for the particular district. In these statutes the terms enter and entry designate the filing or inscribing upon the records of the land-office of the proceedings in writing required, and not the actual going upon and taking possession of the land; although actual settlement and occupation is requisite to perfect the proceedings, and to obtain a patent for the land entered.

4. The proceeding of depositing for copyright, under the copyright laws of

the United States, the title or description of a book or other article, is frequently termed entering for copyright; the statute, however, uses the words deposit and record, rather than enter or entry, except that the notice of the copyright required by law to be inserted in or inscribed upon every copyrighted book or other article is, in one form, "Entered, according to act of Congress, in," &c.

5. In legal procedure, enter is frequently applied to the putting a proceeding on record in proper technical language and order. Originally, in the common-law practice, every step in an action was formally entered in the record; and an omission to enter even a continuance put an end to the proceeding. The judgment record was made up of the various entries in the course of the action, actual or formal, arranged in order. Books containing forms of the proceedings in various actions, as they appeared of record, were much relied on as precedents, and were commonly called "books of entries."

In modern practice, the formal entry in a particular record of the proceeding of each step in due course is not so strictly required; but the terms enter and entry are still applied to the filing of a proceeding in writing, such as a notice of appearance by a defendant, and, very generally, to the filing of the judgment roll as a record in the office of the court.

Entry of appearance. The filing or entering of record, on the part of the defendant in a suit, a statement that he comes into court, or is ready to proceed in the action. But, besides a formal entry to this effect, almost any step or proceeding taken, from which it may be implied that the defendant submits himself to the jurisdiction, is deemed, in practice, equivalent to a regular entry of appearance. See APPEAR.

In the former English practice, the entry of appearance in a chancery suit was made by the defendant or his solicitor leaving with the clerk of records and writs a slip of paper, with words indicating that he entered an appearance at the suit of the plaintiff, the name and address of the solicitor being added. If the defendant failed to enter an appearance, the plaintiff might enter an appearance for him. (*Hunt Eq.*) The form of entering an appearance in an action at common law was almost precisely similar. The memorandum of appearance required under the judicature act of 1875 is substantially in the same form, with a statement appended that the defendant does, or does not, require a statement of the plaintiff's complaint to be delivered to him. *Mozley & W.*

The meaning of the phrase entry of an appearance must be interpreted by the course and practice of the particular court. Whatever is held in such court to be a submission to its authority in the cause, whether coerced or voluntary, must be deemed an appearance; and, further, when such submission has been once made, it cannot be retracted. Cooley *v.* Lawrence, 5 *Duer*, 605. And see *U. S. Dig.* tit. Action.

Entry of cause for trial; or **Entry on the roll.** These phrases designated, in English practice, the proceeding by a plaintiff in an action who had given notice of trial, depositing with the proper officer of the court the *nisi prius* record, with the panel of jurors annexed, and thus bringing the issue before the court for trial.

Entry of judgment. Judgment is entered in an action by preparing a statement or history of the proceedings, with the pleadings and other necessary proceedings in writing (either the original documents or transcripts of them), forming what is usually termed the judgment roll, and depositing this roll as a record in the office of the court. In practice, the roll or record is usually prepared by the attorney or solicitor of the successful party. See JUDGMENT.

As used in Ga. Code, § 2863, making a judgment dormant, if no entry be made thereon for seven years, the word entry means a statement, signed by the sheriff, and dated, that the execution is placed in his hands with orders to make the money. Hatcher *v.* Gammell, 49 *Ga.* 576.

III. AS A REMEDY.

The name writ of entry was applied, in the old common-law practice, to a writ which lay to recover the possession of lands wrongfully withheld from the owner. It was a remedy of great antiquity in English law; was allowed in several forms, and long continued to be the usual remedy for the recovery of the possession of lands. It is classed as a real action, and is altogether possessory in its nature, as it decides nothing with respect to the right of property, but only restores the demandant to that situation in which he was, or by law ought to have been, before the dispossession. 3 *Bl. Com.*

180. In England, however, it was superseded in practice by the action of ejectment, and was finally abolished, with other real actions, by Stat. 3 & 4 Wm. IV. ch. 27, § 36.

A writ of entry was a writ made use of in a possessory action, directed to the sheriff, requiring him to command the tenant of the land to render the same to the demandant, because that he, the tenant, had not entry into the land in question, but by or after disseisin, intrusion, or the like, made within the time limited by law for such actions; or that in case of his refusal so to render the land, then to appear in court to show the reason of his refusal. It was usual to specify in the writ the degree or degrees within which the same was brought, in this manner: 1. If the writ was brought against the party himself who did the wrong, then it only charged the tenant himself with the injury; 2. If the writ was brought against an alienee of the wrong-doer, or against the heir of the wrong-doer, then it was said to be in the first degree, and charged the tenant in this manner: that he, the tenant, had not entry, but by, *i. e., through, per,* the original wrong-doer who alienated the land or from whom it descended to him; 3. If the writ was brought against a tenant holding under a second alienation or descent, then it was said to be in the second degree, and charged the tenant in this manner: that he, the tenant, had not entry but by, *i. e., through, per,* a prior alienee, to *whom, cui,* the original wrong-doer demised the same; 4. If the writ was brought against a tenant holding under more than two alienations or descents, *i. e.,* after two degrees were past, it charged the tenant in this manner: that he, the tenant, had not entry unless *after, post,* or subsequent to the ouster or injury done by the original wrong-doer. *Brown.*

If the action be brought by tenant in tail, or tenant for life, it is said that both in the writ and count the demandant may state generally, that he was seised as of freehold; but it appears to be more regular to show the commencement of the particular estate, both in the count and writ. If the action be brought on a disseisin done to the demandant's ancestor, the derivative title from that ancestor must be stated in the count; as the writ may be brought either in the *per,* the *per* and *cui,* or the *post,* the count must be framed accordingly. *Roscoe Real Act.* 182; 12 *Phila. Law Library,* N. S. 128.

If a writ of entry was brought against the party that did the wrong, it charged the tenant himself with the injury. But if such wrong-doer had made any alienation of the land, or if it had descended to his heir, that circumstance it was necessary to allege in the writ. One such alienation or descent made the first degree, called the *per,* because the form was *non habuit ingressum nisi* per *Gulielmum,* — he had not entry except *through* William, — &c. A second alienation or descent made the *per* and *cui,* because the form was *non habuit ingressum nisi* per *Ricardum,* cui *Gulielmus illud dimisit,* — he had not entry except *through* Richard, *to whom* William demised it, — &c. If more than two degrees were passed, the party complaining was barred of his writ of entry, and driven to his writ of right, — a long and final remedy, — to punish his neglect in not sooner putting in his claim. But the statute of Marlbridge, 52 Hen. III. ch. 29 (passed in 1267–68), extended the writ of entry beyond these degrees. In such case, it was called a writ of entry in the *post,* because the words were *non habuit ingressum nisi* post *intrusionem quam Gulielmus in illud fecit,* — he had not entry except *after* the intrusion which William made upon it. *Mozley & W.*

Enumeratio unius est exclusio alterius. The specification of one thing is the exclusion of a different thing. A maxim more generally expressed in the form, *expressio unius est exclusio alterius,* q. v.

ENVOY. One sent; a public minister of high grade, though not fully equal to an ambassador.

Eodem ligamine quo ligatum est dissolvitur. By the same tie by which it is bound it is dissolved. An obligation is extinguished in the same way as it is constituted. See the following maxim.

Eodem modo quo quid constituitur, eodem modo dissolvitur. In that manner in which any thing is constituted, in the same manner is it dissolved. An obligation is extinguished in the same way as it is constituted. Thus, an obligation which has been verbally entered into may be discharged verbally; while an obligation constituted by writing under seal can only be discharged by an instrument of like solemnity. The maxim does not apply, of course, to an extinguishment by performance of an obligation; nor is it to be considered as laying down a rule excluding all other modes of discharging an obligation, but merely as pointing out a proper means of effecting the discharge of any obligation, corresponding to the means by which it was constituted. In the Roman law, this rule was more strictly applied than in mod-

ern practice; the same or corresponding words or acts being used in discharging any obligation which were used in creating it. The maxim is sometimes expressed in the form, *eodem ligamine quo ligatum est dissolvitur*.

To affect debts due by specialty would, perhaps, require a seal, on the principle, *eodem modo quo oritur, eodem modo dissolvitur;* but short of that, an oral agreement, on good consideration, may modify or totally defeat a simple contract, accordingly as one or the other may appear to have been intended by the parties. Fellows *v.* Stevens, 24 *Wend.* 294.

Equally to be divided. This phrase imports that each of the persons among whom the division is to be made is to take the same share. Henderson *v.* Womack, 6 *Ired. Eq.* 437.

It relates to the quality of the estate, and not to its limitation. It creates a tenancy in common. Jackson *v.* Luquere, 5 *Cow.* 221.

A testator's direction to his wife to divide a certain residue "equally between her relations and mine," was held to be properly executed by a division in her will equally between her and his relatives; namely, half to six of her relatives, and half to nineteen of his relatives. Young's Appeal, 83 *Pa. St.* 59.

EQUITABLE. According to natural right or natural justice; that which is just and right in a particular case, as distinguished from the strict rule of a general and positive law. Also, in a more technical sense, that which can only be sustained, or made available or effective in a court of equity, or upon principles of equity jurisprudence. See EQUITY. The word occurs most frequently in the following phrases:

Equitable assets. Assets of a deceased person, which cannot be reached by his creditors by proceedings at law, but which may be made available through a court of equity.

Equitable assets are all assets which are chargeable with the payment of debts or legacies in equity, and which do not fall under the description of legal assets. 1 *Story Eq. Jur.* § 552.

Assets such as are recognized only in equity are termed equitable assets; and these, after satisfying all who have liens on any specific property, will be distributed among creditors of all grades, proportionably, *i. e.* without regard to legal priority; all debts ranking equal, when conscientiously considered. *Wharton.*

Equitable assignment. Such an assignment as gives the assignee a title which, though not cognizable at law, equity will recognize and protect.

To make an equitable assignment there must be such an appropriation of the subject-matter as to confer a complete and present right on the party intended to be provided for, even where the circumstances do not admit of its immediate exercise. A mere promise, though of the clearest and most solemn kind, to pay a debt out of a particular fund, is not an assignment of the fund, even in equity. If the holder of the fund retains control over it, such as power on his own account, to collect it or to revoke the disposition promised, that is fatal to the transaction as an equitable assignment. Christmas *v.* Russell, 14 *Wall.* 69.

Equitable conversion. A change in the nature of property by which, for certain purposes, real estate is considered as personal, or personal estate as real, or transmissible and descendible as such. See CONVERSION.

Equitable defence. The name applied, in modern practice, to a defence to an action at common law on equitable grounds; permitted, in England, under the common-law procedure act of 1854. The term is used in a like manner in the practice under various codes of procedure and practice acts in the United States, by which, usually, a defendant is allowed to avail himself of both legal and equitable defences in the same action.

Equitable estate. A right or interest in land, which is acquired by operation of equity, or which is only recognized in a court of equity.

That is properly an equitable estate or interest for which a court of equity affords the only remedy. Of this nature is the benefit of every trust, express or implied, which is not converted into a legal estate by the statute of uses. Others are: equities of redemption, constructive trusts, and all equitable charges. *Burt. Comp.* ch. 8

An equitable estate is an estate an interest in which can only be enforced in a court of chancery. Avery *v.* Dufrees, 9 *Ohio*, 145.

It must not be supposed that courts of law never take any cognizance of equitable rights. Thus, for instance, a trustee defrauding the parties equitably entitled under the trust may be criminally prosecuted in a court of law. And for elections and other collateral purposes the equitable estate may be recognized in a court of law. *Mozley & W.*

Equitable mortgage. A lien upon real estate, recognized in equity as a security for the payment of money, and treated as a mortgage, although arising without any deed or express contract for

that distinct purpose. The most familiar example is the deposit of title-deeds by a debtor with his creditor; such a transaction is deemed a valid agreement for a mortgage, which amounts to an equitable mortgage, and is not within the operation of the statute of frauds. The term is also applied to a mortgage of a merely equitable estate or interest. And the lien of a vendor of real estate, as security for the purchase-money, is sometimes termed an equitable mortgage.

Wharton says that a mortgage is called equitable, where the subject of it is trust property; where it is an equity of redemption; where there is a written agreement only to make a mortgage; and where a debtor deposits the title-deeds of his estate with his creditor, or some person on his behalf.

Equitable waste. Injury to a reversion or remainder in real estate, which is not recognized by the courts of law as waste, but which equity will interpose to prevent or remedy.

Equitable waste is waste which was hitherto cognizable only in a court of equity, as by a tenant for life pulling down a mansion-house, or felling timber standing for ornament, or doing other permanent injury to the inheritance. This kind of waste is forbidden, even to a tenant for life who holds without impeachment of waste; and this doctrine is recognized in the judicature act of 1875. *Mozley & W.*

EQUITY. 1. Equality of rights; fairness in determination of conflicting claims; justice.

2. That system of jurisprudence of historic rather than philosophic origin, which embodies an endeavor to moderate or vary the operation of strict rules of law, in classes of cases in which they would operate unfairly, by application of the principles of justice, according to the opinion of a judge authorized for the purpose.

Equity, scarce known to our forefathers, makes at present a great figure. Like a plant gradually tending to maturity, it has for ages been increasing in bulk; slowly indeed, but constantly; and at what distance of time we are to take for its maturity is perhaps not easy to foretell. Courts of equity, limited originally within narrow bounds, have, in civilized nations, acquired an extent of jurisdiction that obscured, in a great measure, the courts of law. A revolution so signal will move every curious enquirer to attempt, or to wish at least, a discovery of the cause. But vain will be the attempt till first a clear idea be formed of the difference between law and equity. The former, we know deals in precise rules: but does the latter rest on conscience solely without any rule? This would be unsafe, while men are judges, liable not less to partiality than to error. Nor could a court without rules ever have attained that height of favor and extent of jurisdiction which courts of equity enjoy. A court of equity must then be governed by rules and principles. One operation of equity, universally acknowledged, is to remedy imperfections in the common law, which sometimes is defective and sometimes exceeds just bounds. This suggests a hint. As equity is constantly opposed to common law, a just idea of the latter will probably lead to the former.

After states were formed and governments established, courts of law were invented to compel individuals to do their duty. This innovation, as generally happens, was confined within narrow bounds. To these courts were given power to enforce duties essential to the existence of society: such as that of forbearing to do harm or mischief. Power was also given to enforce duties derived from covenants and promises, as tended more peculiarly to the well-being of society. The enforcing these duties by established authority was a great improvement, which gave full satisfaction, without suggesting any thought of proceeding any farther. To extend the protection of a court to natural duties of every sort would, in a new experiment, have been reckoned too bold. But when the great advantages of a court of law were experienced, its jurisdiction was gradually extended, with universal approbation, to every covenant and every promise. It was extended also to other matters, till it embraced every obvious duty arising in common and ordinary dealings between man and man; while causes of an extraordinary nature, were appropriated to the king and council. Such extraordinary cases, multiplying greatly by complex and intricate connections among individuals, daily discovered, became a burden too great for the king and council. In order therefore, to relieve this court, extraordinary cases of a civil nature were, in England, devolved upon the court of chancery. This made it necessary to give a name to the more ordinary branch of law which is the province of the common or ordinary courts of law. It is termed "the common law;" and in opposition to it, the extraordinary branch which devolved on the court of chancery is termed equity: the name being derived from the nature of the jurisdiction, directed less by precise rules than *secundum æquum et bonum*, or according to what the judge in conscience thinks right. Thus equity, in its proper sense, comprehends every matter of law that by the common law is left without remedy;

and supposing the boundaries of the common law to be ascertained, there can no longer remain any difficulty about the powers of a court of equity. With respect, then, to the common law, it is evident from the foregoing deduction that it has not a precise, natural boundary, but in some measure is circumscribed by accident and arbitrary practice. *Ld. Kames Prin. of Eq.*

Equity is a portion of law accidentally severed from the common law. A very short account of the origin of equity will show this to be a correct statement, and that the separation of the two jurisdictions is not due to any difference in principle, but solely to historical circumstances. The history of the separate jurisdiction dates from the reign of Richard II. (1377). In this reign, poor suitors took courage to appeal to the prerogative jurisdiction of the chancellor, as the representative of the king, for that redress which they could not get at common law. But in the majority of instances where the chancellor was thus appealed to, it was admitted that while the common law recognized the plaintiff's rights, yet, by reason of the special circumstances, the redress there would be inadequate. The common lawyers soon saw the mischief this new jurisdiction was likely to do them, and we find a perpetual struggle going on against the chancellor's authority; in 1389 the commons petitioned that no man might be brought before the chancellor or the king's council for matters remediable at the common law; but the king answered that he would keep his regality as his predecessors had done before him. In four years afterwards a second petition was presented to the same effect, and again in six years (1399) a similar petition was presented to the new King, Henry IV., who answered that the statutes should be kept, except where one party was so great and rich and the other so poor that he could not otherwise have remedy. The complaint always was, not that the chancellor was introducing new law, but that he was usurping and supplanting the jurisdiction of the common-law courts. This accounts, historically, for the rise of that portion of equity jurisprudence which does not conflict with the common law, except so far as it anticipates it on its own domain by providing a more efficacious remedy. The other portion of equity jurisprudence, which deals with trusts, a separate subject-matter, took its origin about the same time, because the common law would not recognize mere fiduciary obligations, nor provide appropriate writs to enforce their observance.

The greatest authorities of this day have differed on the subject of the relation which equity has borne to the common law during its separation from it; but it has become in fact, as it will hereafter be in name, a part of law, deciding in its own sphere according to precedents and fixed rules.

The following is an accurate definition, or rather description, of equity, as administered in courts of chancery: That part of the law which, having power to enforce discovery, (1) administers trusts, mortgages, and other fiduciary obligations; (2) administers and adjusts common-law rights where the courts of common law have no machinery; (3) supplies a specific and preventive remedy for common-law wrongs where courts of common law only give subsequent damages. *Chute. Eq.* 4.

Equity is not synonymous with natural justice, but has a narrower signification; for not only does the court (in order that it may have some rule to proceed by, and not leave the rights of individuals to depend solely on the particular opinion of the party holding the great seal), strictly adhere to principles which have been successively enunciated by its various judges in adjudicating on the causes which have been brought before them, notwithstanding the enforcement of such principles may in particular instances occasion injustice; but it also leaves many matters of natural justice to be disposed of *foro conscientiæ*, from the impossibility of framing general rules respecting them, and from the mischief and inconvenience which would arise from attempting judicially to enforce such moral duties as charity, gratitude, or kindness, or even positive engagements which are not founded on a good or valuable consideration. Equity therefore, in its technical sense, contradistinguished from natural and universal equity or justice, may well be described as a "*portion of justice*" or natural equity, not embodied in legislative enactments, or in the rules of common law, yet modified by a due regard thereto and to the complex relations and conveniences of an artificial state of society, and administered in regard to cases where the particular rights, in respect of which relief is sought, come within some general class of rights enforced at law, or may be enforced without detriment or inconvenience to the community; but where, as to such particular rights, the ordinary courts of law cannot, or originally did not, clearly afford adequate relief. *Roberts, Prin. of Eq.*

Equity, in its technical and scientific legal use, means neither natural justice nor even all that portion of natural justice which is susceptible of being judicially enforced. It has a precise, limited, and definite signification, and is used to denote a system of justice which was administered in a particular court, — the English high court of chancery, — which system can only be understood and explained by studying the history of that court, and how it came to exercise what is known as its extraordinary jurisdiction. *Bispham Prin. of Eq.* 1.

Equity is the term commonly used to designate that portion of the law which is administered by the courts of chancery in Lincoln's Inn and at the rolls. Equity, in this sense, is wider than law, and narrower than natural justice or natural equity, in

the extent of the matters which are the subjects of its jurisdiction. Equity cannot be defined in its contents otherwise than by an enumeration of its various subject-matters, being trusts, mortgages, administrations, &c. *Brown.*

The distinction between equity in the technical sense and law, is truly matter of history, and not matter of substance. The short sum of the matter is this, that the court of chancery recognizes certain rights and applies certain remedies, which the courts of law might have equally recognized and applied, but did not. *Haynes Eq.* Lect. I.

Equity is not the chancellor's sense of moral right, or his sense of what is equal and just, but is a complex system of established law; and an equitable maxim — as equality is equity — can only be applied according to established rules. Savings Inst. *v.* Makin, 23 *Me.* 360.

The word equity, in the oath administered to the special jury on appeals in common-law cases, under the statute of Georgia, is synonymous with law, meaning a system of jurisprudence governed by established rules, and bound down by fixed precedents. The special jury is sworn to try the cause according to equity and the opinion they entertain of the evidence, and not their opinion of equity, as well as of the evidence. Thornton *v.* Lane, 11 *Ga.* 459.

Equity, as used in the Georgia relief act of 1868, providing that the jury, under certain circumstances, may reduce the plaintiff's claims according to the equities between the parties, does not mean a whim of the jury, nor mere mercy, but that fair and honest duty which each owes to the other, growing out of the contract, or arising between them since. Butler *v.* Weathers, 39 *Ga.* 524.

Equity of redemption. The privilege accorded to a mortgagor to redeem the mortgaged estate after nonpayment, at the time appointed, of the money secured by the mortgage according to the legal obligation of the instrument.

This right or equity of redemption is, in the contemplation of the court of chancery, the ancient estate in the property without change of ownership. It is therefore subject to all the limitations to which other equitable estates are liable, and is treated as an equitable asset. *Wharton.*

An equity of redemption is an estate in lands, which may be devised or taken on execution, and which may descend to heirs and be subject to dower. Simonton *v.* Gray, 34 *Me.* 50.

Equity of a statute. The sound interpretation of a statute the words of which may be too general, too special, or otherwise inaccurate or defective, is termed the equity of the statute.

Equity to a settlement, or wife's equity. The right of a wife, recognized in equity, to have a portion of her equitable property settled upon herself and her children. This right was originally granted to the wife when the husband sued in a court of equity for the purpose of reducing the property into his possession, on the principle that he who seeks equity must do equity. The chancellor was accustomed, whenever a husband needed to file a bill in order to reduce property in right of his wife to possession, to make it a condition of granting whatever relief was prayed, that the husband should settle a proper portion of the fund or property upon the wife. Subsequently, however, this equity was allowed to be asserted actively by the wife. The amount to be settled on the wife and children is in the discretion of the court, and varies according to circumstances.

EQUIVALENT. In patent law, the term equivalent, when used of machines, has a certain definite meaning; but when used with regard to the chemical actions of such fluids as can be discovered only by experiment, it means equally good. Tyler *v.* Boston, 7 *Wall.* 327.

ERECT; ERECTION. To erect, when used in connection with a house, or church, or factory, is to build; and no such building can be said to be erected until completed. An indictment under 2 Rev. Stat. 667, § 4, which makes it a felony to set fire to or burn "any building erected for the manufacture of cotton or woollen goods, or both," cannot be sustained for setting fire to a structure designed for such a factory, but of which part of the frame is not raised, and the part raised not entirely enclosed, the stairs not up, and no part ready for occupation or for the reception of machinery. A building so incomplete is not a building "erected" for any purpose. McGary *v.* People, 45 *N. Y.* 153.

The phrase, erection of any building, in an indenture pertaining to a party-wall, was held to mean more than partly rebuilding and adjusting to three old walls. Shaw *v.* Hitchcock, 119 *Mass.* 254.

So, where a building, erected originally for a meeting-house, and subsequently used for a joiner's shop, was extensively repaired, and converted into a dwelling-house, it was held that such repairs and alterations did not constitute the "erection of a dwelling-house," within a statute. Booth *v.* State, 4 *Conn.* 65.

Erecting or repairing, in a mechanic's

lien law, includes painting. Martine *v.* Nelson, 51 *Ill.* 422.

The removal of a building from one part of a lot to another, where it is permanently located, is not erection within the meaning of a statute forbidding the erection of wooden buildings. Brown *v.* Hunn, 27 *Conn.* 332.

Neither is elevating and enlarging a wooden building, although its character is materially changed. See Douglass *v.* Commonwealth, 2 *Rawle*, 262.

ERROR. 1. Is used in a technical sense to signify such an error — that is, irregularity, mistake, or wrong ruling — as warrants a reversal of the judgment or proceeding infected, upon an appeal or writ of error; and a step or ruling in a cause, exposing the proceedings to be reversed, is called erroneous.

Errors of fact, in N. Y. Code of Pro. § 366, does not refer to an erroneous finding upon the evidence, but to those errors of fact which do not appear from the record or evidence; such as infancy, coverture, &c. Adsit *v.* Wilson, 7 *How. Pr.* 64; Kasson *v.* Mills, 8 *Id.* 377; Biglow *v.* Sanders, 22 *Barb.* 147. See also *U. S. Dig.* tit. Appeal.

To speak of an error in telegraphing implies a sending or delivering of the message. Baldwin *v.* United States Telegraph Co., 6 *Abb. Pr.* N. S. 405, 423.

2. Error is also used as an elliptical expression for writ of error; as in saying that error lies; that a judgment may be reversed on error.

The writ of error was a common-law method, by which a court of appellate jurisdiction might review the proceedings of an inferior court; and corresponded in common-law practice to appeal in equity, and in procedure framed according to the civil law. The general theory of the writ of error is that the party defeated below sues out a new writ in the appellate court to obtain a review of the proceedings. He is called the plaintiff in error, and the adverse party is the defendant in error. The course of proceedings upon the writ brings up to the appellate court the entire record of the proceedings below, including a bill of exceptions, by which the rulings of the judge below upon the trial are shown, in connection with so much of the evidence as is necessary to explain them. The plaintiff in error assigns errors upon this record. Upon these argument is heard; and, if error to the plaintiff's injury is affirmatively shown (all intendments are in favor of the proceedings below), a reversal of the judgment is the consequence.

The course of proceedings upon a writ of error has been modified in several of the states by statutes; and in many more an appeal (*q. v.*) has been substituted for it, at least in civil actions.

Until a comparatively recent date, a writ of error was not allowable in criminal causes; but modern laws have accorded it to persons convicted by a jury, as a means of reviewing the proceedings against them.

Error juris nocet. Error of law is injurious. The party who mistakes the law must bear the consequences.

Error scribentis nocere non debet. An error of the scribe ought not to injure. This maxim points to a distinction between mistakes of law or fact committed by a party to a transaction reduced to writing, as such, and errors attributable to the scrivener merely, or to the party in the capacity of scrivener. An error in the mere mode of writing down the transaction will not be allowed to injure. Clerical errors may be disregarded or corrected.

ESCAPE. An unlawful withdrawal from or relaxation of imprisonment.

In its ordinary, popular sense, the word suggests only the voluntary withdrawal of a prisoner from custody; and this an actual and complete one. The word would only be considered applicable where a person in custody gets free and goes at large. The technical sense includes more than this: wrongful or careless relaxation of imprisonment by the officer in charge is called an escape, even in cases where the prisoner does not go at large.

The meaning of the word must be considered in three aspects: as a default in duty by the sheriff or jailer, subjecting him to liability for damages at the suit of a creditor injured by the escape; as a misconduct, or even offence, by the prisoner, or by the officer; and as calling for a pursuit and recaption. Considered in the second and third of these aspects, the word, probably, has substantially its vernacular meaning. A prisoner does not commit the crime of escaping, nor is

authority for a recaption necessary, unless there is a voluntary and complete departure from custody. But, in the first-mentioned use, which is the one most frequently observed, it has a wider extension. When the civil liability of the sheriff to an execution creditor for an escape is in question, the general rule has been said to be that every liberty given to a prisoner not authorized by law is an escape. Colby *v.* Sampson, 5 *Mass.* 310; Lowry *v.* Barney, 2 *D. Chip.* 11. Escapes are chiefly either *voluntary* or *negligent*, this distinction depending on the conduct of the officer, not that of the prisoner. An escape which the officer knowingly permits is voluntary; one attributable to his omission of precautions only, is negligent. See Loosey *v.* Orser, 4 *Bosw.* 391; Littlefield *v.* Brown, 1 *Wend.* 398; Lockwood *v.* Mercereau, 6 *Abb. Pr.* 206. But the sheriff may become liable to the creditor upon an escape of either kind. Warburton *v.* Wood, 6 *Mo.* 8. In common-law phraseology, there are, indeed, three kinds of escape: voluntary escape, in which the sheriff permits the prisoner to go at large, and in which there is no defence to an action of debt on his official bond; negligent escape, where the prisoner breaks out of prison, and is at large without the consent of the sheriff, to an action of debt for which escape the sheriff can plead a recaption on a fresh pursuit; and an escape effected by the act of God or the public enemies, but upon this kind no action of debt arises. Adams *v.* Turrentine, 8 *Ired. L.* 147. But the decisions upon the question of liability do not use the word escape in the limited sense of meaning either complete or permanent liberty. Mere relaxations of custody, not authorized by law, are called escapes when the liability of the sheriff is what is in question, though they have been termed *constructive* escapes, in distinction from such as are *actual*. It is not a defence in behalf of the sheriff that the prisoner remains within the shrievalty, and has been at all times amenable to the execution. Warner *v.* Evens, 2 *Tyler*, 121; s. p. Pulver *v.* McIntyre, 13 *Johns.* 503. Thus the term has been used where the prisoner went at large for a short time only, notwithstanding he returned to custody, Nall *v.* State, 34 *Ala.* 262; and see Dole *v.* Moulton, 2 *Johns. Cas.* 205; Ballou *v.* Kip, 7 *Johns.* 175; where the prisoner was allowed to remain at night out of the cells, though in the jail-yard, Bartlett *v.* Willis, 3 *Mass.* 86; or in rooms or buildings which, although portion of the jail, were not appropriated for custody of prisoners, Freeman *v.* Davis, 7 *Id.* 200; Clap *v.* Cofran, *Id.* 98; Burroughs *v.* Lowder, 8 *Id.* 373; but see, to the contrary, Burns *v.* Brian, 1 *Spears*, 131; Pattridge *v.* Emmerson, 9 *Mass.* 122; Spear *v.* Alden, 11 *Id.* 444; Steere *v.* Field, 2 *Mas.* 486; where the prisoner was forcibly carried away by third persons, Cargill *v.* Taylor, 10 *Mass.* 206; Abbott *v.* Holland, 20 *Ga.* 598; but see Wichelhausen *v.* Willett, 12 *Abb. Pr.* 319, 21 *How. Pr.* 40; where he was set at liberty on giving an improper form of poor-debtors' oath by mistake of the magistrates, Little *v.* Hasey, 12 *Mass.* 319; or upon a discharge granted by a justice without proper authority, Van Slyck *v.* Taylor, 9 *Johns.* 146; or upon a bail bond which proved to be forged, Conyers *v.* Rhame, 11 *Rich.* 60; where he went outside the jail liberties without lawful excuse, Reed *v.* Fullum, 2 *Pick.* 158; Howard *v.* Blackford, 3 *N. J. L.* 777; although he returned before action commenced, Briggs *v.* Cramer, 5 *Id.* 498; where he was left in custody of private persons who had not lawful authority to detain him, Palmer *v.* Hatch, 9 *Johns.* 229; where the sheriff allowed the prisoner to have the keys of the prison, though the latter did not go outside the walls, Steere *v.* Field, 2 *Mas.* 486; Wilkes *v.* Slaughter, 3 *Hawks*, 211; but see Currie *v.* Worthy, 2 *Jones L.* 104. Where the coroner arrested the sheriff, and confined him in his own jail, this was held an escape, on the ground that a sheriff cannot be, in view of the law, imprisoned in the jail of which he has the charge. Day *v.* Brett, 6 *Johns.* 22. If the jailer is committed to his own jail, on execution by the sheriff, this, it is said, is an escape of the jailer, for which the sheriff is answerable, without the appointment of a new keeper; but it is not an escape of the other prisoners, if they are in fact

kept in custody, under the authority of the jailer or his agents. Steere *v.* Field, 2 *Mas.* 486. The liability of the sheriff, in cases like the above, has been differently decided under variations in detail of circumstances, and in view of the positive obligations of the bond involved, or of some local law; but the word escape is freely used in the cases as signifying much less than actual, corporal freedom.

By English law, an escape of a person lawfully arrested for felony or misdemeanor is an offence against public justice, and punishable by fine or imprisonment. Officers and others negligently permitting a felon to escape are punishable by fine; but voluntarily permitting an escape amounts to the same kind of offence, and is punishable in the same degree as the offence of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or trespass; although, before the conviction of the principal party, the officer thus neglecting his duty may be fined and imprisoned for a misdemeanor. 4 *Steph. Com.* 294. This is, in the United States, quite generally a subject of statutory regulation; the punishment for making or permitting an escape is that imposed by the local law.

Escape-warrant, in English practice, is a process addressed to all sheriffs, &c., throughout England, to retake an escaped prisoner, and commit him to proper custody. *Wharton; Tomlins.*

ESCHEAT. This word, derived from a French verb signifying to fall, anciently meant that which fell. It is said that branches of trees which fell to the ground were called escheats. In very early times, however, in English real-property law, it came to be used to signify a falling back or reversion of an estate to the lord from whom it was held, upon some failure of the tenant to render the services upon which the tenancy was conditioned. This might be either through failure of blood, that is, want of any descendants or heirs of the original tenant who should render the services; or through crime of the tenant, that is, by reason of a felony or attainder. This last ground has been abolished; so that escheat, in England, now signifies a reversion of an estate to the grantor upon failure of heirs to the tenant.

In the United States, escheat signifies a reversion of property to the state in consequence of a want of any individual competent to inherit. The state is deemed to occupy the place, and hold the rights of the feudal lord. It is, indeed, not quite practicable to deduce a practical system of rules on the subject from common-law principles of feudal tenure; but statutory rules have been quite generally prescribed, so that, upon the whole, it may be said that, in this country, property of one who dies without any competent heirs reverts to the state, by a right known as escheat.

Escheat is an obstruction of the course of descent, and consequent determination of the tenure, by some unforeseen contingency, in which case the land naturally results back, by a kind of reversion, to the original grantor, or lord of the fee. 2 *Bl. Com.* 15.

It is the casual descent, in the nature of forfeiture, of lands and tenements within his manor, to a lord, either on failure of issue of the tenant dying seised, or on account of the felony of such tenant. *Jacob.*

An escheat is partly in the nature of a purchase as well as of a descent: it is a purchase, so far as it is necessary for the lord to enter on the reverted property, in order to complete his full ownership of it; and it is a descent, because the escheated estate follows the seigniory, and is inherited, along with it, by the lord's heir-at-law. The lord, on the escheat, takes the estate by a title paramount to the tenant, since he is in in right of an estate out of which the tenant's interest was originally carved. It is, therefore, a mixed title, being neither a pure purchase nor a pure descent, but, in some measure, compounded of both. It differs from a forfeiture, in that the latter is a penalty for a crime personal to the offender, of which the crown is entitled to take advantage by virtue of its prerogative; while an escheat results from tenure only, and arises from an obstruction in the course of descent. It originated in feudalism, and respects the intestate's succession. So, while the forfeiture affects the rents and profits only, escheat operates on the inheritance. *Wharton.*

Escheat denotes that incident of feudal tenure by which the land reverts back to the lord upon the failure of a tenant to do the services. Escheat used to arise from two causes: *propter defectum sanguinis, i.e.* on account of the failure of heirs of the grantee; or, *propter delictum tenentis, i.e.* on account of the felony or attainder of the tenant. But, by Stat. 33 & 34 Vict. ch. 23, no confession, verdict, inquest, convic-

tion, or judgment of or for any treason or felony, or *felo de se*, is to cause any attainder or corruption of blood, or any forfeiture or escheat. So that, at the present day, escheat, it appears, can only arise from the failure of heirs of the grantee. *Brown.*

Escheator. The title of an officer whose function is to take charge, on the part of government, of escheated estates.

ESCROW. A deed or other instrument delivered to a third person, to be held by him until the performance of a specified condition, and then to be by him delivered to the grantee.

The expression is sometimes found that a deed is delivered *in* escrow; as if escrow meant the condition or status of the instrument while in the conditional holder's hands. This is a doubtful use of the word. Properly, it seems to be equivalent to *scroll*, and denotes the instrument itself. The sense is that the instrument is, pending a final delivery, not a full deed, but only a scroll, — a draught or memorandum. See *Burrill.*

A deed is delivered as an escrow when it is delivered conditionally, *i.e.* when it is delivered to a third person to keep until something be done by the grantee; and it is of no force until the condition is fulfilled. Jackson *v.* Catlin, 2 *Johns.* 248; Clark *v.* Gifford, 10 *Wend.* 310; White *v.* Bailey, 14 *Conn.* 270.

An escrow is a deed delivered to a third person upon a future condition to be performed by either party. It must be delivered to a stranger, and the condition mentioned. *Jacob; Shep. Touch.* 59; Raymond *v.* Smith, 5 *Conn.* 555; Jordan *v.* Pollock, 14 *Ga.* 145; Bramam *v.* Bingham, 26 *N. Y.* 483.

A deed left in the hands of a co-obligor, to be delivered to the obligee on the performance of some condition, is an escrow. Johnson *v.* Baker, 4 *Barn. & Ald.* 440; Pawling *v.* United States, 4 *Cranch*, 219; Jackson *v.* Rowland, 6 *Wend.* 666; Hoboken City Bank *v.* Phelps, 34 *Conn.* 92.

Whether a deed handed by the grantor to the grantee for the purpose of being transmitted by the latter to a third person, to be held by such third person until the performance of a condition, is an escrow, see Bramam *v.* Bingham, 26 *N. Y.* 483; Gilbert *v.* North Amer. Fire Ins. Co., 23 *Wend.* 43.

ESNECY. The privilege of the eldest. A privilege among coparceners, by which, upon a voluntary partition, the eldest has a right to the first choice of one of the parts of the estate after it is divided. The privilege was considered personal, and descended to the heirs of the eldest coparcener.

ESPLEES. An old term for the products which the ground or land yield; as the hay of the meadows, the herbage of the pasture, corn of arable fields, rent and services, &c. The word has been anciently applied to the land itself.

ESQUIRE. In English law, a title of dignity next above gentleman, and below knight. Also, a title of office given to sheriffs, sergeants, and barristers-at-law, justices of the peace, and others. 1 *Bl. Com.* 406; 3 *Steph. Com.* 15, note; *Tomlins.* It is familiarly employed in the United States, but is a title of courtesy merely.

ESSENTIALIA. Essentials. See ACCIDENTALIA.

ESSOIN, or ESSOIGN. An old term for an excuse for not appearing in court. The first day of term was called essoin day, because it was assigned for hearing such excuses.

ESTABLISH. The word establish is found in various places in the United States constitution, in each of which it is used in a somewhat different sense. Thus, "to establish justice" seems to mean to settle firmly, to fix unalterably, to dispense or administer justice; "to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcy," is manifestly used as equivalent to make, or form, and not to fix or settle unalterably or for ever; "to establish post-offices and post-roads" means to create, to found, and to regulate; "We, the people, &c., do ordain and establish this constitution," &c., signifies to create, to ratify, to confirm. The prohibition that congress shall make no law respecting an establishment of religion, prohibits any laws which shall recognize, found, confirm, or patronize any particular religion or form of religion, permanent or temporary, present or future. 1 *Story Const.* § 454.

Authority conferred upon a municipal corporation to establish a market, a dispensary, &c., involves, as a necessary incident to that authority, power to purchase real estate for the purposes of a market. Ketchum *v.* Buffalo, 14 *N. Y.* 356; Beekman *v.* People, 27 *Barb.* 260; People *v.* Lowber, 28 *Id.* 65.

The right to establish a market includes the right to shift it from place to place, when the convenience or necessities of the people demand it, but gives no right to build one on the public highway. Wartman *v.* Philadelphia, 33 *Pa. St.* 202.

The terms "incorporated banking com-

pany in this state," and "banking company established in this state," are not identical. The former necessarily implies a bank organized under a legal charter or authority, in the form of a special act, or some general law authorizing and giving a corporate character to such association. The term established may imply nothing more than a voluntary association organized by its own independent agreement, and not in pursuance of any statute incorporation. Commonwealth *v.* Simonds, 11 *Gray*, 306.

Establish ordinarily means to settle certainly, or fix permanently, what was before uncertain, doubtful, or disputed. Smith *v.* Forrest, 49 *N. H.* 230.

Established, as used in La. Civ. Code, § 1099, means that a claim to property, doubtful as between a third person and the succession, is permanently settled and confirmed. Weigel *v.* Betz, 18 *La. Ann.* 49.

Establishment. In order that a particular article or class of articles should constitute a part of a manufacturing establishment, it is not essential that they be actually employed in the process of manufacture. The establishment includes, also, all the usual and necessary appliances for storing, measuring, weighing, packing, and delivering the manufactured article, after the process of manufacture is completed. Thus the tanks or reservoirs, and the principal meter of a gas company, used for storing and measuring the gas preparatory to its distribution to the consumers, are a part of the manufacturing establishment, though they are not at all employed in the process of manufacture. And this fact would not be otherwise, though such reservoir and meter might be located upon the premises of others, and at a distance from the place of actual manufacture. They are a part of the usual and necessary appliances of such an establishment, without which the gas manufactured could not be preserved or delivered to the consumer. Memphis Gas Light Co. *v.* State, 6 *Coldw.* 310.

ESTATE. Is used in several very variant senses. Only the context, or the circumstances under which it is employed, can guide one in assigning to it the meaning intended.

1. In what is considered the most proper technical sense of the term when used concerning property, it signifies the degree, quality, nature, and extent of one's interest in or ownership of the subject-matter in question. In this use, it denotes not the things themselves which a man owns, but the abstract idea of his title to them. The various estates are the various rights, differing in extent and duration, which may by law exist in respect to things. It may have this meaning in respect to things personal as well as real; but the leading use of it, when quality or extent of ownership is the idea suggested, is in distinguishing the various titles to and interests in realty, as is more fully shown below.

Estates in land are variously classified and named, according to the quantity of interest, primarily into freehold estates and estates not of freehold. The principal freehold estates are estates in *fee-simple*, in *fee-tail*, otherwise called entails or estates tail, and estates *for life*. Estates not of freehold are estates *for years*, *at will*, and *at sufferance*. Estates *upon condition* form another class, of which mortgage is the most familiar example; estates by *elegit* and by *statute merchant* are other instances. Estates are also classified with regard to the time at which they may be enjoyed into estates *in possession* and *in expectancy*, sometimes called expectant estates. Again, with respect to the number and relation of their owners, estates are divided into estates *in severalty*, *in joint tenancy*, *in coparcenary*, and *in common*.

For descriptions of the nature and incidents of these various estates in real property, see the particular names by which they are designated; especially the articles CONDITION; COPARCENARY; CURTESY; DOWER; ENTAIL; EQUITABLE ESTATE; ESTATE AT SUFFERANCE; ESTATE AT WILL; ESTATE FOR LIFE; ESTATE FOR YEARS; EXPECTANT ESTATE; FEE; JOINT TENANCY; STATUTE MERCHANT; REMAINDER; REVERSION; TENANCY IN COMMON.

Estate in land, means the kind and quantum of one's interest therein. The term is susceptible of every possible variation in which man can be related to the soil. Cutts *v.* Commonwealth, 2 *Mass.* 284.

Estate is a very comprehensive word, and signifies the quantity of interest which a person has, from absolute ownership down to naked possession; and the quantity of interest is determined by the duration and extent of the right of possession. Jackson *v.* Parker, 9 *Cow.* 73, 81.

Alimony is not in itself an estate in the technical legal sense of that word; nor is it a charge upon the husband's estate (if he has one), but is a mere personal charge upon, or duty of, the husband, which the court will control and enforce against him from time to time, at discretion, compelling the payment thereof from his income,

whether he has an estate or not. Campbell *v.* Campbell, 37 *Wis.* 206.

2. Instead of signifying the title or interest, estate may mean the subject-matter of ownership; as in the phrases, proprietor of a valuable estate; income from an estate; I devise all my estate; and the like. In this use, again, it may be used of personal property as well as real; but is seldom or never used of personalty alone, and is most frequently used of realty alone.

Estate, as used in N. C. Rev. Code, ch. 119, § 11, providing for nuncupative wills, does not embrace land. Smithdeal *v.* Smith, 64 *N. C.* 52.

The word estate is a word of the greatest extension, and comprehends every species of property, real and personal. It describes both the corpus and the extent of interest. Deering *v.* Tucker, 55 *Me.* 284.

Estate comprehends every thing a man owns, real and personal, and ought not to be limited in its construction, unless connected with some other word which must necessarily have that effect. Sutton *v.* Wood, *Cam. & N.* 202.

It means, ordinarily, the whole of the property owned by any one, the realty as well as the personalty. Hunter *v.* Husted, *Busb. Eq.* 141.

Estate may embrace both real and personal property. Jackson *v.* Robins, 16 *Johns.* 537; United States *v.* Crookshank, 1 *Edw.* 233; Havens *v.* Havens, 1 *Sandf. Ch.* 324, 334.

The term real estate is not, as usually applied, a technical expression; for estate, strictly speaking, expresses the title or interest that one hath in lands or tenements. But, in common parlance, the word estate, used with the words real and personal, has come to signify all the subjects of property, and to be equivalent to the more technical expression of things real and personal. Bates *v.* Sparrell, 10 *Mass.* 323.

That estate, even when used so as to embrace personalty, does not include rights in action, see Pippin *v.* Ellison, 12 *Ired. L.* 61; City of Louisville *v.* Henning, 1 *Bush*, 381; McIntyre *v.* Ingraham, 35 *Miss.* 25; Sibbald's Estate, 18 *Pa. St.* 249.

3. The meaning attributable to the word estate, when used in a will, is determined more by the circumstances and context, as evincing the testator's intention, than by any fixed definitions of the term. It will be treated as meaning things owned by the testator, or as meaning his interest or ownership, according to his evident intention.

Estate, in a devise, is descriptive of the subject of property, or of the quantum of interest, according to the context. It will pass a fee whenever the intention of the testator does not restrict it to import a description rather than an interest. Hammond *v.* Hammond, 8 *Gill & J.* 436; Jackson *v.* Merrill, 6 *Johns.* 185; Hart *v.* White, 26 *Vt.* 260; Arnold *v.* Lincoln, 8 *R. I.* 384.

Estate is sufficiently comprehensive to embrace every description of property; and a charge by a testator of his debts on his estate, will charge his lands with them, if used with other words which indicate such an intention; otherwise, if used alone, with no words indicating such intent. Archer *v.* Deneale, 1 *Pet.* 585.

The word estate, in a will, is sufficient to pass a freehold as well as a chattel; it includes estate, real as well as personal. Countess of Bridgewater *v.* Duke of Bolton, 6 *Mod.* 106.

A devise of a testator's estate, generally, passes both real and personal estate. Jackson *v.* Delancey, 11 *Johns.* 365; Blewer *v.* Brightman, 4 *McCord*, 60; Andrews *v.* Brumfield, 32 *Miss.* 107.

Estate, in a will, may carry real or personal estate, or both, according to the manner of its use in different clauses of the will. Stump *v.* Deneale, 2 *Cranch C. Ct.* 640; Den *v.* Snitcher, 14 *N. J. L.* 53.

Equity will not presume that, from a devise of his estate, the devisor meant to include property, which in equity was not his own. Crostwaight *v.* Hutchinson, 2 *Bibb*, 407.

A bequest of the testator's "estate, real and personal," does not apply to land of which he is in possession without color of title. Austin *v.* Rutland R. R. Co., 45 *Vt.* 215.

Where a testator puts real and personal estate in the executor's hands for disposition, and gives to his wife certain personal property in lieu of all demands on his estate, the word estate must be construed to mean real as well as personal. Norris *v.* Clark, 10 *N. J. Eq.* 51.

Estate, in a devise of "all my estate," refers to quantity of testator's interest, as well as extent of land, and will carry the fee, if vested in testator. Donovan *v.* Donovan, 4 *Harr.* (*Del.*) 177.

The devise of all a man's estate, where there are not words to control or restrain its operation, shall be construed not merely to mean his lands, but the quantity of interest which he has in them, so as to pass an estate of inheritance, if he has one. Sometimes the word estate is enumerated with others, all descriptive of personal or chattel interests, so as to exclude real estate. Sometimes it is used as a word of mere local description, as, "my estate at" such a place. But where it can be construed to intend all one's real estate, without restriction, it carries a fee. Godfrey *v.* Humphrey, 18 *Pick.* 537.

The words "residue of my estate," in a will, should be, ordinarily, construed as carrying real as well as personal property. It is true that estate is susceptible of different meanings, according to the connection

and the subject-matter: it may mean real or personal estate; or it may be descriptive of the locality, or quantity of land only; or of the quantity of time or interest therein, or both; and, when it is descriptive of the subject or property devised, it will be considered as descriptive also of the interest in the subject, unless manifestly used in a different sense. But the phrase "residue of my estate," in a gift by will, is not restrained to mean personal estate only, unless there are circumstances calculated to raise serious doubts of the testator's intention. Den *v.* Drew, 14 *N. J. L.* 68.

Estate is a word generally appropriated to real and not to personal property, though sometimes the latter will be included; but a devise of "factory estate" was held to apply only to the realty, and not to include the machinery in the factory. Brainerd *v.* Cowdrey, 16 *Conn.* 1.

4. In a very common use, estate signifies the entire condition, in respect to property, of an individual; as in speaking of a bankrupt, decedent, or insolvent estate, of administering upon an estate. Here not only property, but indebtedness, is part of the idea. The estate does not consist of the assets only: if it did, such expressions as insolvent estate would be misnomers. Debts and assets, taken together, constitute the estate. It is only by regarding the demands against the original proprietor as constituting, together with his resources available to defray them, one entirety, that the phraseology of the law governing what is called settlement of estates can be justified.

Estate, in the Louisiana civil code, in the English text, has the same meaning as the word succession in the French text. It means the estate, rights, and charges which a person leaves after his death. Davis *v.* Elkins, 9 *La.* 135.

5. Estate is employed outside the realm of property law altogether, to signify the status, or condition, or rank of an individual; and also the division of the community into classes, as in the phrase, the estates of the realm.

"Estate" and "degree," when used in the sense of an individual's personal status, are synonymous, and indicate the individual's rank in life. State *v.* Bishop, 15 *Me.* 122.

The three estates of the realm are the lords spiritual, the lords temporal, who sit together in one house of parliament, and the commons, who sit by themselves in the other. Some writers have argued, from the want of a separate assembly and separate negative of the prelates, that the lords spiritual and temporal are now in reality only one estate; which is unquestionably true in every effectual sense, though the ancient distinction between them still nominally continues. (1 *Bl. Com.* 153, 157; 2 *Steph. Com.* 326–331.) *Mozley & W.*

Estate at sufferance. Where a tenant who has once come rightfully into possession of lands by permission of the owner continues to occupy them after the time during which he is entitled to hold them under such permission has expired, the law recognizes his interest in the lands as an estate at sufferance. It is not of frequent occurrence, and is only important with reference to the rule that in such cases the owner must enter on the land before he can sustain an action of ejectment to recover the possession from the tenant.

Estate at will. An estate in lands arising by entry and possession of the tenant under a demise to hold at the will of the lessor. This estate occurs but infrequently; and is often turned into an estate for years, or an estate from year to year, by the operation of a statute or the decisions of the courts.

Estate for life. A freehold estate in lands, not of inheritance, which is held by the tenant for his own life, or the life or lives of one or more other persons, or for an indefinite period, which may endure for the life or lives of persons in being, but not beyond the period of a life. *Washb. Real Prop.* 88. An estate during widowhood is also classed with estates for life, as of similar nature. An estate for the tenant's own life is called absolutely an estate for life; but when it is for another's life, it is called an estate *per autre vie*.

In early English law, an estate for life was both the largest and the smallest estate in lands, being, in fact, the only recognized estate. It was the largest estate in lands, for the reason that the lord would not grant a larger one, the condition of the tenure being that the tenant should be personally competent to discharge the feudal services annexed to it; and it was also the smallest estate, for the reason that the vassal might in all cases hold for life, conditionally, upon his continuing competent to discharge the feudal services. A grant of lands was originally a grant to the vassal, so long as he personally could hold

them, and not longer; in other words, it was an estate for his own life.

Estate for years. An interest in lands entitling the tenant to the possession for a fixed and determinate period of time; usually arising by virtue of a contract in the nature of a lease. Though the time for which it will endure is a single year, or even less, it is not the less called an estate for years.

This class of estates embraces such as are for a single year, or for a period still less, if definite and ascertained; such as a term for a fixed number of weeks or months, as well as those for a definite number of years. Brown *v.* Bragg, 22 *Ind.* 122.

Estate tail. An interest in lands or tenements given to a person and heir of his body. *Brown.*

Estate tail, quasi. When a tenant for life grants his estate to a man and his heirs, as these words, though apt and proper to create an estate tail, cannot do so, because the grantor, being only tenant for life, cannot grant *in perpetuam*, therefore they are said to create an estate tail *quasi*, or improper. *Brown.*

Estates less than freehold; estates of freehold. These expressions relate to a distinction in real-property law, between various interests in lands and tenements, classified according to the interest which the tenant that is occupant or possessor has in the property, measured by the duration and extent of his right of enjoyment; according, in other words, as it is to subsist for an uncertain period, as during his own life or for the life of another man, — or is to determine at his own decease or remain to his descendants, — or is circumscribed within a certain number of years, months or days, — or is indefinite or unlimited, being vested in him and his representatives for ever. *Jacob; Tomlins.*

Estates of inheritance; estates not of inheritance. Estates of freehold may be considered either as estates of inheritance or estates not of inheritance. The former are again divided into inheritances absolute, or fee simple, and inheritances limited, or subject to conditions or qualifications. *Jacob; Tomlins.*

Estates of the realm. The three branches of the British legislature; the lords spiritual, the lords temporal, and the commons. A notion is entertained by many that the three estates of the realm are the king, the lords, and the commons; this, however, is an error. (3 *Hall. Mid. A. ch.* 6, *Pl.* 3.) *Wharton.*

ESTOPPEL. The past acts or declarations of a person are, under certain circumstances, regarded in law as warranting that he should be precluded or prohibited from contradicting them, whatever the truth and right may originally have been. This kind of restriction upon putting forward assertions or claims which may be in their own nature correct or well founded, is termed, when it arises from what the party or those for whom he is responsible has done or said, estoppel. That it should be deducible from the act of the party seems implied in the term. For although a private statute might perhaps create an estoppel, which would be called an estoppel by record, yet restrictions imposed by general laws, such as the statute of limitations which forbids a creditor to demand a debt after lapse of a certain term of years, not upon any ground of probability of payment forgotten, but for the sake of quieting the community in respect to demands long neglected, are never called estoppels; though difficult to distinguish from them, unless the distinction is that they are imposed by law, not drawn upon the party by his own act or word. If this is the distinction, the line between estoppel by a judgment, and what might be called estoppel by statute, is very fine.

Estoppels are of three kinds. 1. By matter of record, which imports such absolute and incontrovertible verity, that no person against whom it is producible shall be permitted to aver against it. A record generally concludes the parties thereto, and their privies, whether in blood, in law, or by estate.

2. By deed. No person can be allowed to dispute his own solemn deed, which is therefore conclusive against him and those claiming under him, even as to the facts recited in it. The general rule is, that an indenture estops all who are parties to it, while a deed-poll only estops the party who executes it, since it is his sole language and act.

3. Equitable estoppel, or, as it is termed in the earlier cases, estoppel *in pais*. This is founded on the principle of natural justice that when a person has done or said something with intent to influence the dealings of another, and that other has acted upon faith of it, the former ought not to be permitted to change it, to the injury of the latter. A familiar example is where an owner of

property has stood by and seen it sold without disclosing his title and objection to the sale; in such case, he is precluded by estoppel from claiming the property from one who was led to buy it and pay the price, by the supposition that the sale was authorized. To establish this species of estoppel, it must be shown: that the person sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or which he had reason to believe would influence his conduct, inconsistent with the evidence he proposes to give, or the title he proposes to set up; that the other party has acted upon or been influenced by such act or declaration; that the party will be prejudiced by allowing the truth of the admission to be disproved. Brown *v.* Bowen, 30 *N. Y.* 519. An equitable estoppel never takes place where one party did not intend to mislead, and the other party is not actually misled. Jewett *v.* Miller, 10 *N. Y.* 402. Thus an admission only operates as an estoppel where it has been acted upon by the party in whose favor it is claimed so to operate, and in such wise that he would suffer injustice if the admission were retracted or contradicted. Catlin *v.* Grote, 4 *E. D. Smith*, 296. A party will be estopped by his admissions, where his intent is to influence another, or derive an advantage to himself. But where he has not acted with this view, and there is no breach of faith in receding, he will not be included. Young *v.* Bushnell, 8 *Bosw.* 1.

An estoppel is when a man is concluded by his own act or acceptance to say the truth; of which there are three kinds: by matter of record, by deed, and by matter of *pais*. Sparrow *v.* Kingman, 1 *N. Y.* 242; Frost *v.* Saratoga Mut. Ins. Co., 5 *Den.* 154; Dezell *v.* Odell, 3 *Hill*, 215.

Estoppel is that which concludes and "shuts a man's mouth from speaking the truth." When a fact has been agreed on, or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed; and when parties, by deed or solemn act *in pais*, agree on a state of facts, and act on it, neither shall ever afterwards be allowed to gainsay a fact so agreed on, or be heard to dispute it; in other words, his mouth is shut, and he shall not say that is not true which he had before in a solemn manner asserted to be true. Armfield *v.* Moore, *Busb. L.* 157.

ESTOVERS. An old English word for maintenance, nourishment, support. It is used by law writers as more particularly signifying wood. *Holthouse.* Also, it is a short expression for common of estovers, which is the right to take necessaries, particularly wood, from another's estate.

ESTRAY. An animal, the subject of property, found wandering at large, and whose owner is unknown.

By English law, estrays were not the property of the finder, but went to the king, or, by grant from the crown, to the lord of the manor. *Jacob; Mozley & W.* In the various statutes of the Union there are statutory regulations under which they are to be impounded, for a return to the owner, on payment of expenses. *U. S. Dig.* tit. Animals.

Estray must be understood as denoting a wandering beast whose owner is unknown to the person who takes it up. Roberts *v.* Barnes, 27 *Wis.* 422; Walters *v.* Glats, 29 *Iowa*, 437.

An estray is an animal that has escaped from its owner, and wanders or strays about; usually defined, at common law, as a wandering animal whose owner is unknown. An animal cannot be an estray when on the range where it was raised, and permitted by its owner to run, and especially when the owner is known to the party who takes it up. The fact of it being breachy or vicious does not make it an estray. Shepherd *v.* Hawley, 4 *Oreg.* 206.

ESTREAT. The true extract, copy, or note of some original writing or record, and especially of fines, amercements, &c., imposed on the rolls of a court, to be levied by the bailiff or other officer. *Jacob; Wharton.*

Estreat of a recognizance. Extracting or taking out from among the other records of a recognizance or obligation which has become forfeited, and sending it up to the court of exchequer, there to be enforced; or, in some cases, directing it to be levied by the sheriff, and returned by the clerk of the peace to the lords of the treasury. (4 *Bl. Com.* 252, 253; 2 *Steph. Com.* 143, note (*y*); *Oke's Mag. Syn.*) *Mozley & W.*

ESTREPE. To strip or lay bare; to commit waste. Estrepement: waste or spoil made by a tenant for life upon any lands or woods, to the prejudice of the reversioner.

Writ of estrepement. This writ formerly lay to prohibit the tenaut from

making waste during a suit, or from making waste after judgment and before execution; but when the object of a writ of estrepement became attainable by a motion for an injunction in chancery, the writ became obsolete. And as it was in aid of a real action, it is impliedly abolished by Stat. 3 & 4 Wm. IV. ch. 27, § 36. 3 *Bl. Com.* 225, 226; 3 *Steph. Com.* 408, note; *Haynes Eq.* Lect. IX.

ET. And. Many Latin phrases and sentences introduced by this word, in familiar use when pleadings and proceedings were in that language, are still frequently employed, such as the following:

Et alius. And another. A phrase used in entitling causes where there are more plaintiffs or defendants than one; the name of the first plaintiff or defendant being given in full, followed by an abbreviation representing this phrase, — *et al.* for one additional party; *et als.* for more than one. These abbreviations continue in use, although the pleading is in English.

On an appeal from a judgment in favor of two or more parties, a bond, payable to one of the appellees *et al.*, will be good. The expression *et al.* must be considered as referring to all the other appellees to whom the bond will be available. Bacchus *v.* Moreau, 4 *La. Ann.* 313; Lebeau *v.* Trudeau, 10 *Id.* 164; Conery *v.* Webb, 12 *Id.* 282.

Et cætera. And others; and other things. An expression frequently used in an abbreviated form, — *etc.*, — to denote that, besides things specifically enumerated, others are intended to be included; or to denote the omission, for convenience, of a portion of any recital or lengthy expression or formula, either previously given in full, or otherwise supposed to be familiar to the reader; or to mark other like omissions or abbreviations. In general, *etc.* is considered too indefinite and uncertain to be properly employed in pleadings or in important instruments, but was formerly much used in making full defence, as distinguished from half defence, in actions of trespass at common law.

Where a recognizance is entered in a short memorandum, conditioned "for defendant's appearance, *etc.*, at" a time and place specified, the condition may be understood to be defendant's appearance and not departing without leave, that being the usual form of recognizance, and there being nothing else to which the *etc.* can reasonably be applied. Commonwealth *v.* Ross, 6 *Serg. & R.* 427; see Queen *v.* Ridpath, 10 *Mod.* 152.

The abbreviation *etc.* is sometimes used in pleadings to avoid repetitions, and, when so used, usually relates to things unnecessary to be stated. As used in a statute giving a lien to laborers on the production of their labor for such work and labor, and prescribing how real estate shall be sold, "under a lien for labor, such as ditching, building levees, *etc.*," the *etc.* should not be so construed as to include railroads, and allow the real estate of a railroad to be sold by virtue of a lien for labor thereon. Dano *v.* M. O. & B. R. R. Co., 27 *Ark.* 564.

Et de hoc ponit se super patriam. And of this he puts himself upon the country. The formal words of conclusion of a plea in bar by way of traverse at common law. The literal translation is retained in the English form.

Et habeas ibi tunc hoc breve. And have you then there this writ. The formal words of a writ, directing its return. The literal translation is retained in the English form of some writs.

Et hoc paratus est verificare. And this he is prepared to verify. The formal words of conclusion of a plea in bar in confession and avoidance. The literal translation is still used in the English form of such pleas.

These words were used, when the pleadings were in Latin, at the conclusion of any pleading which contained new affirmative matter; they expressed the willingness or readiness of the party so pleading to establish by proof the matter alleged in his pleading. A pleading which concluded in that manner was technically said to "conclude with a verification," in contradistinction to a pleading which simply denied matter alleged by the opposite party, and which for that reason was said to "conclude to the country," because the party merely put himself upon the country, or left the matter to the jury. *Brown.*

Et hoc petit quod inquiratur per patriam. And this he prays may be inquired of by the country. The formal words of conclusion of a replication or other pleading on the part of the plaintiff which tenders an issue of fact. The literal translation is still used in the English form of such pleas.

Et inde petit judicium. And there-

upon he prays judgment. The formal words of a clause at the end of pleadings, praying judgment in favor of the party pleading.

Et inde producit sectam. And thereupon he brings suit. The formal words of conclusion of a declaration. Anciently, this clause of the declaration signified that the plaintiff actually produced in court his suit or followers, to confirm his allegations, in the manner then required by the law. But although this proceeding by actual production of suit was discontinued at an early day, the same form of words continued to be used as long as pleadings in Latin were used, and is translated in the English form of declarations at common law still in use by the words above given.

Et modo ad hunc diem. And now at this day. The formal words used at the commencement of the entry of the appearances of the parties in a suit, and of a continuance. The corresponding English words are still so used.

Et non. And not. Formal words of denial in pleading having the same effect as the phrase *absque hoc* (q. v.), and sometimes used instead of that expression.

Et sic. And so. Formal words of pleading, used at the commencement of a special conclusion of a plea in bar, to render the plea positive, and to take away any ground of objection to it as argumentative; as in debt on a bond, *et sic non est factum*, — and so it is not his deed; or in debt on a simple contract, *et sic nil debet*, — and so he owes nothing.

Eundo, morando, et redeundo. In going, remaining, and returning. A phrase expressing the extent of the privilege from arrest allowed to parties, witnesses, or others, in order to enable them freely to perform their respective functions; being protected, in general, while going to, remaining at, and returning from the place of holding court or transacting other business on account of which the exemption from arrest is allowed, or during a time sufficient for so doing.

EVASION. A subtle endeavoring to set aside truth or to escape the punishment of the law. This will not be allowed. If one person says to another that he will not strike him, but will give him a pot of ale to strike first, and, accordingly, the latter strikes, the returning the blow is punishable; and if the person first striking is killed, it is murder; for no man shall "evade" the justice of the law by such a pretence. (1 *Hawk. Pl. C.* 81.) So no one may plead ignorance of the law to evade it. *Jacob.*

EVICTION. Dispossession; ejection; ouster.

Originally it seems confined to dispossession by judgment of law. In more modern use, it may embrace dispossession by paramount right, or claim of such right. Thus one speaks of eviction of a tenant by his landlord, without importing that any judgment has passed for restoring the landlord to the possession.

The word is ordinarily used of real property; but Brown says it is not inapplicable to dispossession from personal property also.

Eviction implies an entry under paramount title, so as to interfere with the rights of the grantee. The object of the party making the entry is immaterial, whether it be to take all, or a part of the land itself, or merely an incorporeal right. Phrases equivalent in meaning are, "ouster by paramount title," "entry and disturbance," "possession under an elder title," and the like. Mitchell *v.* Warner, 5 *Conn.* 497.

Eviction is an actual expulsion of the lessee out of all or some part of the demised premises. Pendleton *v.* Dyett, 4 *Cow.* 581, 585.

Eviction may be either an actual turning out of possession, or consist in acts which place the party in such a situation that, his expulsion being inevitable, he voluntarily surrenders possession to avoid actual expulsion. Reasoner *v.* Edmundson, 5 *Ind.* 393.

Actual dispossession is not necessary to constitute an eviction. A purchaser may be evicted, although he continues in possession of the property, if that possession is under a different title; as, for instance, if the vendee of one holding an imperfect title should subsequently hold under the true owner, either by right of inheritance or otherwise. Succession of Coxe, 15 *La. Ann.* 514.

EVIDENCE. That which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue. 3 *Bl. Com.* 367. It is called evidence, because thereby the fact is made evident. *Jacob.* It is whatever is exhibited to a court or jury in order to enable them to pronounce with certainty concerning the truth of a matter in dispute, *Bac. Abr.;* excluding, however,

comment or argument, 1 *Stark. Ev.* 8. It is the means of making proof; while proof is the effect of evidence, 1 *Greenl. Ev.* § 1; Schloss *v.* His Creditors, 31 *Cal.* 201; Buffalo, &c. R. R. Co. *v.* Reynolds, 6 *How. Pr.* 96. It is that which tends to prove the existence of a fact. Nelson *v.* Johnson, 18 *Ind.* 329. It originally signifies the state of being evident, *i.e.* plain, apparent; but, by inflection, is applied to that which tends to render evident, or to generate proof, to any matter the effect or tendency of which is to produce a persuasion as to the existence of a fact. 1 *Best Ev.* § 11. Testimony is not synonymous with evidence, Harvey *v.* Smith, 17 *Ind.* 272; but evidence includes testimony and all other modes of proof, *Co. Litt.* 283.

Evidence is divided into several classes, according to the nature and effect of different kinds. *Moral* evidence includes all the evidence which is not obtained either from intuition or from demonstration. 1 *Greenl. Ev.* § 1. *Positive* or *direct* evidence is that which, if believed, establishes the truth of the fact in question without the aid of any presumption; as when the fact is declared by persons who have knowledge of it by the senses. *Bouvier*; 1 *Phil. Ev.* 116; 1 *Stark.* 19. *Presumptive* evidence, as opposed to direct, is where, in the absence of direct evidence, a fact is presumed or inferred from others known to exist. *Hearsay* evidence is the narration of persons who relate not what they know themselves, but what they have heard from others. *Circumstantial* evidence (*q. v.*) consists in the proof of facts which usually attend the main fact in dispute, and therefore tend to establish its existence. *Bouvier.* Circumstantial evidence consists in reasoning from facts which are known or proved, to establish such as are conjectured to exist. People *v.* Kennedy, 32 *N. Y.* 141. The *best* evidence (*q. v.*), or *primary* evidence, is that particular means of proof which is indicated by the nature of the fact under investigation, as the most natural and satisfactory; the best evidence the nature of the case admits; such evidence as may be called for in the first instance, upon the principle that its non-production gives rise to a reasonable suspicion that if produced it would tend against the fact alleged. The term *secondary* evidence is applied to evidence not primary, but which, having some tendency to prove the fact, is received because the best evidence cannot be obtained. *Conclusive* evidence sometimes means that which, while uncontradicted, controls the decision of the judge or jury; it also means that which the law does not allow should be contradicted; while *presumptive* evidence, as opposed to conclusive, is that which may be met and overthrown by counter proofs. *Prima facie* evidence is evidence which, standing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced. Emmons *v.* Westfield Bank, 97 *Mass.* 230. Conclusive evidence means some piece or mass of evidence sufficiently strong to generate conviction in the mind of a tribunal or by law rendered obligatory on a party. *Best Ev.* § 533.

EX. From; out of; of; by; on; on account of; according to. A word beginning many Latin phrases and maxims, the principal of which are defined below. For others, see E, which is another form of this word, less frequently used.

Ex abundanti. Out of abundance; abundantly; superfluously. The expression is oftenest used in the phrase *ex abundanti cautela*, — out of abundant caution.

Ex æquo et bono. According to what is just and good; in justice and fair dealing. Sometimes expressed in the form *ex bono et æquo*, which is the order of the words as used in the civil law.

Ex antecedentibus et consequentibus fit optima interpretatio. From what precedes and what follows the best interpretation is made. A doubtful word or passage may be best construed by reference to the whole instrument. This rule is of general application in the interpretation of statutes, and of deeds and other instruments in writing, including wills, subject to the limitation, upon all such rules of construction, that there must be some doubt or difficulty as to the meaning of a word or clause apparent, before the rule will be applied;

for, where the words used are clear and unambiguous, they will be expounded in their natural and ordinary sense. The general meaning of the maxim is, that in cases of doubt one uniform and consistent sense is to be collected from the doubtful clause and from the entire context, if possible, and that the construction is not to be made upon disjointed parts of a writing which may operate as a consistent and harmonious whole. Thus, in construing a bond, the condition may be taken into consideration, for the purpose of correcting and explaining the obligatory part. So the recitals in deeds or agreements may be looked into to discover the meaning of the parties to them; and covenants are construed as dependent upon each other, or otherwise, according to the intention of the parties as indicated by the whole deed. The intention of the testator, which is the chief guide in the interpretation of wills, is to be ascertained and collected from the whole instrument. And in the construction of statutes, where the meaning of a clause is doubtful, the courts will consider the other clauses, and even the preamble or the title of the statute, and adopt that interpretation of the clause in dispute which is most consistent with the general purpose of the statute.

Ex arbitrio judicis. By the discretion of the judge.

Ex certa scientia. Of sure knowledge. Formal words, anciently used in English letters-patent, expressing that the crown had full knowledge of the matter.

Ex comitate. Out of comity; from courtesy.

Ex consulto. From deliberation; deliberately.

Ex contractu. Out of contract; arising from a contract. A phrase applied to rights and obligations, and to actions growing out of or founded upon contracts. As the opposite of *ex delicto*, it expresses one of the principal distinctions of obligations and actions. Originally terms of the civil law, these phrases were adopted in the common law at a very early date, and are still generally employed to mark the distinction between obligations and actions which arise out of contracts, and those which arise from wrongful acts or neglect.

Ex debito justitiæ. From a debt of justice; in accordance with the requirements of justice; as a matter of legal right. A term applied to any thing asked from or granted by a court or judge, as a matter of strict legal right, distinguished from what is asked or granted as a matter of favor, termed *ex gratia*. The expression *ex debito* is sometimes used either as an abbreviated form of this phrase, or as applicable to any thing demanded or given or allowed as a matter of right or obligation.

Ex delicto. Out of fault; arising out of wrongful act or neglect. A term applied to the class of obligations and actions which grow out of or are founded upon misconduct, negligence, or tort or crime of any description, as distinguished from obligations and actions arising out of contracts, termed *ex contractu*, q. v.

Ex demissione. From the demise; upon the demise. A phrase used in entitling actions in ejectment; usually in an abbreviated form, — *ex dem.* The fiction of a lease from the party whose title was sought to be established in the suit, to a fictitious person, having been resorted to for the purpose of determining the question of title in an action of this description, the cause was entitled in the name of such fictitious person as plaintiff claiming on the demise of the real owner; usually in the form "John Doe *ex dem.*" the real owner, termed the lessor of the plaintiff. The phrase was also used in the form *ex dimissione*.

Ex diuturnitate temporis, omnia præsumuntur rite et solemniter esse acta. From length of time, all things are presumed to have been done rightly, and in due form. This maxim is generally expressed, *omnia præsumuntur rite et solemniter esse acta*, q. v.

Ex dolo malo. Out of fraud; from deceit. A phrase applied to obligations and causes of action vitiated by fraud or deceit. See Dolus.

Ex dolo malo non oritur actio. Out of fraud a cause of action does not arise; fraud cannot give a right of action. The rule of law expressed by this maxim,

that an action founded in fraud cannot be maintained, is included in the more comprehensive principle of the maxim, *ex turpi causa non oritur actio*, q. v. As to what is considered as *ex dolo malo*, within the meaning of this rule, see DOLUS.

Ex facie. From the face; apparently; evidently. A term applied to what appears on the face of a writing.

Ex facto. 1. Out of fact; from matter of fact. An example of the use of the phrase in this sense occurs in the maxim, *ex facto jus oritur.*

2. From a thing done; in consequence of an act or deed. Generally applied, in this sense, to something done in violation of law or right. Thus Bracton applies it to a title commencing in an unlawful act, giving the phrase somewhat of the force of *de facto*, as distinguished from *de jure*. *Bract.* 172.

Ex facto jus oritur. Out of the fact the law arises; law arises from fact. A rule of law, although it may be considered as having existence as an abstract principle independent of any facts calling for its application, continues in abstraction and theory until an act is done on which it can attach, and assume, as it were, a body and shape. The maxim must be understood in this sense (*Best Ev.* § 1), in which it is consistent with the theory of the common law, that, in applying the rules of law to new questions and new circumstances, the courts do not make new laws, but merely declare the law already existing. A somewhat different meaning is sometimes given to the maxim in applying it to a particular case, — that the decision of the law in any one case depends upon the facts proved or made to appear in that case. The words are also translated: out of fact the right arises; with reference to a right claimed which depends upon matter of fact.

Ex gratia. Out of grace; from favor. A term applied to any thing asked or granted as a matter of favor or indulgence, as distinguished from thing demanded or granted *ex debito*. The phrase *ex gratia* was commonly inserted in grants from the crown, to indicate that such grants were not made upon any legal right or claim to the subject-matter.

Ex industria. From deliberate design; with fixed purpose; intentionally.

Ex maleficio. Out of a wrongful act; from misconduct; arising out of an act in any way illegal. This term is used in the civil law, in a sense nearly similar to that of the phrase *ex delicto* in the common law, to distinguish obligations and actions arising out of misconduct, malfeasance, or any illegal act, from those growing out of contract, termed, therefore, *ex contractu.*

Ex mero motu. Of mere motion; of free will, without request from another; of one's own motion. A term frequently applied to an order made or a proceeding taken by a court or judge, which is not asked for by or upon the motion of any party, but which is, notwithstanding, deemed proper as a matter of justice or public policy. The words were also used in royal charters and patents to indicate that the grant was of the free will of the sovereign, and not under any claim of right. Compare EX GRATIA.

Ex mora. From delay; on account of default. Where, under a contract for the payment of money, payment is not made at the time agreed, the interest allowed for the time subsequently elapsing before payment is said to be *ex mora.*

Ex necessitate. From necessity; necessarily. This and the next succeeding phrase are used in expressing rules and exceptions to rules of law in favor of those who may have unavoidably and from necessity incurred some liability from which they should be relieved. Thus the right of a landlord to distrain for rent all property found upon the demised premises, without regard to its ownership, is said not to extend to property of a stranger brought there *ex necessitate*, or *ex necessitate rei.*

Ex necessitate rei. From the necessity of the thing; from the urgency of the case.

Ex nudo pacto non oritur actio. From a bare agreement a cause of action does not arise; no cause of action arises from a mere promise without consideration. This is a leading maxim in both the common law and the civil law. It is applied, generally speaking, to parol

agreements without consideration, and to mere gratuitous promises and undertakings, which, however binding in morals or in honor, do not create any legal obligation. Promises under seal, however, although without actual consideration, are presumptively binding, the solemnity of the execution and delivery of a sealed instrument being held to import a consideration. As to the meaning of the rule, see, further, NUDUM PACTUM.

Ex officio. From office; by virtue of office; officially. A term applied to an authority derived from official character merely, not expressly conferred upon the individual, but rather annexed to the official position. Also used of an act done in an official character, or as a consequence of office, and without any other appointment or authority than that conferred by the office.

Ex parte. On the part; of one part; on one side. A term applied to proceedings in an action had on the application or at the instance of one side only, and without notice or opportunity to oppose given to the other side; and to proceedings in which there is no adverse party.

Ex parte materna. On the mother's side; of the maternal line.

Ex parte paterna. On the father's side; of the paternal line.

The phrases *ex parte materna* and *ex parte paterna* denote the line, or blood, of the mother or father, and have no such restricted or limited sense as from the mother or father exclusively. Banta *v.* Demarest, 24 *N. J. L.* 431.

Ex post facto. From an after act; in consequence of a subsequent act. A phrase used in the civil law, and in early English law, to describe any act done or effect arising out of matter occurring subsequent to some prior act; frequently as the opposite or correlative of the phrases *ab initio* and *ante facta*. This more general sense has fallen into comparative disuse; and, in modern law, the term is principally used to designate a class of statutes. This is especially the case in the United States, where, by reason of the prohibition in the constitutions of the United States and many of the states of the passage of *ex post facto* laws, the meaning of the term has been much discussed. The literal meaning of *ex post facto* law is, clearly, a law of after-enactment, — a law which, subsequently enacted, operates upon something done prior to its passage; which would seem to be the true meaning of the term, giving to the word *facto* the sense of a public act, and not confining it merely to acts of individuals. But the phrase is generally defined, somewhat loosely, as meaning laws passed concerning and after a fact or thing done, or action committed; a law passed after a fact done by a subject or citizen, which shall have relation to such fact, and shall punish him for having done it; laws made to punish for actions done before the existence of such laws. See, for a very full discussion of the literal and grammatical translation of the phrase *ex post facto*, and explanation of the force of the term *ex post facto* law, *Burrill*, 446, 447.

As used in the American constitutions, an *ex post facto* law is briefly defined as a law which renders an act punishable in a manner in which it was not punishable when committed. The constitutional restriction does not extend to all retrospective laws, which might be included in the literal rendering of the phrase, but is limited to laws for the creation or punishment of crime.

Ex post facto signifies something done so as to affect another thing that was committed before. Thus, a lease granted by tenant for life to endure beyond his life may be confirmed *ex post facto* by the reversioner or remainder-man. An *ex post facto* law is a law visiting a past act with penal consequences. *Mozley & W.*

A man may be a trespasser from the beginning by matter of after fact; as where an entry is given by law, and the party abuses it; or where the law gives a distress, and the party kills or works the distress. So an act unlawful in the beginning may, in some cases, become lawful by matter of after fact. In reference to such and all similar cases, the words *ex post facto* mean by matter of after fact; by something after the fact; where the phrase is used unconnected with and without relation to legislative acts or laws. Calder *v.* Bull, 3 *Dall.* 386.

The phrase, *ex post facto* law, literally means any law which relates to and operates upon a fact which existed prior to its enactment. But this sense of the words is too large and indefinite to be received as the sense in which they were used and understodd by the framers of our constitution. Many statutes have a retrospective

operation, which cannot be supposed to be included in this constitutional prohibition. Of this description are all acts legalizing past proceedings; all acts of relief of pardon or indemnity; all acts which might mitigate the malignity of an offence, or mollify the rigor of the criminal law; and many others which might be enumerated. These are all retrospective, but are not, in the constitutional sense, *ex post facto*. The plain and obvious meaning of the prohibition is, that the legislature shall not pass any law, after a fact done by any citizen, which shall have relation to that fact, so as to punish that which was innocent when done; or to add to the punishment of that which was criminal; or to increase the malignity of a crime; or to retrench the rules of evidence, so as to make conviction more easy. This definition of an *ex post facto* law is sanctioned by long usage. The words had acquired an established, definite, technical signification, long before British jurisprudence was known, or the English language spoken, in America. In this sense the words have been used and understood by the most celebrated statesmen and jurists, both here and in England. Strong *v.* State, 1 *Blackf.* 193; Den *v.* Van Riper, 16 *N. J. L.* 7, 11.

The phrase *ex post facto*, in the constitution, extends to criminal and not to civil cases. And under this head is included: 1. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2. Every law that aggravates a crime, or makes it greater than it was when committed. 3. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are prohibited by the constitution. But a law may be *ex post facto*, and still not amenable to this constitutional inhibition; that is, provided it mollifies, instead of aggravating, the rigor of the criminal law. Boston *v.* Cummins, 16 *Ga.* 102; Cummings *v.* Missouri, 4 *Wall.* 277; United States *v.* Hall, 2 *Wash. C. Ct.* 366; Woart *v.* Winnick, 3 *N. H.* 473.

An *ex post facto* law is one which renders an act punishable, in a manner in which it was not punishable when committed. Such a law may inflict penalties on the person, or pecuniary penalties which swell the public treasury. The legislature is therefore prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime, which was not declared, by some previous law, to render him liable to such punishment. Fletcher *v.* Peck, 6 *Cranch*, 87, 138.

That is an *ex post facto* law which increases the punishment denounced against the act when committed, or which punishes an offence in a manner in which it was not punishable when committed, irrespective of its comparative severity, unless the new punishment is one the same in kind as the old, but less in degree. Shepherd *v.* People, 25 *N. Y.* 406.

As used in the constitution of the United States, the phrase must be understood in a restricted sense, and as relating to criminal cases only. Carpenter *v.* Pennsylvania, 17 *How.* 456; Municipality, &c. *v.* Wheeler, 10 *La. Ann.* 745; Perry's Case, 3 *Gratt.* 632; S. P. White *v.* Wayne, *T. U. P. Charlt.* 94; Byrne *v.* Stewart, 3 *Desau.* 466.

It does not extend to civil rights or remedies. Calder *v* Bull, 3 *Dall.* 386; Society for the Propagation of the Gospel, &c. *v.* Wheeler, 2 *Gall.* 105, 138; State *v.* Reed, 31 *N. J. L.* 133; Suydam *v.* Bank of New Brunswick, 3 *N. J. Eq.* 114.

Laws altering, modifying, and even taking away, remedies for the recovery of debts, do not violate the provisions of the constitution against the passage of *ex post facto* laws, and laws impairing the obligation of contracts. Evans *v.* Montgomery, 4 *Watts & S.* 218; Oriental Bank *v.* Freeze, 18 *Me.* 109; Mechanics', &c. Bank Appeal, 31 *Conn.* 63; Lord *v.* Chadbourne, 42 *Me.* 429.

The term *ex post facto* law, in the United States constitution, cannot be construed to include and to prohibit the enacting any law after a fact; nor even to prohibit the depriving a citizen of a vested right to property. Calder *v.* Bull, 3 *Dall.* 386.

Every retrospective act is not necessarily an *ex post facto* law. That phrase embraces only such laws as impose or affect penalties or forfeitures. Locke *v.* New Orleans, 4 *Wall.* 172.

Retrospective laws divesting vested rights are impolitic and unjust; but they are not *ex post facto* laws within the meaning of the constitution of the United States, nor repugnant to any other of its provisions; and, if not repugnant to the state constitution, a court cannot pronounce them to be void, merely because in their judgment they are contrary to the principles of natural justice. Albee *v.* May, 2 *Paine*, 74.

Retrospective laws which do not impair the obligation of contracts, or affect vested rights, or partake of the character of *ex post facto* laws, are not prohibited by the constitution. Bay *v.* Gage, 36 *Barb.* 447.

A statute changing the punishment of an offence from whipping to imprisonment may be applied to an offence committed before, but prosecuted after, its passage, without violating the constitutional prohibition against *ex post facto* laws. Every law which operates retrospectively is not necessarily an *ex post facto* law. The phrase has a definite technical signification. The provision in the constitution means that the legislature shall not pass any law, after a fact done by a citizen, which shall have re-

lation to that fact, so as to punish that which was innocent when done, or to add to the punishment of that which was criminal, or to increase the malignity of a crime, or to alter the rules of evidence so as to make conviction more easy. A law which substitutes imprisonment for whipping, cannot be said to produce any of these results. Strong *v.* State, 1 *Blackf.* 193.

An *ex post facto* law does not involve, in any of its definitions, a change of the place of trial of an alleged offence after its commission. Gut *v.* State, 9 *Wall.* 35.

An act is not unconstitutional as being *ex post facto* which authorizes the jury, in their discretion, to inflict fine and imprisonment, one or both, in lieu of imprisonment in the penitentiary not less than two, nor more than five, years. Turner *v.* State, 40 *Ala.* 21.

When, before judgment is rendered in a criminal action, a statute is passed, increasing the penalty for the offence alleged to have been committed, and repealing, without any saving clause, the former statutes under which the indictment was found, so far as they are inconsistent, a liability is imposed which did not exist when the act constituting the offence was committed, and judgment of conviction cannot be rendered. Commonwealth *v.* McDonough, 13 *Allen*, 581.

A statute providing that when any person who should be convicted of certain offences, of which the punishment was confinement, &c., had been before sentenced to a like punishment, he should be sentenced to solitary confinement, &c., in addition to the punishment by law prescribed for the offence for which he should be last tried; and that when the former conviction, &c., should not be known, at the time of the subsequent indictment and trial, he might afterwards be brought into court to receive the additional sentence, — is not an *ex post facto* law, when applied to a case in which the second offence was committed after the passing of the statute. Ross's Case, 2 *Pick.* 165.

Otherwise, where the offence was committed before the statute was passed. Riley's Case, 2 *Pick.* 172.

A statute which provides that "when any person is convicted of an offence, and sentenced to confinement therefor in the penitentiary, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he had been before sentenced in the United States to a like punishment, he shall be sentenced to be confined five years, in addition to the time to which he is or would be otherwise sentenced," applies to the case of a prisoner whose first conviction and sentence was prior to its passage, and, as applicable to such a case, is not *ex post facto* and unconstitutional. It does not apply to the case of a conviction for an offence committed after the commission of that for which the prisoner is on trial. Rand *v.* Commonwealth, 9 *Gratt.* 738.

A statute providing that persons previously convicted of murder and awaiting sentence, instead of being sentenced to death, shall be sentenced to confinement at hard labor until such punishment of death shall be inflicted, which shall not be for one year, nor then, until a warrant shall be issued by the governor, — is *ex post facto*, and void. Although the intention of the legislature may have been to extend favor rather than increased severity to such convicts, the statute changes, and in effect increases, the punishment, since it prescribes a year's imprisonment before the punishment of death. It is competent for the legislature to remit any separable portion of the prescribed punishment, — *e.g.*, where a crime is punished by both fine and imprisonment, to remit either one; or where it is punished by stripes, to diminish the number. And changes referable to prison discipline — *e.g.*, changes in the employment of the convicts, the means of restraint, &c. — may be made, even though they operate to increase the severity of the punishment. But the legislature cannot substitute for the former penalty a different one. Hartung *v.* People, 22 *N. Y.* 95; Shepherd *v.* People, 24 *How. Pr.* 388.

Ex proprio vigore. By its own force.

Ex relatione. Upon the information; on the relation. A phrase used in entitling proceedings prosecuted in the name of the people on the relation or information of the individual aggrieved, who is termed the relator. Such proceedings are entitled in the name of the people or the state *ex relatione* the individual on whose information the prosecution is brought. An abbreviated form, *ex rel.*, is frequently used.

Ex testamento. From a testament; under a will. A phrase used as the opposite or correlative of *ab intestato*, q.v.

Ex turpi causa non oritur actio. Out of a base transaction a cause of action does not arise; no cause of action arises from any contract or other transaction which is itself immoral or illegal. This is a maxim of wide and frequent application, especially in the law of contracts, in regard to which it is often expressed in the form, *ex turpi contractu non oritur actio*, — out of a base contract a cause of action does not arise. In this application of the rule, all contracts which are immoral or illegal are held void, and cannot be enforced by the aid of the law; whether they are contrary to an express statute or rule of the common law, or merely contrary to the gen-

eral policy of the law, or *contra bonos mores;* and whether it is the consideration (which is the ground of the promise) or the promise (which is the consequence or effect of the consideration) that is objectionable. Nor is any distinction made, under this principle, between parol contracts and contracts under seal. Instances of the application of the maxim to contracts and to other matters are familiar, and need not be here cited. Numerous subjects and transactions, of which it is declared by other maxims *non oritur actio*,— such as *ex dolo malo*, from fraud; *ex maleficio*, from an illegal act; *ex pacto illicito*, from an illegal agreement, — seem to be included in the more comprehensive expression, *ex turpi causa*, and set forth the same principle in less general terms. It may be remarked, further, that *ex turpi causa* a defence cannot arise, any more than a right of action, at least as against an innocent party. No man shall set up his own iniquity as a defence. But, where the turpitude of both parties to the transaction plainly appears, the illegality constitutes a defence in an action by one against the other, based on the unlawful transaction; no remedy is afforded, either at law or in equity, in favor of one against the other of two persons equally culpable. This is consistent with the consideration upon which the rules of law governing this whole subject depend, — that the object sought is the public good, rather than the advantage of either party to an iniquitous agreement or transaction.

With respect particularly to contracts affected by fraud, — *ex dolo malo*, — it is said, generally, fraud vitiates every thing. But fraud merely gives a right to avoid or rescind a contract, and does not render it absolutely void; and if a party to a contract which might be attacked on the ground of fraud, elects, with knowledge of the fraud, to treat the contract as binding, he loses his right to avoid or rescind it, and an action upon it may be sustained.

The principle of *ex dolo malo non oritur actio* is: no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground that the court goes, — not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for, where both are equally in fault, *potior est conditio defendentis*. Holman *v.* Johnson, I *Cowp.* 341.

Wherever a transaction contravenes the general policy or the express stipulations of the law, no form of expression is permitted to veil its inherent impropriety; the real object of each party to the contract will be examined, and, if either is found to be aiming at that which is repugnant to principles established for the general benefit of society, the courts of justice will repudiate it, however artfully the arrangements have been made to accomplish the desired end. Where both have been equally guilty, the courts have with equal pertinacity refused to interfere, though that refusal has indirectly benefited one of the guilty parties. Groves *v.* Slaughter, 15 *Pet.* 449.

In the application of this maxim there is no distinction as to vitiating the contract between *malum in se* and *malum prohibitum*. (2 *Bos. & P.* 374.) The rule is not restricted to contracts expressly forbidden: it is extended to such as are calculated to affect the general interest and policy of the country. Bank of the United States *v.* Owens, 2 *Pet.* 527; and see State *v.* Buffalo, 2 *Hill*, (*N. Y.*) 434.

Contracts are illegal, either in respect to the consideration or the promise. Where both of these are lawful and right, the maxim, *ex turpi contractu non oritur actio*, can have no application. The incapacity of the contracting party, whether it be a corporation, an infant, a *feme covert*, or a lunatic, has nothing to do with the legality of the contract, in this sense. Bissell *v.* Michigan Southern, &c. R. R. Co., 22 *N. Y.* 258.

Ex vi termini. From the force of the term; by the very meaning of the term.

Ex visceribus. From the bowels; from the essence.

Ex visitatione Dei. From the visitation of God; by natural cause. A term used, in inquisitions by a coroner, to signify that the death inquired into is found to have been natural.

EXACTION. A wrong done by an officer, or one in pretended authority, by taking a reward or fee for that which the law allows not. The difference between exaction and extortion is this: extortion is where an officer extorts more than his due, when something is due to him; an ex-

action is when he wrests a fee or reward where none is due. *Jacob.*

EXAMINATION. The various examinations most frequently spoken of in jurisprudence are the following:

Examination of accused persons. This is a preliminary hearing of the evidence against a person who has been arrested upon a criminal complaint, by a justice or magistrate, or under United States laws, before one of the commissioners of the circuit court. If the magistrate is satisfied, upon hearing the proofs offered by the complainant, that a *prima facie* case may be established against the accused, it is his duty to commit him, taking bail or not, as the case may admit, and sending the depositions, in cases requiring intervention of the grand jury, before that body, for their consideration. But, if no case is made out, upon complainant's own proofs the magistrate may dismiss the complaint, and set the accused at liberty. The preliminary examination is therefore, practically at least, as conducted in New York state, a privilege of the accused, as it may save him the necessity of giving bail, and the delay of awaiting the grand jury's action. If he waives an examination, none is held.

Examination of bankrupt. This is the interrogation of a bankrupt, in the course of proceedings in bankruptcy, touching the state of his property. This is authorized in the United States by Rev. Stat. § 5086; and section 5087 authorizes the examination of a bankrupt's wife.

Examination of body of a deceased person. See POST-MORTEM EXAMINATION.

Examination of invention. By U. S. Rev. Stat. § 4893, on filing an application for a patent, the commissioner of patents must cause an examination to be made of the alleged new invention. The object of the examination is to ascertain whether the invention is sufficiently new and useful to be patentable, whether it interferes with any other invention, &c. These examinations involve comparison of the features of the invention submitted, with all known inventions of like kind; and they constitute a large part of the business of the patent office.

Examination of a long account. This phrase is used, in statutes authorizing trial by referees instead of by jury, of action involving the examination of a long account. It does not mean, the examination of the account to ascertain the result or effect of it, but the proof by testimony of the correctness of the items composing it. Magown *v.* Sinclair, 5 *Daly*, 63.

Examination in proceedings supplementary to execution. See SUPPLEMENTARY PROCEEDINGS.

Examination of students, preliminary to admission to the bar, as a test of their learning and qualifications, is prescribed by laws or rules of court of several of the states.

In England, the examinations of an articled clerk, for the purpose of testing his fitness to become an attorney and solicitor, are three in number: the preliminary examination, at the commencement of his clerkship; the intermediate examination, in the middle of it; and the final examination, at the end of it. *Mozley & W.*

Examination of title. After a contract has been made for a sale of real property, or after an agreement for a loan, and before a conveyance is accepted or the money is advanced, it is usual for the purchaser or lender, by his attorney, to make an examination of the deeds by which the seller holds, and to search the public records for any incumbrances upon the land. The general object is to ascertain whether the title about to be conveyed is in truth good, and free from any charges except such as may have been considered in the agreement of sale. This is called an examination of title. The result is embodied in a document known as abstract of title, *q. v.*

Examination of witness. This consists in interrogating a witness to elicit his testimony. The ordinary examination is in three parts, — the *direct* examination, or examination in chief, by the counsel of the party in whose behalf the witness is produced; the *cross* examination, which is by the adverse party, and must ordinarily be confined to the subject-matter on which he has been questioned on the direct, but may

be very searching and extensive; and the *re-direct*, which must ordinarily be confined to points of inquiry arising out of the cross-examination. There may also be a *re-cross* examination, when the course of the testimony requires. And there is also what is known as an examination on the *voir dire*, q. v.

Examiner. The title of an officer or person charged with the duty of taking or making an examinatiou. Thus there are examiners in chancery, whose function it is to take depositions of witnesses, which may afterwards be submitted to the court on the hearing. There are also examiners in the patent office, whose business it is to examine the patentability of inventions.

Exceptio probat regulam. This maxim is often translated, "the exception proves" or "confirms the rule;" and is understood as meaning that an exception to a general rule, which is not within the reason of the rule, and therefore is consistent with the general principle, is a confirmation of the rule itself.

Another rendering is, "the exception tests the rule." *Probo*, or prove, means "to put to the test," quite as clearly as "to confirm or establish." In this rendering, the idea is that the correctness of the form in which a rule is expressed may be tested by observing whether exceptions to it must be allowed. Thus, if the rule were offered, "homicide is unlawful," the objection would at once occur, that some cases must be excepted; the execution of a criminal, and killing in self-defence, for instance. If the form of the rule were changed to "murder is unlawful," these exceptions would be unnecessary, and this would show that the rule was more accurately stated. Thus the necessity of exceptions is a test of the correctness of a rule.

The second rendering of the proverb seems more simple and sensible; the first is, however, supported by the consideration that what appears to be intended as the same, is expressed in other forms which accord better with the first construction. Thus the following are found in Bacon's Aphorisms: *Exceptio firmat regulam in casibus non exceptis*, the exception affirms the rule in cases not excepted; *exceptio firmat regulam in contrarium*, the exception affirms the rule to be the contrary; *exceptio quoque regulam declarat*, the exception also declares the rule.

Every exception that can be accounted for is so much a confirmation of the rule that it has become a maxim, — *exceptio probat regulam.* King *v.* Eriswell, 3 *Durn. & E.* 707.

EXCEPTION. Generally, an exclusion of or objection to something.

1. An exception in a contract or deed is a clause whereby the party excludes from the operation of the instrument some part of the subject-matter previously described, which would otherwise be subject to it.

2. An exception in a statute is a clause which excludes from the operation of the law some of the persons or things which would be included by force of the previous description. How it differs from proviso, see PROVISO.

An exception in a deed is always a part of the thing granted, and of a thing in being, and is distinguishable from a reservation, which is of a thing not in being, but newly created out of the lands and tenements granted. Both words, however, are often used promiscuously; and the distinction will not be observed where to do so would defeat the intention of the parties to the deed. Winthrop *v.* Fairbanks, 41 *Me.* 307; State *v.* Wilson, 42 *Id.* 9; Adams *v.* Morse, 51 *Id.* 497; Cocheco Manuf. Co. *v.* Whittier, 10 *N. H.* 305; Goodrich *v.* Eastern R. R. Co., 37 *Id.* 149; Thompson *v.* Gregory, 4 *Johns.* 81; Gould *v.* Glass, 19 *Barb.* 179.

3. In admiralty and equity practice, exception is a formal allegation tendered by a party, that some previous pleading or proceeding taken by the adverse party is insufficient.

4. In common-law practice, an exception is a formal notice, following the denial of a request or overruling an objection, made in the course of a trial, that the party intends to claim the benefit of the request or objection in future proceedings; as upon writ of error. It is also somewhat used to signify other objections in the course of a suit; for example, exception to bail is a formal objection that special bail offered by defendant are insufficient. 1 *Tidd Pr.* 255.

EXCHANGE. When used to designate a mode of transferring property, exchange consists in a mutual grant of interests esteemed equal, one being the consideration for the other.

The distinction between a sale and exchange of property is rather one of shadow than of substance. In both cases, the title to property is absolutely transferred; and the same rules of law are applicable to the transaction, whether the consideration of the contract is money or by way of barter. It can make no essential difference in the rights and obligations of parties, that goods and merchandise are transferred and paid for by other goods and merchandise instead of by money, which is but the representative of value or property. Commonwealth *v.* Clark, 14 *Gray*, 367.

EXCHEQUER. The establishment or department of the public business in England having the management of the royal revenue. It for a long time consisted of two divisions, the first being the office of the receipt of the exchequer for collection of the royal revenue, the second being a court for the administration of justice; but the court of exchequer (*q. v.*) is now fused in the high court of justice.

Exchequer bills, or bonds. Instruments issued by the exchequer, under the authority, for the most part, of acts of parliament passed for the purpose, and containing an engagement, on the part of the government, for the repayment of the principal sums advanced, with interest in the mean time. 2 *Steph. Com.* 574.

EXCISE. Means, properly, an impost or charge for the support of government, levied upon commodities of inland growth and manufacture, and corresponding with customs or duties upon imported merchandise.

Dr. Johnson's definition of excise is noticeable as expressing the general prejudice which long prevailed in England against this mode of collecting a revenue: "A hateful tax levied upon commodities, and adjudged, not by the common judges of property, but by wretches hired by those to whom excise is paid."

Excise was a name formerly confined to the imposition upon beer, ale, cider, and other commodities, being charged sometimes upon the consumption of the commodity, but more frequently upon the retail sale of it. (*Cowel;* 1 *Bl. Com.* 318; 2 *Steph. Com.* 565.) Under recent acts of parliament, however, many other imposts have been classed under excise. Such is the case with regard to the license which must be taken out by every one who keeps a dog, uses a gun, or deals in game. (2 *Steph. Com.* 567.) *Mozley & W.*

The term excise is of very general signification, meaning tribute, custom, tax, tollage, or assessment. It is limited, in the Massachusetts constitution, as to its operation, to produce, goods, wares, merchandise, and commodities. Portland Bank *v.* Apthorp, 12 *Mass.* 252.

The words "tax" and "excise," although often used as synonymous, are to be considered as having entirely distinct and separate significations, under Mass. Const. ch. 1, § 1, art. 4. The former is a charge apportioned either among the whole people of the state, or those residing within certain districts, municipalities, or sections. It is required to be imposed, so that, if levied for the public charges of government, it shall be shared according to the estate, real and personal, which each person may possess; or, if raised to defray the cost of some local improvement of a public nature, it shall be borne by those who will receive some special and peculiar benefit or advantage which an expenditure of money for a public object may cause to those on whom the tax is assessed. An excise, on the other hand, is of a different character. It is based on no rule of apportionment or equality whatever. It is a fixed, absolute, and direct charge laid on merchandise, products, or commodities, without any regard to the amount of property belonging to those on whom it may fall, or to any supposed relation between money expended for a public object and a special benefit occasioned to those by whom the charge is to be paid. Oliver *v.* Washington Mills, 11 *Allen*, 268.

Excise law. As the various spirituous or intoxicating liquors of domestic production were early made prominent subjects for levy of an excise, and as the laws having this for their original purpose were easily and naturally made use of, to some extent, as a means of restraining or regulating the sale of such liquors in the promotion of temperance, a tendency is noticed to use the term excise laws as if it meant laws restricting the sale of liquor. Such is not the legitimate meaning of the phrase. An excise law is a law to collect revenue to the government, from any specified domestic productions of the country. The English excise system corresponds to the internal revenue system in the United States.

EXCLUSIVE. That which debars or shuts out. Thus, an exclusive privilege is one which forbids all persons but its proprietor to exercise it.

The term exclusive, in section 11 of the

patent act of 1836, comprehends not only an exclusive right to a whole patent, but an exclusive right to the patent in a particular section of country. An assignment may be exclusive, though limited to a certain number of machines. Washburn *v.* Gould, 3 *Story C. Ct.* 122, 131, 1 *West. Law J.* 465, 7 *Law Rep.* 276.

A provision in a municipal charter, giving the city authorities the exclusive right to fix the rates of licenses for selling liquor, does not imply a restriction upon the legislature, preventing them from passing a general act regulating the sale of liquor throughout the state. The city acquires no other power under such a provision to regulate the sale of spirituous liquors than it has in any other matters relating to the police of the city; and the fixing rates and granting a license by the city excuses from liability to the city ordinances, but cannot excuse from liability to the penal laws of the state. The word exclusive, in the connection in which it is used in such a charter, does not imply an express release to the corporators from all liability to the state laws relative to licenses. It may be interpreted as evincing the intention to grant this exclusive power to the council as against other coordinate city authorities, or to secure to the city, as a matter of police regulation, the right to fix the rates of such licenses for city purposes independently of the action of the legislature, without raising any implication that it was the intention to exempt persons living within the bounds of the corporation from the operation of the general license laws of the state. Sloan *v.* State, 8 *Blackf.* 361.

On a *sci. fa.*, the jury found for the plaintiff in a certain sum, "exclusive of a bond," not then due. Held, that the word exclusive might be construed "over and above," to effectuate the intent of the jury. Walker *v.* Gibbs, 2 *Dall.* 211, 1 *Yeates*, 255.

EXCOMMUNICATION. A sentence of censure pronounced by one of the spiritual courts for offences falling under ecclesiastical cognizance. It is described in the books as twofold: 1. The *lesser* excommunication, which is an ecclesiastical censure, excluding the party from the sacraments. 2. The *greater*, which excludes him from the company of all Christians. Formerly, too, an excommunicated man was under various civil disabilities. He could not serve upon juries, or be a witness in any court; neither could he bring an action to recover lands or money due to him. These penalties are abolished by Stat. 53 Geo. III. ch. 127. 3 *Bl. Com.* 101; 3 *Steph. Com.* 315, 316.

EXCUSABLE HOMICIDE. See HOMICIDE.

Excusat vel extenuat delictum in capitalibus, quod non operatur idem in civilibus. That excuses or extenuates a wrong in capital cases, which does not so operate in civil suits. In criminal prosecutions, especially for capital crimes, matters are admissible in defence, such as want of malice or of evil intent, which do not constitute a defence to a civil action, even for a like wrong. The principle appears to be, that punishment for an offence is to be awarded only where a criminal intent is shown: while the object of the civil proceeding is to afford the injured party a remedy for the wrong done him irrespective of the intent; although, in cases of malicious injury, vindictive damages are sometimes allowed by way of punishment.

Bacon says that, in capital causes, the law will not punish in so high a degree, except the malice of the will and the intention appear; but, in civil trespasses, and injuries that are of an inferior nature, the law doth rather consider the damage of the party wronged than the malice of him that was the wrongdoer. For instance, the law makes a difference between killing a man upon malice aforethought, and upon present heat and provocation; but if I slander a man, and thereby damnify him in his name and credit, it is not material whether I do so upon sudden choler, or of set malice; but I shall be, in either case, answerable for damages. For there is a distinction in this respect between answering *civiliter* and *criminaliter* for acts injurious to others; in the latter case, the maxim ordinarily applies, *actus non facit reum nisi mens sit rea:* but it is ofttimes otherwise in civil actions, where the intent may be immaterial if the act done were injurious to another. Of this rule a familiar instance occurs in the liability of a sheriff, who, by mistake, seizes the goods of the wrong party under a writ of *fi. fa.* So an action for the infringement of a patent is maintainable in respect of what the defendant does, not of what he intends; the patentee is not the less prejudiced because the invasion of his right was unintentional. *Bacon Max.* reg. 7; *Broom Max.* 324.

EXECUTE. To complete; to finish; to perfect; to perform. Executed: that which is completed or performed. Execution: the completion or entire performance of something. Executory: that which has not yet been, but is to be, performed or done.

These words are used in a variety of senses and connections; yet the meaning generally bears a close relation to the general significations above given.

To execute, applied to a word which is at once the name of a written instrument, and also stands for the rights and relations created by it, may mean either to complete the instrument, *i.e.* do whatever is necessary to render it operative and valid; or. to perform its stipulations, *i.e.* do what it provides or requires. To execute a contract, spoken not of the mere instrument or writing in which the contract might be embodied, but of its substance, of the relations and rights created by it, means, to perform its stipulations; but the phrase may be used of the instrument only, and then execution means subscribing, and perhaps sealing.

To execute a deed, a mortgage, or a will, almost always means to sign, seal, and deliver the instrument.

To execute a decree, judgment, writ, or process, means, almost invariably, to perform its requirements.

To execute a criminal is to put him to death. The true meaning seems to be, that the sentence is executed; that is, performed, carried into effect.

To execute a written instrument spoken of as a writing only, not with reference to its substance, means to complete it as an effective instrument, to sign it, and to seal and deliver it, when these are essential to its inception.

Executed, when spoken of promissory notes, imports delivery as well as making. Bagley *v.* McMickle, 9 *Cal.* 430.

Execution, when used in a legal sense, with reference to a bond, implies signing, sealing, and delivery. Tiernan *v.* Fenimore, 17 *Ohio*, 545.

The expression "an execution executed," in a peculiar statute, held to mean not an execution under which all has been done which the writ requires or the law permits, but an execution levied. Smith *v.* Young, 12 *N. J. L.* 300.

Executed consideration. A consideration which has been received; which is wholly past.

Executed contract. Is one which has been performed. A contract may be executed by one party only. If the subject-matter mentioned is an instrument as such, to say the contract was executed, would mean it was subscribed, &c.

Executed estate. Means the same as a vested estate, or estate in possession, which are more common expressions.

Executed remainder. A remainder which vests a present interest in the tenant, though the enjoyment is postponed to the future. 2 *Bl. Com.* 168; *Fearne Cont. Rem.* 31.

Executed trust. One which is completely created, so that no future act is necessary to be done to bring it into effect and operation.

Executed use. The first use in a conveyance upon which the statute of uses operates by bringing the possession to it, the combination of which, *i.e.* the use and the possession, form the legal estate; and thus the statute is said to execute the use.

Executed writ. A writ the commands of which have been obeyed by the person to whom it was directed.

Executory consideration. A consideration which has not yet been made or given; one which is to be performed or rendered in future.

Executory contract. A contract which is to be performed in time to come. As some of the stipulations in a contract may require future performance, while others are already performed, it follows that a contract may be executory as to some of its engagements, and executed as to others; executory as to one party, and executed as to the other.

Executory devise. A devise of some future interest in lands, given not to take effect immediately upon testator's death, but to arise and vest upon some future contingency. Such a limitation of a future estate has been allowed to be made by will, in some cases where it could not be made by deed. A similar disposition of chattels should be called an executory bequest.

Executory estate. An interest the enjoyment of which is dependent upon some subsequent event or contingency.

Executory remainder. The same as a contingent remainder, *q. v.*

Executory trust. Means, not a trust which is yet to be carried into effect as towards the beneficiary, but a trust towards the complete creation of which some act is needed to be done by the creator of the trust, or the trustee.

Executory uae. A springing use, which confers a legal title answering to an executory devise; as when a limitation to the use of A in fee is defeasible by a limitation to the use of B, to arise at a future period or on a given event.

The words "executory" and "executed" denote, respectively, incomplete and complete; and that as well in their common-law application to contracts, as in their equity application to trusts. Thus, in the case of contracts, the contract or consideration is said to be executed when it is completely performed; and it is said to be executory when it is not yet completely, or only incompletely as yet, performed. And it is clear that a contract may be executed on one side and executory on the other. And in the case of trusts, a trust is said to be executed when it is completely created or declared; and executory, when the words of trust are merely directory, and point to some further instrument as being necessary to complete the declaration or creation. *Brown.*

Executed and executory are used in law in a sense very nearly equivalent to past (or present) and future, respectively. Thus,

1. A contract may be either executed (as if A and B agree to exchange horses, and they do it immediately; here the possession and the right are transferred together), or executory (as if they agree to exchange next week; here the right only vests, and their reciprocal property in each other's horse is not in possession, but in action); for a contract executed, which differs nothing from a grant, conveys a chose in possession; a contract executory conveys only a chose in action. (2 *Bl. Com.* 443; 2 *Steph. Com.* 58.)

2. So a consideration for a promise may be executed or executory, according as the consideration precedes the promise or not; and its character in this respect is determined by the relation which it bears in point of time to the promise as being prior or subsequent.

3. A use is also executed or executory. Thus, on a conveyance to A to the use of B, the use in B is said to be executed by the statute of uses. But a use in land, limited *in futuro* on a condition independent of any preceding estate or interest in the land, is an executory use, because it is not executed by the statute of uses till the fulfilment of the condition on which it is to take effect. Such a use is also called a springing use. (2 *Bl. Com.* 332–334; 1 *Steph. Com.* 544, 545.)

4. So a devise by which a future estate is allowed to be limited contrary to the rules of the old common law, is called an executory devise. (2 *Bl. Com.* 173, 334; 1 *Steph. Com.* 611, 612.)

5. Also, an estate in possession, whereby a present interest passes to the tenant, is sometimes called an executed estate, as opposed to the executory class of estates depending on some subsequent circumstances or contingency. (2 *Bl. Com.* 163.)

6. A trust may also be executed or executory. An executed trust is one where the trust estate is completely defined in the first instance, no future instrument of conveyance being contemplated. An executory trust is a trust where the party whose benefit is designed is to take through the medium of a future instrument of conveyance, to be executed for the purpose. (1 *Steph. Com.* 374.) Or, an executory trust is one of which the author indicates, either by the vagueness and generality of the words he has used, or by his intention expressed in the instrument creating the trust, that some further conveyance should be executed for expressing the trusts in proper legal form; while an executed trust is a trust itself expressed in proper legal form. An executory trust thus bears to an executed trust the same relation which the heads of a settlement bear to the settlement itself. *Mozley & W.*

All trusts are in a sense executory; because a trust cannot be executed except by conveyance, and therefore there is always something to be done. But that is not the sense which a court of equity puts upon the term executory trust. An executory trust is where the author of the trust has left it to the court to make out from general expressions what his intention is. An executed trust is where there is nothing to be done but to take the limitations given you, and convert them into legal estates. Egerton *v.* Brownlow, 4 *Ho. of L. Cas.* 210.

As all trusts are executory in the sense that the trustee is bound to dispose of the estate according to the tenor of his trust, whether active or passive, it would be more accurate and precise to substitute the terms perfect and imperfect for executed and executory trusts. 1 *Hayes Conv.* 85.

EXECUTIO. The Latin term for execution, used, according to Burrill, in both the senses of complete performance of something, and of a writ for carrying a judgment into effect.

Executio est finis et fructus legis. Execution is the end and fruit of the law. The proper completion of and the object sought in a suit is the execution.

The execution is the end of the law; it gives the successful party the fruits of his judgment. A distress warrant is a most effective execution; for it may act on both the body and estate of the individual against

whom it is directed. So powerful a process must not be issued by a mere ministerial officer independent of judicial review. United States *v.* Nourse, 9 *Pet.* 8, 28.

Executio juris non habet injuriam. The execution of the law does not work a wrong. The bringing of an action without malice and upon a probable cause, in a court having jurisdiction, or any act done in the regular course of legal proceedings, or under authority of legal process regularly issued in an action, is not deemed an injury for which the law should afford a remedy, even though such action is brought upon insufficient grounds or against the wrong party; if damage result, it is *damnum absque injuria*. It is only where an action is brought maliciously and without probable cause; where an illegal act is done under color of the law; where legal process is abused for purposes of oppression or extortion; or in similar cases of proceedings not really sanctioned by the law, although in legal form, — that liability is incurred for acts either of an officer or a private individual in an executive capacity in the course of legal proceedings.

EXECUTION. 1. The completion or perfection of a written instrument, by the signature of the party, and the delivery.

2. The doing or performance of somewhat called for by a contract, judgment, writ, &c.

3. The technical name of the writ principally used to carry into effect a judgment or decree. And see EXECUTE.

By "execution of a note," in a rule of court excusing plaintiff, in certain cases, from producing proof of execution, is meant only the actual making and delivery. It does not involve other matters, such as an allegation that the note was dated back in order to include usurious interest. Freeman *v.* Ellison, 37 *Mich.* 459.

Delivery is a part of the execution of a sealed instrument. A bond signed and sealed on Sunday, but not delivered until a week-day, is good; for it is not executed on Sunday. State *v.* Young, 23 *Minn.* 551.

Although "executed" imports delivery, in addition to signing and sealing, yet a certificate of acknowledgment that one has "signed and sealed" a deed may be sustained as a substantial compliance with a statute requirement that it should say "executed," the substituted words being evidently used in the broad sense. Little *v.* Dodge, 32 *Ark.* 453.

Execution is a judicial writ issuing out of the court where the record or other judicial proceeding is on which it is grounded. It usually issues at the end of fourteen days from the verdict, but it may for good reason be either expedited or delayed; and it may issue within six years after the recovery of the judgment, without getting the judgment revived. It is either a *fi. fa.*, an *elegit*, or a *ca. sa.*; and the plaintiff may sue out either he pleases, and, after suing out one, he may abandon it before execution and sue out another; or he may even have several writs running at the same time, either of the same species into different counties, or of different species into the same or different counties. But only one of such writs must be actually executed. If part only of the amount be levied on the one writ so actually executed, then the writ must be returned; and after the return another writ may issue.

By the common-law procedure act, 1852, § 121, the writ should be directed to the sheriff of the county in which it is to be executed. If it is to be executed within a liberty or franchise, it must be directed to the sheriff of the county in which such liberty or franchise is situate. And by section 134 of the same act, the writ, if unexecuted, does not remain in force for more than one year from the *teste* of the writ, unless it is renewed. *Brown.*

EXECUTIVE. In the distribution of the powers of government into the three great classes, that power which secures the due performance of the laws is termed the executive power. And the word is often used in the United States as an impersonal title of the president or governor; thus, a fugitive is said to be surrendered on the demand of the executive of the state from which he fled.

Executive administration, or ministry. A political term applicable to the higher and responsible class of public officials by whom the chief departments of the government of the kingdom are administered. The number of these amounts to fifty or sixty persons; their tenure of office depends on the confidence of a majority of the house of commons; and they are supposed to be agreed on all matters of general policy except such as are specifically left open questions. *Cab. Lawyer.*

Executive department. See DEPARTMENT.

Executive officer. This phrase includes that class of officers who are concerned with the execution of the laws, as distinguished from legislative and

judicial officers. Some classifications make two classes of officers in the executive department of government, — executive and administrative.

Executive officer means an officer in whom resides the power to execute the laws. Thorne *v.* San Francisco, 4 *Cal.* 127, 146.

EXECUTOR. A man appointed, in virtue of his being named for that office in a will, to carry its provisions into effect. Executrix: a woman so appointed.

If the will names no one as executor, or the person named refuses to act, or dies, some suitable person is appointed by the court of probate to superintend the execution of the will; but such person is not styled an executor, but an administrator with the will annexed.

An executor is the legal personal representative of his testator, and the testator's rights and liabilities devolve for the most part upon him. His duties, generally stated, are: To bury the deceased in a manner suitable to the estate which he leaves. To prove the will. To make an inventory of the goods and chattels of the deceased, and collect the goods so inventoried; and, for this purpose, if necessary, to take proceedings against debtors to his testator's estate. To pay, first, the debts of his testator, and then the legacies bequeathed by his will; and to distribute the residue, in default of any residuary disposition, among the next of kin of the testator.

An executor rightfully or lawfully appointed is sometimes called a lawful or rightful executor, to distinguish him from an executor *de son tort*, an executor in his own wrong; who is a person who has thrust himself in, without lawful authority, to manage affairs of the estate. For, upon familiar principles of probate law, a person intermeddling with the estate of a deceased person, and doing acts which an administrator or executor alone may do, will make himself liable as executor *de son tort*. Bennett *v.* Ives, 30 *Conn.* 329; Bacon *v.* Parker, 12 *Id.* 213; Wilson *v.* Hudson, 4 *Harr.* 168; Howland *v.* Dews, *R. M. Charlt.* 383; Semmes *v.* Porter, *Dudley*, 167; Wiley *v.* Truett, 12 *Ga.* 588; Barron *v.* Burney, 38 *Id.* 264; Brown *v.* Durbin, 5 *J. J. Marsh.* 170; Johnson *v.* Duncan, 3 *Litt.* 163; Gentry *v.* Jones, 6 *J. J. Marsh.* 148; White *v.* Mann, 26 *Me.* 361; Leach *v.* Pittsburg, 15 *N. H.* 137; Emery *v.* Berry, 28 *Id.* 473; Scoville *v.* Post, 3 *Edw.* 203; Crinkleton *v.* Wilson, 1 *Browne*, 361; Howell *v.* Smith, 2 *McCord*, 516; Givens *v.* Higgins, 4 *Id.* 286; Hubble *v.* Fogartie, 3 *Rich.* 413. For numerous cases in which this doctrine applies, see *U. S. Dig.* tit. Executors and administrators.

Exempla illustrant non restringunt legum. Examples illustrate but do not restrict the law. Instances of the application of a legal principle illustrate the reason and the operation and effect of the rule, but do not restrict it to the facts of the particular case.

EXEMPLARY DAMAGES. Money which juries are allowed, in certain actions, to award to the plaintiff, additional to a compensation for his pecuniary loss, by way of compelling defendant to atone for a wrong done.

The propriety of allowing damages by way of punishment has been strongly contested, many able jurists and writers contending that, in the civil action by the person injured by a wrong, the damages ought in all cases to be restricted to a compensation for the loss sustained, and that all considerations of punishment should be reserved to be determined in some prosecution at the suit of government. A well known and instructive discussion, between Mr. Sedgwick, in favor of the rule allowing exemplary damages, and Judge Greenleaf, in favor of restricting damages to compensation, may be found in the successive editions of their treatises on Damages and Evidence. The weight of authority throughout the United States seems to be, that, in a proper case, damages to punish the defendant may be allowed. Exemplary damages is perhaps the most common name for these; but they are also known as "smart-money," "punitive damages," and "vindictive damages."

Under these various names the propriety of allowing such damages has been often discussed; and the general result of the cases seems to be to sustain, in nearly all the states, the rule, that, when-

ever the injury is shown to have been inflicted wantonly or maliciously, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation, but they may award an additional sum, as a punishment of or atonement for the wilful malicious wrong. But malice, in this rule, is not merely the intentional doing a wrongful act: the word is used as implying an actual design to injure or to violate law. See *U. S. Dig.* tit. Damages, I. 4.

To meet the objection that the practice of allowing such damages leads to a double punishment, Judge Hoffman, of the New York superior court, in Fry *v.* Bennett, 1 *Abb. Pr.* 304, gave a very close and guarded statement of the rule, distinguishing between punishing the wrong done to the plaintiff, which he urges is the sole object, and therefore the limit, of exemplary damages, and vindicating the peace of society, which is the object of criminal punishment. He says: "When the terms vindictive damages or exemplary damages are employed in a civil action for libel, they mean the atonement which the law demands shall be made to the libelled party by the offender; and such atonement involves essentially his punishment. It is condemnation, and infliction for traducing the individual, not for provoking him to break the peace. It would be objectionable, in this view of the case, to instruct a jury to give damages, on the ground that the interests of society required the defendant's punishment, or that they could consider the offence to the state as a reason for increasing the damages."

Two recent cases in New Hampshire, Fay *v.* Parker, 53 *N. H.* 342, which contains a most elaborate and extended review of the authorities, and Bixby *v.* Dunlap, 56 *N. H.* 456, discuss the question in the light of the same distinction as was urged in Fry *v.* Bennett; and present the true rule as being this: that compensation is the primary rule of damages, but, when actual malice enters into the tort, damages to punish it may be allowed, for the purpose, really, of making atonement to the sufferer for the injury to the feelings and other elements of his damage, which are not susceptible of direct pecuniary valuation; but such allowance must never be carried so far as to embrace or take the place of punishment of the tort as a public offence. According to Bixby *v.* Dunlap, it is incorrect to encourage the jury to separate actual from exemplary damage. The true rule is, not for the jury first to determine the actual money damage which plaintiff has sustained, and then, if they find the defendant has been malicious, give another separate sum in damages by way of example or punishment; but they should be told that, if they find the defendant has been malicious, the rule of damages will be more liberal. Then, instead of awarding damages only for those matters which are capable of pecuniary valuation, they may take into consideration all the circumstances of aggravation, the insults, offended feelings, degradation, &c., and endeavor, according to their best judgment, to award such damages by way of compensation or indemnity as on the whole the plaintiff ought to receive, and the defendant to pay. Damages thus enhanced, to give a full compensation for the injury attending a malicious offence, are sometimes called vindictive, because they have a tendency to satisfy the just indignation of the plaintiff and the jury; sometimes exemplary, because they call public attention to the wrong and the remedy; sometimes punitory, because, although intended by law to operate as compensation, they are likely to be felt by defendant as a punishment.

EXEMPLIFICATION. An official transcript of a document from public records, made in form to be used as evidence, and authenticated as a true copy.

EXEMPT, *v.* To except or excuse from the operation of a law. Exempt, *a.*: the condition of being excepted or excused; and this word is often used as a noun, to denote a person excused by law from the performance of a duty or obligation imposed on others, as from jury duty or military service. Exemption: a privilege of being excepted from, or free of the operation or burden of, some law.

Probably the most frequent use of

these words is in connection with the laws governing execution against property: they generally allow a debtor to retain certain necessary articles as "exempt from execution."

EXEQUATUR. A rescript or order given by the foreign department of a state to which a consul or commercial agent is accredited, authorizing the functionaries of the home department to recognize the official character of the consul.

EXHIBIT, *v.* To produce publicly, for inspection; also, to submit to a court or officer, in course of proceedings. Exhibit, *n.* : a document produced and identified for future use as evidence.

In chancery practice, when testimony of witnesses was taken by an examiner in the form of depositions, to be afterwards submitted to the chancellor at the hearing, it was necessary, when documents were involved in the testimony, to exhibit them to the witness and examiner. The witness having identified them, the examiner marked them as having been exhibited upon the examination. They could then be produced before the chancellor, and identified by the examiner's marks as the same papers as were referred to by the witness; hence the name exhibits.

The same method is pursued when documents are introduced on a jury trial or before a referee, and need to be identified for purposes of any appeal. Moreover, when documents are referred to in a pleading, and annexed, instead of being copied in full in the body of the pleading, they are usually referred to as exhibits. If several exhibits are introduced, they are usually distinguished by letters, — exhibit A, exhibit B, &c.

In equity practice, in stating written instruments in a pleading, it is usual to refer to the instrument itself. This reference makes the whole instrument referred to a part of the pleading. But it does not make it evidence: to do that, the instrument must be proved in the usual way. The sole office of an exhibit is to help out the pleading, in case it should be found, on the trial, that the allegations therein do not give some needed particulars of the writing, or do not give the writing with sufficient accuracy. Brown *v.* Redwyne, 16 *Ga.* 67.

The use of exhibits is a convenient mode of abridging evidence in the case of written documents, the proof being either *viva voce* or by affidavit. But only some documents may be exhibited, namely, extracts from registries, records from the Bodleian and Museum libraries, and generally all documents coming out of the custody of a public officer having care of them; also, office-copies of records, whether of the superior courts at Westminster or of the courts of the county palatine of Lancaster, or of the inferior courts of record; also, and chiefly, deeds, bonds, notes, bills of exchange, letters, or receipts, and the like. Documents of other kinds may not be so proved; and, generally, no document may be proved as an exhibit, if it requires more to substantiate it than the proof of the execution or of handwriting, *e.g.* if any ulterior circumstance which might affect it requires to be proved, and the opposite side would have a right to cross-examine upon that circumstance. (Lake *v.* Skinner, 1 *Jac. & W.* 9, 15.) *Brown.*

The presentment of a complaint, and the issuing of the warrant by the magistrate, is a sufficient exhibiting of it, within the Connecticut statute of limitations, although the arrest may not be made until after the expiration of the time limited. Newell *v.* State, 2 *Conn.* 38.

Exhibition, in Scotch law, signifies the production of deeds; and an action of exhibition is an action for compelling production of the same. *Bell; Pat. Comp.*

EXIGENT. The name of a writ in proceedings before outlawry, directing the sheriff to cause to be demanded the defendant from county court to county court, until he be outlawed; or, if he appear, then to take and have him before the court on a day certain, to answer to the plaintiff. At the same time issued the writ of proclamation of exigents, which was followed, if the defendant was not taken and did not appear, by the writ of *capias utlagatum.*

Exigi facias. That you cause to be demanded. The emphatic words of the Latin form of the writ of exigent. They are sometimes used as the name of that writ.

EXILIUM. Exile; banishment. In ancient English law, this term was applied to a species of waste, having reference to persons by sending them away or driving them from the land; such as setting free or wrongfully ejecting bond-servants or bond-tenants, or pulling down buildings so as to compel the occupants to leave, or other acts having the same tendency and purpose.

EXISTING. The phrase existing laws, in the saving clause of an act, refers to the laws in existence at the time of the

passage of the act. Lawrie *v.* State, 5 *Ind.* 525.

The operation of a law for regulating "all existing railroad corporations," extends to and controls railroads incorporated after, as well as before, its passage, unless exception is provided in their charters. Indianapolis & St. Louis R. R. Co. *v.* Blackman, 63 *Ill.* 117.

The phrase existing creditors, in Iowa Code 1873, § 1923, regulating the recording of sales or mortgages of personal property, is not limited to those who were creditors when the sale was made: it applies equally to those who became such before possession was changed, the bill of sale recorded, or notice given. Fox *v.* Edwards, 38 *Iowa*, 215.

EXONERETUR. Let him be discharged. The name of an entry on a bail-piece, that the bail are exonerated or discharged, made by order of the court or judge, upon proper cause shown, as the surrender of their principal, or other performance of the condition of the obligation.

EXPATRIATION. The act of an individual in forsaking his own country, with a renunciation of allegiance, and with a view of becoming a permanent resident and citizen in another country.

Whether this can rightfully be done without consent of the country abandoned has been the subject of much discussion.

By act of July 27, 1868, congress declared the policy of the United States on the subject as follows:

Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore, any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic. All naturalized citizens of the United States, while in foreign countries, are entitled to and shall receive from this government the same protection of persons and property which is accorded to native-born citizens. *Rev. Stat.* §§ 1999, 2000.

EXPECTANT ESTATE. An estate in lands, consisting of a present vested contingent right of future enjoyment; the right to pernancy of the profits, although vested, being contingent, and postponed to a future time. Estates in remainder and in reversion (*q. v.*) are expectant estates. The term future estates is also applied to this class of interests in lands.

Expectant estates, as used in 1 N. Y. Rev. Stat. 725, § 35, includes every present right or interest which may by possibility vest in possession at a future day. Lawrence *v.* Bayard, 7 *Paige*, 70, 76; Underhill *v.* Saratoga, &c. R. R. Co., 20 *Barb.* 455, 462.

Expedit reipublicæ ut sit finis litium. It is for the advantage of the state that there be an end of suits; the public good requires that some period be put to litigation. More frequently expressed in the form, *interest reipublicæ ut sit finis litium*, q. v.

EXPENSE. A promise to pay half the expense of building a wharf, is not a promise to pay whatever may be spent about it, but whatever it may reasonably cost. One sued for contribution may show that a larger amount was paid than was justly due. Snow *v.* Johnson, 1 *Minn.* 48.

Under a written contract to pay a certain proportion of the net profits of an adventure after deducting "the actual expenses that may appertain to the goods themselves," expenses for clerk-hire, advertising, and taxes may properly be deducted from the gross amount. Foster *v.* Goddard, 1 *Cliff.* 158.

Expenses, in a will, is never taken to signify expenses incurred during the life of the testator: these would be debts. Matter of Haines, 8 *N. J. Eq.* 506.

EXPERT. Originally, experienced; practiced; skilful. By a familiar rule of evidence, when questions requiring skill or knowledge in art or science are involved in the issue, persons possessing such skill or knowledge may be called as witnesses, and allowed to give their opinions on the question presented; such witnesses are called experts.

An expert is a person who possesses peculiar skill and knowledge upon the subject-matter that he is required to give an opinion upon. State *v.* Phair, 48 *Vt.* 366.

An expert is a skilful or experienced person; a person having skill or experience, or peculiar knowledge on certain subjects, or in certain professions; a scientific witness. Heald *v.* Thing, 45 *Me.* 392; Clark *v.* Rockland Water Power Co., 52 *Id.* 68.

An expert must have made the subject

upon which he gives his opinion a matter of particular study, practice, or observation, and he must have particular and special knowledge on the subject. Jones *v.* Tucker, 41 *N. H.* 547.

The science which an expert should be required to possess, implies that special and peculiar knowledge acquired only by a course of observation and study, and the expenditure of time, labor, and preparation, in a particular employment and calling of life. Dole *v.* Johnson, 50 *N. H.* 452.

On a question of handwriting, a witness who, by study, occupation, or habit, has been skilful in marking and distinguishing the characteristics of handwriting, may be an expert, although he had never been in a situation where duty required him to distinguish between genuine and counterfeit handwriting. Sweetser *v.* Lowell, 33 *Me.* 446.

EXPLOSION. Injuries to a building insured, caused by an explosion of spirit-vapor accumulating in the building and becoming mixed with the atmosphere, and the mixture being ignited from a gas-jet, are within an exception in a policy of insurance, of losses caused by "any explosion whatever." The word explosion is variously used in ordinary speech, and is not one that admits of exact definition. Every combustion of an explosive substance, whereby other property is ignited and consumed, would not be an explosion within the ordinary meaning of the term. It is not used as a synonyme of combustion. An explosion may be described generally as a sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report. But the rapidity of the combustion, the violence of the expansion, and the vehemence of the report, vary in intensity as often as the occurrences multiply. Hence, an explosion is an idea of degrees; and the true meaning of the word, in each particular case, must be settled, not by any fixed standard or accurate measurement, but by the common experience and notions of men in matters of that sort. United Life, &c. Ins. Co. *v.* Foote, 22 *Ohio St.* 340. See FIRE.

EXPORT, *v.* To carry or send out of the country; the opposite of import. Exportation: the act of carrying or sending abroad. Exports, *n.*, and sometimes exportations: things sent abroad; subject-matter of exporting.

The words are used almost exclusively of merchandise sent from one country to another in the adventures of commerce.

Export signifies the taking or carrying out an article of trade or commerce. State *v.* Turner, 5 *Harr.* 501.

Exportation is the carrying of goods out of a port to a foreign country, and does not include a coastwise transportation, before the period of exportation commences; the period of exportation is the termination of exportation. Forman *v.* Peaslee, 11 *Monthly Law Rep.* N. S. 273.

Exports, as used in U. S. Const. art. 1, §§ 8, 10, embraces only articles exported to foreign countries, and does not include those transported from one state into another. *Exp.* Martin, 7 *Nev.* 140.

EXPOSE. To exhibit; to show.

Exposure of the person, that is, of the parts which decency requires should be kept clothed in public, is an indictable offence, on the ground that every public show and exhibition which outrages decency, shocks humanity, or is contrary to good morals, is punishable at common law. 2 *Bish. Cr. Law*, § 318.

Expose to sale. Means to show to the by-standers. A statute authorizing an express company to expose unclaimed goods to sale, does not import authority to sell goods in locked trunks. Adams Express Co. *v.* Schlessinger, 75 *Pa. St.* 246.

EXPRESS. Declared in terms; distinctly mentioned; openly stated; set forth in words.

Express is generally used as the opposite of implied; as actual is opposed to constructive. Thus, an express assumpsit or contract is a contract which is made in terms, not left to implication; an express repeal is where a statute refers to and declares the repeal of another, instead of leaving the courts to deduce the repeal from the inconsistency of the two laws. Express trust is a trust declared in terms, not raised by rules of law from the dealings of parties. Express warranty is a warranty made in terms, as distinguished from one which may be implied.

Express malice is a phrase sometimes used, but not to be approved: actual malice better gives the meaning; which is, not malice which has been avowed or declared, but malice shown to have existed in emotion, as distinguished from a design merely imputed. But see 4 *Bl. Com.* 198, 200.

Express trusts are those which are created in express terms in the deed, writing, or will, while implied trusts are those which, without being expressed, are deducible from the nature of the transaction, as matters of intent, or which are superinduced upon the transactions by operation of law, as matters of equity, independently of the particular intention of the parties. Brown *v.* Cherry, 56 *Barb.* 635.

EXPRESS COMPANY. A firm or

corporation making it their business to receive and transport packages of portable property. These are, by the weight of authority, common carriers. They cannot be discriminated from other carriers by a precise line of legal definition, but are practically distinguished by such peculiarities as these: They do not usually own or operate the vehicles in which the transportation is made, but rely on those of common carriers, in which their agents, with goods in charge, travel back and forth. They seek more particularly the business of carrying the lighter and more valuable kinds of property. They offer assurances of greater expedition in carrying and care in delivery. They combine with carrying the transaction of other business incidental to it; as the collection of the price due upon goods sold and intrusted to them for delivery.

Expressio eorum quæ tacite insunt nihil operatur. The expression of things which are tacitly implied avails nothing. A clause in an instrument which merely expresses what is tacitly implied by the law is inoperative, and is treated in construction as mere surplusage. An illustration of this maxim frequently given is the case of a lease to two persons for the term of their lives, which, at common law, creates a joint tenancy; if the words "and the survivor of them" are added, such words are mere surplusage, because, by law, the term would go to the survivor.

In bills of exchange and promissory notes, the words value received express only what the law will imply from the nature of the instrument and the relation of the parties apparent upon it. Those words are regarded as surplusage, and do not prevent inquiry into the consideration of the bill or note, as between the immediate parties thereto.

Expressio unius est exclusio alterius. The expression of one thing is the exclusion of another; the express mention of one thing, person, or place, or of a particular class or number, implies the exclusion of all others not mentioned. This maxim is of general application in the construction of contracts and written instruments, and in the interpretation of statutes, but is subject to some limitations. The general principle is, that, where parties have expressed the conditions or terms or stipulations of their acts or engagements, they are presumed to have expressed *all* such terms or conditions, and not merely a part of them. The application of the maxim is, however, subject to the intention of the party as discoverable upon the face of any particular instrument or transaction, which intention, when apparent, must prevail. The rule of law excluding parol evidence as to the terms of a written instrument, unambiguous upon its face, is founded upon the same or a very similar principle, expressed in the maxim, *expressum facit cessare tacitum*, considered by Mr. Broom as merely another form of this maxim. *Broom Max.* 651. A frequent application of the general principle is to restrict the meaning of general words within the limits defined by more particular and specific expressions accompanying them. An example in the construction of deeds is the rule that an implied covenant is to be controlled within the limits of an express covenant, on the same subject. Especially, after an enumeration of particular things, words of a general nature following are to be taken, by reference to the preceding enumeration, to include only things *ejusdem generis*. In the interpretation of statutes, also, this maxim is of general application; subject, however, to the intention of the legislature as the chief guide to the construction. Moreover, where the language of a statute may fairly comprehend many different cases, and some only are expressly mentioned merely by way of example, others, of a similar nature, are not thereby excluded. So, where the words used by the legislature are general, and the statute is only declaratory of the common law, it may extend to other persons and things beside those actually named. But where the expressions used are restrictive, and intended to exclude all things not enumerated, the maxim is to be applied. Thus, a statute by which a tax or charge is imposed upon certain specific things would seem intended to exclude every thing else even of a similar nature, and, *a fortiori*, all things different in nature and description from those which are expressed. *Broom Max.* 664.

Expressum facit cessare tacitum. That which is expressed supersedes that which is not mentioned. Express stipulations cannot be controlled by mere implications, or by other matters left unexpressed in the agreement or instrument. A familiar illustration of this maxim is the rule excluding parol evidence to contradict or vary the terms of an instrument in writing. The principle extends to all cases of express contracts. It is not necessary that the parties to every agreement should provide in terms that they are not to be bound by any thing not expressly set down. Compare the maxim, *expressio unius est exclusio alterius.*

EXPROPRIATION. The surrender of a claim to exclusive property. *Wharton.*

In French law, expropriation is the compulsory realization of a debt by the creditor out of the lands of his debtor, or the usufruct thereof. When the debtor is co-tenant with others, it is necessary that a partition should first be made. It is confined, in the first place, to the lands (if any) that are in *hypothèque,* but afterwards extends to the lands not in *hypothèque.* Moreover, the debt must be of liquidated amount. *Brown.*

EXPULSION. Removal from membership.

In the older and stricter use of the terms, it signified the depriving a member of a corporate body or society of non-political rights of membership; and was distinguishable from amotion (*q. v.*), and disfranchisement (*q. v.*).

It is applied to a termination of membership in a legislative body, by vote of the body, founded upon charges against the member involved.

EXTENSION OF PATENT. A privilege accorded by the former patent laws, whereby the patentee of an ordinary patent, upon proof that, without neglect or fault on his part, he had failed to obtain a reasonable remuneration for the time, ingenuity, and expense bestowed upon the invention, and on the introduction thereof into use, might obtain an extension of such patent for the term of seven years longer; the term for which original patents were granted being then fourteen years. By act of congress of 1861, the term for which patents for inventions are at first issuable is enlarged to seventeen years, and extensions are disallowed. Patents for designs are issued for shorter terms, and may be extended.

EXTENT. 1. A writ, in the nature of an execution, by which lands of the debtor, instead of being sold, are valued and set off to the creditor, either absolutely or for a term during which their rental may be sufficient, as a satisfaction of his judgment. Such a proceeding is of English origin, and has been in use in some of the United States.

2. In England, extent is a writ available in cases in which the crown has an interest. The extent may either be an extent in chief or an extent in aid, the distinction being that the former is a hostile proceeding by the crown against its debtor, or against the debtor of that debtor; while the latter is an extent issued at the instance of the crown debtor himself against his debtor, to aid his payment of the crown debt, — the advantage of it arising from the rule that the crown has priority over all executions of the subject.

Extents are of several kinds, as follows: A process of execution under the laws relating to statutes-staple and statutes-merchant, by which the lands and goods of a person whose recognizance had been forfeited, or whose debt had been acknowledged on statute-staple or statute-merchant, might be appraised and delivered to the creditor. (3 *Bl. Com.* 419, 423; 1 *Steph. Com.* 309; 3 *Id.* 663.) An extent in chief, which is a writ issuing out of the court of exchequer, for the recovery of debts of record due to the crown; by which the sheriff is directed to cause the lands, goods, and chattels of the debtor to be appraised at their full value, and to be seized into the hands of the sovereign. An extent in aid, issued at the suit or instance of a crown debtor against a person indebted to the crown debtor himself. A special writ of extent, directing the sheriff to seize the lands and goods of a deceased crown debtor. This writ is called *diem clausit extremum.* (3 *Bl. Com.* 420; 3 *Steph. Com.* 662–668.) An ancient valuation put upon lands in Scotland, for the purpose of proportioning the shares of the public taxes, as well as for fixing the "casualties of superiority." (*Bell.*) *Mozley & W.*

EXTINGUISHMENT. The annihilation or extinction of a right or obligation.

Extinguishment of common, is a destruction or termination of a right of common, *q. v.*

Extinguishment of copyhold. Ja-

cob says it is a general rule that any act by the copyholder which denotes his intention to hold no longer of his lord, and amounts to a determination of his will, is an extinguishment of his term.

Wharton says that when a tenant conveys to his lord, or does an act denoting his intention of not holding of his lord any longer, his copyhold is extinguished; when the lord is the active party, an enfranchisement is effected.

Extinguishment of debts, takes place not only by payment, but in several other ways, — as where the creditor accepts a higher security, or recovers a judgment; where he gives a release; where he unites in an accord and satisfaction.

Extinguishment of an estate, may take place where a less estate is merged in a greater one; as when one who has a term for years in land acquires the fee, this extinguishes his estate for years.

Extinguishment of a way, may be affected by a purchase, by the owner of the right of way, of the land over which the way lies.

EXTORTION. In the strict sense of the criminal-law authorities, extortion is the offence committed by an officer who corruptly claims and takes, as his fee, that to which he is not entitled.

Extortion is an abuse of public justice, which consists in any officer's unlawfully taking, by color of his office, from any man, any money or thing of value that is not due to him, or before it is due. 4 *Bl. Com.* 141.

Extortion is any oppression under color of right. In a stricter sense, the taking of money by any officer, by color of his office, when none, or not so much, is due, or it is not yet due. 1 *Hawk. Pl. Cr.* (Curw. ed.) 418.

It is the corrupt demanding or receiving by a person in office of a fee for services which should be performed gratuitously; or, where compensation is permissible, of a larger fee than the law justifies, or a fee not due. 2 *Bish. Cr. L.* § 390.

The distinction between bribery and extortion seems to be this: the former offence consists in the offering a present, or receiving one, if offered; the latter, in demanding a fee or present, by color of office. *Jacob.*

Extortion, in its stricter sense, is the taking of money by an officer, by color of his office, either where none at all is due, or not so much is due, or when it is not yet due. It is not necessary to charge that it was taken as fees to his own use. People *v.* Whaley, 6 *Cow.* 661.

The exacting payment of a fee by an officer before it is due, constitutes extortion. Commonwealth *v.* Bagley, 7 *Pick.* 279.

Extortion is the taking, by color of an office, money, or other thing of value, that is not due, before it is due, or more than is due. Williams *v.* State, 2 *Sneed*, 160.

EXTRA. This Latin word, meaning beyond, outside of, occurs in several phrases and compound words.

Extra costs. A term which seems to be applied in English practice to those charges which do not appear upon the face of the proceedings, such as witnesses' expenses, fees to counsel, attendances, court-fees, &c., an affidavit of which must be made, to warrant the master in allowing them upon taxation of costs.

Extra-dotal property, is used in Louisiana to designate property which forms no part of the dowry of a woman. *La. Civ. Code*, art. 2315.

Extra-judicial. Beyond jurisdiction. An act or decision by a judge or court, beyond its proper authority in a cause before it, is called extra-judicial.

Extra-parochial. Out of any parish; any thing privileged and exempt from the duties of a parish.

Extra quatuor maria. Beyond the four seas. Out of the realm of Great Britain; beyond the jurisdiction. See BEYOND SEA.

Extra services, when used with reference to officers, means services incident to the office in question, but for which compensation has not been provided by law. Commissioners of Miami County *v.* Blake, 21 *Ind.* 32.

Extra-territorial. Beyond the territory. A law which should be allowed to operate beyond the territory of the government by which it was passed, would be said to operate extra-territorially.

Extra viam. Outside the way. The substantive words of a replication used in the common-law action of trespass, where the defendant having pleaded a right of way in justification of the trespass alleged, the plaintiff desired to set up that the trespass was beyond the limits of the way alleged.

EXTRACT. Signifies, usually, a

portion of a book or document, separately transcribed.

In some cases, extracts from public books are received in evidence; as, extracts from the registers of births, marriages, and burials, kept according to law, when the whole of the matter has been transcribed which relates to the cause or matter in issue.

To some extent, extracts are allowed to be made, by authors and compilers, from works previously copyrighted and published; this, within limits, is not deemed an infringement of the prior copyright.

EXTRADITION. The delivering up, by one government to another, of an individual who has fled to the territory of the latter, to escape the operation of the laws of the former.

As respects the United States, cases of extradition are of two classes. One class comprises persons who have fled from one of the United States or organized territories, to take refuge in another; the other class comprises persons who have fled from foreign countries, to take refuge anywhere within the United States. Cases of the latter class are practically governed by provisions of treaties between the United States and foreign countries, and acts of congress passed to carry those treaties into effect. Cases of the former class arise under a provision of the constitution, and statutes passed pursuant to it, which, probably, may be invoked in the case of a fugitive apprentice, Boaler *v.* Cummines, 1 *Am. Law Reg.* 654; but are of use and importance only in respect to fugitives from penal justice.

Extradition of offenders who have fled to this country to escape the justice of a foreign government lies between the government of the United States, considered as a homogeneous national sovereignty, and the foreign government making the demand. The states, as such, are not concerned. If the fugitive is captured within a state, the surrender is an act of national sovereignty, which the United States government alone, as the foreign affairs of this country are practically administered, is accustomed to perform. Holmes *v.* Jennison, 14 *Pet.* 540, 3 *Op. Att.-Gen.* 559; *Exp.* Holmes, 12 *Vt.* 631. If he is to be given up from a territory or from the District of Columbia, the sovereignty of congress over those places aids the surrender.

I. INTERNATIONAL EXTRADITION. An underlying question here is whether extradition is a right and duty, or is it a voluntary practice only, a creature of national compact.

The general question, whether by the principles of the public law of nations an escaped criminal must or may be delivered up, by the nation in whose territory he has sought refuge, to the one whose laws he has violated, has been much discussed, and appears to be unsettled. Earnest and able opinions have been pronounced upon both sides. See 1 *Kent Com.* 36, and notes in later editions; *Wheat. Int. Law*, Lawrence's and Dana's editions; 3 *Story Const.* 675; *Story Confl. L.* 520. The advance which has been made in recent years in the adoption of systematic extradition treaties has much diminished, for the United States at least, the importance of an inquiry as to the propriety of an extradition independent of treaty; and that question may very probably always remain unresolved by any controlling authority. It ought, however, when discussed, to be considered in three distinct branches: 1. Is one nation under obligation, by public law, and independent of a treaty, to deliver up the fugitive criminals of another? Upon this branch of the question the weight of authority and of reason seems to us to be that there is not any such obligation. No nation can demand from another the surrender of a fugitive, as matter of right, unless the right has been conceded by treaty. 2. A nation not being deemed under obligation to surrender a fugitive, is she authorized or at liberty so to do, if comity or reasons of political expediency incline her to grant a request for a surrender; or is the surrender an act of tyranny, beyond the proper functions of government, in a case where no treaty demands it? On this branch the true answer seems to be that the sovereign power may, for wise reasons, in the particular case, surrender persons charged with the graver crimes, with offences

recognized as such by the laws of civilized nations. The general right of asylum conceded to those who remove their domicile to a new country does not extend so far as to forbid the adopted country from returning the individual, upon reasonable proof that he came in evasion of the criminal laws of his native land, if she sees fit. 3. An abstract authority to surrender a criminal being assumed, in whom, in what tribunals or officers, is its exercise vested? This must depend on the constitution of government, or the positive law of the realm. Thus it may be that sovereignty, as it exists in the United States government, can authorize a surrender independent of a treaty, and yet that a particular court or a particular officer, even the president, has not yet been empowered to exercise that authority.

The current of opinion in the United States has been that the government disclaims any obligation to surrender fugitives from foreign countries, unless pursuant to a treaty stipulation, and will not make it a practice. Matter of Metzger, 5 *How.* 176; Case of José Ferreira dos Santos, 2 *Brock. Marsh.* 493; United States *v.* Davis, 2 *Sumn.* 482, 1 *Op. Att.-Gen.* 68, *Id.* 510, 2 *Id.* 359, 3 *Id.* 661, 6 *Id.* 85, 7 *Id.* 356; and see *Re* Kaine, 14 *How.* 103, 112. But it has in exceptional cases asserted the right both to receive and to surrender a criminal without such stipulation requiring it.

As between the United States and foreign countries, therefore, extradition is to be considered and defined as being, not a duty or right, but a practice of surrendering fugitive criminals, founded upon treaty stipulations between the governments involved, or upon exceptional and extraordinary reasons recommending a surrender in a particular case. The cases in which, and crimes for which, an offender will be reclaimed or surrendered as matter of right, are precisely those defined by some treaty between the United States and the other government involved, and, if there is no such treaty, there is no right of extradition.

The following is such an exhibit as can be made in limited space of the provisions of the existing treaties declaring grounds of extradition. It must be understood that the crimes are often more minutely defined in the treaty than is here indicated. The treaties themselves are most conveniently consulted in the volume of U. S. Rev. Stat. containing public treaties in force Dec. 1, 1873, and in the subsequent annual laws.

By our treaty with Great Britain of Aug. 9, 1842, it is agreed that the United States and Great Britain "shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other: Provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had been there committed."

Our treaty with the Hawaiian Islands of Dec. 20, 1849, contains provisions on the subject of extradition which correspond with those of the treaty with Great Britain, above mentioned. So does our treaty with Baden of Jan. 30, 1857, re-declared July 19, 1868, except that it does not specify utterance of forged paper, and does mention fabrication or circulation of counterfeit money, either coin or paper, and embezzlement of public moneys.

By our treaty with France of Nov. 9, 1843, it is agreed that the United States and France shall, on requisitions made in their name, through the medium of their respective diplomatic agents, deliver up to justice persons who, being charged with the following crimes: — "murder (comprehending the crimes designated in the French penal code by the terms assassination, parricide, infanticide, and poisoning), or with an attempt to commit murder, or with rape, or with forgery, or with arson, or with embezzlement by public officers,

when the same is punishable with infamous punishment," — shall seek an asylum, or shall be found within the territories of the other: Provided, that this shall be done only when the fact of the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found would justify his or her apprehension and commitment for trial, if the crime had been there committed; and shall not be done for offences of a purely political character.

Robbery and burglary are added to the above enumeration by the treaty of Feb. 24, 1845; and by the treaty of Feb. 10, 1858, the above provisions are extended to persons charged, whether as principals, accessories, or accomplices, with "forging or knowingly passing or putting in circulation counterfeit coin or bank-notes or other paper current as money, with intent to defraud any person or persons; embezzlement by any persons or persons hired or salaried to the detriment of their employers, when these crimes are subject to infamous punishment."

Our treaty with the Orange Free State of Dec. 22, 1871, covers substantially the same crimes as the treaties with France, with the addition of piracy.

Our treaty with the Two Sicilies of Oct. 1, 1855, provides extradition for murder (including assassination, parricide, infanticide, and poisoning), attempt to commit murder, rape, piracy, arson, making and uttering false money, forgery (including forgery of evidences of public debt, bank-bills, and bills of exchange), robbery with violence, intimidation, or forcible entry of an inhabited house, embezzlement by public officers (including appropriation of public funds, when these crimes are subject to infamous punishment, or the punishment *della reclusione*), &c. Offences before date of the treaty and political offences are excepted; and neither party need deliver up its own citizens or subjects.

Our treaty with Sweden and Norway of March 21, 1860, provides for the extradition of persons "who shall have been charged with or sentenced for any of the following crimes; to wit, murder (including assassination, parricide, infanticide, and poisoning), or attempt to commit murder, rape, piracy (including mutiny on board a ship, whenever the crew or part thereof, by fraud or violence against the commander, have taken possession of the vessel), arson, robbery and burglary, forgery, and the fabrication or circulation of counterfeit money, whether coin or paper money, embezzlement by public officers, including appropriation of public funds." But the stipulation is declared not to apply to citizens or subjects of the nation upon whom the demand is made; to offences of a political character; nor, until after trial and punishment or acquittal, to persons who have committed new crimes within the State to which they have fled.

Our treaties with Austria of July 3, 1856, re-declared Sept. 20, 1870, are substantially the same in the enumeration of offences as that with Sweden and Norway, above mentioned. So are our treaties with Nicaragua, of June 25, 1870, and with Ecuador, of June 28, 1872, except that these omit attempts to murder.

Our treaties with Venezuela, of Aug. 27, 1860, with the Dominican Republic, of Feb. 8, 1867, and with Italy, of March 23, 1868, also substantially conform in the enumeration of offences to that with Sweden and Norway; the most important difference being the addition of embezzlement from employers by persons hired or salaried.

Our treaty with the Swiss Confederation of Nov. 25, 1850, also corresponds, in substance, with the treaty with Sweden; excepting that counterfeiting is omitted, and embezzlement by employes is included in the crimes enumerated.

By our treaty with Prussia of June 16, 1852, it is agreed that "the United States and Prussia, and the other states of the Germanic Confederation included in, or which may hereafter accede to, this convention, shall, upon mutual requisitions by them or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forg-

ery, or the utterance of forged papers, or the fabrication or circulation of counterfeit money, whether coin or paper money, or the embezzlement of public moneys, committed within the jurisdiction of either party, shall seek an asylum, or shall be found within the territories of the other: Provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed."

And by a subsequent treaty with the king of Prussia, of Feb. 22, 1868, the above provisions are extended to all the states of the North German Confederation.

Our treaty with Bavaria of Sept. 12, 1853, re-declared May 26, 1868, contains the same provisions as that with Prussia.

By our treaty with Mexico of Dec. 11, 1861, re-declared July 10, 1868, persons may be delivered up who are charged, whether as principals, accessories, or accomplices, with either of the following crimes: "Murder (including assassination, parricide, infanticide, and poisoning), assault with intent to commit murder, mutilation, piracy, arson, rape, kidnapping (defining the same to be the taking and carrying away of a free person by force or deception), forgery (including the forging or making, or knowingly passing or putting in circulation, counterfeit coin or bank-notes, or other paper current as money, with intent to defraud any person or persons); the introduction or making of instruments for the fabrication of counterfeit coin or bank-notes or other paper current as money, embezzlement of public moneys, robbery (defining the same to be the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting them in fear), burglary (defining the same to be breaking and entering into the house of another with intent to commit felony), and the crime of larceny, of cattle or other goods and chattels, of the value of twenty-five dollars or more, when the same is committed within the frontier states or territories of the contracting parties."

Our treaty with Hayti of Nov. 3, 1864, provides extradition for murder, including assassination, parricide, infanticide, and poisoning; attempt to commit murder, piracy, rape, forgery, counterfeiting, utterance of forged paper, arson, robbery, and embezzlement by public officers or persons hired or salaried, when these crimes are subject to infamous punishment. It does not apply to any crime or offence of a political character, nor to any crime or offence committed prior to the date of the treaty; and neither party need deliver up its own citizens.

By our treaty with Belgium of March 19, 1874, persons shall be delivered up who shall have been convicted of or be charged with murder (comprehending parricide, assassination, poisoning, and infanticide); the attempt to commit murder, rape, arson, piracy, and mutiny on board a ship, whenever the crew, or part thereof, by fraud or violence against the commander, have taken possession of the vessel; burglary (defined to be the act of breaking and entering by night into the house of another with the intent to commit felony), robbery (defined to be the act of feloniously and forcibly taking from the person of another goods or money by violence or putting him in fear), and the corresponding crimes punished by the Belgian laws under the description of thefts committed in an inhabited house by night, and by breaking in by climbing or forcibly; and thefts committed with violence or by means of thefts; forgery (by which is understood the utterance of forged papers, and also counterfeiting of public, sovereign, or government acts); the fabrication or circulation of counterfeit money, either coin or paper, or of counterfeit public bonds, bank-notes, obligations, or, in general, any thing being a title or instrument of credit; the counterfeiting of seals, dies, stamps, and marks of state and public administrations, and the utterance thereof; embezzlement of public moneys committed within the jurisdiction of either party by public officers or depositaries; and embezzlement by any person or persons, hired or salaried,

to the detriment of their employers, when the crime is subject to punishment by the laws of the place where it was committed.

Our treaty with the Ottoman Empire of Aug. 11, 1874, contains provisions almost precisely identical with those of the treaty with Belgium, last mentioned; except there is nothing to correspond to the paragraph relating to thefts as punished by Belgian laws. The same is true of our treaty with Spain of Jan. 5, 1877; but that adds the act of breaking and entering the offices of the government and public authorities, or the offices of banks, &c., or trust or insurance companies, with intent to commit a felony therein, and kidnapping. This treaty excepts political offences; also offences committed before its ratification, offences outlawed in the country in which they were committed, and persons under prosecution for crimes committed in the country where arrested; and neither nation can be called upon to deliver up one of its own citizens or subjects.

II. EXTRADITION BETWEEN THE STATES. A provision of the federal constitution, art. 4, § ii. 2, directs that "a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." As expounded by the supreme court in Commonwealth of Kentucky *v.* Dennison, 24 *How.* 66, this is a compact which includes, and was intended to include, every offence made punishable by the law of the state in which it was committed, and which gives the right to the executive authority of such state to demand the fugitive from the executive authority of the state in which he is found. The right given to "demand" implies an absolute right; and there is a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the state to which the fugitive has fled. But while the duty of a governor, upon whom a demand for extradition is made, is merely ministerial, and vests in him no discretion to inquire into the nature or character of the crime, but he is called upon by the constitution to make the arrest and delivery at once, upon the requisite demand and proofs being laid before him, yet, if he refuses to perform the duty, there is no power conferred upon the judicial or any other department of the general government to compel him to perform it.

Extradition between the states must, therefore, be considered and defined to be a political duty of imperfect obligation, founded upon compact, and requiring each state to surrender one who, having violated the criminal laws of another state, has fled from its justice and is found in the state from which he is demanded, on demand of the executive authority of the state from which he fled.

EXTRAORDINARY CARE. Is synonymous with greatest care, utmost care, highest degree of care. Toledo, &c. R. R. Co. *v.* Baddeley, 54 *Ill.* 19. See CARE; DILIGENCE; NEGLIGENCE.

EXTREME HAZARD. To constitute extreme hazard, the situation of a vessel must be such that there is imminent danger of her being lost, notwithstanding all the means that can be applied to get her off. King *v.* Hartford Ins. Co., 1 *Conn.* 421.

EYRE. Justices in eyre were judges commissioned in very early times in England to travel systematically through the kingdom, holding courts in specified places for the trial of certain descriptions of causes.

F.

F was anciently, in England, branded upon felons on their being admitted to clergy, *Jacob;* also, sometimes, upon persons guilty of fights or frays, *Cowel;* and upon those guilty of falsity, 2 *Reeve Hist. Eng. L.* 392; 4 *Id.* 485.

FACE. The expression, the face of a judgment, means the sum for which the judgment was rendered, excluding the interest accrued thereon. Osgood *v.* Bringolf, 32 *Iowa*, 265.

Facio ut des. I do that you may give. *Facio ut facias:* I do that you may do. These phrases were used in the civil law as representative of classes of contracts, distinguished according to the nature of the promise or consideration on each side. See DO UT DES.

FACT. An actual occurrence; a circumstance or event; something which has been done.

The word is much used in phrases which contrast it with law. Law is a principle, fact is an event. Law is conceived, fact is actual. Law is a rule of duty, fact is that which has been according to or in contravention of the rule. The distinction is well illustrated in the rule that the existence of foreign laws is matter of fact. Within the territory of its jurisdiction, law operates as an obligatory rule which judges must recognize and enforce; but, in a tribunal outside that jurisdiction, it loses its obligatory force and its claim to judicial notice. The fact that it exists, if important to the rights of parties, must be alleged and proved, the same as the actual existence of any other institution.

Questions, issues, and conclusions are constantly spoken of as of law or of fact. Questions of law are said to devolve on the court, those of fact on the jury. Conclusions of law must be separately stated in a referee's report from those of fact. These phrases require the same discrimination as that above stated: the acts or occurrences to which the law is to be applied must be distinguished from the rule of duty by which they are to be adjudged.

Attorneys are called attorneys in fact when they are made, by the act or choice of the principal, to manage non-professional business only.

Fraud in fact consists in an actual intention to defraud, carried into effect; as distinguished from fraud imputed by law, in view of the necessary consequences of one's action.

The facts, not the evidence of them, are to be pleaded. This rule means that the pleading must show the occurrences or things done out of which the rights involved in the suit arise, and need not proceed to show how they are to be established.

A fact is a circumstance, act, or event. A truth is a legal principle which governs the fact and its effect. Drake *v.* Cockroft, 4 *E. D. Smith*, 34, 1 *Abb. Pr.* 203; Lawrence *v.* Wright, 2 *Duer*, 673.

FACTOR. A factor is generally considered to be a person whose business it is to sell, for account of the owner, merchandise forwarded to him for the purpose, he receiving a commission upon the sales for his services. The term is equivalent to commission merchant, which is more commonly used in the United States.

It is not erroneous, though it is infrequent, to employ the word to designate a person employed to buy instead of to sell.

A leading difference between a factor and a broker is, that the factor is usually intrusted with the custody and control of the goods; and in virtue of these he has a special property in them, and a lien upon them for his advances. He is, moreover, usually understood to be authorized to deal in his own name, as well as in that of his principal. *Russ. Fact.* 1, 4; 2 *Steph. Com.* 77, 78; *Paley Ag.* 13; *Story Ag.* § 33; *Beames Lex Merc.* 44.

A factor is styled domestic or foreign, according as he resides in the same country with his principal, or not.

A factor is the agent of a merchant abroad, residing in this country, or *e contra*. A factor is authorized by a letter of attorney, with a salary or allowance for his care.

He must pursue his commission strictly; and the same person may be factor for many different merchants. (*Mal. Lex Merc.*) *Jacob.*

Where a person employs another to sell goods and wares at a distant place, and agrees that the employe shall receive a certain sum yearly, and a stipulated portion of the profits, for his services; and the employe is to select and rent a business house, and employ clerks, and conduct the business; and all rents and expenses are to be paid out of the proceeds, if sufficient, but if not, then by the employer, — the person conducting the business is a factor. Winne *v.* Hammond, 37 *Ill.* 99.

An agent for collecting debts merely, is not a factor. Hopkirk *v.* Bell, 4 *Cranch*, 164.

A clerk of the owner of goods, intrusted with the bill of lading, &c., as such clerk merely, cannot be deemed a factor within the meaning of the New York factor's act, which sustains a sale made by an agent intrusted with the possession, for the purpose of sustaining an unauthorized disposal of the goods made by him. Zachrisson *v.* Ahman, 2 *Sandf.* 68.

The captain of a steamboat selling flour on freight will not be considered a factor without express authority, or such as is implied by the usages of trade. Taylor *v.* Wells, 3 *Watts*, 65; Rapp *v.* Palmer, *Id.* 178.

Factors' act. The common-law powers of a factor, which enabled him to bind his principal by the sale of the goods intrusted to him (but he could not pledge the goods), received an important extension, in England, by Stat. 6 Geo. IV. ch. 94, usually called the factors' act. This statute, passed for the protection of persons dealing with factors, upon the faith of their apparent possession of the goods, enables a factor to make a valid pledge of the goods, or of any part thereof, to one who believes him to be the *bona fide* owner of the goods. And Stat. 5 & 6 Vict. ch. 39, further enables a factor in all respects, as if he were the true owner of the goods, to enter into any contract or agreement regarding them by way of "pledge, lien, or security," as well for an original loan, advance, or payment made on the security of such goods or documents, as also for any further or continuing advance in respect thereof; and such contract or agreement is made valid against the principal, notwithstanding the lender was fully aware that the borrower was a factor only. But this power does not extend to antecedent debts.

The principles of this legislation have been to some extent adopted in some of the United States.

Factorage, is sometimes used to designate what are more commonly termed the commissions earned by a factor.

Factorizing process. A name for a proceeding whereby a creditor may reach a demand due to his debtor from a third person, and have it applied to the satisfaction of his demand. It is the same process, in substance, as is more frequently called garnishment (*q. v.*) or trustee process (*q. v.*).

FACTORY. An inclosed building, commonly called an ashery, and "used since its erection for the purpose of depositing ashes therein, and converting the same into potash," is a factory, which may be, under Ohio statute, the subject of burglary. Blackford *v.* State, 11 *Ohio St.* 327.

The term factory embraces the fixed machinery necessary to operate the factory. A covenant to keep insured a factory necessarily embraces the obligation to keep the machinery necessary for the operation of the factory also insured. Mahew *v.* Hardesty, 8 *Md.* 479.

FACTUM; FAIT. These words, the one Latin, the other French, are used in the sense of a fact (*q. v.*), also in the sense of deed (*q. v.*) or an instrument under seal.

Factum juridicum, or fait juridique. Denotes one of the factors or elements constituting an obligation.

FACULTY. An authority founded on the consent of a party competent to give it; a dispensation; a license; used chiefly in ecclesiastical and Scotch law.

Faculty of advocates. See ADVOCATES.

Faculty of a college, in American usage, is the body of professors; the permanent instructors; and is to be distinguished from the board of trustees. The faculty is charged with the duties of instruction, with regulating the course of study, superintending the labors of individual professors, administering discipline, and conferring degrees. The trustees constitute the corporation, and hold the title to and have the care of the land and buildings, the endowment, and the pecuniary affairs of the institution.

FAILURE OF ISSUE. A want of descendants. The phrase is applied, in law, particularly to a lack of issue to

take an estate limited over by an executory devise. A distinction is made between a definite and an indefinite failure of issue. When a precise time is fixed by the will, at or within which the failure of issue is to render the limitation over operative, a definite failure of issue is said to be intended; as in case of a devise to A, but if he dies without issue living at the time of his death, then to another. But when the language of the devise imports a general failure of issue, whenever it may happen, without fixing any time, or any certain or definite period, within which it must happen, the testator is said to have intended an indefinite failure of issue; and such a limitation was formerly held void, as too remote. Compare DYING WITHOUT CHILDREN. But this rule of interpretation has been changed in England and many of the United States by statutes or by judicial decisions, and such expressions as failure of issue, dying without issue, &c., in limitations over, are now usually held to refer to a failure of issue at the death of the first taker.

The words failure of issue, used in limiting an executory devise, mean, in their technical legal sense, an indefinite failure of issue, and must be taken in that sense, unless there be something in the will clearly demonstrating a different intention on the part of the testator. Tongue *v.* Nutwell, 13 *Md.* 415.

Failure of issue, and dying without issue, are understood as meaning not only a failure of the grantee to have issue, but a failure of the issue of such issue, at any period of time, or an indefinite failure of issue. Patterson *v.* Ellis, 11 *Wend.* 259, 278.

Where an executory devise is limited to take effect after the dying without heirs, or without issue, or without lawful issue, or on failure of issue of the first taker, the courts of England have held, for a period of centuries, that by such language the testator intended an indefinite failure of issue, unless a different intention could be discovered in the context or other parts of the will, or from the whole will taken together; and the courts of New York felt constrained to follow this rule of interpretation, until it was swept away by the revised statutes. But the rule was always made to yield to other words in the will indicating an intention that the estate limited over should vest upon failure of issue of the first taker living at his death. Dumond *v.* Stringham, 26 *Barb.* 104.

FAIR. 1. Equal, as between opposing interests; just; proper; usual.

To constitute a fair abridgment, within the privilege allowed in the administration of the copyright law of publishing fair abridgments, there must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon, and not merely the facile use of the scissors, or extracts of the essential parts constituting the chief value of the original work. Folsom *v.* Marsh, 2 *Story C. Ct.* 100; Story *v.* Holcombe, 4 *McLean*, 306.

The phrase, fair average crop, takes into account the nature of the season, and unforeseen events beyond the control of a prudent, faithful overseer. Wright *v.* Morris, 15 *Ark.* 444.

The phrase, a fair, legal trial in a bond conditioned for delivery of chattels to the obligee, if on a fair, legal trial he shall prove property, means such a trial as puts the right of property, either directly or indirectly, in issue between the parties. Such an issue is not made up in a criminal prosecution for stealing the things in question. Simpkins *v.* Oakley, 1 *Blackf.* (2d ed.) 537.

Fairly is not synonymous with truly; and truly should not be substituted for it in a commissioner's oath to take testimony fairly. Language may be truly yet unfairly reported; that is, an answer may be truly written down, yet in a manner conveying a different meaning from that intended and conveyed. And language may be fairly reported, yet not in accordance with strict truth. Lawrence *v.* Finch, 17 *N. J. Eq.* 234.

That fairly may be deemed synonymous with equitably, even in construing a statute requiring a division to be made "equitably and fairly," see Satcher *v.* Satcher, 41 *Ala.* 26, 40.

2. In English law, fair signifies a greater species of market: it can be held only by grant from the crown, or by prescription, which supposes a grant. These fairs, as anciently held in England, had a distinctive legal character and privileges, which have lost most of their importance at the present day; and have never been much known in the United States. What are here popularly known as fairs depend upon the voluntary action of the persons concerned, and are governed by the ordinary laws of partnership, sales, &c.

FALCATURA. In old English law, was one day's mowing of grass; a customary service to a lord from his inferior tenants. *Tomlins.* The grass, fresh mown, and lying to dry, was called *falcata;* and the tenant acting as mower, the *falcator.* *Jacob; Kenn. Gloss.*

FALCIDIAN LAW. A law of Rome, which restricted the power of a testator, so that, while he might give away not to exceed three-fourths of his estate, one-

fourth at least must descend to his heir or heirs. The law obtained its name from that of the tribune, Falcidius, by whom it was proposed.

The principle of this law has been operative in Spain and in Louisiana, and has been adopted to a limited extent in some of the United States.

FALDAGE. See FOLDAGE.

FALL. The season known as the fall begins the 1st of September. State *v.* Haddock, 2 *Hawks*, 461.

A delivery of fruit-trees and grape-roots in bundles, in freezing weather, on the twenty-second day of November, was held not to fulfil the terms of a contract to deliver "this fall." Weltner *v.* Riggs, 3 *West Va.* 445.

FALSE. In the more important uses, in jurisprudence, of false and falsely, they usually import somewhat more than the vernacular sense of erroneous or untrue. They are oftenest used to characterize a wrongful or criminal act, such as involves an error or untruth intentionally and knowingly put forward. A thing is called false, when it is done or made with knowledge, actual or constructive, that it is untrue or illegal; or is said to be done falsely, when the meaning is that the party is in fault for its error. Thus, false claim may sometimes mean merely unfounded claim, — a claim for more than is due; and would generally be understood to imply a claim preferred with knowledge that it was unfounded or excessive. False imprisonment does not mean that the imprisonment is unreal or deceptive, but presents the party causing it as in fault for knowingly doing so upon an apparent but unreal authority. A charge of false pretences imports a knowing use of a pretence with intent to deceive. False swearing, in a condition of a policy imposing forfeiture for any false swearing by the insured, means swearing to a false statement, with knowledge of its falsity. Franklin Ins. Co. *v.* Culver, 6 *Ind.* 137. A statute prescribing forfeiture of the security, when a mortgagee renders to an attaching creditor a false account, has been held not applicable to an account which, although erroneous, was rendered in good faith and with all reasonable efforts to make it just and correct. Putnam *v.* Osgood, 51 *N. H.* 192. Upon the other hand, under a statute that "every person who shall falsely make, deface, destroy, &c., any record, &c., shall be deemed guilty of forgery," an indictment charging that the defendant did "unlawfully and feloniously destroy," &c., has been held not objectionable for omitting the word falsely, on the ground that the words inserted are more than equivalent to the word omitted. State *v.* Dark, 8 *Blackf.* 526.

A false bank-note may be merely an illegitimate impression from a genuine plate, and may, in addition, have forged or fictitious signatures. In a statute defining crimes, false bank-bill ought not to be construed as including bills which are only counterfeit, forged, or spurious. Kirby *v.* State, 1 *Ohio St.* 187.

Falsification, literally, making false, is used in two senses: 1. To signify altering something, a writing, record, &c., so as to render it untrue. 2. To make proof of errors or untruths, particularly in an account. In equity practice, "surcharge and falsify" is an expression applied to contesting an amount. Surcharging applies to the balance of the whole account, and supposes credits omitted which ought to be allowed. Falsification applies to some item of the debits, supposing it to be wholly false, or in part erroneous. Bruen *v.* Hone, 2 *Barb.* 586; see also Phillips *v.* Belden, 2 *Edw.* 1, 23.

Falsify. 1. To prove a thing to be false. (*Cowel; Hunt. Eq.*; 4 *Bl. Com.* 300; 4 *Steph. Com.* 463.)

2. To tamper with any document, whether of record or not, by interlineation, obliteration, or otherwise. (Stat. 24 & 25 Vict. ch. 98, § 28; 4 *Steph. Com.* 223; *Cox & S. Cr. Law*, 158.)

3. To represent facts falsely, as, for instance, to state a pedigree falsely. (Stat. 22 & 23 Vict. ch. 35, § 24; 4 *Steph. Com.* 147, 148.) *Mozley & W.*

FALSE IMPRISONMENT. The wrong of arresting, confining, or detaining an individual without lawful authority to do so.

Imprisonment is any restraint of the personal liberty of another; any prevention of his movements from place to place, or his free action according to his own pleasure and will: a man is imprisoned when he is under the control of another in these respects, or either of them, against his own will. It is false imprisonment where this is done without lawful authority. And such imprisonment is deemed an assault in law,

though no assault in fact is made. Johnson *v.* Tompkins, *Baldw.* 571, 600.

To constitute false imprisonment, it is not necessary that the person should be arrested or assaulted; if he is detained by threats of violence, and prevented from going where he wishes by a reasonable apprehension of personal danger, this is sufficient. Pike *v.* Hamson, 9 *N. H.* 491; Smith *v.* State, 7 *Humph.* 43.

False judgment. In England, a writ of false judgment formerly lay to the superior courts at Westminster to rehear and review a cause which had been tried in an inferior court, not of record, and the judgment in which was complained of as erroneous. At the present day, since the judicature acts, appeal is the remedy open to the party dissatisfied with a judgment.

False personation. The representing one's self to be another person, when done with intent to obtain property belonging to him, or accompanied by acts tending to subject him to a liability, is an offence, known as false personation. So there may be a false personation of an officer for the purpose of making a pretended arrest. These are misdemeanors at common law, and are punishable by statute in many of the states. In England, by Stat. 37 & 38 Vict. ch. 36, passed in 1874, it is made felony, punishable with penal servitude for life, to personate any person, or the heir, executor, &c., of any person, with intent to claim succession to real or personal property, or falsely to claim relationship to any family.

False pretence. A false pretence is some untrue allegation or token, wilfully and knowingly made or used, to defraud another of property. The plural, false pretences, is frequently used as an elliptical expression for the offence of obtaining money (or property) by false pretences.

This offence is variously defined by statute; and acts may be punishable under this general name within some jurisdictions which are not in others. As generally understood, however, to warrant a conviction, the evidence must show that the accused made or exhibited to the complainant some false affirmation as to matter of existing fact, or some delusive token or device; that he did this knowingly and fraudulently; that it was done under circumstances which ordinary prudence would not avoid; and that by means of it the accused obtained value, money, goods, signature to an evidence of debt, &c., to which he was not entitled. See cases 1 *U. S. Dig.* tit. False pretences.

Upon the meaning of the phrase false pretences, used as signifying the allegation or devise used to perpetrate the offence of obtaining by false pretences, the rule is well settled that, to constitute a false pretence by representations, there must be an express allegation which is false, not a mere act calculated to deceive. Allen's Case, 3 *City H. Rec.* 118; Conger's Case, 4 *Id.* 65; s. c. 1 *Wheel. Cr.* 448. It is familiar law that not every false representation made by which a person has obtained the property of another can be treated as a false pretence. The pretence must be of some existing fact, made for the purpose of inducing the prosecutor to part with his property, and to which a person of ordinary caution would give credit. A pretence, therefore, that a party would do an act he did not intend to do, is not within the statute, because it is a mere promise for his future conduct. A representation or assurance, in relation to a future event, may be a promise, a covenant, or a warranty, but cannot amount to a statutory false pretence. Examples are: where one seeking to borrow money declared that a third person was indebted to him, and would repay the loan in his behalf, this was held promissory in its nature, and not within the law of false pretences. State *v.* Magee, 11 *Ind.* 154. But one who obtained goods under the pretence that he lived with, and was employed by, another person, who sent him for them, was held indictable for obtaining goods by false pretences. People *v.* Johnson, 12 *Johns.* 292; s. p. Heath's Case, 1 *City H. Rec.* 116; Johnson's Case, *Id.* These cases are very near the line; either of them, upon slight variations of the evidence, might be decided differently. But they illustrate the principle, and the difficulty of applying it. The representation must be as to existing facts: a declaration in the nature of a promise, or of an assurance of the party's belief in what is to

happen in future, is not enough. In regard to giving a check upon a bank where the drawer has no funds, this has been differently viewed; it has been held an indictable false pretence in Maley *v.* State, 31 *Ind.* 192; and not to be one in Van Pelt's Case, 1 *City H. Rec.* 137; see also Stuyvesant's Case, 4 *Id.* 156; People *v.* Tompkins, 1 *Park. Cr.* 224. An attempt to obtain money from a bank by means of a forged letter transmitting a certificate of deposit has been held an attempt to obtain property by a false pretence. People *v.* Ward, 15 *Wend.* 231.

False return. The certificate of a sheriff or other officer to the manner in which he has served or executed a writ, when untrue, is called a false return. In general, the return is taken as true, for the purpose of sustaining proceedings founded upon it; but, if the error leads to consequences injurious to a party, he has an action against the officer for the breach of duty. In this use of false, we do not understand that it imports that the officer necessarily knew the falsity.

FALSUS; FALSA. This Latin word, meaning false, occurs in several law maxims.

Falsus in uno, falsus in omnibus. False in one respect, false in all. The maxim is frequently applied to the testimony of a witness, which, if shown to be wilfully false in regard to one matter, may be wholly rejected as unworthy of credit. The wilful falsity is essential to make a case for the application of this rule. The principle is also invoked to discredit documentary evidence, affidavits, depositions, &c. It is also applied, in civil cases, to sustain charges of deceit or misconduct involving the element of deception, and has been cited as the foundation of the rule that the testimony of a person once convicted of perjury is inadmissible, now generally abolished.

Where a witness speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place, if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood; and courts of justice, under such circumstances, are bound, upon principles of law and morality and justice, to apply the maxim, *falsus in uno, falsus in omnibus.* The Santissima Trinidad, 7 *Wheat.* 283, 339.

The maxim may properly be applied in support of a charge of embezzlement of the cargo of a vessel by salvors, who are shown to have embezzled the rigging and other ship's furniture, in a case where their claim to salvage is sought to be defeated because of such embezzlement. He who would embezzle the one would not hesitate as to the other. The Boston, 1 *Sumn.* 328, 356.

The maxim applies only to cases of wilful falsehood; a jury must believe the testimony of a witness to be wilfully false in some particular, before they are authorized to discredit his whole evidence. Wilkins *v.* Earle, 44 *N. Y.* 172.

The maxim does not stop at *nisi prius.* All the rules of evidence which govern in the estimate of its weight or effect are essential to the discovery of truth, whether addressed to a jury, or coming in the form of written answers or depositions. People *v.* Davis, 15 *Wend.* 602.

Falsa demonstratio non nocet. False description does not injure. Mere erroneous description does not render an instrument inoperative, where there is no doubt as to the identity of the person or thing intended to be specified. The description, so far as it is false, is inapplicable to any subject at all, and, so far as it is true, it can apply to one subject only; hence the courts, in rejecting matter of erroneous description, reject only those words which are shown to have no application to any subject. Wherever there is an adequate and sufficient description, with convenient certainty, of what is intended to be specified by the instrument, a subsequent erroneous addition will not vitiate it. This qualification of the general terms of the maxim, which is necessary to define it truly, has been expressed by the addition of the words *cum constat de corpore*, or *cum constat de persona*, suggested by Lord Kenyon, in the case of Thomas *v.* Thomas, 6 *Durnf. & E.* 676. Subject to this limitation, the maxim is of frequent application in the construction of all classes of written instruments, particularly of wills. Its operation in cases of bequests is sometimes expressed by the maxim, *falsa demonstratione legatum non perimi*, — by erroneous description a legacy is not rendered void.

Falsa grammatica non vitiat chartam. False grammar does not vitiate a

deed. If a clause of a deed, or the deed as a whole, sufficiently expresses its purpose, it is not rendered void because not grammatically expressed. But there must be a clear meaning. Language altogether ungrammatical and insensible is of no effect; the courts are not bound to find out a meaning for it.

Falsa orthographia non vitiat chartam. False spelling does not vitiate a deed. This maxim is to be understood with similar qualifications in regard to bad spelling as the preceding maxim in regard to bad grammar.

In construction, too much regard must not be paid to the nature and proper definition, significations, and acceptance of words and sentences, to pervert the simple intentions of the parties; for *qui hæret in litera hæret in cortice;* i. e., the lawyer who forms his opinion on the mere words without the context goes only skin deep into the argument; and it is a rule of law, *mala grammatica non vitiat chartam;* neither false Latin nor false English will make a deed void when the intent of the parties doth plainly appear. It is therefore held that two negatives do not make an affirmative when the apparent intent is contrary. *Shep. Touch.* 87.

Falso retorno brevium. For the false return of writs. The name of a writ in old English practice issued against a sheriff for falsely returning writs.

FAMILY. This word is used in many diverse senses; the meaning intended can only be determined by considering the context, and also all extrinsic facts bearing upon the general purpose of the entire writing in which it occurs. 3 Wms 257: 12 Pd 207.

In such expressions as "he is of noble family," it refers to a man's ancestry; in saying "he is a family man," it would imply wife and children; in saying "the house was too small for the family," it would include domestic servants; in "he is married, but has no family," it would mean children only; in "many of his family are residing in the state at the present day," it would import remote descendants and connections. The connection and circumstances govern. The following are decisions upon various uses:

Family, in its origin, meant servants; but, in its more modern and comprehensive meaning, it signifies a collective body of persons living together in one house, or within the curtilage, in legal phrase. Wilson *v.* Cochran, 31 *Tex.* 677.

Family may mean children, wife and children, blood relatives, or the members of the domestic circle, according to the connection in which the word is used. Spencer *v.* Spencer, 11 *Paige*, 159.

Having a wife and keeping house is not enough to entitle one to a legacy conditioned on his "marrying and having a family." Family in such connection means children. Spencer *v.* Spencer, 11 *Paige*, 159.

Family was held to mean children, in a devise with power in trust to convey "to any of the male descendants of my family of the name of D, and their heirs." Dominick *v.* Sayre, 3 *Sandf.* 555.

A bequest of a provision for "maintenance of my family," does not include a son nearly grown and not residing with the widow and other children. Andrews *v.* Andrews, 7 *Heisk.* 234.

The bequest of an annuity to A, in trust for the use and benefit of his wife and family during the life of the said A, does not include A as a beneficiary, in the term family. Wallace *v.* McMicken, 2 *Disney*, 564.

Family, as used in a will, may be understood to include a wife as well as children. Bowditch *v.* Andrew, 8 *Allen*, 339.

A statute enacted to modify the law of descent so as to prevent the real property of an ancestor from going "out of the family," should be deemed to use the word in that sense in which the law uses it when speaking of descents. Thus restricted, it comprehends only the descendants of such ancestor; those who have his blood running in his veins; his issue. Pierson *v.* De Hart, 3 *N. J. L.* 481.

A statute allowing to a widow furniture necessary for herself and family, includes such persons as constituted the domestic circle of the deceased at the time of his death, and the servants and children who had attained their majority, but not mere boarders. Strawn *v.* Strawn, 53 *Ill.* 263.

Family, in the Wagn. (Mo.) Stat. 88, §§ 33, 34, relative to the absolute property of the widow in cases of administration, means children, or those persons who have a legal or moral right to expect to be clothed and fed by the widow; and does not include assistants who may be necessary to keep the house or manage the farm. Whaley *v.* Whaley, 50 *Mo.* 577; but see Bradley *v.* Rodelsperger, 3 *S. C.* 226.

A man and his daughter who live together, the wife and mother being dead, and the daughter being dependent upon her father for support, are a family, within the meaning of the exemption laws. Cox *v.* Stafford, 14 *How. Pr.* 519.

An adult, residing with his step-mother, and transacting her business, is neither a householder nor a member of the family of the person with whom he resides, within such laws. Bowne *v.* Witt, 19 *Wend.* 475.

One who has children whom he maintains is within such laws, though they are

temporarily absent to be educated. Robinson's Case, 3 *Abb. Pr.* 466.

A man and wife, without children, who dwell together, are a family, within such laws. Cox *v.* Stafford, 14 *How. Pr.* 519.

A married woman residing in the state, who has no children, and whose husband is a non-resident, is not a person having a family, within the contemplation of such laws. Keiffer *v.* Barney, 31 *Ala.* 192.

Professional books necessary to a professional man who supports a family, are part of his "family library," and are exempt from attachment. Robinson's Case, 3 *Abb. Pr.* 466.

Family, in popular acceptation, includes parents, children, and servants, — all whose domicile or home is ordinarily in the same house and under the same management and head. In a statute providing that to gain a settlement in a town one must have "supported himself and his family therein" for six years, it includes the individuals whom it was the right of the head to control, and his duty to support. The wife is a member of the family within such an enactment. Cheshire *v.* Burlington, 31 *Conn.* 326.

The term family, as used in the act of Missouri regulating the service of process, is not confined to persons under the defendant's control, or in his employ; thus, a widowed mother who resides with her son is a member of his family, within the meaning of the statute. Ellington *v.* Moore, 17 *Mo.* 424.

Under a statute which imposes a fine upon any person who in the night wilfully disturbs "any neighborhood or family," an indictment will lie for disturbing a woman occupying a dwelling-house alone. Noe *v.* People, 39 *Ill.* 96.

Family council, or meeting. By the law of Louisiana, a meeting of relatives or immediate friends of minors, or persons incompetent to act for themselves, may be convened, by judicial order, to deliberate and decide upon the property, interests, guardianship, &c., of such persons. The decision of the family council is often referred to in the reported cases, as influencing the judicial disposal of the interests involved.

Family physician. Means one who is accustomed to attend members of a family in the capacity of a physician, not one who has only occasionally so attended them. Reid *v.* Piedmont, &c. Life Ins. Co., 58 *Mo.* 421.

Family physician, as used in questions issued to a person making application for a policy of life insurance, requiring him to disclose the name of his family physician, is a phrase in common use, and which has no technical signification. It may be sufficiently defined as signifying the physician who usually attends and is consulted by the members of a family in the capacity of physician. It is not necessary, in order to constitute one person the family physician of another, that he should invariably attend and be consulted by each and all the members of a family. One who is usually consulted by the wife and children of the insured may be deemed his family physician, though not usually consulted by the insured himself, and must be disclosed under such an interrogatory as is above stated. Price *v.* Phœnix Mut. Life Ins. Co., 17 *Minn.* 497, 519.

FARM. The noun farm, in American usage, prominently means a tract of land chiefly under cultivation; and the verb means, most frequently, to cultivate or manage agriculturally a tract of land. Farm is said, by Blackstone and other authorities, to be an old Saxon word signifying provisions; and he says that it came to be used of rent or render, because anciently the greater part of rents were reserved in provisions, the use of money being infrequent; so that a farmer was one who held lands upon payment of provisions by way of rent. By a gradual departure from this original sense, the word farm came to signify the term or tenure for or by which the land was held, and at length to mean the land itself so held upon farm or rent. And thus, in America, where the agriculturist is generally proprietor of his own lands, it is used of lands devoted to raising provisions, irrespective of the tenure by which they are held. See Burrill for a fuller discussion of this gradual change, and an explanation of intermediate steps.

The verb to farm has retained somewhat of its old legal sense of to let, particularly in the phrases "to farm let" and "to farm out." The first of these is of usual, though not necessary, employment in a lease, being in continuation of the old Latin form of lease, *demisi, concessi et ad firmam tradidi*, — I have demised, granted, and to farm let. The second means the same, to lease; it is, however, more appropriate to the leasing a privilege or franchise.

The words "farm" and "lot," in a statute regulating assessment of taxes, held synonymous. Saunders *v.* Springsteen, 4 *Wend.* 429.

Farm crossing, in the New York general railroad act, includes passages under as well as upon the land. Wheeler *v.* Rochester, &c. R. R. Co., 12 *Barb.* 227.

Farmer. A butcher who has a farm, as

a convenient appendage to his business, to fatten sheep upon, is not a farmer within the exception of an ordinance forbidding persons to sell meat without a license, "except farmers selling the produce of their farms." See Trustees of Rochester *v.* Pettinger, 17 *Wend.* 265.

FAUCES TERRÆ. The jaws of the land. Projecting headlands, closely approaching each other, and inclosing an arm of the sea.

FEALTY. Fidelity; allegiance to the feudal lord of the manor; the obligation upon a feudal tenant or vassal to render obedience and service to the immediate lord. Also, sometimes, the oath by which this obligation was assumed and expressed.

Familiar principles of the feudal system involved the ideas that a vassal owed duty, obedience, and service to the sovereign of the country, in view of the general protection enjoyed from him, and also to the immediate lord or proprietor, from whom he held lands, in return for his enjoyment of them. The first of these obligations was generally termed allegiance; the second, fealty. 1 *Bl. Com.* 263, 367; 2 *Sharsw. Bl. Com.* 45, 86; *Cowel.* Fealty was understood to comprise the following obligations; viz., *incolume*, that the tenant do no bodily harm to his lord; *tutum*, that he do no secret damage to him in his house; *honestum*, that he damage not his reputation; *utile*, that he do no damage to him in his possessions; *facile*, and *possibile*, that he render it easy for the lord to do any good, and not make that impossible to be done which was before in his power to do. *Leg. Hen. I.* ch. 5. It was assumed by a solemn oath; and this oath has itself been sometimes termed fealty, being considered as the obligation itself. 2 *Bl. Com.* 86; 3 *Steph. Com.* 508; 1 *Crabb*, § 770.

Fealty has, in modern times, fallen into disuse; the oath is no longer exacted.

Fealty is the oath taken at the admittance of every tenant, to be true to the lord of whom he holds his land: and he that holds land by the oath of fealty has it in the freest manner; because all persons that have fee, hold *per fidem et fiduciam*, that is, by fealty at least. And fealty is incident to all manner of tenures except frankalmoign and tenancy at will. *Jacob.*

Although foreign jurists consider fealty and homage as convertible terms, because in some continental countries they are blended so as to form one engagement, yet they are not to be confounded in England; for they do not imply the same thing, — homage being the acknowledgment of tenure; and fealty, the vassal-oath of fidelity, being the essential feudal bond, and the animating principle of a feud, without which it could not subsist. *Wharton.*

Fealty signifies fidelity, the phrase "feal and leal" meaning simply faithful and loyal. Tenants by knights' service and also tenants in socage were required to take an oath of fealty to the king or other their immediate lords; and fealty was one of the conditions of their tenure, the breach of which operated a forfeiture of their estates. *Brown.*

FEASANCE, *n.* **FEASANT,** *part.* Doing, as a noun or participle, is the equivalent of these old law French terms. Thus, misfeasance or malfeasance is ill-doing; damage feasant is doing damage.

FEDERAL. A term applied to describe a government as being formed by the union of several independent states or provinces in a homogeneous government for certain purposes, while they reserve sovereignty for other purposes.

The United States has been generally styled, in American political and judicial writings, a federal government. The term has not been imposed by any specific constitutional authority, but only expresses the general sense and opinion upon the nature of the form of government. In recent years, there is observable a disposition to employ the term national in speaking of the government of the Union. Neither word settles any thing as to the nature or powers of the government. Federal is somewhat more appropriate if the government is considered a union of the states; national is preferable if the view is adopted that the state governments and the Union are two distinct systems, each established by the people directly, one for local and the other for national purposes. See United States *v.* Cruikshank, 92 *U. S.* 542.

FEE. Reward or compensation for services rendered or to be rendered.

1. A payment in money for official or professional services, whether the amount be optional, or fixed by law or custom. Fees are distinguished from costs in being always a compensation or recompense for services; while costs are an indemnification for money laid

out and expended in a suit. They are also distinguished as a compensation for particular acts or services, from wages, which denotes a compensation paid by the day, week, &c., for services; and from salary, which is usually applied to a per annum compensation. See Cowdin *v.* Huff, 10 *Ind.* 83.

The word fees, in the Connecticut statute of 1828, regulating the levy of executions, is not restricted to the charges of the officer for his personal services in levying the execution, but embraces also all the expenses attending the levy, and included in it. Camp *v.* Bates, 13 *Conn.* 1.

A per diem allowance of county superintendents of schools is to be regarded as "compensation," not as fees. Jefferson Co. *v.* Johnson, 64 *Ill.* 149.

2. An estate in lands held of a superior as a reward for services, and on condition of rendering service. In feudal law, in which the term originated, fee denoted a stipendiary estate held of a superior by service, being merely a right to the use of the land. But, in England, such estates very early became estates of inheritance, held on condition of service; and, in modern English law, a fee is an estate of inheritance supposed to be held mediately or immediately of the sovereign. It is the most extensive estate that can exist, absolute ownership in an individual being an idea entirely opposed to the theory of the law of real property in England. The right of alienation is attached to the fee, to the full extent of the estate vested in the tenant, or for any lesser estate.

In American law, a fee is an estate of inheritance without condition, belonging to the owner, and alienable by him, or transmissible to his heirs absolutely and simply. It is an absolute estate in perpetuity, and the largest possible estate a man can have. The difference between the significations of the term in English and American law results from the general abolition of feudal tenures throughout the United States.

The word fee is also frequently used to denote the land which is held in fee.

Fee-*simple* is often employed, merely to distinguish a fee without qualification or restriction from a fee-*tail*, q. v.: a fee-simple being an estate belonging to a man and his heirs generally; while a fee-tail is limited to a particular class or classes of heirs. And one may further analyze the phrase "estate" in fee simple by saying that "estate" imports an interest in land, without indicating how extended an interest is meant; "fee" imports the estate meant is an inheritable one; and "simple," that it is unlimited. Thus the phrase is equivalent to saying, "an absolute, unlimited estate of inheritance in lands." *Holthouse.*

The true meaning of the word fee is the same with that of feud or fief. In the northern languages, it signified a conditional stipend or reward. These feuds, fiefs, or fees were large districts or parcels of land allotted by the conquering general to the superior officers of the army, and by them dealt out again in smaller parcels to the inferior officers and deserving soldiers. The condition annexed to them was that the possessor should do service faithfully, both at home and in the wars, to him by whom they were given. A fee or feud is therefore defined by Sir Henry Spelman as being the right which the vassal or tenant hath in land, to use the same and take the profits thereof to him and his heirs, rendering to the lord his due services. Hence the word fee is used to signify an estate of inheritance, being the highest and most extensive interest which a man can have in a feud; and when the term is used simply, without any adjunct, or has the adjunct of simple annexed to it, it is used in contradistinction to a fee conditional at the common law, or a fee-tail under the statute *de donis*, importing an absolute inheritance descendible to heirs general, and liable to alienation at the pleasure of the owner, whether by will or deed, to the full extent of his interest, or for a smaller estate. *Mozley & W.*

According to Spelman, a fee is the right which the vassal has in lands to use the same, and take the profits thereof to him and his heirs, rendering to his lord the due service therefor. Fees were either fee-simple or fee tail, the former being a simply, *i. e.*, generally, inheritable estate, open to any heirs; the latter being also an inheritable estate, but in a limited manner, to wit, open to lineal descendants only, or issue or heirs of the body. *Brown.*

The word fee was originally used in contradistinction to allodium, and signified that which was held of another, on condition of rendering him service. It related to the quality, and not the quantity, of the estate. And, although the word is now generally employed to express the quantum of estate, that is not its only meaning. Wendell *v.* Crandall, 1 *N. Y.* 491.

In modern English tenures, a fee signifies an estate of inheritance; and a fee-simple imports an absolute inheritance, clear of any condition or limitation whatever, and, when not disposed of by will, descends to the heirs generally. There are also lim-

ited fees: 1, qualified or base fees; and, 2, fees conditional at the common law. A base fee was confined to a person as tenant of a particular place. A conditional fee was restrained to particular heirs, as to the heirs of a man's body. Patterson *v.* Ellis, 11 *Wend.* 259, 277.

Fee-simple, a freehold estate of inheritance, absolute and unqualified, stands at the head of estates, as the highest in dignity and the most ample in extent; since every other kind of estate is derivable thereout, and mergeable therein. It may be enjoyed not only in land, but also in advowsons, commons, estovers, and other hereditaments, as well as in personalty, as an annuity or dignity, and also in an upper chamber, though the lower buildings and soil belong to another. A fee-simple generally is pure, without condition and unrestrained, except by the laws of escheat, and the canons of real-property descent. *Wharton.*

Tenant in fee-simple is he which has lands or tenements to hold to him and his heirs for ever. *Jacob.*

Fee-simple, without words of qualification or limitation, means an estate in possession and owned in severalty. Brackett *v.* Bidlon, 54 *Me.* 426.

Fee-simple signifies a pure fee; an absolute estate of inheritance; that which a person holds inheritable to him and his heirs general for ever. It is called fee-simple, — that is, pure, — because clear of any condition or restriction to particular heirs, being descendible to the heirs general, whether male or female, lineal or collateral. It is the largest estate and most extensive interest that can be enjoyed in land, being the entire property therein, and it confers an unlimited power of alienation. Haynes *v.* Bowen, 42 *Vt.* 686.

A fee-simple is the largest estate known to the law; and, where no words of qualification or limitation are added, it means an estate in possession, and owned in severalty. It is undoubtedly true that a person may own a remainder or reversion in fee. But such an estate is not a fee-simple: it is a fee qualified or limited. So, when a person owns in common with another, he does not own the entire fee, a fee-simple: it is a fee divided or shared with another. Brackett *v.* Ridlon, 54 *Me.* 426; and see Stinson *v.* Rouse, 52 *Id.* 261.

Every estate of inheritance, notwithstanding the abolition of tenures, shall continue to be termed a fee-simple, or fee; and every such estate, when not defeasible or conditional, shall be termed a fee-simple absolute, or an absolute fee. 1 *N. Y. Rev. Stat.* 722, § 2.

The word fee, in a statute authorizing a forfeiture, for treason, of all lands, &c., "held in fee or for term of life," held not to include estates in fee-tail, but only those in fee-simple. Den *v.* Clark, 1 *N. J. L.* 340, 358.

A sale of the fee does not include, in the term itself, a sale free from incumbrances, but only the nature of the estate as distinguished from a life-estate, a remainder, a fee-tail, or any estate less than a fee-simple. Land is frequently sold in fee-simple, subject to incumbrances; and this mode of expression is common among conveyancers and in legal proceedings, and involves no contradiction or inconsistency. Cool *v.* Higgins, 23 *N. J. Eq.* 308.

FEE-FARM. Land held of another in perpetuity by the tenant and his heirs at a yearly rent, without fealty, homage, or other services than such as are specially comprised in the feoffment, was said to be held in fee-farm. The rent was termed fee-farm rent. It must be at least one-fourth the value of the land. In modern law, the term is applied to land held at a perpetual rent.

Fee-farm is where an estate in fee is granted, subject to a rent in fee of at least one-fourth of the value of the lands at the time of its reservation; such rent appears to be called fee-farm, because a grant of lands reserving so considerable a rent is indeed only letting lands to farm in fee-simple, instead of the usual method of life or years. (1 *Steph. Com.* 676.) *Wharton.*

Fee-farms are lands held in fee to render for them annually the true value, or more or less; so called because a farm rent is reserved upon a grant in fee. Such estates are estates of inheritance: they are classed among estates in fee-simple; no reversionary interest remains in the lessor; and they are, therefore, subject to the operation of the legal principles which forbid restraints upon alienation, in all cases where no feudal relation exists between grantor and grantee. De Peyster *v.* Michael, 6 *N. Y.* 467, 497.

Fee-farm rent is a rent-charge issuing out of an estate in fee; a perpetual rent reserved on a conveyance in fee-simple. De Peyster *v.* Michael, 6 *N. Y.* 467, 495.

FEE-SIMPLE. An estate in fee, without condition or restriction. The term is employed to distinguish such an estate from a fee-tail or other qualified fee. See FEE.

The word simple adds no meaning to the word fee standing by itself. But it excludes all qualification or restriction as to the persons who may inherit it as heirs, thus distinguishing it from a fee-tail, as well as from an estate which, though inheritable, is subject to conditions or collateral determination. *Wharton.*

The term fee implies an inheritable estate, and the addition of the word simple, forming the compound word, fee-simple, as used in modern conveyancing, adds nothing to the force and comprehensiveness of the original term. Nor does the addition of the term absolute, as "fee-simple absolute," add any thing to the force and meaning of fee

or fee-simple. In modern estates, the terms fee, fee-simple, and fee-simple absolute, are substantially synonymous. Jecko *v.* Taussig, 45 *Mo.* 167.

FEE-TAIL. An estate of inheritance, limited to a person and the heirs of his body, or to him and particular heirs of his body. Such an estate was, in early English law, held to be a conditional fee; so that, if the donee did not have heirs or issue according to the prescribed description, the land reverted to the donor; but, if the condition was performed by the birth of such heirs presumptive, or issue, the donee was held to have a fee-simple, and might alien or charge the land as a fee-simple estate. In case, however, the issue became extinct before alienation made, the estate reverted to the donor. The term fee-simple conditional was usually applied to such an estate which had not yet become absolute by descent to the issue. The celebrated statute, *de donis conditionalibus* (13 Edw. I. ch. 1), took away from the holder of such estates the power to alien the land, providing that it should remain to the issue of those to whom it was given after their death, or, upon failure of issue, should revert to the donor or his heirs. The estate thus became a perpetual entail, the entire inheritance being divided into two parts or estates; viz., the estate tail, and the reversion or remainder in fee expectant upon the failure of the estate tail. Objections to such perpetual entailments were, in course of time, developed, and a means of evading the statute *de donis*, and changing the fee-tail into a fee-simple, was devised, by the fictitious proceeding termed a common recovery. Levying a fine was also, to some extent, employed for the same purpose. See FINE; RECOVERY. When fines and recoveries were abolished in England, a still simpler mode of barring entails was authorized, by a disentailing deed, in all cases where a fine or recovery was previously allowable.

In England, therefore, the possibility of entailing estates for any considerable length of time has long been, and is now, practically done away. In the United States, estates tail are abolished in most of the states; and, where they are still retained, they are allowed to be barred, usually by a deed by the tenant. The policy of the law in both countries at present seems to favor the free alienation of lands, as of other kinds of property. *Washb. Real Prop.* 66-72.

An estate in fee-tail is that which a man hath to hold to him and the heirs of his body, or to him and particular heirs of his body. By the statute *de donis conditionalibus* (13 Edw. I. st. 1, ch. 1, passed in 1285), an estate so limited devolved, at the death of the donee, on his issue; and, on the failure of issue, reverted to the donor and his heirs. In the construction of this statute, the judges held that the donee had an estate which they called a fee-tail. This estate thus assumed the form of a perpetual entail until the reign of Edward IV., when, in a celebrated case, called Taltarum's Case, it was held by the judges that an estate tail might be barred by the collusive and fictitious proceeding called a common recovery, and thus turned into an estate in fee-simple. And, in the reign of Henry VIII., the process called a fine was made effectual to enable a tenant in tail to bar his issue, but not the remainder-man or reversioner. Fines and recoveries were abolished by Stat. 3 & 4 Wm. IV. ch. 74, passed in 1833; and now an estate tail may in general be barred by a simple disentailing deed, to be enrolled in chancery within six months, in cases where it could, previously to the act, have been barred by fine or recovery. But estates tail of which the reversion is in the crown cannot be barred so far as regards the reversion; and estates tail created by act of parliament cannot in general be barred. So a tenant in tail, after possibility of issue extinct, cannot bar his estate. *Mozley & W.*

FEIGNED ISSUE. In the peculiar practice of courts of chancery, the decision of questions of fact, as well as the application of the proper rules of law of equity, lay with the chancellor. If, however, he wished the assistance of a jury trial of the question of fact, resort was allowed to the fiction of arranging a series of pleadings between the parties, in the same form as if an action had been commenced at common law upon a bet or wager involving the fact in dispute; and the issue joined thereon was referred to a jury; or, in later times, issues were framed stating the questions of fact, and these were sent for jury trial. These were called feigned issues. This practice is believed to be retained in most of the states adhering to the distinction between law and equity courts and procedure. In the states which have adopted reformed codes, issues may

be framed in a class of cases requiring them ; but these are few. In England, the necessity for a resort to them seems abrogated, at least, much diminished. The Stat. 8 & 9 Vict. ch. 109, § 19, made it lawful for any court, either of law or equity, to refer any question of fact to a jury in a direct form. And by Stat. 21 & 22 Vict. ch. 27, §§ 3-6, provision was made for trial by jury in the court of chancery. 3 *Bl. Com.* 452; 3 *Steph. Com.* 601.

FELO DE SE. A felon of himself; a self-murderer; one who deliberately puts an end to his own existence, or who commits an unlawful or malicious act, the consequence of which is his own death. The term denotes a person guilty of the crime of intentional self-destruction, and is more limited in meaning than suicide, which extends to all cases of taking one's own life. To constitute *felo de se*, the person must be of years of discretion, and mentally capable of the criminal intent which is essential to the offence.

Although suicide is deemed a grave public wrong, yet, from the impossibility of reaching the successful perpetrator, no forfeiture is imposed; but yet every person who attempts suicide should be punishable, and every person who wilfully, in any manner, encourages or assists another person in taking or attempting his own life, knowingly furnishes him with any drug or weapon to be used in so doing, &c., is punishable for aiding suicide or an attempt at it. Rep. Pen. Code, 1864, § 227.

FELON. An offender of the grade between treason and misdemeanor; a person who has committed felony.

FELONICE. The Latin word for which feloniously is the English equivalent. It was, under the stricter practice of former times, even more strictly required in indictments for felony, when Latin forms were used, than is feloniously at the present day. See FELONY.

FELONY. Crimes are divided, in modern usage, into felonies and misdemeanors; the ground of distinction being their comparative heinousness, as indicated by the punishment affixed. Felony, as used throughout the United States, marks or includes the graver offences; those which receive punishment of or above a specified grade of severity. What this grade is, varies with the statutes of the jurisdiction. Most of the systems of penal law in the United States contain a positive definition of what crimes shall be deemed felony; and this enables the legislature to use the term felony, in general laws regulating criminal proceedings and punishment, as a generic term, embracing the graver offences as defined.

Felony seems to be derived from words connected with the feudal law, signifying loss of one's fee; forfeiture of a feudal estate; and it originally denoted offences which occasioned a forfeiture of the tenure by which the accused held his lands. In later times, it is said to have been continued in use to designate the offences involving other forfeitures. Thus Blackstone has defined it to be "an offence which occasions a total forfeiture of either lands or goods, or both, at the common law, and to which capital or other punishment may be superadded, according to the degree of guilt," 4 *Bl. Com.* 95; and this definition is approved by Jacob as being, upon the whole, "the only adequate definition of felony," and has, moreover, been frequently cited by subsequent writers.

Felony stands associated in general use with the idea of capital punishment. This, however, is not altogether correct. The term embraced, formerly, every species of crime which occasioned, at common law, the forfeiture of lands or goods. This most frequently happened in those crimes for which a capital punishment was liable to be inflicted, so that at length all capital offences came to be, in some degree or other, felony; but this was likewise the case with some other offences which are not punished with death, as suicide, where the party is already dead; homicide by chance-medley, or in self-defence; and petty larceny or pilfering, — all which were, by English usage, felonies, as they subjected the committers of them to forfeitures. And, upon the other hand, as felony might be without inflicting capital punishment, so, anciently, there might be capital punishment for an offence which was no felony; as in case of heresy or standing mute, which, though by the common law, capital, never worked any forfeiture of lands or goods; an insepa-

rable incident to felony. In short, the true original criterion of felony is forfeiture; for, in all felonies which are punishable by death, the offender lost all his lands in fee-simple, and also his goods and chattels; in such as are not so punishable, his goods and chattels only. But the idea of felony is so generally connected with that of capital punishment, that it seems hard to separate them.

In English usage, felony seems to have, in strictness, included treason; yet this has not been so universally recognized but that "treason, felony, and misdemeanor" is a phrase employed to designate crimes comprehensively. Thus the United States constitution provides for extradition as between the states of offenders guilty of "treason, felony, or other crime;" and this clause has been construed as including every offence forbidden and made punishable by the laws of the state where the offence is committed. Kentucky *v.* Dennison, 24 *How.* 66.

But whatever the derivation and precise extension of the term in England may have been, they have lost importance in the United States, where felony is now chiefly used subordinate to some statutory definition, to bring a class of crimes within general provisions of penal law.

Thus, by 2 N. Y. Rev. Stat. 702, § 30, the term felony, when used in any statute, "shall be construed to mean an offence for which the offender, on conviction, shall be liable by law to be punished by death or by imprisonment in a state prison." And the word felony is then repeatedly used in other general enactments as a sweeping designation of all the graver offences; as in 2 Rev. Stat. 701, § 23: "No person sentenced upon a conviction for felony shall be competent to testify," unless pardoned. The intention of the statutory definition is held to have been to do away with the common-law definition of felony, as entirely inapplicable, and to substitute one which should have significance and be readily understood. The meaning of the statute is to declare all crimes not expressly denominated misdemeanors by statutes creating them, which are punishable by imprisonment in the state prison, to be felonies. Klock *v.* People, 2 *Park. Cr.* 676. The statutory definition was, however, enacted merely for the purpose of giving the word a definite meaning when found in statutory law, and without any design of affecting the rights or liabilities of third persons resulting from ordinary business transactions. Keyser *v.* Harbeck, 3 *Duer*, 373, 12 *N. Y. Leg. Obs.* 201; s. p. Peabody *v.* Fenton, 3 *Barb. Ch.* 451.

In applying this statutory definition to an offence in respect to which the statute gives the court discretion or option to punish it, either by imprisonment in state prison, or by fine, or imprisonment in county jail, the rule is, that an offence is felony if it is liable to be punished by death or imprisonment in state prison; and is not less felony because it may be punished by some milder punishment instead. People *v.* Van Steenburgh, 1 *Park. Cr.* 39; see also Keyser *v.* Harbeck, 3 *Duer*, 373. And the definition is construed as relating to the punishment prescribed for the crime, without reference to any personal exemption of the criminal, such as one on account of his age. People *v.* Park, 41 *N. Y.* 21.

Similar statutory definitions of the term have been enacted in several other states. They are not founded on, and do not purport to express, the common-law nature of felony, but are prescribed for the purpose of securing a short and accurate term for the graver crimes, which may be used in general legislation.

The laws of the United States as now revised do not contain any specific definition of felony; and we do not recall that it is employed in acts of congress in any instance where stress need be laid on its precise meaning, except Rev. Stat. § 4090, which provides that, in certain cases in foreign countries, "offences against the public peace, amounting to felony under the laws of the United States," may be tried before the United States minister. It does not seem clear what are the offences amounting to felony under the laws of the United States. It would seem, upon the principle that though the United States has no com-

mon law of crimes, the common-law definitions may be resorted to in determining what is meant by names of offences used in acts of congress, that the common-law meaning of felony should govern; yet it is doubtful if congress intended offences involving forfeiture.

Felon: a person who has committed a felony. This is not much employed, in the United States, in any technical connection. But felonious, and feloniously, which impute the character of felony to the act to which they are applied, are terms of much importance in framing indictments. In several jurisdictions the word feloniously has been said to be indispensable to an indictment for felony, and the courts have refused to sanction the use of any equivalent. Bowler *v.* State, 41 *Miss.* 570; Cain *v.* State, 18 *Tex.* 387; State *v.* Eldridge, 12 *Ark.* 608; State *v.* Gilbert, 24 *Mo.* 380; State *v.* Feaster, 25 *Mo.* 324; State *v.* Rucker, 68 *N. C.* 211; and see *Bish. Stat. Cr.* § 387. Such is believed to be the general rule of the English practice and authorities. But, in Tennessee, the words "with intent to commit a felony" have been held equivalent to feloniously, and sufficient. Dillard *v.* State, 3 *Heisk.* 260. And, in Texas, it has been held that an indictment for larceny need not allege the taking to have been felonious by that precise term: the word fraudulently is equivalent to feloniously. Austin *v.* State, 42 *Tex.* 345. Conversely, it has been held there that an indictment for theft, which charges that the defendant "did feloniously steal," sufficiently alleges that the taking was "fraudulent." Musquez *v.* State, 41 *Tex.* 226.

Felony is any capital crime short of treason, and such as occasioned at common law the forfeiture of the felon's lands and goods, or, at any rate, of his goods. The word, in its generic sense, includes even treason, and under particular statutes, *e.g.* 39 & 40 Geo. III. ch. 93, the offence of treason may be prosecuted as a felony. The crime of felony stands midway between treason and misdemeanors. *Brown.*

In the general acceptation of English law, felony comprises every species of crime which at common law occasioned a forfeiture of lands and goods. Treason, therefore, was a species of felony. At the time when Blackstone wrote, an act of parliament making an offence felony without benefit of clergy, meant that the offender, if convicted, was to suffer death, and incur a forfeiture of his lands and goods. But, as capital punishment never entered into the true idea of felony, so it has now long ceased to have any necessary connection with it in practice. And by the felony act of 1870, § 1, forfeiture for treason and felony is abolished, so that the essence of the distinction between felony and misdemeanor is lost, though such other differences between the two classes of offences, whether in procedure or otherwise, as existed before that act, exist still. *Mozley & W.*

An indictment for rape, charging that defendant feloniously did ravish, &c., may be sustained, although the statute punishing the offence uses the expression "unlawfully and forcibly have carnal knowledge." The word feloniously, here substituted for unlawfully, is not only tantamount to it, but is a word of far more extensive and criminal meaning. The act complained of could not have been feloniously, and not unlawfully, done. Omitting the word unlawfully, therefore, does not vitiate the indictment. Weinzorpflin *v.* State, 7 *Blackf.* 186.

An indictment charged that the defendant did "unlawfully and feloniously . . . touch and strike one A, with intent then and there unlawfully and feloniously, and with premeditated malice, to kill and murder said A," &c. Held, that the phrase with intent sufficiently expressed the word purposely in the statutory definition of murder; and that the word feloniously was, in its connection, identical with the word purposely. Carder *v.* State, 17 *Ind.* 307.

Where a statute makes criminal the doing of an act "wilfully and maliciously," it is not sufficient for the indictment to charge that it was done "feloniously and unlawfully," or "feloniously, unlawfully, and wilfully;" these latter terms not being synonymous, equivalent of the same legal import, or substantially the same as "wilfully and maliciously." State *v.* Card, 34 *N. H.* 510; S. P. State *v.* Delue, 1 *Chand.* 166; State *v.* Roberts, 3 *Brev.* 139.

FEME. A woman. In the phrase *baron et feme* (q. v.), the word has the sense of wife.

Feme covert. A married woman. Generally used in reference to the legal disabilities of a married woman, as compared with the condition of a *feme sole.*

Feme sole. A single woman. The term includes women who have never been married; those who have been married, but whose marriage has been dissolved by death of the husband or by divorce; and (for some purposes) those

who are judicially separated from their husbands.

FENCE. Jacob, and Wharton, following him, define fence as a hedge, ditch, or other inclosure of land, for the better manurance and improvement of the same. In the United States, it generally signifies an artificial structure for the purpose of inclosing land. A hedge or ditch would not ordinarily be deemed included.

A fence is nothing more than a line of obstacle, and may be composed of any material which will present a sufficient obstruction. Allen *v.* Tobias, 77 *Ill.* 169.

Fence, as used in a statute requiring railroads to make and maintain a legal and sufficient fence, includes a gate. Estes *v.* Atlantic, &c. R. R. Co., 63 *Me.* 308.

FEOD. FEODUM. English and Latin forms of a term equivalent, nearly, to feud; a fief or fee.

The right which, under ancient English military tenures, the vassal had to use and take the profits of the land (or other immovable property) of the lord, rendering duties or services therefor, according to the conditions of his tenure, was not an estate in the lands as modern tenancies are; the property in the soil remained in the lord. Accordingly the form *feod* has been, by some writers, preferred, as conforming to the distinction between this most ancient tenure and the fees afterwards established. The same form is used in the derivatives. *Wharton.*

FEOFFMENT. A gift or grant of lands in fee, by delivery of the seisin and possession. It is defined by Blackstone as the gift of any corporeal hereditament to another. Strictly, a feoffment means simply a gift of the fee; but the term was always used to denote the feudal mode of transferring estates more fully described by the name "feoffment with livery of seisin." The transfer of the seisin is essential to this mode of conveyance, as it operates by the change of possession. The deed or instrument of conveyance, when one was employed, was also termed a feoffment; the person who made a feoffment was called the feoffor; and he to whom it was made, the feoffee.

This was one of the earliest modes of conveying land under the common law, but has become obsolete in England, having been superseded by grant and other forms of conveyance. In the United States, feoffments have been used to but a limited extent. See CONVEYANCE.

Feoffment with livery of seisin is either in deed or in law. Livery in deed is thus performed: the feoffor or his attorney goes to the land or house with the feoffee or his attorney; and there, in the presence of witnesses, declares the contents of the feoffment. And then the feoffor doth deliver to the feoffee a clod or turf, or twig or bough, there growing, with words to this effect: "I deliver these to you in the name of seisin of all the lands and tenements contained in this deed." But if it be of a house, the feoffor must take the ring or latch of the door (the house being empty), and deliver it to the feoffee in the same form. Livery in law is made, not on the land, but in sight of it only; the feoffor saying to the feoffee, "I give you yonder land: enter and take possession." Here, if the feoffee enters during the life of the feoffor, it is a good livery, but not otherwise, unless he dares not enter, through fear of his life or bodily harm; and then his continual claim, made yearly in due form of law, as near as possible to the lands, will suffice without an entry. This livery in law cannot be given or received by attorney, but only by the parties themselves. *Mozley & W.*

Feoffment to uses. A feoffment of lands to one person for the use of another. Before the passage of the statute of uses, 27 Hen. VIII. ch. 10, a feoffee to uses had the legal estate in the lands so conveyed by feoffment; the claim of the person to whose use they were conveyed being enforceable only in chancery. Under the operation of that statute, uses are turned into legal estates; and the feoffee to uses has no longer even a legal estate in the land, but merely what is called a *scintilla juris.*

FERÆ NATURÆ. Of a wild nature. A term applied to animals, wild by nature, as distinguished from those of a tame and domestic nature, termed *domitæ naturæ*, q. v. The distinction is made in regard to rights of property in animals, the rules applicable to the two classes being entirely different.

FERM. A Saxon word signifying provisions; hence, secondarily, rent of lands, that being so often payable in provisions; then a term in lands; and, at last, land itself held upon payment of rent for agricultural uses, or a farm, *q. v.* Otherwise spelled ferme; fearm; feorm. Fermer, or fermor: one who held lands as lessee for agriculture; a farmer.

FERMENTED. The terms "malt liquor" and "fermented liquor," in the internal revenue act of congress of June 6, 1872, are used synonymously. United States *v.* Dooley, 21 *Int. Rev. Rec.* 115.

Fermented beer is not necessarily strong beer; and an admission of the defendant that he had sold "ale, strong beer, or fermented beer," without a license, does not prove him guilty of an offence. Nevin *v.* Ladue, 3 *Den.* 437.

FERRY. As a law term, means the franchise or right of running a boat to and fro across inland waters, in the business of transporting persons and property for tolls. It is sometimes used in the vernacular sense of the establishment of boats, landing-places and appurtenances, so used. Ferriage: the compensation or toll paid for crossing by a ferry; also, the operating a ferry. Ferryman: one whose business it is to operate a ferry.

Ferry properly means a place of transit across a river or arm of the sea; but in law it is treated as a franchise, and defined as the exclusive right to carry passengers across a river, or arm of the sea, from one vill to another, or to connect a continuous line of road leading from one township or vill to another; it is not a servitude or easement; it is wholly unconnected with the ownership or occupation of land, so much so, that the owner of the ferry need not have any property in the soil adjacent on either side. (Newton *v.* Cubitt, 12 *C. B.* N. S. 32.) *Brown.*

Ferry, when considered as a franchise, is the right arising from grant or prescription to have a boat or boats for carrying men and horses across a river, for reasonable fare or toll. Aikin *v.* Western R. R. Corporation, 30 *Barb.* 305, 310; but see reversal of S. C., 20 *N. Y.* 370.

A ferry is a franchise, and is not the subject of levy, sale, or delivery, under execution. It involves a personal trust granted by the sovereign, upon conditions imposed upon the grantee alone; and his liability is personal, and cannot be removed by substitution. Munroe *v.* Thomas, 5 *Cal.* 470.

A ferry is a liberty to have a boat for passage upon a river, for the carriage of horses and men for a reasonable toll. It is usually to cross a large river. State *v.* Wilson, 42 *Me.* 9.

Ferry, in a statute regulating ferries, may sometimes mean the terminus or landing-place on one side of the water to be crossed, and not include both landings and the entire route between. State *v.* Hudson, 23 *N. J. L.* 206.

A flat-bottomed boat, connected with cables spanning the stream, and moored or propelled back and forth across it by power supplied by a stationary engine on the bank, is a ferry, as distinguished from a bridge, both under the legislation of Kansas and according to the usual meaning of the word. Parrot *v.* City of Lawrence, 2 *Dill.* 332.

Ferriage, literally speaking, is the price or fare fixed by law for the transportation of the travelling public, with such goods and chattels as they may have with them, across a river, bay, or lake. People *v.* San Francisco, &c. R. R. Co., 35 *Cal.* 606.

FEUD. A holding of land from a superior, on condition of rendering him service. A right to use and enjoy lands, on condition of rendering service therefor to a superior who has the absolute property in the land; also, the land itself so held. Otherwise called a feod; a fief; a fee.

A feud is properly only a right in land, not the land itself. Such right was not originally hereditary, but merely precarious; although it soon became, by custom, certain for life, and subsequently inheritable.

The Latin word *feudum* was used to denote a feudal estate by writers in that language on the feudal law, especially in continental Europe. In England, however, after such estates had become hereditary, the word *feodum* was applied to them. Blackstone and other writers in English appear to apply feud, as the translation of *feudum*, to distinguish the original feudal grant or estate from the fee of modern law, apparently regarding fee as the proper translation of *feodum*, and involving the element of inheritance. But this distinction is not maintained by later writers, who generally use all these terms with the French *fief* as equivalents.

The theory of the feudal system was that the property in, as well as the dominion over, all lands in any country was originally in the king or chief who ruled over it; that the use of these was granted out by him to others, who were permitted to hold them upon condition of performing certain duties and services for their superior, who theoretically retained the property in the land itself. The one who had the use of the land by this arrangement was said to hold of or under his superior, the latter taking the name of lord, the former of vassal; and this right to hold was designated by the term *seisin*. This holding of lands under another was called a *tenure*.

The system was not limited to the relation of the first or paramount lord and vassal, but extended to those to whom such vassal, within the rules of the feudal law, might have parcelled out his own feud to his own vassals; by such subinfendation he became the *mesne* lord between his lord or the lord paramount and his own vassals. Those who held directly of the king were called his tenants *in capite*, or tenants in chief. Every vassal was bound to perform certain services, usually military, as a return to his lord for the privileges of his tenure. An oath of fealty or fidelity from the tenant to his lord was also incident to all tenures, and without it no feud could subsist; and, if the feud was hereditary, the vassal was required to do homage therefor to the lord. On the other hand, the lord assumed various obligations to his vassal; principally that of protecting the vassal in the enjoyment of the feud, and supplying to him a new one of equal value if deprived of it. *Washb. Real Prop.* 18–20. The obligations and incidents of the tenure, besides military service, usually enumerated, are, aids, reliefs, and fines upon alienation, — all which were pecuniary in their nature, — wardship, maritage, and escheat, *qq.v.*

The various kinds of feuds or tenures are enumerated by Bracton thus: "Tenements are of two kinds, franktenement and villenage. And of franktenements, some are held freely in consideration of homage and knight-service; others in free socage, with the service of fealty only. Of villenages, some are pure and others are privileged; he that holds in pure villenage being bound to uncertain services of a villein nature, and he that holds in privileged villenage being bound to certain services of a villein nature, whence, also, the latter is often called a villeinsocman." Nearly all the modern estates are tenures in free socage, that class including fees-simple, fees-tail, estates for life, in dower, by the curtesy, and other less common estates.

Feuds seem to have originated among the northern nations who overran the Roman empire; and the system appears to have become fully established in continental Europe about the reign of Charlemagne, and under him and his successors. It was not introduced in England until the conquest by William I., under whom the feudal system was completely introduced; and, as a consequence, all individual ownerships of lands were abolished, and mere tenures substituted for them. The system thus established is the foundation of the English law of real property, and, from the greater relative importance of real property in the middle ages, it has greatly influenced the law of personal property and personal relations. And although feudal tenures were abolished in England in 1660, by Stat. 12 Car. II. ch. 24, the principles of the system are necessarily recognized in the qualities which it originally imparted to estates created under it. To a lesser extent, this is true of the American law of real property. In many of the United States, feudal tenures are expressly abolished by statute, and all lands declared to be allodial; but many of the principles regarding real property which arose out of the feudal system, and which were adopted in the United States as part of the English common law, continue to be recognized. An illustration is the rule which prohibits any limitation of real property founded on an abeyance of the fee.

Feudalism, strictly so called, was unknown in England previous to the Norman conquest, although something superficially analogous to it existed in Anglo-Saxon times. It was introduced into England partially in 1066, as a consequence of the acquisition or conquest of England by William I. in that year; and the system was completely established in England in 1085 by Law 52 of that sovereign, founded on the oath taken at Salisbury in the latter year by all free men. The law is in these words: "*Statuimus ut omnes liberi homines fœdere et sacramento affirment quod intra et extra universum regnum Angliæ Wilhelmo regi domino suo fideles esse volunt; terras et honores illius omni fidelitate ubique servare cum eo et contra inimicos et alienigeras defendere.*" The precise nature of the change in the law of land, which was thus effected at a stroke, was the entire destruction of ownerships and the substitution for them of tenures; thenceforward there was no such thing as absolute ownership in land, but only a tenure of them; whence, also, lands have ever since been, as they now are, described as tenements. It is so absolute a maxim of the feudal law, or law of tenures, that all lands are holden mediately or immediately of the king, that even the king him-

self cannot give lands in so absolute and unconditional a manner as to set them free from tenure; and therefore, in the case of such a gift, the donee would, prior to 12 Car. II. ch. 24, have held the lands of the king *in capite* by knight service, and would, since that statute, now hold by fealty. *Brown.*

Feudal tenures arose in England from the allotments of land made by the conqueror to the superior officers of his army, and by them to the inferior officers and deserving soldiers, on the condition that the possessor should do service faithfully, both at home and in the wars, to him by whom they were given; for which purpose he took the oath of fealty; and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them. At first, the lord was the sole judge whether the vassal performed his services faithfully; and the feuds were in consequence held at the will of the lord. Afterwards they became certain for one or more years; after that, they were granted for the life of the feudatory (*i.e.* the grantee). Afterwards they became extended to his sons, thence to his heirs, so as to admit his male descendants *in infinitum;* thence they became confined to the eldest son; the feudatory, or holder of the feud, not being able to alienate it in his lifetime, or to devise it by will. The feudatories, being under frequent incapacities of cultivating and manuring their own lands, soon found it necessary to commit part of them to inferior tenants, exacting returns in service, corn, cattle, or money; which returns were the original of rents. This innovation was an inroad into the previously purely military character of feuds. The guise of a military character, however, continued until the abolition of military tenures by statute. *Mozley & W.*

Feu or *feudum* was used to denote the feudal holding where the service was purely military; but the term has been used in Scotland in contradistinction to wardholding, the military tenure of the country, to signify that holding where the vassal, in place of military service, makes a return in grain or in money; a species of holding which is coeval with feudality. *Bell.*

Feude. Signifies a hatred not to be satisfied but with the death of the enemy; such as that among the people in Scotland and the northern parts of England, which is a combining together of all the kindred to revenge the death of any of the blood upon the slayer and all his race. This word is mentioned in Stat. 43 Eliz. ch. 13. *Termes de la Ley.*

Feudary. The name of an officer in the English court of wards charged with assisting, on behalf of the crown, at the valuation of lands, on proceedings for escheat.

Feudatory. A feudal vassal; the tenant of a feudal estate.

Feudal law. The law as to feuds; the system of law regulating the feudal relation of lord and vassal, and the creation, enjoyment, and transmission of feudal estates. This body of law was originally unwritten, consisting of mere usage, but was reduced to writing about the middle of the twelfth century, in the compilation commonly called *feodarum consuetudines*, which was the foundation of subsequent digests. The feudal law prevailed throughout nearly all western Europe during the middle ages, and although it has long since become extinct there, it constituted an important element in the formation of the political institutions of England, and especially in the principles of common law with regard to real property; radically affecting, also, the common law in respect to personal rights and relations and personal property. See FEUD.

FEUDUM. A feud; a fief; a fee. This is the form of the word used by most of the writers in Latin upon the feudal law. The earlier writers in England used the form *feodum.* See FEUD.

FIAT. Let it be done. This Latin word has been used in English practice as the form of a short order or warrant of a judge for making out and allowing certain processes. *Jacob.*

Also, an indorsement by the lord chancellor or attorney-general, on behalf of the crown, upon a petition for warrant to bring a writ of error, or for any purpose for which the consent of the crown is necessary, is called the *fiat. Tomlins.*

Proceedings in bankruptcy used also, at one time, to commence by what was called a *fiat* in bankruptcy, which was a power under the lord chancellor's signature, authorizing proceedings to be taken in bankruptcy. 2 *Steph. Com.* 153, note.

Fiat justitia. Let justice be done. On a petition to the king, for his warrant to bring a writ of error in parliament, he writes on the top of the petition *fiat justitia,* and then the writ of error is made out, &c. *Jacob.*

And when the king is petitioned to redress a wrong, he indorses upon the petition, "Let right be done the party." *Dyer,* 385; *Stamf. Prærog. Reg.* 22.

FICTION. The act of feigning; that which is feigned or pretended to be true. In its technical, legal use, the term signifies an assumption that something is true which is or may be false. Such fictions are allowed for furtherance of justice, and sometimes for mere convenience. A fiction is not to be disproved, as regards the purpose for which it is assumed as a fact. But, on the other hand, a fiction is not permitted to be carried further than the object for which it is introduced necessarily requires, nor to extend to that which is impossible; nor is it allowed to work any injury.

Fictions are distinguished from presumptions of law. Such presumptions are arbitrary inferences, which may or may not be true, but which the rules of law do not permit to be disproved. In the case of a fiction, the fact assumed is usually understood to be false. A like distinction exists as between fictions and estoppels. In estoppels, a person is merely held to be precluded from asserting what is acknowledged to be a fact; but an opposite state of facts is not necessarily assumed to be true.

Fictions were very numerous in the Roman and the civil law. They were frequently resorted to also in the early common law, usually to sustain an extension of jurisdiction or of a remedy or form of procedure from cases to which it was applicable, to other cases to which it was not strictly applicable, the ground of the inapplicability being some difference of an immaterial character. The history of the action of ejectment affords a familiar example. The more useful of these fictions have been superseded by changes in the law, and are but seldom resorted to in modern jurisprudence. They were found, however, of great utility and importance in the amelioration of the rules of the common law, and are classed, with equity and legislation, as one of the three principal methods of improvement of the law.

Fiction of law is defined as a supposition of law that a thing is true, without inquiring whether it be so or not, that it may have the effect of truth so far as is consistent with justice. *Mozley & W.*

The phrase "implied by law" is frequently used to cover a legal fiction. For instance, when it is said that a contract or request is "implied by law," it is frequently meant that no such contract or request has ever been made, but that, for certain legal purposes, it must be held to have been made. But the phrase is applied equally to the most rational and obvious inferences of fact. *Mozley & W.*

FIDEI COMMISSARIUS. A person who has a beneficial interest in an estate which, for a time, is committed to the faith or trust of another. This is a term of the civil law very nearly equivalent to the term *cestui que trust* in the common law; and in the Anglicized form, *fidei commissary*, or *fide commissary*, has been proposed as a substitute for *cestui que trust*.

FIDEI COMMISSUM. A thing committed to one's faith; a trust; particularly, a devise or bequest in trust. This term, in the civil law, denoted a gift of property by will to one person, in confidence that he would convey the property or dispose of the profits to or for the benefit of another.

A donation of land by act *inter vivos* to a person on condition that, in case she should die without posterity and without having disposed of the land, it should belong to third persons, is a *fidei commissum*, prohibited by the civil code of Louisiana. Ducloslange *v.* Ross, 3 *La. Ann.* 432.

The provision of the Louisiana civil code, that substitutions and *fidei commissa* are prohibited, abolishes express trusts, but does not reach or affect implied trusts, arising where an individual has, against conscience and right, possessed himself of another's property. In such a case, the Louisiana law affords redress as speedily and amply as the law of any other state. Gaines *v.* Chew, 2 *How.* 619.

FIDUCIARY. Involving confidence; founded upon actual trust reposed.

The word seems derived from the civil law, but its exact meaning there is not retained. Prominent instances of the use of it in American jurisprudence are in the bankrupt laws, and the provision of the New York code allowing arrest for debt.

As the term is used in the New York laws allowing arrest as a remedy for debts incurred in a fiduciary capacity, it is held to import trust, confidence: it refers to the integrity, the fidelity, of the party, rather than his credit or ability; and contemplates good faith, rather than legal obligation. Stoll *v.* King, 8 *How.*

Pr. 298; compare Frost *v.* McCarger, 14 *Id.* 131, 137. It embraces a trust reposed, some relation which involves the receipt and payment of money belonging to another, over to him, not the receipt of money upon a transaction where the recipient has bound himself to pay the debt, whether it be received by him or not. Sutton *v.* De Camp, 4 *Abb. Pr.* N. S. 483. Indebtedness based not on credit, but on confidence, is to be deemed an indebtedness in a fiduciary capacity. Dunaher *v.* Meyer, 1 *Code R.* 87.

Moneys received under one of the express trusts known to the law, such as that of an executor, trustee, &c., are clearly received in a fiduciary capacity; but not so those received in any and every ordinary agency. Smith *v.* Edmonds, 1 *Code R.* 86. As to agencies, generally, an agent who receives money of his principal, which he has no authority to disburse, but is bound to pay over on request, receives it in a fiduciary capacity. Republic of Mexico *v.* Arrangoiz, 5 *Duer*, 634. The test is as to an agent or attorney employed to collect money, whether the specific moneys ought, in good faith, to have been kept and paid over, or whether the agent had a right to use the money. Stoll *v.* King, 8 *How. Pr.* 298. So one who receives money from another to pay directly to a third person, may, on his omission to pay it over, be arrested in an action to recover it. Burhans *v.* Casey, 4 *Sandf.* 707.

An auctioneer or a commission merchant, who receives goods to sell for a commission, and receives the proceeds, acts in a fiduciary capacity. Holbrook *v.* Horner, 6 *How. Pr.* 86; Schudder *v.* Shiells, 17 *Id.* 420. In general, a factor, who has agreed to sell upon commission, and account for net proceeds, acts in a fiduciary capacity, and is liable to arrest for not paying over the proceeds, Turner *v.* Thompson, 2 *Abb. Pr.* 444; Schudder *v.* Shiells, 17 *How. Pr.* 420; Ostell *v.* Brough, 24 *Id.* 274; Dunaher *v.* Meyer, 1 *Code R.* 87; but whether this is so, where the factor has, for an additional compensation, guaranteed his sales, see Ostell *v.* Brough, 24 *How. Pr.* 274; Sutton *v.* De Camp, 4 *Abb. Pr.* N. S. 483; Chaine *v.* Coffin, 17 *Abb. Pr.* 441; Angus *v.* Dunscomb, 8 *How. Pr.* 14.

A person who receives money for the purchase of goods, under a distinct understanding that it is not to be used in any other way, is a factor acting in a fiduciary capacity. Noble *v.* Prescott, 4 *E. D. Smith*, 139. An agent who is intrusted with negotiable paper by the maker, to get it discounted, and who transfers it to a *bona fide* purchaser, and receives the proceeds, applying them to his own use, is liable for the money as for money received in a fiduciary capacity. Wolfe *v.* Brouwer, 5 *Robt.* 601. Whether money deposited with a broker, to secure him against loss in the performance of the depositor's orders as an agent, is held by the broker in a fiduciary capacity, see Clark *v.* Pinckney, 50 *Barb.* 226; McBurney *v.* Martin, 6 *Robt.* 502. Money collected by a banker, under an express agreement he may use the fund till drawn out, is not held in a fiduciary capacity. Bussing *v.* Thompson, 15 *How. Pr.* 97.

The bankrupt laws of 1841 and 1867 each contained a provision that debts contracted in a fiduciary capacity should not be barred by a discharge. This provision has been construed in several cases.

Money put into the hands of an agent for a specific purpose of investment, in regard to which he was to exert himself to execute the depositor's intention, constitutes a special trust; and, if he appropriates it to his own use, it is a debt in a fiduciary capacity, incurred by violation of good faith, and is not discharged by a certificate in bankruptcy. Flagg *v.* Ely, 1 *Edm.* 206.

The indebtedness of a collector of city taxes, for moneys collected officially, is a fiduciary debt. Morse *v.* Lowell, 7 *Met.* 152.

A factor who retains the money of his principal is not indebted in a fiduciary capacity, within the meaning of the provision withholding a discharge in bankruptcy from persons owing money in a fiduciary capacity. The exception relates to technical trusts. Chapman *v.* Forsyth, 2 *How.* 202, 206, 208; S. P. Commercial Bank *v.* Buckner, 2 *La. Ann.* 1023.

A private person who receives a note or other security for collection, receives it in a fiduciary capacity: it is a case of special trust. White *v.* Platt, 5 *Den.* 269.

Fiduciary includes indebtedness of a commission merchant for proceeds of goods sold. Meador *v.* Sharpe, 54 *Ga.* 125.

Money collected by an agent, under an agreement to account and pay over monthly,

is not a debt created in a fiduciary character. Grover, &c. Sewing Machine Co. *v.* Clinton, 5 *Biss.* 324, 8 *Bankr. Reg.* 112.

Making a general deposit of a sum of money with a person does not give him a fiduciary character. Hervey *v.* Devereux, 72 *N. C.* 463.

An agreement by an executor, guaranteeing the payment of a demand against the estate, and admitting the possession of sufficient assets, does not constitute a debt created by the executor while acting in any fiduciary character. Amoskeag Manuf. Co. *v.* Barnes, 49 *N. H.* 312.

FIELD. The phrase "veterans re-enlisting in the field," employed in bounty resolutions during the war of 1861–65, meant soldiers who re-enlisted while they were yet held to service under a former enlistment. A man ceased to be a soldier in the field, when he received a discharge from the service. The phrase "in the field" means in the military service for the purpose of carrying on the pending war. Sargent *v.* Ludlow, 42 *Vt.* 726.

FIERI. To be made or done; occurs in several phrases.

Fieri facias. That you cause to be made. The name of a common-law writ of execution, directed to the sheriff, commanding him that of the lands and goods and chattels of the judgment debtor in his bailiwick he cause to be made an amount specified; the name being derived, as usual, from the emphatic words in the Latin form of the writ. It issued upon a judgment in an action for debt or damages. In the ancient English forms, the writ issued against, and might be levied upon, either lands or goods and chattels; but, in modern practice, it included and affected only goods and chattels. In most of the United States, it is directed to be executed, in the first instance, against goods and chattels, and, failing those, against the lands of the person named. The abbreviated form of the term, *fi. fa.*, is frequently used.

Fieri feci. I have caused to be made. The return made by a sheriff or other officer to a writ of *fieri facias* or similar writ, signifying that he has collected the whole or part of the sum directed to be made. In modern practice, the return, as actually made, is expressed by indorsing the word "satisfied" upon the writ.

Fieri non debet, sed factum valet. It ought not to be done, but if done it is valid.

There are contracts, rights, and obligations which the law does not enforce. It would be against the policy of the law to enforce them. Yet where the party, bound by such a contract or obligation, voluntarily performs what he had promised to do, the courts ratify his acts, and will not suffer him to retract. When a man pays a debt which he was not legally bound to pay, or performs his contract, although it was void in law, he cannot afterwards recede and annul what he has done. The maxim applied to such cases is *fieri non debet, sed factum valet.* Yates *v.* Foot, 12 *Johns.* 1.

FIFTEENTHS. The name of a tax anciently imposed, in England, upon cities, towns, &c., being one-fifteenth of a valuation made of the personal property of the inhabitants. *Cowel; Tomlins.*

FILE, *n.* A thread, string, or wire, upon which writs and other exhibits in courts and public offices were in old times fastened or filed, for the more safe keeping of, and ready turning to, the same. File, *v.*: to place papers upon a file; or, more generally, to deposit papers in official custody, or receive them officially, for orderly, systematic safe-keeping.

The method of preserving writings, which is still widely used for papers of small or temporary value, by stringing them upon a wire or thread, seems to have been anciently the usual system of keeping loose papers which accumulated in the offices of the courts. In modern practice, papers which are not of sufficient importance to be transcribed into books of record are usually folded similarly, indorsed with some note of their contents, and tied up in a bundle. Such a bundle is called a file. The exact mode of preserving the papers is not, however, important. The file is the manner adopted, whatever it may be. Files, *plu.*: in such expressions as the files of the court, is used, in a very general sense, as meaning official custody of papers. To file, and filing, mean the act either of the party in bringing the paper and depositing it with the officer, for keeping, or the act of the officer in folding, indorsing, and putting up the paper. Filacer is no longer used: the duty of filing is performed by clerks, registers, &c., and their deputies.

Filing a paper is considered an exhibition of it to the court; and the clerk's

office in which it is filed represents the court for that purpose. Filing is effected by delivering the paper, indorsed with the title of the cause and the attorney's name, to the clerk of the court in which the action is pending, who marks it "filed," adding the date, and deposits it under the proper head among the papers or files in his office. The mere leaving the instrument with the clerk is not sufficient, unless the purpose of so leaving it is stated, and not left to inference. Lamson *v.* Falls, 6 *Ind.* 309.

Filing imports more than a mere reception into the custody of the clerk of the court: his indorsement is necessary. Pinders *v.* Yager, 29 *Iowa*, 468.

Filing a paper consists in presenting it at the proper office, and leaving it there, deposited with the papers in such office. Indorsing it with the time of filing is not a necessary part of the filing. Bishop *v.* Cook, 13 *Barb.* 326.

A paper in a cause is said to be filed when it is delivered to the clerk, and received by him to be kept with the papers in the cause. Engleman *v.* State, 2 *Ind.* 91.

The expressions "filing" and "entering of record" are not synonymous; they are nowhere so used, but always convey distinct ideas. Filing originally signified placing papers in order on a thread or wire for safe-keeping. In this country and at this day it means, agreeably to our practice, depositing them in due order in the proper office. Entering of record uniformly implies writing. Naylor *v.* Moody, 2 *Blackf.* 247.

Filed, as used in a statute regulating the time of filing bills of exceptions, comprehends not merely the indorsement to that effect, but the entry made by the clerk on the record, that the bill has been allowed. Fulkerson *v.* Houts, 55 *Mo.* 301.

Filacer, filazer, or **filizer,** is an officer of the court of common pleas, so called, as he files those writs whereon he makes out process. There are fourteen of these filazers in their several divisions and counties, and they make forth all writs and processes upon original writs, issuing out of chancery, as well real as personal and mixed, returnable in that court; and in actions merely personal, where the defendants are returned summoned, they make out attachments, and then a *distringas*, and so on. They enter all appearances and special bails, upon any process made by them; and make various other writs. The filazers of the common pleas have been officers of that court before Stat. 10 Hen. VI. ch. 4, wherein they are mentioned; and in the king's bench, of later times, there have been filazers who make out process upon original writs, returnable in that court, on actions in general. *Jacob.*

There were also officers of the same name in the courts of king's bench and exchequer. These offices were all abolished in 1837 by Stat. 7 Wm. IV. & 1 Vict. ch. 30. *Mozley & W.*

FILIATION. Parentage; the relation or tie between a child and its parents. Also, the ascertaining of parentage; the assignment of a child to its parent; this is often called affiliation, *q. v.*

The term is almost always used of the relation between the child and its father; but this seems rather because there is seldom any need to use it of maternity, than because the meaning of the word does not include the mother.

Filius nullius. The son of nobody. Also, **Filius populi.** The son of the people. These terms are applied to a bastard.

Filum aquæ. A thread of water; a line of water. The word *filum* properly imports the edge, or outer line, and is so used of water in the phrase *altum filum*, — high-water mark. But the term *filum aquæ*, as well as the more precise expression *medium filum aquæ*, is used, alone and as a part of several phrases, to denote the middle line of a stream of water, supposed to divide it into two equal parts, and constituting in many cases the boundary between the riparian proprietors on each side.

Filum viæ. The thread of a way; the middle line of a road. An imaginary line drawn through the middle of a road, constituting the boundary between the proprietors of the lands on each side.

FINAL. The uses of this word in jurisprudence are frequent and important. They cannot be said to depart materially from the vernacular meaning, yet they require attention.

Final adjudication, decree, judgment, order, or **sentence.** These expressions may indeed signify a judicial decision which is superior to review; one which conclusively determines the questions involved. See Moore *v.* Mayfield, 47 *Ill.* 167. But this is not the usual sense. See DEFINITIVE, for a suggestion of a word for this meaning. Final, particularly in statutes and decisions authorizing or relating to a review of adjudications, means a decision which concludes the action, 3 *Bl. Com.* 398; which determines that particular

cause, 1 *Kent Com.* 316; which disposes completely of the questions involved, so that nothing further is left for that court to adjudicate, 2 *Dan. Ch. Pr.* (Perk. ed.) 1199, note; which disposes ultimately of the suit, so that the cause is at an end, and no further hearing can be had, *Adams Eq.* 375, 388. It is commonly used to distinguish a decision which exhausts the powers of the particular court, from *interlocutory* decisions, made in the progress of the cause, and which contemplate future proceedings in the same tribunal. For numerous decisions as to what decisions are final, see *U. S. Dig.* tit. Appeal, also Error.

A judgment is either final or interlocutory. It is said to be final when it is complete in itself, and entitles the party to obtain at once the fruits of his judgment, without any further inquiry being requisite for the purpose of ascertaining its amount. On the other hand, a judgment is called interlocutory, when something further remains to be done in the suit before the successful party is entitled to issue execution upon his judgment. *Brown.*

Final judgments, within a statute requiring final judgment to be reached before a review is allowed, are all judgments which determine the particular cause. The term is not confined to those in which the right is finally decided, so that it can never again be litigated between the parties. Weston *v.* City Council, 2 *Pet.* 449.

A judgment, to be final, so that an appeal will lie, must not merely decide that one of the parties is entitled to relief of a final character, but must give that relief by its own force, or be enforceable for that purpose, without further action by the court, except in case of a necessity arising for process for contempt. Bondurant *v.* Apperson, 4 *Metc.* (*Ky.*) 30.

It is not essential for a judgment to be final, that it should settle all the rights existing between the parties to the suit. All that is required is that it should determine the issues involved in the action. The judgment is none the less final because some future orders of the court may become necessary to carry it into effect. Perkins *v.* Sierra Nevada S. M. Co., 10 *Nev.* 405.

No judgment is final which does not terminate the litigation between the parties. A judgment reversing the judgment of an inferior court, and remanding the cause "for such other and further proceedings as to law and justice shall appertain," does not do this. Saint Clair County *v.* Lovingston, 18 *Wall.* 628; s. p. Moore *v.* Robbins, 18 *Id.* 588.

A judgment, when pronounced by the court, is as final as when entered and recorded by the clerk. Kehoe *v.* Blethen, 10 *Nev.* 445.

The nature of an order, as a decree or final order, or as not final, depends on the effect produced by the adjudication upon the rights and interests of parties. The usual distinction between interlocutory and other orders, depending on the stage of the cause in which they are made, is not the test for appellate purposes. Barry *v.* Briggs, 22 *Mich.* 201.

If an interlocutory order will finally affect the merits of the cause, or deprive a party of any benefit he may have at the final hearing, an appeal is allowable; and so it is, if money is required by the decree to be paid, or property to be transferred. Kennedy *v.* Kennedy, 3 *Ala.* 434; Barfield *v.* Impson, 2 *Miss.* 326.

Many of the definitions of final decree are quite loose and unsatisfactory. An exact definition applicable to all cases possible to arise in practice is not easily given. It is not always absolutely required to dispose of the entire merits of a cause and all the parties before the court, as a necessity to a final decree upon certain particular conceded or established rights. Tucker *v.* Yell, 25 *Ark.* 420.

A decree is final when it disposes of the whole merits of the cause, and leaves nothing for the further consideration of the court; it is interlocutory when it finds the general equities, and the cause is retained for reference, or consideration, to ascertain some matter of fact or law. The circumstance that a decree directs that certain facts shall be ascertained in execution of such decree, will not make it interlocutory; nor, on the other hand, if a decree finds the general equities of the cause, and reference is had to a master to ascertain facts preparatory to final disposition, will it be regarded as final. Kelly *v.* Stanberry, 13 *Ohio*, 421.

Any order or decree, finally settling any right or interest in controversy, between the parties to a cause, is final, and reviewable. Ware *v.* Richardson, 3 *Md.* 505.

A decree or order is final, and within the provision allowing an appeal, which is conclusive as to its subject or object. Baker *v.* Lehman, *Wright*, 522.

Where a decree ascertains and settles the rights of the parties in litigation, it is so far final as to sustain a writ of error, although the cause may be afterwards referred to a master to ascertain facts for an account; and it will not vary the case that proceedings are afterwards had, and new parties made, for a purpose not affecting the merits, but relating to the account to be taken. Bank of Mobile *v.* Hall, 6 *Ala.* 141.

A decree or judgment which directs a reference and states that all further questions and directions be reserved until the coming in of the report of the referee, is not the final order or judgment from which an appeal will lie. Harris *v.* Clark, 4 *How. Pr.* 78.

A decree which provides for a reference, and reserves further directions, so that the cause must be again set down for a hearing before all parts of the litigation are disposed of, is not final, although it adjudicates upon the merits, and disposes of the question of costs; and therefore it is not appealable. Cruger *v.* Douglass, 2 *N. Y.* 571.

A decree giving all the consequential directions, so as finally to dispose of the whole case upon the coming in and confirming of the master's report, by a common order in the clerk's office, and disposing of the question of costs, without the necessity of bringing the cause again before the court for any other decree or further directions, — is a final decree. Quachenbush *v.* Leonard, 10 *Paige*, 131; Coithe *v.* Crane, 1 *Barb. Ch.* 21; Wright *v.* Miller, 3 *Id.* 382.

A decree cannot be said to be final where it is impossible for the party in whose favor the decision is made to obtain any benefit therefrom, without again setting the cause down for hearing upon the equity reserved. Johnson *v.* Everett, 9 *Paige*, 636.

Decrees become final upon the expiration of the term at which they are rendered, unless specially entered otherwise; and they are final when entered as final on some day before the end of the term, with a view to other proceedings upon them as final decrees. Jenkins *v.* Eldredge, 1 *Woodb. & M.* 61.

In admiralty, a decree is final when it disposes of the whole controversy, leaving nothing further for the court to do in the cause; as where a libel is dismissed with or without costs, &c. But when the decree shows that something still remains to be done by the court before all the rights of the parties in the premises are fixed and determined, and the recovering party has an order for execution, then the decree is interlocutory, however much it may dispose of the merits of the cause. The mere fact that costs were not adjudged is not sufficient to render a decree interlocutory. The Leonide *v.* United States, 1 *Wash. T.* 174.

A decree, final in other respects, is not converted into an interlocutory one, because it directs a taxation of costs. Craig *v.* The Hartford, *McAll.* 91.

Final hearing or trial. The act of congress of March 2, 1867, authorizes removal of certain causes from state to national courts upon a petition to be filed at any time before the final hearing or trial of the cause. It has been held that the adjective final, in this phrase, qualifies trial as well as hearing. Insurance Co. *v.* Dunn, 19 *Wall.* 214.

The meaning of the clause is the same as if the words had not been transposed from the order in which they stood in the act of 1866, "before trial or final hearing." Beery *v.* Irick, 22 *Gratt.* 484.

The phrase final hearing in this clause, designates the trial of an equity case upon the merits, as distinguished from the hearing of any preliminary questions arising in the cause, which are termed interlocutory. Akerly *v.* Vilas, 24 *Wis.* 165.

The phrase, hearing or trial, means the examination of the facts in issue; hearing relating to chancery, and trial to law. After one trial has been had, the right to a second must be perfected before a demand for removal can be made; for every trial of a cause is final until in some form it has been vacated. Vannevar *v.* Bryant, 21 *Wall.* 41.

When, after a trial has been had in a state court, a new trial is granted, the cause stands the same as if no trial had been had. In the clause in question, "the trial" means not a trial, but the final one. Minnett *v.* Milwaukee, &c. Railway Co., 3 *Dill.* 460.

Final process. Writs of execution are so styled to distinguish them from *original* process, now almost disused, and *mesne* process, which includes the various kinds practically employed before the rendition of judgment.

Final recovery, in Mass. Gen. Stats. ch. 156, § 5, — enacting that, when the final recovery does not exceed twenty dollars, the plaintiff shall not recover costs, — relates to the verdict, not to the judgment. If the verdict is for exactly twenty dollars, or for less, no costs are recoverable, even though between verdict and judgment interest carries the sum for which judgment is entered up to exceed twenty dollars. Joannes *v.* Pangborn, 6 *Allen*, 243.

This phrase refers to the ultimate judgment rendered in any court. Fisk *v.* Gray, 100 *Mass.* 191.

FIND. Has a technical use, signifying to determine a question in controversy; to reach and express in form a conclusion upon an issue. Finding, *n.*: the conclusion or determination, formally expressed. It generally means the decision of a judge or referee, and may be of a question of law or fact, either of an issue or question. Finding, *part.*: the act of determining an issue or question including a formal statement of the result. It is frequently used in the phrase, finding a verdict, which signifies the act of a jury in making and reporting a decision upon issues or questions of fact.

There is one finding by the jury and another by the judges, and, when the defendant confesses it, &c., the judges find sufficient matter before them to give judgment. Powlter's Case, 11 *Coke*, 30.

The expression may also be applied to the presentment of a grand jury; thus, we say that a true bill was found against such a party. 4 *Steph. Com.* 367.

FINE. End; termination. 1. In the

English law of real property, this term was originally applied to any final agreement concerning lands, or to the sum of money or price paid upon such an agreement. Subsequently, it was used especially of an amicable composition of a suit, by leave of the court, whereby the lands in question became or were acknowledged to be the right of one of the parties. This proceeding was chiefly used as a species of conveyance, the device of a fictitious suit being employed where no actual suit or controversy existed. The object most frequently sought to be accomplished by levying a fine was the barring of an estate-tail, the power to do which was deemed to have been given by the statute of fines (11 Hen. VII. ch. 1), as judicially construed in the reign of Henry VIII., and which construction was afterwards confirmed by the Stat. 32 Hen. VIII. ch. 36, which also made the bar immediate. Only the issue of the tenant were barred. Fines were abolished in England by Stat. 3 & 4 Wm. IV. ch. 74, which substituted a disentailing deed, executed by the tenant in tail, and enrolled, but in which the protector of the settlement refuses to concur. See FEE-TAIL; RECOVERY.

Fines were also used to some extent to pass the interests of married women in real property, the requisite consent of the court being relied upon for the protection of their rights in the same manner as the modern form of acknowledgment of a married woman's deed.

The party to the proceedings who acknowledged the right of the opposite party to the lands was termed the cognizor, and he was said to levy the fine. The party to whom the acknowledgment was made was termed the cognizee, and the fine was said to be levied to him.

Fines were distinguished as of four classes: fines *sur cognizance de droit come ceo que il ad de son done*, or a fine upon acknowledgment of the right of the cognizee as that which he hath of the gift of the cognizor, which was considered the best and surest kind of fine, and equivalent to a feoffment of record; a fine *sur cognizance de droit tantum*, or upon acknowledgment of the right merely, which was commonly used to pass a reversionary interest in the cognizor; a fine *sur concessit*, in which the cognizor, though he acknowledged no precedent right, yet granted to the cognizee an estate *de novo* for life or years, by way of supposed composition; and a fine *sur don, grant et render*, which was a double fine, comprehending the fine *sur cognizance de droit come ceo*, &c., and the fine *sur concessit*. This fine might be used to create particular limitations of the estate; as by it the cognizee, after the right was acknowledged to be in him, granted back again, or rendered to the cognizor, or perhaps to a stranger, some other estate in the premises.

Fines were, at common law, held conclusive not only upon the parties thereto, but also upon all persons who, not being under any disability, neglected to put in a claim within a year and a day; but, by statute, strangers were subsequently allowed five years to prosecute their rights.

Fines were to some extent employed as a mode of conveyancing in the United States; but the proceeding has either been expressly abolished or suffered to become obsolete in the different states.

Fines are of equal antiquity with the rudiments of the law itself. The mode of levying them, as regulated by Stat. 18 Edw. I., was as follows: The party to whom the land was to be conveyed or assured commenced an action against the other by suing out a writ or *præcipe*, called a writ of covenant; the supposed foundation of which agreement or covenant was, that the one should convey the lands to the other; on the breach of which agreement the action was brought. On this there was due to the king, by ancient prerogative, a *primer* fine, amounting to one-tenth of the annual value of the land. The second step was the *licentia concordandi*, or leave to agree; for in old times a suit commenced could not be abandoned without leave, lest the lord (or king) should be deprived of his perquisites for deciding the same. The leave was granted, but on payment of another fine, called the king's silver, otherwise the *post* fine, amounting to three-twentieths of the annual value of the land. The third step was the concord or agreement itself, by which the lands were acknowledged to belong to the complainant. This acknowledgment was made either openly in the court of common pleas, or before one of the judges of that court, or before two or more commissioners in the county appointed by a writ of *dedimus potestatem*; which judges and commissioners were required to see that the cognizors were of full age, sound memory, and out of prison. If a married woman were among the cognizors, she was pri-

vately examined whether she did it willingly and freely, or by the compulsion of her husband. The fourth step was the note of the fine, being an abstract of the writ of covenant and the concord. This was enrolled of record in the proper office. The fifth part was the foot of the fine, or conclusion of it, which included the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied. Of this there were indentures made or engrossed, and delivered to the cognizor and the cognizee. *Mozley & W.*

A fine is a feoffment upon record, called so because it puts a *finis* or end to litigation. Its object is to quiet titles more speedily than by the ordinary limitation of twenty and twenty-five years. By means of this final proceeding, one of two contesting claimants of real estate could compel an assertion or abandonment of the pretensions of his adversary in one-fifth the usual period of delay. The practice of levying fines is as ancient in England as any court of record, and dates back beyond the conquest. It continued in the state of New York as a mode of conveyancing from its earliest settlement by the English till the year 1830, when, with other antiquities, it was abolished by the legislature, and a simpler system substituted in its stead. McGregor *v.* Comstock, 17 *N. Y.* 162.

Fine on alienation. This was a sum of money paid in ancient times to the lord by a tenant whenever he had occasion to make over his land to another; and so, even to the present day, fines are payable by the custom of most manors to the lord, upon every descent or alienation of a copyhold tenement. *Mozley & W.*

The word fine was used by the author of the Touchstone, and by Lord Coke, to denote a sum of money agreed to be paid on alienation, and not a penalty imposed by any court. And it is used in the former sense not only in the older, but in the modern, books. De Peyster *v.* Michael, 6 *N. Y.* 467, 495.

Fine for endowment. This was a fine anciently payable to the lord by the widow of a tenant, without which she could not be endowed of her husband's lands. It was abolished under Henry I., and afterwards by Magna Charta. *Mozley & W.*

2. A pecuniary mulct, inflicted as a punishment for an offence. Fine, *v.*: to impose a pecuniary punishment; to order or adjudge that an offender pay a sum of money as a punishment.

In this sense of the word fine, it corresponds with its derivation from "*finis*" an end. It is a sum paid to terminate a prosecution. Payment of the fine puts an end to any liability of the accused to any punishment for the act for which it is imposed

The word is commonly employed to designate, not a penalty or forfeiture for violation of a penal statute, but a pecuniary punishment for a breach of the criminal law. When the proceeds arising from civil suits for penalties are intended to be embraced, the phrases, "fines and penalties," or "fines and forfeitures," instead of the word "fines" alone, should be used. Common Council of Indianapolis *v.* Fairchild, 1 *Ind.* 315.

It is not confined to a pecuniary punishment of an offence, inflicted by a court in the exercise of criminal jurisdiction. It has other meanings; and may include a forfeiture, or a penalty recoverable by civil action. Hanscomb *v.* Russell, 11 *Gray*, 373.

FINISHED. The fact that the owner of a house moved into it at a certain time was held not to estop him to deny that it was finished, within the meaning of his acceptance of an order "to be paid when the house is finished." Robbins *v.* Blodgett, 121 *Mass.* 584.

FIRE. A policy of insurance against fire includes every loss necessarily following from the occurrence of a fire, if it arises directly and immediately from the peril, or necessarily from incidental and surrounding circumstances, the operation of which could not be avoided. Brady *v.* Northwestern Ins. Co., 11 *Mich.* 425.

As to the distinction between fire (as used in policies of insurance) and explosion, see Scripture *v.* Lowell, &c. Ins. Co., 10 *Cush.* 356; City Fire Ins. Co. *v.* Corlies, 21 *Wend.* 367; Hayward *v.* Liverpool, &c. Ins. Co., 2 *Abb. App. Dec.* 349; 7 *Bosw.* 385; Greenwald *v.* Ins. Co., 3 *Phila.* 323.

As to the distinction between fire and lightning, see Kenniston *v.* Merrimac, &c. Ins. Co., 14 *N. H.* 341; Babcock *v.* Montgomery County Mut. Ins. Co., 4 *N. Y.* 326.

Fire-arms. Under this designation are comprised all sorts of guns, fowling-pieces, blunderbusses, pistols, &c. *Wharton.*

A fire-arm, the carrying of which is prohibited by Ala. Rev. Code, § 3555, need not be a weapon of present offence or defence. A pistol so battered up that it cannot be discharged by the trigger is a fire-arm, the carrying of which, concealed, without sufficient excuse, is an indictable offence. Atwood *v.* State, 53 *Ala.* 508.

Fire-bote. An allowance of wood for fuel. See BOOT.

Fire insurance. A contract by which a capitalist or company undertakes, in consideration of absolute payment of a certain sum called premium, to indemnify an owner of property subject to burning against loss from that cause, during a specified term.

Fire ordeal An ancient mode of trial, in which the test was the ability of the accused to handle or tread upon red-hot irons, &c. See ORDEAL.

Fire policy. The writing usually employed to express the contract of insurance against loss by fire.

FIRST. First, or *imprimis*, when employed to distinguish a bequest in a will, does not import a precedence of that bequest over one introduced by "second" or "next." Everett *v.* Carr, 59 *Me.* 325.

First boat. Goods were ordered to be sent by the first boat. It was held that this meant the first boat by which it was possible safely to send them; and that a sending by the first general boat was sufficient, though a boat had before been sent by a few shippers who specially chartered her. Johnson *v.* Chambers, 12 *Ind.* 102.

First-class misdemeanant. Section 67 of the English prisons act, 1865, 28 & 29 Vict. ch. 126, provides that in the county, city, and borough prisons of England and Wales, prisoners convicted of misdemeanor, and not sentenced to hard labor, shall be divided into two divisions, and whenever any person convicted of misdemeanor is sentenced to imprisonment, without hard labor, the court or judge may order that such person shall be treated as a "misdemeanant of the first division." Such a misdemeanant is usually called a first-class misdemeanant, and is not treated as a prisoner charged with or convicted of a crime. *Mozley & W.*

First draw. An agreement, in consideration of the "first draw," to aid a party in procuring a pension was held to mean the first annuity only, and not the amount due at the date of the certificate of the pension. Trimble *v.* Ford, 5 *Dana*, 517.

First-fruits. In ancient times, the pope received, throughout Christendom, the first year's whole profits of each benefice or religious living. Payment of these, in England, was restrained by early statutes, but was continued, until, at length, after the reformation, when the crown was made head of the church in England, these payments were transferred to the crown, by Stat. 26 Hen. VIII. ch. 3. They were called the first-fruits. Queen Anne restored them to the church, by Stat. 2 & 3 Anne, ch. 11; since which, under the name of Queen Anne's bounty, they have formed a fund used to increase the income of the poorer livings. 1 *Bl. Com.* 284; 1 *Steph. Com.* 199; 2 *Id.* 531, 673.

In the feudal law, first-fruits was employed to designate the profits of land during the year immediately following the death of a tenant. They belonged to the king. 2 *Bl. Com.* 66; *Wharton.*

First impression. A cause which presents a question for the first time, and for which, consequently, no precedent is known, is called a case of the first impression.

First purchaser. This phrase has been applied, in English real-property law, to denote the person who first acquired (by purchase) a landed estate, which was afterwards continued in the family, being transmitted by descent.

First term. The words first term, in an act which provides that if the defendant in a criminal case, in which a change of venue is not allowed by law, "will make oath that there exists too great an excitement to" his "prejudice, to come to trial at the first term, it shall be a sufficient cause for a continuance," mean the term at which the prosecuting officer demands the arraignment of the prisoner. John *v.* State, 1 *Head*, 49.

The term meant by the provision of section 3 of the act of congress, March 3, 1875, which requires application to a state court for removal of a cause to a circuit court, to be made before or at the term at which said cause could be first tried, is some term occurring after the passage of the act, and not a term before its passage. Merchants', &c. Nat. Bank *v.* Wheeler, 13 *Blatchf.* 218.

If the term at which the cause could otherwise be first tried is one which occurs during the time a trial of the cause is stayed by an order of the state court, that is not such a term as is meant. Warner *v.* Pennsylvania R. R. Co., 13 *Blatchf.* 231.

The term meant by the above-mentioned provision is the term at which the issues are first made up, the party applying for a removal not having been guilty of negligence. Scott *v.* Clinton, &c. R. R. Co., 6 *Biss.* 529.

FISHERY. The business or practice of catching fish; also, a place where fish are usually caught in considerable quantities. These are the popular meanings of the word; but, in legal use, it generally signifies the right to take fish at a certain place or in particular waters.

By the common law in England, the right of fishery in all navigable rivers, so far as the sea ebbs and flows, belongs to the crown by prerogative; and although such fisheries are usually left free to all the subjects, the right may be granted to one or more individuals as private property. In rivers not navigable, or where the tide does not ebb and flow, the right of fishery belongs to the owners of the soil or the riparian proprietors, to each within his territorial limits. Various distinctive terms have been em-

ployed to designate the rights arising under the application of these principles. Thus an exclusive right of fishing in a public navigable river, granted by the crown to a subject, is termed a *free* fishery. It is, of course, entirely distinct from the ownership of the soil. A *several* fishery, on the other hand, is the right of fishery in a stream not navigable, and is the right of the owner of the soil, or is derived from such owner by grant or prescription. A *common of fishery*, or *common of piscary*, is a right of fishery, not exclusive, but held in common with others. Such a right has sometimes been termed a common fishery; but the latter expression is more appropriate for a right common to every one, as a fishery in the sea. The terms free fishery and common of fishery have been said to be equivalent (*Angell on Watercourses*, ch. 6, §§ 3, 4); and the distinctions between the various terms above mentioned has not been very strictly maintained by writers on the subject.

In the United States, these terms have but little application. The right to fisheries in navigable waters, whether tidal or not, is in some states held to be vested in the state, and open to all the world; in some of the older states, such fisheries were appropriated by the towns in which the waters were situated; and in others private rights of fishery were established during the colonial condition. All such fisheries are to some extent subject to legislative control.

The right of taking fish on the high seas is, of course, common to all the world. But the term fishery is also applied to this right, and the manner of enjoying particular fisheries of this description, and privileges necessary or convenient to the use of them has been the subject of many treaties.

There are three sorts of fisheries or piscaries. Free fishery, several (or separate) fishery, and common of piscary. Common of piscary is a liberty of fishing in another man's water. A free fishery, or exclusive right of fishing in a public river, is a royal franchise: this differs from a several fishery; because he that has a several fishery must also be (or at least derive his right from) the owner of the soil. It differs also from a common of piscary, in that the free fishery is an exclusive right, the common of piscary is not so: and therefore in a free fishery a man has property in the fish before they are caught; in a common of piscary, not till afterwards. As to a free fishery, no new franchise can at present be granted of it, by the express provision of Magna Charta, ch. 16, and the franchise must be at least as old as the reign of Henry II. *Jacob.*

The right to take fish in the waters upon the soil of a private proprietor, for one's own use, is not an easement, but a right of profit in lands. It can only be acquired by grant, or prescription from which a grant may be presumed. Nor will prescription or custom or dedication raise a general right in the public to enter on the lands of a private owner, at their own pleasure, and catch fish in the waters thereon. Cobb *v.* Davenport, 33 *N. J. L.* 223.

FIX. Is often used in law, as meaning to render a contingent liability absolute. Thus, fixing bail means rendering the bail finally liable. Bail are said to be fixed by the steps which complete their liability.

In a constitutional provision that the general assembly shall fix the compensation of all officers, fix signifies to prescribe the rule by which the compensation is to be determined, — not to decide the sum each officer is to receive. Cricket *v.* State, 18 *Ohio St.* 9.

FIXTURE. There is a confusion in the employment of the word fixtures in the cases. Sometimes it is used to denote that which *must not* be removed from the freehold, sometimes that which *may* be. The signification which we believe to be sustained by the best reasons, and by a sufficient number of voices, is this: A thing which, although movable in its original nature, has been so affixed to the realty as to become a part of it, and no longer removable by the original owner without consent of the owner of the fee. But there is good authority for an opposite sense. The following definitions, which have been given, show what different views have been entertained by lexicographers and text-writers of the meaning of the word:

Things so fastened to the land that they cannot be removed against the will of the owner. *Appleton's Cycl.* (1st ed.); *Bingham, Tr. on Real Est.*

The term, doubtless, originally connoted in every instance of its use that sort of positive fixation and annexation which its etymology suggests; yet it now connotes, in general, no such idea, either necessarily or at all; but is not unfrequently suggestive of the very

opposite conception, viz., the right of the tenant to remove; and this, and not annexation, has been said to be the true criterion. *Brown, Tr. on Fixtures.*

Things fixed or affixed to other things. The rule of law regarding them is that which is expressed in the maxim, *accessio cedit principali*, "the accessary goes with, and as part of, the principal subject-matter." *Brown, Dict.*

A thing fixed to the freehold, not a part of it. The word properly denotes something *fixed* and permanent, as distinguished from that which is removable (the Latin *fixum* having the sense not only of attachment or connection, but of *stability*); and in this respect the popular coincides entirely with the primary legal meaning, the general rule being, that a fixture once annexed to the realty cannot be removed or separated from it, as against the owner of the freehold or inheritance, to whom it belongs. *Burrill.*

Something not originally constructed as part of a building, but formerly a movable chattel, and afterwards annexed to the building or land for the more convenient enjoyment thereof, and which, at the will of the owner, is at all times readily capable of being removed, though, at the time, annexed. *Chitty, Gen. Prac.*

Personal chattels which have been annexed to land, and which may be afterwards severed and removed by the party who has annexed them, or his personal representative, against the will of the owner of the freehold. *Ferard, Tr. on Fixtures*, 2; *Bouvier.* Amos & Ferard, Grady, and Parsons (2 *Contr.* 431) employ the word substantially in this sense. And Ewell (*Tr. on Fixtures*, 4, note 2) gives a number of adjudications, in which he says this definition has been adopted.

Chattels which, by being physically annexed or affixed to real estate, become a part of and accessory to the freehold, and the property of the owner of the land. *Hill.*

The ordinary meaning is the appropriate and legal meaning; which is, things fixed in a greater or less degree to the realty. *Kent.*

Any thing annexed to the freehold; that is, fastened to or connected with it. *Smith Lead. Cas.* 187. Holthouse's and Tomlins' Dictionaries, and the treatises of Ewell, Gibbons, and Tyler appear to concur in this view. Smith adds, that mere juxtaposition, or the laying an object, however heavy, on the freehold, does not amount to annexation.

Things of an accessory character, annexed to houses or lands; including not only such things as grates in a house or steam-engines in a colliery, but also windows and palings. To be a fixture, a thing must not constitute part of the principal subject, as in the case of the walls or floors of a house; but, on the other hand, it must be in actual union or connection with it, and not merely brought into contact with it, as in the case of a picture suspended on hooks against a wall. *Steph. Com.* 236. This definition is adopted by Mozley & Whiteley.

That which is fixed or attached to something permanently as an appendage, and not removable. *Webster.*

Things of an accessory character annexed to houses or lands, which become immediately on annexation part of the realty itself; *i.e.*, governed by the same law which applies to the land. *Wharton.* Taylor (*Land. and T.* 388, § 544) and Washburn (1 *Real Prop.* 6) use the term in substantially this sense.

That which is fixed: a piece of furniture fixed to a house, as distinguished from movable; something fixed or immovable. *Worcester.*

The general result seems to be that three views have been taken. One is, that fixture means something which has been affixed to the realty, so as to become a part of it; it is fixed, irremovable. An opposite view is, that fixture means something which appears to be a part of the realty, but is not fully so; it is only a chattel fixed to it, but removable. An intermediate view is, that fixture means a chattel annexed, affixed to the realty, but imports nothing as to whether it is removable; that is to be determined by considering its circumstances and the relation of the parties.

In reading the decisions upon the subject, it is of much importance to bear in mind this contrariety in the use of the

word; for an adjudication that a given thing is not a fixture may mean precisely the same with another that it is, if one of the cases uses the word in the sense of a thing removable, and the other in the sense of a thing not removable.

Moreover, it is important to remember, in any attempt to reconcile the cases upon fixtures, that the rule as to the right of removal differs between parties holding different interests in the freehold. The general doctrine is, that whatever is affixed in a permanent manner, with tokens of intent that it shall remain, or in such way that its removal will break or mar the realty, becomes part of the realty, and vests in the owner of that. This doctrine governs, as a general rule, when the question of the right of removal arises between heir or devisee, and administrator or executor; or between vendor and purchaser; or between mortgagor and mortgagee.

By statute, indeed, in some jurisdictions, the rule has been modified; as by 2 N. Y. Rev. Stat. 83, § 7, providing that "things annexed to the freehold, or to any building, shall not go to the executor, but shall descend with the freehold to the heirs or devisees;" except things annexed to the freehold, or to any building, for the purpose of trade or manufacture, and not fixed into the wall of the house so as to be essential to its support.

But between landlord and tenant a great relaxation of this rule is established, independently of any local statute; for the encouragement of letting of property, by facilitating tenants in employing it for the uses for which it is hired. And between these parties the rule is understood to be liberal, that a tenant, whether for life, for years, or at will, may sever at any time before the expiration of his tenancy, and carry away all such fixtures of a chattel nature as he has himself erected upon the demised premises for the purposes of ornament, domestic convenience, or to carry on trade; provided, always, that the removal can be effected without material injury to the freehold.

Hence the same thing may be adjudged a fixture in a cause between vendor and purchaser, or heir and executor, and not to be a fixture if the question is between landlord and tenant. This is no real conflict, but an apparent one; nor is it dependent, as the one above mentioned is, upon the use of the word, so that it would be avoidable by agreeing upon a definition. The difference lies in the rights of parties occupying different positions as towards the subject-matter.

Below are points of selected decisions giving the general rules for distinguishing fixtures, taking the word in the sense of a chattel so affixed that it may not be removed. For a multitude of cases deciding whether particular objects have, under the circumstances of their annexation, become part of the realty or not, see *U. S. Dig.* tit. Fixtures; also, when the question depends on relation of the parties, tit. Landlord and tenant; Mortgage; Vendor and purchaser. Consult, also, Ferard on Fixtures (later than, and comprising, Amos & Ferard), and the treatises of Gibbons (13 *of Phila. Law Lib.*), Grady (35 *Id.* N. S.), Hill, Brown, Ewell, and Tyler, upon Fixtures.

A fixture is something substantially affixed to the land, but which may afterwards be lawfully removed therefrom by the party affixing it, or his representative, without the consent of the owner of the freehold. Prescott *v.* Wells, 3 *Nev.* 82; State *v.* Bonhan, 18 *Ind.* 231; Pickerell *v.* Carson, 8 *Iowa*, 544.

The word fixtures has acquired the peculiar meaning of chattels which have been annexed to the freehold, but which are removable at the will of the person who annexed them. Hallen *v.* Runder, 1 *Cromp. M. & R.* 266.

Fixtures does not necessarily import things affixed to the freehold. The word is a modern one, and is generally understood to comprehend any article which a tenant has the power to remove. Sheen *v.* Rickie, 5 *Mee. & W.* 174; Rogers *v.* Gilinger, 30 *Pa. St.* 185, 189.

The term fixture, in the ordinary signification, is expressive of the act of annexation, and denotes the change which has occurred in the nature and the legal incidents of the property; and it appears to be not only appropriate, but necessary, to distinguish this class of property from movable property, possessing the nature and incidents of chattels. It is in this sense that the term is used in far the greater part of the adjudicated cases. Teaff *v.* Hewitt, 1 *Ohio St.* 511, 524.

A personal chattel becomes a fixture, so as to form a part of the real estate, when it

is so affixed to the freehold as to be incapable of severance without injury thereto; and this whether the annexation be for use, for ornament, or from mere caprice. Providence Gas Co. *v.* Thurber, 2 *R. I.* 15; McClintock *v.* Graham, 3 *McCord*, 553.

Fixtures are chattels, or articles of a personal nature, which have been affixed to the land. They must be permanently, habitually attached to it, or must be component parts of some erection, structure, or machine attached to the freehold, without which the erection, structure, or machine would be imperfect and incomplete, Vanderpoel *v.* Van Allen, 10 *Barb.* 157; Dubois *v.* Kelly, *Id.* 496; and by their owner's consent, Cochran *v.* Flint, 57 *N. H.* 514.

If articles are essential to the use of the realty, have been applied exclusively to use in connection with it, are necessary for that purpose, and without such or similar articles the realty would cease to be of value, then they may properly be considered as fixtures, and should pass with it. Hoyle *v.* Plattsburg & Montreal R. R. Co., 51 *Barb.* 45.

In Pennsylvania, a fixture has been defined to be something essential to the use of the freehold, whether actually fastened to it or not. But this doctrine was limited to fixtures in mills and manufactories, and was not extended to dwelling-houses. Voorhis *v.* Freeman, 2 *Watts & S.* 116.

As a general rule, articles, to become fixtures, must either be fastened to the realty or to what is clearly a part of it, or must be placed upon the land with a manifest intent that they shall permanently remain there; or must be in some way peculiarly fitted to something that is actually fastened upon it. Farmers' Loan & Trust Co. *v.* Hendrickson, 25 *Barb.* 484.

Actual fastening to the land is not necessary to make a chattel a fixture. Snedeker *v.* Warring, 12 *N. Y.* 170. Compare McRea *v.* Central Nat. Bank, 66 *N. Y.* 489.

It is the permanent and habitual annexation, and not the manner of fastening, that determines when personal property becomes part of the realty. Laffin *v.* Griffiths, 35 *Barb.* 58; Cook *v.* Champlain Trans. Co., 1 *Den.* 91; Brennan *v.* Whittaker, 15 *Ohio St.* 446; Walker *v.* Sherman, 20 *Wend.* 636.

Mere annexation to the realty is not sufficient to give to a personal chattel the character of a fixture, unless it is so annexed that an injury to the freehold will result from its removal. Swift *v.* Thompson, 9 *Conn.* 67.

Many articles, really chattels in themselves, are by construction or destination so annexed to the freehold as to be properly regarded as fixtures, or part and parcel of the realty. Whatever has become thus annexed to the realty, though temporarily separated therefrom for convenience in making repairs, or otherwise, still remains a part, and passes by a conveyance thereof, notwithstanding the severance. Wadleigh *v.* Janvrin, 41 *N. H.* 503.

Tests which may aid in determining the question whether articles, personal in their nature, have acquired the character of real estate, are:

1. Actual annexation of a permanent character; except in case of those articles which are not themselves annexed, but are deemed to be of the freehold, from their use and character, such as mill-stones, fences, statuary, and the like.

2. Adaptability to the use of the freehold.

3. The intention of the parties at the time of making the annexation. Voorhees *v.* McGinnis, 48 *N. Y.* 278; s. p. Teaff *v.* Hewitt, 1 *Ohio St.* 511; Winslow *v.* Merchants' Ins. Co., 4 *Metc.* (*Mass.*) 306; Swift *v.* Thompson, 9 *Conn.* 63; Gale *v.* Ward, 14 *Mass.* 352.

In determining whether a chattel is so annexed to the freehold as to become a fixture, reference must be had to the nature of the chattel itself, the position of the party placing it where found, the probable intention in putting it there, the injury that would result from its removal, and the object of the party in placing it on the premises, with reference to trade, agriculture, or ornament. Richardson *v.* Borden, 42 *Miss.* 71; Weathersby *v.* Sleeper, *Id.* 732; Perkins *v.* Swank, 43 *Id.* 349.

To ascertain what is a fixture, courts will inquire what was the intention of the party, — whether it was his purpose to make it a permanent accession to the freehold, or otherwise; this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made. Eaves *v.* Estes, 10 *Kan.* 314.

The question of articles being fixtures is not absolutely controlled by the circumstance whether they may be removed without great injury to the building or to themselves, but its determination depends rather upon the intention of their annexation. McRae *v.* Central Nat. Bank, 50 *How. Pr.* 51; s. p. Quinby *v.* Manhattan Cloth & Paper Co., 24 *N. J. Eq.* 260; Wagner *v.* Cleveland, &c. R. R. Co., 22 *Ohio St.* 563.

In the consideration of the question, whether certain articles, which in their nature are chattels, have become part of the freehold by mere attachment and ordinary use therewith, for the general purpose to which it is adapted and employed, the intention of the owner, evidenced by accompanying acts, is sufficient to so appropriate and convert them into fixtures annexed to the freehold, that they will pass by deed to a grantee. Funk *v.* Brigaldi, 4 *Daly*, 359.

Personal property attached to land will be regarded as fixtures, where such is the manifest intention of the parties. Potts *v.* New Jersey Arms, &c. Co., 14 *N. J. L.* 395; Ford *v.* Cobb, 20 *N. Y.* 344; Hill *v.* Wentworth, 28 *Vt.* 428.

A thing attached to land may be a fixture or a chattel personal, according to the agreement of the parties in relation to it. Brearley *v.* Cox, 24 *N. J. L.* 287; Sheldon *v.* Edwards, 35 *N. Y.* 279.

Houses, in common intendment of law, are not fixtures to, but part of, land; and it is not so much the mode in which they are attached to the land, as the uses and purposes for which they are designed, that determines whether they are fixtures or not. Whether a parol agreement to reserve a house from a sale of the realty is a sufficient severance, is questionable. Goff *v.* O'Conner, 16 *Ill.* 421.

The question, whether a structure of doubtful character is to be deemed a fixture or not, does not depend on the mere question whether it is set upon a foundation let into the ground, but upon the nature and character of the act by which the structure is put in place, the policy of the law connected with its purpose, and the intentions of those concerned in the act. Meigs' Appeal, 62 *Pa. St.* 28.

The true rule in determining what are fixtures in a manufacturing establishment, where the land and buildings are owned by the manufacturer, is, that where the machinery is permanent in its character, and essential to the purposes for which the building is occupied, it must be regarded as realty, and passes with the building; and that whatever is essential to the purposes for which the building is used will be considered as a fixture, although the connection between them be such that it may be severed without physical or lasting injury to either. Green *v.* Phillips, 26 *Gratt.* 752.

The general rule of the common law is, that whatever is once annexed to the freehold becomes part of it, and cannot afterwards be removed, except by him who is entitled to the inheritance. The rule, however, never was inflexible, and without exceptions. It was construed most strictly between executor and heir, in favor of the latter; more liberally between tenant for life or in tail, and remainder-man or reversioner, in favor of the former; and with much greater latitude between landlord and tenant, in favor of the tenant. But an exception of a much broader cast, and almost as ancient as the rule, was engrafted upon it, of fixtures erected for the purposes of trade. Upon principles of public policy, and to encourage trade and manufactures, fixtures which were erected to carry on a business have been allowed to be removed by the tenant during his term, and are deemed personalty for many other purposes. Van Ness *v.* Pacard, 2 *Pet.* 137.

As a general rule, whatever is annexed to the freehold becomes part of it, and cannot be severed from it. And this rule applies in all its strictness between heir and executor, and between vendor and purchaser. English *v.* Foote, 16 *Miss.* 444; Miller *v.* Plumb, 6 *Cow.* 665.

The rule relating to fixtures is applied with different degrees of strictness between different parties. As between vendor and vendee, things are irremovable which would be otherwise between landlord and tenant. McGreary *v.* Osborne, 9 *Cal.* 119.

Between grantor and grantee, the rule allowing removal of fixtures is less liberal than as towards tenants. Pea *v.* Pea, 35 *Ind.* 387.

Buildings erected for a temporary use, or barns erected by persons other than the owner, and not intended for permanent fixtures, may, in some cases, be considered and treated as personal property; but as between vendor and vendee, heir and executor, mortgagor and mortgagee, all buildings which enhance the value of the estate, and are designed to be occupied by the owner thereof, agreeably to the principles of the common law, become a part of the realty, and pass with it by deed or by descent. Leland *v.* Gassett, 17 *Vt.* 403; Schemmer *v.* North, 32 *Mo.* 206; Weathersby *v.* Sleeper, 42 *Miss.* 732.

As between grantor and grantee, vendor and vendee, mortgagor and mortgagee, and heir and personal representative, whatever is annexed or affixed to the freehold, by being let into the soil or annexed to it, or to some erection upon it, to be habitually used there, particularly if for the purpose of enjoying the realty or some profit therefrom, becomes a part of the freehold. Buckley *v.* Buckley, 11 *Barb.* 43.

The same rule as to fixtures prevails between mortgagor and mortgagee, as between vendor and purchaser. Permanent erections made by the mortgagor upon the land, after execution of the mortgage, become part of the realty, and are covered by the mortgage. Snedeker *v.* Warring, 12 *N. Y.* 170; S. P. Robinson *v.* Preswick, 3 *Edw.* 246.

Between mortgagor and mortgagee, whatever is attached to the land, to be habitually used and enjoyed with it, whether for the purpose of trade and manufacture or not, goes with land as a part of the mortgage security. Breese *v.* Bange, 2 *E. D. Smith*, 474.

The old rule, that whatever is attached to the freehold becomes a part of it, and cannot be taken away, has been very much relaxed by modern determinations, as between landlord and tenant. Reynolds *v.* Shuler, 5 *Cow.* 323; Weathersby *v.* Sleeper, 42 *Miss.* 732.

A building erected by a tenant of lands, for the more profitable and comfortable enjoyment of the premises during his tenancy, is removable by him at any time before his right of enjoyment expires, or while holding over, where the erection and removal will not prejudice the owner's rights, by leaving it in a worse condition than when he took possession. Dubois *v.* Kelly, 10 *Barb.* 496.

To take a case out of the operation of the general principle that where a building is erected upon the land of one person by

another person, without any authority or agreement in respect thereto, it becomes a part of the realty, and passes with a conveyance of the land, upon the ground that the building was erected by a tenant for purposes of trade and business, it is not enough to show that such building was occupied for the purposes of business, but the existence of the relation of tenant must be made out by express proof or clear implication, and the facts must also be shown that the building was erected by the tenant for the purposes of trade or business, and that he exercised his right of removal during the term. Richtmyer *v.* Morss, 4 *Abb. App. Dec.* 55.

Buildings erected on leased land by the tenant, for the purposes of his business, upon the faith of at least an implied license, given and sanctioned by the owner, will not in equity be treated as part of the realty in the hands of a subsequent purchaser obtaining title with a full and actual knowledge of such license. Wilgus *v.* Gettings, 21 *Iowa*, 177.

Things affixed by a tenant of a building to the building, for the convenience of his trade,— as copper stills, &c., for distilling, — are removable by him at any time during his term. Reynolds *v.* Shuler, 5 *Cow.* 323; S. P. Raymond *v.* White, 7 *Id.* 319; Weathersby *v.* Sleeper, 42 *Miss.* 732; Hayes *v.* New York Mining Co., &c., 2 *Col. T.* 273; and see Heermance *v.* Vernoy, 6 *Johns.* 5.

Fixtures erected by a tenant during his term, the removal of which will not injure the demised premises, or put them in a worse plight than they were before, are in law deemed personal property, and may be mortgaged as chattels, or levied on as personalty, and sold upon execution; and the purchaser at such sale has the right to enter upon the premises to remove them. Lamphere *v.* Lowe, 3 *Neb.* 131.

The right of a tenant to remove a trade fixture does not extend beyond his term or possession. But the right may be extended by an agreement with the landlord. Where the landlord agreed to sell a trade fixture for the benefit of the tenant, but failed to do so, it was held that the tenant had a reasonable time to remove such fixture, although his term was ended and possession surrendered. Torrey *v.* Burnett, 38 *N. J. L.* 457.

When trade fixtures would otherwise become part of the realty, whatever intention to the contrary on the part of the tenant erecting them may be inferred from his limited interest in the land will not prevent this. The indulgence shown by the law to the tenant, in allowing him to remove them during his term, arises not from any regard to his intention, but by way of exception to a rule which would otherwise work hardship or retard improvement. Treadway *v.* Shawn, 7 *Nev.* 37.

As used in a statute which provides that no road shall be laid out through any fixtures or erections used for the purposes of trade, nor through any yards or enclosures necessary to the use and enjoyment of such fixtures or erections, without the consent of the owner, the word fixture should be construed to include a dock near a ferry landing, erected and designed for the purposes of trade with river-boats, and for landing and piling lumber upon, as well as for the protection and use of, the ferry-boats. Flanders *v.* Wood, 24 *Wis.* 571.

FLAG. The act of congress of April 4, 1818, as now embodied in Rev. Stat. §§ 1791, 1792, enacts that the flag of the United States shall be thirteen horizontal stripes, alternate red and white; and the union of the flag shall be thirty-seven stars, white in a blue field; and that, on the admission of a new state into the Union, one star shall be added to the union of the flag; and such addition shall take effect on the fourth day of July then next succeeding such admission.

Flagrante delicto. In the heat of the offence; in the very act of committing the wrong or crime.

FLEEING. Where one leaves his home, residence, or known place of abode, within the district, or conceals himself therein, with intent, in either case, to avoid detection or punishment for some public offence against the United States, this is a "fleeing from justice," which will arrest the running of the United States statute of limitations relating to criminal prosecutions. United States *v.* O'Brian, 3 *Dill.* 381, 19 *Int. Rev. Rec.* 18.

The expression does not necessarily import a fleeing from a prosecution begun. United States *v.* Smith, 4 *Day*, 121.

Fleeing from justice, as used in the Missouri statute of limitations, 2 Wagn. Stat. 1120, § 28, includes absence to avoid arrest. State *v.* Washburn, 48 *Mo.* 240.

FLEET. The name of a famous prison in London, so called from a river or ditch that was formerly there, and on the site whereof it stood. *Cowel; Tomlins.* It was used especially for debtors and bankrupts, and for persons charged with contempt of the courts of chancery, exchequer, and common pleas. It was abolished in 1842, the prisoners then in it being sent to the Marshalsea, afterwards the queen's prison, Stat. 5 & 6 Vict. ch. 22; and was torn down in 1845. *Haydn Dict. Dates.*

FLOTSAM. Floating. This word is applied to goods lost by shipwreck, which float on the water; as jetsam is to those which sink and remain under

water. These terms are used in expressing the ancient rule in regard to such goods, by which they became the king's, if not reclaimed by the owner within a limited time. Hence, goods are deemed flotsam or jetsam only when cast out of a vessel by the violence of the winds or sea, and not when intentionally thrown overboard; for even if thrown over without any mark or buoy, and to lighten the ship, under stress of weather, the owner is not thereby deemed to have renounced his property. And it is only to goods that continue at sea that either of these terms is properly applied; for, if they come to land, they are then distinguished by the term wreck. 5 *Rep.* 106; 1 *Bl. Com.* 292.

FŒTICIDE. The offence of destroying the human fœtus, or of procuring an abortion.

FŒNUS NAUTICUM. Marine interest, *q. v.*

A contract for the repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself, with a condition to be repaid with extraordinary interest. *Wharton.*

The extraordinary rate of interest, proportioned to the risk, demanded by a person lending money on a ship, or on bottomry, as it is termed. The agreement for such a rate of interest is also called *fœnus nauticum.* (2 *Bl. Com.* 458; 2 *Steph. Com.* 93.) *Mozley & W.*

FOLC-GEMOTE. The folks' meeting. A Saxon word for a general assembly of the people. Folc-mote or folk-mote is another form.

Folk-mote denotes an assembly of the people. There was one in the nature of an inferior court, and an appeal lay from it to the superior courts. Another is supposed to have been the same as the shire-gemote in counties, and as the burg-gemote in burghs. But the word had more general meanings, and denoted a popular assembly, summoned for any cause, whether permanent or occasional, and either to complain of existing misgovernment or to renew the duty of allegiance to the sovereign. *Brown.*

FOLC-LAND. The folks' land. A Saxon word for common land, or land enjoyed by the people at large. It seems to have been land held in villenage, being distributed among the common folk or people, at the pleasure of the lord of the manor, and resumed at his discretion. Not being held by any assurance in writing, it stood opposed to boc-land, which was held by writing.

Folc-land was the property of the community. It might be occupied in common, or possessed in severalty; and, in the latter case, it was probably parcelled out to individuals in the folc-gemote or court of the district, and the grant sanctioned by the freemen who were there present. But, while it continued to be folc-land, it could not be alienated in perpetuity; and, therefore, on the expiration of the term for which it had been granted, it reverted to the community, and was again distributed by the same authority. It was subject to many burdens and exactions from which boc-land was exempt. *Wharton.*

FOLDAGE, or **FALDAGE.** A privilege which lords of English manors sometimes reserved to themselves, of setting up folds for sheep in any fields within their manors, for the better manuring the soil. This was done not only with their own, but with their tenant's sheep. Fald fee was a fee or rent sometimes paid by the tenant to have the privilege of folding his sheep on his own land.

FOLIO. 1. A leaf. Anciently, each leaf, instead of each page, of a book bore a distinguishing number; hence references to many of the older law-books are by the folio.

2. A certain number of words, established by statute, rule of court, or usage, as a unit of measurement for estimating length of documents. The number varies in different jurisdictions. By the United States fee-bill, act of congress of Feb. 26, 1853, § 3, 10 Stat. at L. 168, a folio is one hundred words, counting each figure a word. The same rule is prescribed by state statute for New York, and probably prevails in most of the states.

Folio is a certain number of words: in conveyances, &c., amounting to seventy-two, and in parliamentary proceedings to ninety. *Wharton.*

Folio signifies, generally, seventy-two words of a legal document. (*Wms. R. P.* Part I. ch. 9). But for some purposes ninety words are reckoned to the folio. (*Hunt. Eq.*) *Mozley & W.*

FOR EVER. In an act locating a county seat, means that the place selected as the county seat shall remain the county seat until changed by law. Casey *v.* Harned, 5 *Iowa*, 1.

For ever, used in a conveyance, does not always impart inheritable qualities. Den nis *v.* Wilson, 107 *Mass.* 591, 593.

In an affidavit for an attachment, it is sufficient that the plaintiff swears that the defendant is about to leave the state permanently; it is not necessary to swear that he is about to leave the state for ever. Sawyer *v.* Arnold, 1 *La. Ann.* 315.

FORBEARANCE. Has a technical sense in statutes relative to taking usury for the loan or forbearance of money. It there means giving a further day, when the time originally limited for the return of the loan has passed. Dry Dock Bank *v.* American Life Ins. & Trust Co., 3 *N. Y.* 344, 355; Henry *v.* Thompson, *Minor*, 209, 232.

FORCE. 1. Power in action; compulsion; strength exerted. It is generally used in connections showing that a wrong is designated; and, when so used, is nearly equivalent in nature to violence. It may sometimes be a weaker term than violence; yet imports more than mere "fear." At the present day, it generally signifies any unlawful violence. It is defined by West to be an offence, by which violence is used to things or persons; and he divides it into simple force, or that which is so committed that it hath no other crime accompanying it; as if one by force do only enter into another man's possession, without doing any other unlawful act: and mixed or compound force, which is when some other violence is committed with such a fact, which of itself alone is criminal; as where any one by force enters into another man's house, and kills a man, or ravishes a woman, &c. And he makes several other divisions of this head. *West Symbol.* p. 2, § 65. Lord Coke says there is a force implied in law; as every trespass or disseisin implieth it; and an actual force, with weapons, number of persons, &c., where threatening is used to the terror of another. *Co. Litt.* 257.

Forcibly doing an act is merely doing an act with force. An averment that defendant did "with force and arms violently and unlawfully resist," is sufficient in an indictment under a statute against "forcibly resisting." United States *v.* Bachelder, 2 *Gall.* 15, 19.

"Violently" cannot be substituted for "by force," in an indictment for rape. The latter phrase, when applied to the acts of a man in illicit sexual intercourse, has a peculiar and technical meaning. The word nearest to it in meaning is, indeed, violence; but violence has other significations which are not equivalent to force; hence it cannot be deemed an allowable substitute in such an indictment. State *v.* Blake, 39 *Me.* 322.

2. Efficacy; legal effect or operation; validity. A contract or law is said to be in force, meaning that it is binding or obligatory; is in operation.

3. Force and forces are often used for military power; the soldiery under a particular command or available for some service.

By force of, in a contract such as a policy of insurance, means by reason of, in consequence of. Fisher *v.* Hope, &c. Ins. Co., 40 *N. Y. Superior Ct.*, 291.

Force and arms, or the Latin words *vi et armis*, were formerly inserted in indictments and in declarations for trespass, but are now no longer necessary. 3 *Steph. Com.* 364; 4 *Id.* 372.

Force and fear. Are grounds for the reduction of a contract; but there must be fear sufficient to shake a mind of ordinary firmness. *Bell.*

Forced heirs, are heirs in whose favor the law provides that a portion of the inheritance, at least, shall not be devised away from them. The term is particularly in use in Louisiana, where the law has for a long time given such protection.

Forced sale, is a sale against the consent of the owner. The term should not be deemed to embrace a sale under a power in a mortgage. Patterson *v.* Taylor, 15 *Fla.* 336.

Forcible detainer. The offence or wrong of keeping possession of real property, by strength and arrangements for compulsory exclusion of an adverse claimant, and without authority of law. Forcible detainer may take place after either a forcible or a peaceable entry; but is commonly spoken of in the phrase, forcible entry and detainer. See *U. S. Dig.* tit. Forcible entry and detainer.

Forcible entry. The offence or wrong of taking possession, by exercise of strength or compulsory power, of lands or tenements, against the will of the person entitled to the possession, and without authority of law. The two wrongs of forcible entry and forcible detainer are distinguishable in nature; but, being usually combined, are commonly connected under one name, — forcible entry and detainer.

The bare entry on the possession of an-

other (with or without title), without his consent, is, in contemplation of law, a forcible entry. A mere refusal to restore the premises is, in itself, force, within the statute. Huffaker *v.* Boring, 8 *Ala.* 87.

To constitute this wrong, the entry need not be forcible: it is enough if it be unlawful; *i.e.* a peaceable entry, by fraud, or without color of title. Dickinson *v.* Maguire, 9 *Cal.* 46; s. p. Frazier *v.* Hanlon, 5 *Id.* 166.

To constitute the offence, actual violence, or at least the threat of it, is necessary. The implied force which will sustain an ordinary action of trespass is not enough. Butts *v.* Voorhees, 13 *N. J. L.* 13; Berry *v.* Williams, 21 *Id.* 423.

But force sufficient to constitute this offence may exist without producing any apprehension of personal danger in the mind of the person evicted. If he submits upon, or in consequence of, apparent inability to resist the physical force arrayed against him, this is enough; to show that he was under fear of personal injury is not necessary. Berry *v.* Williams, 21 *N. J. L.* 423, 428.

Possession obtained by threats of forcible entry made by superior numbers is a forcible entry. Harrow *v.* Baker, 2 *Greene*, 201.

FORECLOSURE. The name applied to either of various proceedings which may be instituted for the purpose of barring or extinguishing an equitable right of redemption.

Originally, a mortgage was, in legal effect, what it purports to be, — a conveyance of the fee, subject to defeasance by payment of the mortgage debt; but, if the debt was not paid by the law-day, the mortgagee became unqualified owner of the fee. In view of the hardship of this consequence, chancery in very early times interposed to secure to the mortgagor an opportunity of redeeming the property by paying the debt and interest within an equitable time, ultimately settled at three years; and this rule was at length adopted by courts of law, and became a part of the real effect of the mortgage, the privilege thus accorded being known as the equity of redemption, *q. v.* It then became desirable in a class of cases that some way should be authorized by which this right to redeem might be barred or extinguished before the expiration of the term allowed for the exercise of it: to accomplish this is the object of the foreclosure of a mortgage.

The mode of barring the mortgagor's right of redemption, formerly most frequently resorted to, and which continues in use in England and some of the United States, where it has not been superseded by some other proceeding, is termed a *strict* foreclosure. This proceeding is by bill in equity filed by the mortgagee, upon which the court, having ascertained the amount due upon the mortgage, decrees that unless the party having the equity of redemption shall, within a certain prescribed time, usually six months, pay that sum and redeem the mortgaged estate, he shall be for ever barred from redeeming. The giving the mortgagor a certain time after the decree within which he may redeem is generally considered essential to the validity of a decree for strict foreclosure. And as such a foreclosure is regarded as a severe remedy, the utmost indulgence is extended to the mortgagor to enable him to redeem, the time limited being frequently extended, according to the equity arising from the circumstances.

In England, by Stat. 15 & 16 Vict. ch. 86, § 48, the court, at the request of either party to a foreclosure suit, may direct a sale of the mortgaged property, instead of decreeing a strict foreclosure. But a decree for a sale is not usually made without the mortgagor's consent, unless the mortgagee shows a reason for departing from the usual course. In many of the United States, a similar proceeding is adopted as the ordinary method of foreclosure. The mortgagee obtains a decree for a sale of the property under the direction of an officer of the court, and the proceeds are applied to satisfy the mortgage and other incumbrances, if any, according to their priority. When such a sale is completed by the deed of the officer, the mortgagor's title passes to the purchaser, and the court under whose decree the sale was made will enforce it, by compelling the mortgagor to surrender the possession to the purchaser; while, after a decree for a strict foreclosure, a mortgagee who is out of possession is obliged to resort to an action — such as ejectment — to recover the possession. From this and other apparent advantages of the proceeding, it has become the prevalent mode of foreclosure in most of the United States, and is founded on the

inherent jurisdiction of all courts having general equity powers. The procedure is either by suit in equity or action in the nature of an equitable suit, subject to various statutory regulations, as to the details of the proceedings. For a very full statement of the principles and the history of the practice of selling the mortgaged premises, as a substitute for strict foreclosure, with a review of the English and American authorities on the subject, see the case of Lansing *v.* Goelet, 9 *Cow.* 346.

In some of the United States, particularly New York and Michigan, statutory provisions authorize foreclosure of mortgages containing a power of sale, after default by the mortgagor, by a mere advertisement or notice of sale, and sale under the power, where the power of sale or the mortgage containing it has been duly recorded. Such a sale is equivalent to a foreclosure in equity, so far as to completely bar the mortgagor's equity of redemption; but he is usually allowed a certain period to redeem.

By the statutes in most of the New England states, a mode of foreclosure, by making and recording a formal entry upon the land for breach of condition, and retaining possession, usually for three years, is authorized; and the forms of proceeding, the requisites of the certificate of the entry which is recorded, &c., are regulated by the statutes. In Massachusetts, also, a mortgagee may foreclose by suit, by writ of entry, in which he recovers judgment for possession of the premises, if the debt is not paid within a certain time; and possession under such a judgment continued three years works a foreclosure.

These various statutory proceedings, as well as others employed in different states, are not usually regarded as exclusive of the remedy of strict foreclosure, or of the power of a court of equity to bar the right of redemption; and the right of the mortgagee to recover the possession, after condition broken, by some legal remedy, such as ejectment or writ of entry, or by mere peaceable entry and possession, is generally recognized; but where these modes of proceeding are regarded as more severe than that authorized by the statute of a particular state, the courts of law, as well as of equity, are inclined to favor the right of the mortgagor to redeem.

For a very complete collection of the modes of foreclosure authorized and practised in the various states, with details of the procedure, see 2 *Washb. Real Prop.* 261, note.

A suit of foreclosure may also be resorted to by a pledgee, where the pledgor is in default, and the pledgee desires to make a sale of the thing pledged, in such a way as effectually to extinguish any right of the pledgor to redeem, and has doubt about his right to sell upon mere notice. See Vaupel *v.* Woodward, 2 *Sandf. Ch.* 143.

Foreclosure is also applied to proceedings founded upon some other liens: the object is to collect a charge upon specific property, and extinguish any right of the general owner to reclaim it; thus there are proceedings to foreclose a mechanic's lien.

FOREIGN. In general, that which pertains to another country, nation, or sovereignty. Foreigner: one belonging to another country or nation. In American usage, it properly means any one who, having been born a subject of some other nation than the United States, has not been naturalized; and is equivalent to alien.

Foreign, in Scotch law, seems to have meant a person resident or thing done or originated out of Scotland, though within the United Kingdom. *Bell.*

One who becomes a citizen by naturalization is no longer to be deemed embraced by the word foreigner. Spratt *v.* Spratt, 1 *Pet.* 343.

Foreign answer, issue, matter, or plea. A term applied in old English pleading to a plea, issue, &c., which was not triable in the county where interposed. *Blount; Cowel.*

A foreign plea is a plea objecting to the jurisdiction of a judge, he not having cognizance of the matter of the suit. *Cowel; Jacob; Wharton.*

Foreign apposer, or opposer. An officer in the English exchequer, formerly charged with examining certain accounts of sheriffs.

Foreign assignment. An assignment made in some country abroad, or in another State of the Union.

Foreign attachment. An attachment

of property allowed upon the ground of non-residence of the debtor. See ATTACHMENT.

Foreign bill of exchange. A bill of exchange is foreign when drawn in one state or country, and made payable in another state or country. It is an inland bill when drawn and made payable in the same state or country. The chief difference is, that a foreign bill must be protested by a notary, in order to charge the drawer; while an inland bill need not be. The construction of a foreign bill is often influenced by the law of the place where drawn.

A bill of exchange drawn in one state of the Union, payable in another, is a foreign bill. See 2 *U. S. Dig.* 679, ¶ 31.

In England, a foreign bill of exchange is a bill not drawn in any part of the United Kingdom of Great Britain, the Isle of Man, and the Channel Islands, or not made payable in or drawn upon any person resident therein. This is by the mercantile law amendment act, 1856 (Stat. 19 & 20 Vict. ch. 97, § 7), prior to which any bill of exchange drawn out of England, or payable out of England, was a foreign bill of exchange. *Mozley & W.*

Foreign bought and sold. A custom in London, which, being found prejudicial to sellers of cattle in Smithfield, was abolished. *Jacob; Wharton.*

Foreign coin. Coin issued by the authority of another sovereignty than that where it is found circulating. The valuation of foreign coin in circulation in the United States is regulated by Rev. Stat. §§ 3564, 3565.

Foreign commerce, or trade. Commerce or trade carried on between any ports in the United States and any foreign country; also, sometimes, that between ports of two states of the Union.

The term foreign trade, as used in section 10 of the act of congress of June 1, 1872 (17 Stat. at L. 238), includes trade between the Atlantic and Pacific ports of the United States; and the term coastwise trade, as used in that section, does not include such trade. United States *v.* Patten, 1 *Holmes*, 421.

Foreign corporation. A corporation created by the laws of one country, nation, or state, considered as acting within another.

The term foreign corporation does not include a corporation created by the laws of the state, and located therein. Boley *v.* Ohio, &c. Ins. Co., 12 *Ohio St.* 139.

National banks, organized and doing business under the act of congress, are to be regarded as foreign corporations within the provisions of the code of procedure, authorizing actions to be brought and attachments to be issued against corporations "created by or under the laws of any other state, government, or country." Bowen *v.* First National Bank of Medina, 34 *How. Pr.* 408; S. P. Cooke *v.* State National Bank of Boston, 50 *Barb.* 339, 3 *Abb. Pr.* N. S. 339.

An English joint-stock company, organized under an act of parliament which, though it stipulates that it does not incorporate the company, and that the individual liability of members is preserved, yet grants powers of a corporate nature to the company, so that the company has a name as an association, continuing the identity of the body through all changes of members, holds property divided in transferable shares, enjoys the capacity to sue and be sued in the name of an officer, without liability to abatement by reason of the death or resignation of the officer, or by change in membership, — may be taxed as a "foreign corporation." Such bodies, indeed, are not pure corporations, but are intermediate between corporations as known to the common law and ordinary partnerships. But when, by legislative authority or sanction, an association is formed capable of acting independently of the rules and principles that govern a simple partnership, it is so far clothed with corporate powers that it may be treated, for the purposes of taxation, as an artificial body; and becomes subject as such to the jurisdiction of the government under which it undertakes to act and contract in its associated capacity. Oliver *v.* Liverpool, &c. Ins. Co., 100 *Mass.* 531.

Foreign county. Matters arising in one county, when drawn in question in another, are said to have arisen in a foreign county. One county is called foreign to another, although both are within the same kingdom or state.

Foreign decree, judgment, or sentence. An adjudication rendered by a tribunal of an independent jurisdiction.

Foreign divorce. A divorce obtained in a different jurisdiction from that where the marriage was contracted.

Foreign domicile. A domicile established by a citizen or subject of one sovereignty within the territory of another.

Foreign enlistment, is a phrase used to signify enlisting of soldiers or sailors in the service of a foreign power.

Foreign enlistment acts in England are statutes for preventing British subjects serving foreign states in war.

Similar laws in the United States are called the neutrality laws.

Foreign factor. A factor who resides in a different country from his principal.

Foreign fishing. Where whales are caught and oil is manufactured by the crew of an American vessel, the oil is not the product of "foreign fishing," within the purview of the revenue laws of the United States, though it has since been owned and brought into port by persons in foreign service. United States *v.* Burdett, 2 *Sumn.* 336.

Foreign jury, signifies a jury drawn from another county than that in which the venue of the issue to be tried lies, as is allowable in certain cases.

Foreign law. A statute or unwritten obligatory rule of another country, jurisdiction, or nation.

Foreign port. Implies a port without the United States. King *v.* Parks, 19 *Johns.* 375; Cole *v.* White, 26 *Wend.* 511.

A port exclusively within the sovereignty of a foreign nation. The Eliza, 2 *Gall.* 4.

The ports of the several states of the United States are to each other foreign ports, as regards the authority of masters of vessels lying therein to pledge the credit of the owners for supplies necessary for their vessels. The Lulu, 1 *Abb. U. S.* 191, 10 *Wall.* 192; Negus *v.* Simpson, 99 *Mass.* 388.

Jersey City is a foreign port, as towards New York City, because the two are in separate states; notwithstanding they are on the same bay, lying on opposite shores. The Sarah J. Weed, 2 *Low.* 555.

A tug, engaged in towing vessels between Lake Erie and Lake Huron, is not a vessel bound to "a port in any other than an adjoining state," or to "any foreign port," within the meaning of section 5 of the act of congress of 1790 (1 Stat. at L. 133), prescribing the kind of contract to be entered into between master and mariner. The John Martin, 2 *Abb. U. S.* 172.

Foreign service. In feudal law, was that whereby a mesne lord held of another, without the compass of his own fee; or that which the tenant performed either to his own lord or to the lord paramount out of the fee. (*Kitch.* 299.) Foreign service seems also to be used for knight's service, or escuage uncertain. (*Perkins*, 650.) *Jacob.*

Foreign state. In American usage, the several states of the Union are foreign to each other, with respect to matters governed by their municipal laws; while the relations of the general government and either state are domestic.

This consideration qualifies the usage of several of the phrases mentioned under the present head. It is abundantly well settled that a bill of exchange drawn in one state, payable in another, is a foreign bill. The corporations created by one state are constantly called foreign corporations in any other. In each state the judgments rendered in, and laws enacted by, another state are foreign judgments and laws. A port of another state is a foreign port.

The Indian tribes are not foreign states in the sense of the constitutional provision extending the judicial power to suits between a state and foreign states. In reference to intercourse with foreign nations, they are subject to many of the restraints imposed upon our own citizens. They are domestic, dependent nations, considered by foreign nations, as well as ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or form political connection with them, would be an invasion of our territory, and an act of hostility. Cherokee Nation *v.* Georgia, 5 *Pet.* 1.

Foreign vessel. A vessel owned abroad, or sailing under the flag of another nation.

Foreign vessel, under the embargo act of January, 1808, means a vessel under the flag of a foreign power, and not a vessel in which foreigners domiciled in the United States have an interest. The Sally, 1 *Gall.* 58.

An omission in the registry and enrolment of an American vessel does not make it, in point of fact, a foreign vessel. At most, it only deprives her of the privileges of an American ship. Fox *v.* The Lodemia, *Crabbe*, 271.

Foreign voyage, in the coasting act of Feb. 18, 1793, ch. 8, means a voyage intended to some place without the territorial waters of the United States, and for the purpose of trade. The Lark, 1 *Gall.* 55; The Three Brothers, *Id.* 142.

As a generic expression, "a foreign voyage" means, in the language of trade and commerce, a voyage to some port or place within the territory of a foreign nation. A whaling voyage is not a foreign voyage within the meaning of the act of congress of 1803, ch. 62. Taber *v.* United States, 1 *Story*, 1, 7.

FOREJUDGER. An old English term for a judgment, whereby a man is deprived or put out of a right or thing in question. To be forejudged the court was an expression used when an officer or attorney of any court was expelled from the same for some offence.

FOREST. In English law, is 1. Waste ground belonging to the king, replenished with all manner of beasts of

chase or venery, which are under the king's protection, for his royal recreation and delight. *Cowel;* 1 *Bl. Com.* 289.

2. The word is also used to signify a franchise or right; being the right of keeping, for the purpose of hunting, the wild beasts and fowls of forest, chase, park, and warren, in a territory or precinct of woody ground or pasture set apart for the purpose. 1 *Steph. Com.* 665.

Forestage. The duty paid to the sovereign by a forester. *Encyc. Lond.*

Forester. A sworn officer of the forest, appointed by the king's letters-patent to watch the vert and venison; to walk the forest both early and late, and to bring trespassers to justice. *Termes de la Ley; Cowel.*

Forest courts, were courts which were formerly instituted in England for the government of the king's forests in different parts of the kingdom. They no longer exist.

Forest law. A particular system or body of laws relating to the forests of the crown. *Brown.*

FORESTALL. To intercept one's passage, particularly that of one travelling on the highway. Forestalling: the act or offence of intercepting or hindering a traveller.

Forestalling was chiefly used of a common-law offence, which, more fully expressed, was forestalling the market. It consisted in hindering the transportation of merchandise to market; as by buying up merchandise or victuals coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price when there. As such practices make the market dearer to the fair trader, they were deemed an offence against public trade at common law, and also by Stat. 5 & 6 Edw. VI.; but since Stat. 7 & 8 Vict. ch. 24, this is no longer so. Compare ENGROSS.

FORFEIT, *v.* Generally, to suffer a divestiture of one's property in a thing, without compensation, and as a consequence of some default or offence. It may, however, be used of money, in which case it imports a requirement to pay the sum mentioned, as a mulct, or for a default or wrong. Forfeit, *n.*: a thing lost to its owner by way of punishment. Forfeiture: penalty or punishment for a default, wrong, or offence, by divesting the wrong-doer's title to some property, usually property involved in the wrong; the loss of lands or goods by reason of some act in contravention of law, or of some condition in a written document, expressed or implied.

According to Blackstone (2 *Com.* 267), forfeiture is a punishment annexed by law to some illegal act or negligence, in the owner of lands, tenements, or hereditaments, whereby he loses all his interest therein, and they go to the party injured, as a recompense for the wrong which either he alone, or the public together with himself, hath sustained. Compare *Id.* 420, where forfeiture for crime is mentioned. Burrill says that forfeiture involves the ideas not only of loss by the delinquent party, but of transfer or surrender to some other, whether it be an individual or the state.

Forfeit, in a provision in a contract that a party shall "forfeit" a specified sum on a breach, is equivalent to "penalty," within the rule that it does not import a binding agreement to liquidate the damages, but that under it only actual damages can be recovered. Taylor *v.* Marcella, 1 *Woods,* 302; Salters *v.* Ralph, 15 *Abb. Pr.* 273; Esmond *v.* Van Benschoten, 12 *Barb.* 366; Richards *v.* Edick, 17 *Id.* 260.

FORGERY. The name of a crime recognized and punished by the common law, in which it was defined to be the fraudulent making or alteration of a writing, to the prejudice of another's right. See 4 *Bl. Com.* 247. It is now almost everywhere defined by statute; and the statutory definitions have, upon the whole, operated to enlarge the meaning, to make some things forgeries which by the common law were not so.

The instrument itself which has been forged is sometimes styled a forgery.

As to the distinction between counterfeiting and forgery, see COUNTERFEIT.

Many definitions of the word in its general sense have been given. The fraudulent making of a false writing, which, if genuine, would be apparently of some legal efficacy. 2 *Bish. Crim. Law,* § 524.

The signing by one without authority, and falsely and with intent to defraud, the name of another to an instrument which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability. State *v.* Thompson, 19 *Iowa,* 299; S. P. Ames' Case, 2 *Me.* 365; State *v.* Kimball, 50 *Me.* 409; Commonwealth *v.* Chandler, *Thach. Cr.*

Cas. 187; Commonwealth *v.* Ayer, 3 *Cush.* 150; People *v.* Krummer, 4 *Park. Cr.* 217; Barnum *v.* State, 15 *Ohio*, 717; Commonwealth *v.* Searle, 2 *Binn.* 332; State *v.* Holly, 2 *Bay*, 262; State *v.* Smith, 8 *Yerg.* 151.

Forgery, speaking in general terms, is the false making or material alteration of or addition to a written instrument for the purpose of deceit and fraud. It may be the making of a false writing purporting to be that of another. It may be the alteration in some material particular of a genuine instrument by a change of its words or figures. It may be the addition of some material provision to an instrument otherwise genuine. It may be the appending of a genuine signature of another to an instrument for which it was not intended. The false writing, alleged to have been made, may purport to be the instrument of a person or firm existing, or of a fictitious person or firm. It may be even in the name of prisoner, if it purports to be, and is designed to be received as, the instrument of a third person having the same name. But, as a general rule, the writing falsely made must purport to be the writing of another party than the person making it. The mere false statement or implication of a fact, not having reference to the person by whom the instrument is executed, will not constitute the crime. Commonwealth *v.* Baldwin, 11 *Gray*, 197.

Forgery, at common law, denotes a false making (which includes every alteration or addition to a true instrument), — a making, *malo animo*, of any written instrument for the purpose of fraud and deceit. Rex *v.* Coogan, 2 *East P. C.* 852.

The making a false instrument with intent to deceive. Rex *v.* Coogan, 2 *East P. C.* 853.

The false making an instrument which purports on its face to be good and valid for the purposes for which it was created, with a design to defraud any person or persons. Rex *v.* Jones, 1 *Leach*, 366.

The false making a note or other instrument with intent to defraud. Rex *v.* Parkes, 2 *Leach*, 775.

The false making of an instrument purporting to be that which it is not; it is not the making of an instrument which purports to be what it really is, but which contains false statements. Telling a lie does not become a forgery because it is reduced to writing. *Re* Windsor, 10 *Cox Cr. Cas.* 118, 123; 6 *Best & S.* 522.

The making or altering of a document with intent to defraud or prejudice another, so as to make it appear to be a document made by another. *Re* Windsor, 10 *Cox Cr. Cas.* 118, 124.

The word forgery is "taken metaphorically from the smith who beateth upon his anvil and forgeth what fashion and shape he will." 3 *Coke Inst.* 169.

It is a common mistake to suppose that, if a deed is really executed by the parties by whom it purports to be executed, it cannot be a forgery. So far from this being the case, any material alteration of a written instrument, however slight, is a forgery. And it is forgery to affix a false date to a deed with intent to defraud; such false date being material. The essence of forgery consists in making an instrument to appear to be that which it is not. *Mozley & W.*

Forgery may be committed by making a note in the name of a fictitious person; in an assumed name; in the name of a bank which does not exist. It is not necessary to the offence that the note should be one which, if genuine, would be a valid and binding obligation. It is sufficient that the instrument purports to be good. The want of validity must appear on the face of the paper, to relieve from the character of forgery. United States *v.* Turner, 7 *Pet.* 132; United States *v.* Mitchell, *Baldw.* 366.

Making a false paper, and signing it with a fictitious name, with felonious intent, is forgery. Riley's Case, 5 *City H. Rec.* 87; Gotobed's Case, 6 *Id.* 25.

To constitute forgery, it is not essential that the handwriting should resemble his whose name is forged. Dobb's Case, 6 *City H. Rec.* 61.

A spurious writing over a genuine autograph may properly be termed a forgery. Martine's Case, 6 *City H. Rec.* 27; Caulkins *v.* Whisler, 29 *Iowa*, 495.

When the question is whether words charging forgery are actionable, the word forgery does not necessarily mean a felonious forgery, for which alone an action lies. Alexander *v.* Alexander, 9 *Wend.* 141.

A forged bill is one to which the signatures of the officers of the bank whence it purports to have been issued, are forged, or otherwise falsely affixed. It may be a legitimate or an illegitimate impression from the genuine plate, or it may be an impression from a counterfeit plate. Kirby *v.* State, 1 *Ohio St.* 185.

To forge is to make in the likeness of something else; to counterfeit is to make in imitation of something else, with a view to defraud by passing the false copy for genuine or original. Both words, forged and counterfeited, convey the idea of similitude. State *v.* McKenzie, 42 *Me.* 392.

FORM. The shape or structure of a thing, as distinguished from the material of which it is composed; mode of arrangement. In law, most frequently an established method of expression or practice; a fixed way of proceeding; a formula. A model of an instrument, a pleading or other legal proceeding, containing the essential requisites so arranged as to be used in accordance with the laws, is frequently termed a form; or, where a legal proceeding is pursued in the manner and order required by law, it is said to be in proper form.

A distinction is often made between matters of form and matters of substance, particularly in the interpretation of statutes allowing amendment or waiver of formal defects in pleadings and other proceedings. With respect to pleadings, the distinction is, that, where the matter pleaded is in itself insufficient, without reference to the manner of pleading it, the defect is substantial; but, where the fault is in the manner of pleading, the defect is merely formal; and a similar principle is applied to other proceedings.

Forms of action. The various classes into which personal actions at common law were divided were termed forms of action. They were distinguished by peculiarities in the writs, pleadings, and other proceedings, and in the judgment rendered, corresponding in each form of action to the distinctive features of the particular cause of action. For definitions of the several forms of action, and the nature and incidents of each, their respective names should be consulted. As usually enumerated, they are assumpsit, covenant, debt, detinue, replevin, trespass, trespass on the case, and trover. Account and annuity, which were formerly much in use, have become obsolete, or nearly so. The proceedings by *mandamus* and *scire facias* also sometimes included.

Forms of action were generally adopted in the United States as part of the common-law practice, and long continued in use; but in many of the states they have been abolished, and a uniform course of proceeding, regulated by a code of procedure or practice act, substituted. A like change has been effected in England by the supreme court of judicature acts of 1873 and 1875. Notwithstanding these changes, the principles governing the distinctions between the several common-law actions are still frequently invoked, as applicable to like distinctions founded in the nature of different classes of causes of actions, or in the form of the proceeding found appropriate thereto, in jurisdictions where the technical forms are wholly abolished.

FORMALITY. An established method or rule of proceeding or of expression; usually necessary to make valid or regular the instrument, act, or proceeding with respect to which it is required or is accustomed to be observed.

Formalities: robes worn by the magistrates of a city or corporation, &c., on solemn occasions. *Encyc. Lond.*

FORMEDON. The name of a writ in old English common-law practice, which lay for any person interested in an estate-tail, where, upon an alienation by the tenant in tail, working a discontinuance (*q. v.*), the right of such person was liable to be defeated. As only those who claimed in fee-simple were entitled to an absolute writ of right, this remedy was provided for persons claiming by virtue of any entail, by the statute of Westminster 2d (13 Edw. I. ch. 1), passed in 1825. It was called *formedon*, because the plaintiff in it claimed *per formam doni*, — according to the form of the gift. In modern times, it became nearly obsolete, having been superseded by the action of ejectment; and in 1833 it was abolished in England, with other real actions, by Stat. 3 & 4 Wm. IV. ch. 27, § 36.

The writ of *formedon* was of three kinds: a *formedon* in the descender, which was brought by the heir in tail against the person to whom his ancestor, the tenant in tail, had alienated the land; a *formedon* in the remainder, founded not, indeed, on the express words, but on the equity of the above statute, which was brought by the remainder-man against a stranger, who, on the failure of the issue in tail, had intruded upon the land, and kept the remainder-man out of possession; a *formedon* in the reverter, brought under the like circumstances by the donor or his heirs, claiming in reversion. (*Termes de la Ley; Cowel;* 3 *Bl. Com.* 191, 192.) *Mozley & W.*

FORNICATION. The act of unlawful sexual intercourse, upon the part of an unmarried person. If one of the parties is married and the other is not, the first, according to the better view, is chargeable with adultery, the latter with fornication.

Fornication is punishable by statute in some of the states, in others it is not.

FORSWEAR. To swear to what is not true. Forsworn: having sworn falsely. The words do not necessarily import perjury; for one may be forsworn by making oath to a falsehood before an officer or tribunal not compe-

tent to administer the oath. *Bouvier;* and see Sheely *v.* Biggs, 2 *Har. & J.* 363.

FORTHCOMING. An action in Scotland by which arrestment is made effectual. The arrestment (*q. v.*) secures the goods or debts (*i.e.* the debts due to the debtor) in the hands of the creditor or holder; the forthcoming is an action in which the debt is ordered to be paid, or the effects to be delivered up, to the arresting creditor. *Bell.*

FORTHCOMING BOND. A bond often given to a sheriff who has seized property on attachment or execution, conditioned that the property shall be forthcoming; that the obligor will have it ready to be delivered up, when required by law, in the course of the proceedings, upon which the sheriff intrusts the property to the custody of the obligor.

FORTHWITH. When used in statutes, orders, contracts, &c., requiring an act to be done forthwith, means within a reasonable time, with convenient celerity. Burgess *v.* Boetefeur, 7 *Man. & G.* 481.

In matters of practice, twenty-four hours being deemed a reasonable time for compliance with orders of court, as to service, payment of costs, and the like, forthwith has come to mean, very generally, "within twenty-four hours." See Champlin *v.* Champlin, 2 *Edw.* 328.

When a defendant is ordered to plead forthwith, he must plead within twenty-four hours. When a statute enacts that an act is to be done forthwith, it means that the act is to be done within a reasonable time. *Wharton.*

Forthwith seems to import that the requisite act shall be performed as soon as, by reasonable exertion confined to that object, it might be; and which must consequently vary according to the circumstances of each particular case. 3 *Chitt. Gen. Pr.* 112; 4 *Tyrwh.* 837.

A requirement in a fire policy, to give notice of loss forthwith, implies due diligence under all the circumstances. Edwards *v.* Lycoming County Mut. Ins. Co., 75 *Pa. St.* 378.

Fortior et potentior est dispositio legis quam hominis. The disposition of the law is stronger and more efficacious than that of man. The law sometimes overrules the will of the individual, and renders his expressed intention or contract ineffective. That this is true as a general principle is so familiar a fact, that it needs not to be formally set forth as a maxim; but in the construction of contracts, of wills, &c., in which the intention of the parties, as expressed in the particular instrument, has great weight, this maxim expresses a principle which controls even the plain intention of the writing. Even in the interpretation of a will, the rules of law governing the dispositions of property by a testator absolutely control his expressed intention, and render void any provision by him inconsistent with the *dispositio legis.*

FORTUITOUS. Resulting from unavoidable physical causes. Compare ACCIDENT; ACT OF GOD; INEVITABLE.

FORUM. The name of the place where courts were held and other public business transacted, in Rome and other cities of the Roman empire. Hence, a court; a judicial tribunal; the place where a remedy is sought; the place of jurisdiction. Thus the law of the forum — *lex fori* — means the law of the place where an action is instituted. The word is also used in many other phrases, among which are the following:

Forum conscientiæ. The tribunal of conscience.

Forum contractus. The court of the place where a contract is made. The place of making a contract, considered as a place of jurisdiction.

Forum domicilii. The court of the domicile. The domicile of a defendant, considered as a place of jurisdiction.

Forum ecclesiasticum. An ecclesiastical court. The spiritual jurisdiction, as distinguished from the secular.

Forum originis. The court of one's nativity. The place of a person's birth, considered as a place of jurisdiction.

Forum rei. The court of the defendant; the same as the *forum domicilii*, q. v. Also, the court of the thing; the court of the place where the thing in controversy is; the same as the *forum rei sitæ*, q. v.

Forum rei gestæ. The court of the transaction. The place where an act is done, considered as a place of jurisdiction.

Forum rei sitæ. The court where the thing is situated. The place where the property in controversy is situated, considered as a place of jurisdiction.

Forum seculare. A secular court. The secular tribunal or jurisdiction, as distinguished from the ecclesiastical.

FORWARDER. A person who receives goods for transportation, and sends them forward to their destination, taking upon himself the expenses of transportation, for which he receives a compensation from the owners, but who has no concern in the vessels or vehicles by which they are transported, and no interest in the freight, is termed a forwarder or forwarding merchant. *Story Bailm.* § 502; Roberts *v.* Turner, 12 *Johns.* 232. Such persons combine in their business the double character of warehousemen and agents for a compensation to forward goods. *Angell Carriers*, § 75. The distinction between forwarders and common carriers is important with respect to the different rule of responsibility applied to each; a forwarder being required only to use good faith and ordinary diligence in the care of the goods and in forwarding them by responsible carriers. The same person may be both forwarder and carrier; as where he receives goods into his warehouse to be forwarded according to subsequent orders of the owner.

An agreement "to forward" goods to a place designated for an agreed freight, held not a contract for forwarding, but for carrying. Krender *v.* Woolcott, 1 *Hilt.* 223; and see Blossom *v.* Griffin, 13 *N. Y.* 569.

FOUR CORNERS. To take a written instrument by the four corners is a proverbial expression, meaning to read or construe it as a whole, to consider all its parts.

FOUR SEAS. A term used in English law for the four seas surrounding England; thus the expression within the four seas, *infra quatuor maria*, means within the territorial jurisdiction of England.

FRANCHISE. A privilege emanating from the government or sovereign power, by grant, shown or supposed, and vested in an individual or body politic. Chicago City R. W. Co. *v.* People, 73 *Ill.* 541.

The word includes a privilege conferred by the legislature upon individuals, of managing and drawing a lottery. Commonwealth *v.* Frankfort, 13 Bush, 185.

It does not include immunity (of a corporation) from taxes. State *v.* Maine Central R. R. Co., 66 *Me.* 488, 512.

It may include an exemption from ordinary jurisdiction, and sometimes an immunity from tribute. (*Termes de la Ley; Cowel.*)

At the present day, the word is most frequently used to denote the right of voting for a member to serve in parliament, which is called the parliamentary franchise; or the right of voting for an alderman or town councillor, which is called the municipal franchise. *Mozley & W.*

In England, a franchise is defined to be a royal privilege in the hands of a subject. In this country, it is a privilege of a public nature, which cannot be exercised without a legislative grant. State *v.* Weatherby, 45 *Mo.* 17.

A franchise is a privilege or immunity of a public nature, which cannot be legally exercised without legislative grant. To be a corporation is a franchise; the various powers conferred on corporations are franchises; the execution of a policy of insurance by an insurance company, and the issuing a bank-note by an incorporated bank, are franchises. People *v.* Utica Ins. Co., 15 *Johns.* 387; and 2 *Abb. N. Y. Dig.* 621.

It is a privilege emanating from the government, by a grant, and vested in an individual or body politic. Chicago City Ry. Co. *v.* People, 73 *Ill.* 541.

A franchise is a special privilege conferred by government on individuals, and which does not belong to the citizens of a country generally, by common right. Curtis *v.* Leavitt, 15 *N. Y.* 9, 170; Bank of Augusta *v.* Earle, 13 *Pet.* 519, 595.

It is essential to the character of a franchise that it should be a grant from the sovereign authority; and in this country no franchise can be held which is not derived from a law of the state. Bank of Augusta *v.* Earle, 13 *Pet.* 519, 595.

The term franchise has several significations, and there is some confusion in its use. When used with reference to corporations, the better opinion, deduced from the authorities, seems to be that it consists of the entire privileges embraced in and constituting the grant. It does not embrace the property acquired by the exercise of the franchise. Bridgeport *v.* New York, &c. R. R. Co., 36 *Conn.* 255.

The word franchise has various significations, both in a legal and popular sense. A corporation is itself a franchise belonging to the members of the corporation, and the corporation, itself a franchise, may hold other franchises. So, also, the different powers of a corporation, such as the right to hold and dispose of property, are its franchises. In a popular sense, the political rights of subjects and citizens are franchises, such as the right of suffrage, &c. Pierce *v.* Emery, 32 *N. H.* 484.

A franchise is in the nature of a vested right of property granted by the government, subject, in most cases, to the performance of conditions and duties on the part of the grantee. It is exclusive in character, and, so long as the grantee ful-

fils the conditions and duties imposed upon him by the grant, his rights cannot be impaired or taken away by the government any more than any other private property. California State Teleg. Co. *v.* Alta Teleg. Co., 22 *Cal.* 398, 422.

A franchise is property which may be transferred by sale or devise, and it will descend to heirs like other property; and the owner has the same security for its protection, under the constitution, as has the owner of any other property. Enfield Toll Bridge Co. *v.* Hartford, &c. R. R. Co., 17 *Conn.* 40; Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 *Id.* 19, 36.

FRANK. Free. The word occurs in a few old compounds not entirely obsolete. It has been retained as a single word, in modern times, to signify the privilege formerly enjoyed by certain high officers, both in England and in the United States, of sending letters free of postage. That privilege does not now exist to any considerable extent. While it continued, to frank was for an authorized person to write upon the letter "free," signing his name and abbreviation of office; after which it was carried without charge for postage. A frank was this certificate upon a letter, that it was entitled to go free.

To frank a letter means to send it postfree, so that the person who receives it shall have nothing to pay. This is now done in the ordinary way by prepaying the postage; hence the word frank, like the French *affranchir*, when applied to letters sent by post at the present day, signifies the prepayment of the postage. But, formerly, when the postage of letters was ordinarily paid by the receiver, the word was applied to the privilege, then enjoyed by members of parliament, of sending letters free of duty. *Mozley & W.*

Frankalmoigne. Is a species of tenure of lands, in England, granted by the owner to the church or to any monastic body, to hold to the church or monastery for ever, free (as the name denotes) of all manner of services to the donor for ever, save and except the saying of prayers and the distributing of charity to the poor for the welfare of the soul of the donor and his family for ever. *Brown.*

Frankchase. A liberty of free chase enjoyed by any one, whereby all other persons having ground within that compass are forbidden to cut down wood, &c., even in their own demesnes, to the prejudice of the owner of the liberty. *Cowel.*

Frank-fee is variously defined. 1. As that which is in the hands of the king or lord of any manor, being ancient demesne of the crown. 2. As that which a man holds by common law to himself and his heirs. 3. As a tenure in which no service is required. This is sometimes called an improper feud, because free from all service. *Mozley & W.*

Frank-law. An obsolete expression for the full enjoyment of the common law, as a free subject or citizen; corresponding nearly to the American term, civil rights.

Frank-marriage. An old tenure of lands in England granted by the owner to his son-in-law upon his marrying into the family, to hold to such son-in-law and the heirs of the marriage free (as the name denotes) of all manner of services to the donor until the fourth generation, the sole consideration for the gift being the marriage itself. *Brown.*

Frank-pledge. A system of suretyship for good behavior, which anciently, in England, was required of each free-born man (with some exceptions) on attaining fourteen years of age; and was given for him by the heads of a body of ten households, among which he belonged. *Mozley & W.*

Frater fratri uterino non succedet in hæreditate paterna. A brother shall not succeed a uterine brother in the paternal inheritance. The rule of descent at common law excluding the half blood had a much more extended application than that expressed in this maxim; for under it a distant kinsman of the whole blood was admitted, to the total exclusion of a much nearer kinsman of the half blood; and the estate should rather escheat to the lord, than descend to the half blood; although the fact that a person was of the half blood to the one last seised did not exclude him, if otherwise entitled, as if he were of the whole blood to those ancestors through whom the descent was derived by representation. 2 *Prest. Abs. Title*, 447. But this rule of the common law, even in the limited sense expressed in the maxim, was superseded in England by Stat. 3 & 4 Wm. IV. ch. 106; and has been changed by similar statutes in many of the United States.

FRAUD. A term very difficult of definition, at least without separating actual from constructive fraud. The wilful acquisition or attempt to acquire the property or defeat the rights of another by means which are deceptive and unjust, but not criminal, constitutes fraud in the former sense. A transaction which, if sustained, would operate

as a fraud, although, perhaps, not so intended, is called a constructive fraud.

Fraud was defined in the civil law as any cunning, deception, or artifice, used to circumvent, cheat, or deceive another. Judge Story remarks in regard to this definition that it is "sufficiently descriptive of what may be called positive, actual fraud, where there is an intention to commit a cheat or deceit upon another to his injury. But it can hardly be said to include the large class of implied or constructive frauds which are within the remedial jurisdiction of a court of equity. Fraud, indeed, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another." 1 *Story Eq. Jur.* § 187.

A distinction similar to that between actual or positive fraud, and constructive fraud, is also made by the use of the terms fraud *in fact* and fraud *in law;* based on the difference between cases where fraud is mere matter of fact, and cases where it is a conclusion of law from the facts.

Another distinction is that made between fraud considered as a cause of action or a defence at law, and as a ground of relief by courts of equity. From the peculiar constitution and methods of procedure of the courts of law, they had not the power to deal with fraud otherwise than to punish it by inflicting damages. The many forms of fraud against which specific relief of a preventive or remedial sort is necessary, therefore, became the subjects of equity jurisdiction. Hence it is somewhat inaccurately said, that certain transactions amount to fraud in equity, but not at law.

The ordinary means of fraud are either false representations or concealment as to facts, — often expressed by the Latin terms, *suggestio falsi aut suppressio veri*, q. v. But mere unauthorized, erroneous, or false statements, made by one contracting party to another, do not necessarily amount to fraud, such as will avail in a court of law. The representation or suppression of the truth must have been with the intention to deceive; and damage from such deception must have resulted, to constitute a cause of action.

The cases of fraud against which equity will give relief were classified by Lord Chancellor Hardwicke, in the case of Chesterfield *v.* Janssen, 2 *Ves.* 125, 155, as follows: 1. Fraud may be actual, arising from facts and circumstances of imposition, which is the plainest case. 2. Fraud may be apparent, from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would make, on the one hand, and as no honest or fair man would accept, on the other, which are inequitable and unconscionable bargains; and of such even the common law has taken notice. 3. Fraud may be presumed from the circumstances and condition of the parties contracting; and this goes further than the rule of law, which is, that fraud must be proved, not presumed; but it is wisely established in this court, to prevent taking surreptitious advantages of the weakness or necessity of another, which, knowingly to do, is equally against conscience as to take advantage of his ignorance. 4. Fraud may be collected or inferred in the consideration of a court of equity, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons not parties to the fraudulent agreement. 5. Fraud may infect what are called catching bargains with heirs, reversioners, or expectants, in the lifetime of the parents. These have been generally mixed cases, compounded of all or every species of fraud; there being sometimes proof of actual fraud, which is always decisive.

Any comprehensive definition of fraud in the view of courts of equity seems to have been avoided, lest new cases might arise, which, if they should not fall within the definition, might prove to be without remedy.

The effect of fraud, both at law and in equity, is to avoid a contract *ab initio*, whether the fraud be intended to operate against one of the contracting parties, or against third parties, or against the public generally. But the party guilty

of the fraud cannot, of course, in any case, himself avoid the contract on the ground of the fraud. In many cases of fraud, especially actual or positive fraud, the wrong-doer is liable to an action for damages; but mere fraud without injury constitutes no cause of action.

Fraud, to impair the obligations of a contract, may be either by false representation; concealment of material circumstances; underhand dealing; or taking advantage of imbecility or intoxication. A distinction is taken between *dolus malus* or that gross fraud for which there is no excuse, and *dolus bonus* or some artifice such as those which it is well understood that merchants practise in order to enhance the value of what they sell. Fraud, treated as a crime, is usually charged as "falsehood, fraud, and wilful imposition." To show an attempt to defraud is not enough. *Bell.*

It is impossible to separate deceit or artifice from fraud. The definition given in Bacon's Abridgment (tit. Fraud), viz., "the act by which one person unlawfully, designedly, and knowingly appropriates to his own use the property of another without a criminal intent," omits all the essential ingredients of fraud, and embraces a multitude of acts which have never been supposed to be fraudulent. People *v.* Taylor, 4 *Park. Cr.* 158.

The modes of fraud are infinite, and it has been said that courts of equity have never laid down what shall constitute fraud, or any general rule, beyond which they will not go, on the ground of fraud. Fraud is, however, usually divided into two large classes: actual fraud and constructive fraud. An actual fraud may be defined to be something said, done, or omitted by a person with the design of perpetrating what he must have known to be a positive fraud. Constructive frauds are acts, statements, or omissions which operate as virtual frauds on individuals, or which, if generally permitted, would be prejudicial to the public welfare, and yet may have been unconnected with any selfish or evil design; as, for instance, bonds and agreements entered into as a reward for using influence over another, to induce him to make a will for the benefit of the obligor. For such contracts encourage a spirit of artifice and scheming, and tend to deceive and injure others. *Smith Man. Eq.*

Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Gardner *v.* Heartt, 3 *Den.* 232.

But it may consist in the suppression of the truth, as well as in the assertion of falsehood. Allen *v.* Addington, 7 *Wend.* 9, 20.

Fraud, in its general acceptation, may be defined the misrepresentation or concealment of a material fact. But to constitute fraud in a legal sense there must be a misrepresentation or concealment of a fact peculiarly within the knowledge of the party guilty of either, or some device must be used naturally calculated to lull the suspicions of a careful man, and induce him to forego inquiry into a matter upon which the other party has information, although such information be not exclusively within his reach. And an omission to communicate or concealment of facts must be attended by evidence of some trust or confidence reposed by one party in the other. Van Arsdale *v.* Howard, 5 *Ala.* 596.

To constitute such a fraudulent representation as may be the subject of an action, the representation must have been false, must have been fraudulently made, and must have occasioned damage. *Fraus* includes the idea of intentional deception. When one has made a false representation, knowing it to be false, the law infers that he did so with an intention to deceive. And when one has made a representation positively, or professing to speak as of his own knowledge, without having any knowledge on the subject, the intentional falsehood is disclosed, and the intention to deceive is also inferred. Hammatt *v.* Emerson, 27 *Me.* 308.

Any declaration which induces another to buy or sell upon the confidence that it is true, according to the common acceptation of the words used, is "fraudulent suppression," if the assertion is not strictly true as so understood, notwithstanding it may be true in some other sense different from the ordinary import. Blydenburgh *v.* Welsh, *Baldw.* 331, 337.

The term fraud, as used in N. C. Const. art. 1, § 16, prohibiting imprisonment for debt except in cases of fraud, comprehends not only one's dishonest attempts to baffle his creditors, but also deceitful representations in making a contract, and fraud in incurring the liability, as, for instance, an administrator's conversion of funds of the estate to his own use. Melvin *v.* Melvin, 72 *N. C.* 384.

Fraudulent contract. The phrase fraudulent contract, in a statute allowing divorces in cases of fraudulent contract, is not to be taken in its popular sense, but in the technical meaning which it has obtained as applied to the subject of marriage and divorce; and implies a cause of divorce which existed previous to the marriage, and such a one as rendered the marriage unlawful *ab initio*, as consanguinity, corporal imbecility, or the like. Benton *v.* Benton, 1 *Day*, 111.

Fraudulent conveyance. In a general sense, a transfer of property which is infected by any fraud, whether between the parties or affecting third persons, may be styled a fraudulent conveyance. But the term is usually applied

to transfers made by a person indebted or in embarrassed circumstances, which was intended or will necessarily operate to defeat the right of his creditors to have the property applied to the payment of their demands.

If A practises a fraud upon B, affecting a conveyance between these parties, as, for instance, by misrepresenting the value of the property conveyed, this is not what is generally meant by a fraudulent conveyance. But if A, being indebted to C, D, and E, conveys his property to B for the purpose of securing it against the claims of these creditors, this is what is termed, in view of the fraud upon the third persons (none is practised on the grantee), a fraudulent conveyance.

As applied to fraudulent conveyances, actual fraud, or fraud in fact, consists in the intention to prevent creditors from recovering their just debts by an act which withdraws the property of a debtor from their reach. Fraud in law consists in acts which, though not fraudulently intended, yet as their tendency is to defraud creditors if they vest the property of the debtor in his grantee, are void for legal fraud, which is deemed tantamount to actual fraud, full evidence of fraud, and fraudulent in themselves, the policy of the law making the acts illegal. McKibbin *v.* Martin, 64 *Pa. St.* 352.

Active or meditated fraud in the disposition of a debtor's property is characterized by an actual dishonest intent governing the act. Constructive fraud may consist in innocently doing some act forbidden, or omitting to do some act prescribed, by law. People *v.* Kelly, 35 *Barb.* 444; s. c. *sub nom.* Caldwell's Case, 13 *Abb. Pr.* 405.

FRAUDS, STATUTE OF. See STATUTE OF FRAUDS.

FRAUS. Fraud; deceit. The idea conveyed by the English word fraud is more frequently expressed in the civil law by the terms *dolus* and *dolus malus*. As to the distinction sometimes made between *dolus* and *fraus*, see DOLUS.

Fraus est celare fraudem. It is a fraud to conceal a fraud. Concealment, even of the truth, may amount to fraud, as well as the most positive fraudulent statements.

Fraus est odiosia et non presumenda. Fraud is odious, and not to be presumed. The principle that fraud is not to be presumed is true in a very limited sense only. The law does not presume fraud, where a less odious explanation of the facts is equally consistent with all the circumstances of a case, and the burden of proof is on the party alleging fraud. But fraud may be presumed, or rather may be conclusively inferred, from circumstances not amounting to direct proof.

Fraus latet in generalibus. Fraud lies hid in general expressions. Compare *dolus versatur in generalibus*.

FREE. 1. Certain or honorable; the opposite of base; as free service, free socage.

2. Privileged or individual; the opposite of common; as a free chapel, a free fishery, a free warren.

3. Not held to apprenticeship or servitude, or under parental dominion; at liberty to act as one pleases, consistently with any obligations he may owe in the ordinary domestic relations, or assumed by contract, or imposed by the law of the land.

Free bench. A sort of dower, allowed in copyhold lands.

Free course. Signifies that a vessel has the wind from a favorable quarter.

Free fishery. A franchise which gives a right of fishing in a public navigable river, to a person who has not any ownership on the soil. Sometimes used as equivalent to common of fishery. But the idea is that of a privilege of fishing free of any restriction, tax, or toll by the crown, not a public right.

Free ships make free goods. This maxim signifies that goods on board a neutral vessel are free from capture, even though they are enemy property.

Free socage. A feudal tenure, held by certain services which, though honorable, were not military.

FREEHOLD. An estate in real property, either of inheritance or for life. The term is derived from the feudal law, in which it denoted the holding of a freeman, as distinguished from villeinage, *q. v.* See also ESTATE; FEE. As, originally, no man could receive more, and no freeman would accept less, than an estate for life, the early freeholds were probably merely life tenures. As, however, fees gradually developed into estates of inheritance, they were properly included in the meaning of freehold, which is therefore often defined as including any

estate of uncertain duration, which may possibly last for the life of the tenant at the least. Thus an estate granted to a widow during her widowhood is usually considered an estate of freehold. The term had become completely established in this sense long before the abolition of feudal tenures, and by far the greater part of the real property in England and the United States is now freehold property. The quality of indefinite duration, and the comparative freedom of tenure, are, and always have been, the peculiar qualities of freeholds. A term for years, for however long a period, and though far exceeding the duration of human life, is no freehold.

A distinction is occasionally made between freehold *in deed* and freehold *in law*. Freehold in deed is the real possession of land or tenements in fee, fee-tail, or for life; and freehold in law is the right to such tenements before actual entry.

An estate, to be a freehold, must possess these two qualities: 1, Immobility, that is, the property must be either land, or some interest issuing out of or annexed to land; and, 2, a sufficient legal indeterminate duration; for, if the utmost period of time to which an estate can endure be fixed and determined, it cannot be a freehold. *Wharton.*

In England, the term freehold is in practice used, 1, in opposition to leasehold; 2, in opposition to copyhold.

A leasehold interest, being an estate for a term of years, is but a chattel interest, and in law is less than an estate of freehold, however long the term may be.

A copyhold interest was originally an estate at the will of the lord of the manor, as it is still in name though not in fact; and an estate at will is the smallest estate known to the law. And in their origin copyholds were deemed worthy the acceptance only of villeins and slaves. Freehold is even yet spoken of in contradistinction to copyhold, though the word freehold in a will, if obviously used in contradistinction to leasehold, may sometimes be held to include copyhold. *Mozley & W.*

Estates of inheritance and for life shall continue to be denominated estates of freehold. 1 *N. Y. Rev. Stat.* 722, § 5.

FREEHOLDER. He who possesses a freehold estate. See FREEHOLD.

By the ancient laws of Scotland, freeholders were called milites; and freehold, in England, hath been sometimes taken in opposition to villenage, it being lands in the hands of the gentry and better sort of tenants, by certain tenure, who were always freeholders, contrary to what was in the possession of the inferior people held at the will of the lord. *Jacob.*

FREELY. Without constraint and compulsion. Dennis *v.* Tarpenny, 20 *Barb* 371, 374; Merriam *v.* Harsen, 2 *Barb. Ch.* 232; 4 *Edw. Ch.* 70.

In a statute requiring that a deed by a married woman shall be accompanied by an acknowledgment that she executed the deed freely, &c., the word freely does not import that the wife must act without a motive, or execute the deed as a mere act of generosity; but it means without constraint, coercion, or fear of injury from the husband. Merriam *v.* Harsen, 2 *Barb. Ch.* 232.

FREEMAN. As used in the Pennsylvania constitutional provisions declaring the right of suffrage, does not include the female sex. Burnham *v.* Laning, 1 *Pa. Leg. Gaz. Rep.* 411; 9 *Phila.* 241.

FREIGHT. The money paid for carriage of goods by sea; or, in a larger sense, it is taken for the price paid for the use of a ship to transport goods, and for the cargo or burden of the ship. *Jacob.*

Freight is a compensation for the carriage of goods. Palmer *v.* Gracie, 4 *Wash. C. Ct.* 110; Griggs *v.* Austin, 3 *Pick.* 20.

The term freight has several different meanings; as the price to be paid for the carriage of goods, or for the hire of a vessel under a charter-party or otherwise; and sometimes it designates goods carried, as "a freight of lime," or the like. But, as a subject of insurance, it is used in one of the two former senses. Lord *v.* Neptune Ins. Co., 10 *Gray*, 109.

When used in a policy to describe the subject assured, freight has a well-settled and distinct meaning. It does not include cargo or goods laden on board. These are insured under the term goods, or cargo, or merchandise, or words of like import. Freight signifies the earnings or profit derived by the ship-owner or the hirer of a ship from the use of it himself, or by letting it to others, or by carrying goods for others. It cannot be made to comprehend the profit which the owner of a cargo, having no interest in the vessel or earnings, as such, expects to derive from the transportation of his goods to their port of destination. Minturn *v.* Warren Ins. Co., 2 *Allen*, 86.

In the act of congress of 1851, ch. 43, § 3, — by which the owners of the vessel in fault for a collision are liable to the extent of the "freight then pending," as well as of the value of their vessel, — freight includes the earnings of the vessel, in transporting the goods of her owners. Allen *v.* Mackay, 1 *Sprague*, 219.

Where freight is pledged generally, the word will be understood to include the whole freight for the voyage, which the ship is in the course of earning, and not merely freight to be subsequently earned. The Zephyr, 3 *Mas.* 344.

FRESH. In the sense of recent, oc-

curs in some phrases of technical meaning.

Fresh disseisin. Formerly, a man might by his own act, and without resort to law, seek to defeat a disseisin within the first fifteen days after it was committed. A disseisin thus recent was called a fresh disseisin.

Fresh force. In certain cases, by the custom or usage of a city or borough, a person disseised or otherwise wronged in respect of freehold lands therein, might have his remedy (without any writ out of the chancery), by a proceeding called a bill of fresh force, or an assise of fresh force, brought within forty days after the wrong committed, or title to him accrued. *Mozley & W.*

Fresh pursuit. Following immediately and with intent to reclaim or recapture an animal escaped, a thief flying with stolen goods, &c.

Fresh suit. By former English law, one who was robbed was entitled to have back his goods, if recovered, provided he secured the conviction of the felon by immediate prosecution, which was called fresh suit.

FRIENDLY SOCIETY. A name used, chiefly in England, to designate a class of associations supported by subscription for the mutual relief and maintenance of members, or their wives, children, relatives, or other nominees, against casualties; such as sickness, old age, or widowhood. Friendly societies were first authorized by statute, in Great Britain, in 1793, by the act 33 Geo. III. ch. 54. This, with several subsequent acts on the same subject, was repealed in 1829 by the act of 10 Geo. IV. ch. 56, by which a more favorable system was introduced. From 1829 to 1850 these societies became more and more numerous, and the interests involved in them grew very important. In 1850, the whole law relating to these societies was consolidated by the act 13 & 14 Vict. ch. 115, which act, and the subsequent statutes 18 & 19 Vict. ch. 63, and 21 & 22 Vict. ch. 101, give details of their organization and administration, as they have been conducted down to a recent date. By the Stat. 23 & 24 Vict. ch. 58, provision has been made for the winding up and dissolution of such societies. See also the act 25 & 26 Vict. ch. 87, relative to industrial and provident societies.

FRIVOLOUS. Has been the subject of some adjudications, with reference to statutory provisions authorizing the courts summarily to strike out a frivolous answer or plea; the result of which is that plaintiff can obtain judgment as if the action were undefended, instead of awaiting the call of the cause on the calendar of issues. Such provision was made by the English common-law amendment act; also by the New York code of procedure, and by similar codes in other states. In this use of the term, it means an answer which controverts no material allegation in the complaint, and presents no tenable defence. Lefferts *v.* Snediker, 1 *Abb. Pr.* 41; Brown *v.* Jennison, 3 *Sandf.* 732; see also SHAM, and Hull *v.* Smith, 8 *How. Pr.* 149; a plea clearly insufficient upon its face, and therefore presumably put in for purposes of delay, or to embarrass the plaintiff. *Brown.* A frivolous answer is not necessarily an irrelevant one. Fasnacht *v.* Stehn, 5 *Abb. Pr.* N. S. 338. The rule is sustained by many decisions in New York, that a pleading should not be struck out as frivolous, unless its insufficiency is so manifest that the court can determine it upon bare inspection, without argument.

FROM. Descent "from" a parent cannot be construed to mean descent through a parent. Gardner *v.* Collins, 3 *Mas.* 398, 2 *Pet.* 58; Case *v.* Wildridge, 4 *Ind.* 51.

In the interpretation of contracts, where time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period from or after a day named, the general rule is to exclude the day thus designated, and to include the last day of the specified period. Sheets *v.* Selden, 2 *Wall.* 177.

A statute imposing a new rate of duty on goods imported "from and after" the passage of the act, applies to goods imported upon the day when the act took effect. Arnold *v.* United States, 9 *Cranch*, 104; 1 *Gall.* 248.

The offence of sailing "from a port" with an intent to engage in the slave-trade, is not committed, unless the vessel sails out of the port. United States *v.* La Coste, 2 *Mas.* 129, 137.

The expression "from" or "to" an object excludes the terminus. Bonney *v.* Morrill, 52 *Me.* 252.

From a street, does not necessarily mean

from its nearest line. Pittsburg *v.* Clay, 74 *Pa. St.* 259.

The words, from a town or city, used in a charter granted to a railroad company, are to be taken inclusively; and in the construction of the road the company may enter the corporate limits of such town or city. Tennessee & Alabama R. R. Co. *v.* Adams, 3 *Head*, 596. To the contrary, North-eastern R. R. Co. *v.* Payne, 8 *Rich. L.* 177.

In an act to provide for the construction of a highway between the villages of H and M, appointing commissioners to alter, &c., the public road "leading from the village of H," held that "from" should be construed inclusively to effect the purpose of the act. Smith *v.* Helmer, 7 *Barb.* 416.

By a contract, dated Nov. 25, 1848, A bound himself to pay a certain sum, if, at the expiration of one year from the date, B should perform a certain act. Held, that the doing the act by B on Nov. 26, 1849, was a seasonable performance. Oatman *v.* Walker, 33 *Me.* 67.

Where a statute requires a stream to be kept open, for the free passage of fish, "from" May 5 to July 5, May 5 is excluded. Peables *v.* Hannaford, 18 *Me.* 106.

A lease for a term of years "from the first day of July," commences to run on the second of July. Atkins *v.* Sleeper, 7 *Allen*, 487.

The custom of the place determines whether a lease "from" a day includes or excludes the day. Wilcox *v.* Wood, 9 *Wend.* 346.

The phrase, from a day, is to be construed to include or to exclude the day, according to the apparent intention of the parties as gathered from the context, the subject-matter, and all admissible evidence. Deyo *v.* Bleakley, 24 *Barb.* 9. See DAY.

FRUCTUS. Fruit. Used generally in the plural, the singular and plural being the same in form, meaning the organic productions of a thing; the increase; the profits; also, the right to use the fruits or profits; the usufruct.

Fructus industriales. Industrial fruits; or, sometimes, *fructus industriæ*, — fruits of industry. The fruits, profits, or increase of a thing obtained by the labor or industry of man, as distinguished from those produced by the powers of nature. Such are crops of grain. Emblements are so termed.

The expression *fructus industriales* includes peaches, for they are the product of periodical planting and culture. Purner *v.* Piercy, 40 *Md.* 212.

Fructus naturales. Natural fruits. The fruits, profits, or increase of a thing produced by the powers of nature solely. Such are the fruits of trees growing without cultivation; the young of animals; wool.

Fructus pendentes. Hanging fruits. Fruits or increase of a thing, while remaining united with the thing which produces them. They are considered a part of the principal thing. The term *fructus stantes* — standing fruits — is sometimes used in the same sense.

Frustra petis quod mox ea restituturus. In vain you ask that which immediately you will have to restore. A maxim of the civil law, denying to a party the right to recover money which he may immediately be compelled to refund to the party from whom he claims it. It has sometimes been applied under the common law; as in the case of one partner seeking to recover a demand from the partnership of which he is a member. *Story Partnership*, § 221.

FUGITIVE. See EXTRADITION; FLEEING.

FULL. Occurs in several phrases which have a technical signification.

Full age. The age at which one attains full personal rights and capacities; majority; generally, in England and the United States, the age of twenty-one years.

Full blood. A term in the law of descent indicating that the persons spoken of are posterity of the same married pair. Thus two brothers are brothers of full blood if born in wedlock of the same father and mother. See HALF BLOOD; WHOLE BLOOD.

Full court. A session of a court composed of several judges, at which all are present.

Functus officio. Having discharged the office; having performed the function. One who has fully performed his official functions, and whose official authority has consequently ceased. Also, a thing, particularly an instrument or writing of any kind, which has fulfilled its purpose, and has therefore become of no virtue or effect. The phrase is generally, and more properly, applied to persons; as to an arbiter, who, when he has rendered his decision, is *functus officio*, and can do nothing more by way of modification or review of his award. But the term is also applied to things; as to a writ executed and returned, or a

bill of exchange received by the drawee and passed to the credit of the holder, and which, being then *functus officio*, cannot be further negotiated.

FUNERAL EXPENSES. This term comprehends more than the shroud, the coffin, and the grave. Such expenses may include carriage-hire, vaults, and tombstones. Donald *v.* McWhorter, 44 *Miss.* 124.

Furiosi nulla voluntas est. An insane person has no will. The law regards an insane person as not possessing the power of intelligent exercise of his will, upon which both civil and criminal responsibility depend. An insane person cannot give the assent which is essential to constitute a valid contract or create an obligation binding upon him, or make a conveyance or other disposition of his property. And, if unable to distinguish between right and wrong, he is incapable of the exercise of the will constituting the intent, which is an essential ingredient in crime. The latter application of the maxim is sometimes thus expressed, *furiosus solo furore punitur*, — an insane person is punished by his madness alone; that is, an insane person is not punishable for his acts.

FURNITURE. Includes that which furnishes, or with which any thing is furnished or supplied; whatever must be supplied to a house, a room, or the like, to make it habitable, convenient, or agreeable; goods, vessels, utensils, and other appendages necessary or convenient for housekeeping; whatever is added to the interior of a house or apartment, for use or convenience. Bell *v.* Golding, 27 *Ind.* 173.

A bequest of "stock, plantation utensils, and household furniture" will not pass stills, boilers, smiths' tools, casks, &c., nor hogs fattening on the plantation of the testator. Kendall *v.* Kendall, 5 *Munf.* 272.

A cooking-stove is an article of household furniture, necessary for upholding life, within the meaning of a statute exempting articles from attachment and execution. Crocker *v.* Spencer, 2 *D. Chip.* 68; Hart *v.* Hyde, 5 *Vt.* 328.

A piano-forte is not so exempt. Dunlop *v.* Edgerton, 30 *Vt.* 224; compare Tanner *v.* Billings, 18 *Wis.* 163.

A wooden statue of an elephant in red top-boots, which was used as a sign in front of the "Elephantine Boot and Shoe Store," boots and shoes being hung over it, was held to be included in two mortgages of goods in the store, by the term "furniture" in the first, and "signs and furniture" in the second. Curtis *v.* Martz, 14 *Mich.* 506.

A bequest of "all my household furniture" will pass all household effects except those kept for traffic or merchandise, including the furniture used by the testator in a boarding-school in which he lived. Hooper's Estate, 6 *Phila.* 364, 1 *Brews.* 462.

A bequest of all the testator's "household goods and furniture," passes every thing about the house that has usually been used therewith, and that will tend to the comfort and convenience of the householder. Carnagy *v.* Woodcock, 2 *Munf.* 234.

Plate used in the family passes under a conveyance of "household goods and furniture." Bunn *v.* Winthrop, 1 *Johns. Ch.* 329.

FUND. To fund a debt is to pledge a specific fund to keep down interest and reduce the principal. When extinguishment of the debt is the object prominently contemplated, the provision is called a sinking fund. The term fund was originally applied to a portion of the national revenue set apart or pledged to the payment of a particular debt. Hence a funded debt was a debt for the payment of the principal or interest of which some fund was appropriated. Ketchum *v.* City of Buffalo, 14 *N. Y.* 356, 367, 377, 21 *Barb.* 294.

A direction in a will to settle up and fund an estate so far as practicable, ordinarily signifies, to capitalize with a view to the production of interest. Stephens *v.* Milnor, 24 *N. J. Eq.* 358.

FUTURE. That which may be or will be hereafter.

Future earnings. This term, used in a statute regulating trustee process, which declares an unrecorded assignment of future earnings invalid against such process, includes money to become due for labor and services rendered and materials furnished under an entire contract for building a house, by the terms of which such labor and materials are to be paid for when the house is completed. Somers *v.* Keliher, 115 *Mass.* 165.

Future estate. An estate which is to commence in possession in the future. Such estates are otherwise termed expectancies, or estates in expectancy. They include remainders and reversions, and would include also estates limited to commence at a future time, without any particular estate to support them in the mean time, were not such estates generally prohibited. This definition expresses the sense in which the term is usually employed in English and American law; but in New York a future estate is defined by statute to be "an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination by lapse of time, or otherwise, of a precedent estate created

at the same time." 1 *N. Y. Rev. Stat.* 723, § 10. This definition excludes reversions, which cannot be said to be created at the same time, because they are a remnant of the original estate remaining in the grantor. The same statute, therefore, divides estates in expectancy into estates commencing at a future day, denominated future estates, and reversions. See ESTATE; REMAINDER; REVERSION.

Future extensions. This phrase, in a railway contract for tolls on "any future extensions or branches," does not include a future extension not authorized at the time of the contract, but only such extensions as had already been authorized by law. Morris, &c. R. R. Co. *v.* Sussex R. R. Co., 20 *N. J. Eq.* 542.

G.

G, in law French, seems to have been a letter of equivalent force with the English W; hence the two forms of some words, such as "gage" and "wage," meaning to give security; "garranty," now "guaranty," and "warranty." *Burrill.* The words "guardian," formerly "gardian," and "warden," also "ward," seem to present the same interchange of the two letters.

GAGE. Security; something given to assure a payment or performance. Only important at the present day as entering into the word mortgage (*q. v.*), *i.e.* dead pledge, a security not delivered to the creditor.

GAME. 1. A general term for animals of a wild nature, usually pursued or sought by sportsmen for amusement. As generally used, the word seems prominently to suggest birds; but it embraces beasts, and in special connections may probably include fishes. But no general definition can be given indicating species that are within the term; for its extension varies in different localities, according to differences in the fauna of different regions, in the habits of various communities, and the statutes of different jurisdictions.

Game-keeper. One who has the care of keeping and preserving the game, being appointed thereto by a lord of a manor.

Game laws. Laws regulating the taking or killing of birds, beasts, or fishes within the character or class deemed game. Such laws have long been in force in England, founded chiefly on the idea of protecting the right of taking game, as a privilege of certain classes, particularly land-owners. This being their basis, they seem to have been gradually relaxed, in accordance with the decline of monopolies and special privileges, and the growing recognition of popular rights. Throughout the United States, an opposite tendency is noticed. The chief basis of what are called game laws in this country is the preservation of the breed of the animals embraced, in view of their value to the general public for food and for sport. Hence the game laws of the states are generally aimed at preventing destruction during the breeding season; and such laws have grown rapidly in number, stringency, and rigor of enforcement during recent years.

2. A term applied to distinguish a class of amusements. In popular use, the term has probably a broader meaning than in law. Webster defines it, a contrivance, arrangement, or institution designed to furnish sport, recreation, or amusement; and Worcester, any sport or amusement, public or private, usually as a match for the trial of skill or luck. But what gives occasion for the use of the word at all in jurisprudence is the tendency of certain devices for amusement to incite the players to venture stakes, or third persons to make bets or lay wagers, on the success of one of the parties; hence the distinguishing element of "a game" seems to be that it is designed to amuse or interest by inciting emulation between rival parties, in competing for a single success. Gaming, however, means not merely playing any game, but uniting in a game the terms of which are that the winner shall receive something of value from the loser.

Gambling seems to be an equivalent term to gaming; we observe no important practical difference between the two words.

Gaming is sometimes used for engagements between third persons, to give and receive value, according to the result of a game; but for this, betting is the preferable term. Gaming is the act of persons who engage in playing a game for stakes. The engagement of persons not players to pay money on the event of a game is more accurately called a bet or a wager. See BET.

It is the game, and not the name by which it may be called, that determines whether playing it is in violation of law or not; the law is not to be evaded by changing the name by which it was known when prohibited. Smith *v.* State, 17 *Tex.* 191.

In the popular mind, the universal acceptation of "game of chance" is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill, or adroitness have honestly no office at all, or are thwarted by chance. As intelligible examples, the games with dice, which are determined by throwing only, and those in which the throw of the dice regulates the play, or the hand at cards depends upon a dealing with the face down, exhibit the two classes of games of chance. A game of skill, on the other hand, is one in which nothing is left to chance. State *v.* Gupton, 8 *Ired. L.* 271.

Illegal gaming implies gain and loss between the parties by betting, such as would excite a spirit of cupidity. Paying for the table by the rub is not gaming within the meaning of the law which makes the house a nuisance. People *v.* Sergeant, 8 *Cow.* 139.

It is not gaming to play on a licensed billiard-table, the loser to pay for the use of the table, for that is in accordance with the rule of the game, and the winner makes no profit by it, which is of the essence of gaming. Blewett *v.* State, 34 *Miss.* 606.

Playing cards, dice, or any game of hazard, to determine who shall pay for liquor, or for any other article, is illegal gaming. Commonwealth *v.* Taylor, 14 *Gray*, 26; Commonwealth *v.* Gourdier, *Id.* 390; McDaniel *v.* Commonwealth, 6 *Bush*, 326.

Gambling includes playing billiards for the use of the table, or for beer, oysters, or cigars. State *v.* Bishel, 39 *Iowa*, 42; compare Clark *v.* State, 49 *Ala.* 37.

The offence of gaming is complete by playing once, and does not require a repetition of it. Cameron *v.* State, 15 *Ala.* 383; Swallow *v.* State, 20 *Id.* 30.

If a party plays at a game, knowing that others the betting, he is guilty of gaming, under are statutes of Tennessee. Smith *v.* State, 5 *Humph.* 163.

Gaming, in certain statutory connections, held synonymous with betting. State *v.* Fearson, 2 *Md.* 312; Wolz *v.* State, 33 *Tex.* 331.

The term gaming apparatus does not include animals, such as fighting-cocks. Coolidge *v.* Choate, 11 *Metc.* (*Mass.*) 79.

Nor billiard-tables. See State *v.* Hope, 15 *Ind.* 474.

A billiard-table is a gambling-table. People *v.* Harrison, 28 *How. Pr.* 247; and see Smith *v.* State, 22 *Ala.* 54.

Betting on bagatelle is a violation of Va. Code, ch. 198, § 4, against "any game except bowls, chess," &c. Neal's Case, 22 *Gratt.* 917.

A pack of cards is not a gambling device within the meaning of Kan. crimes act, § 232. State *v.* Hardin, 1 *Kan.* 474.

Cock-fighting is an unlawful game or sport; and an innholder who suffers any person resorting to his premises to use or exercise that game or sport there is indictable under Rev. Stat. ch. 47, § 9. Commonwealth *v.* Tilton, 8 *Metc.* (*Mass.*) 232.

Under Tennessee statutes to prevent gaming, it is an indictable offence to bet on a cock-fighting match. Bagley *v.* State, 1 *Humph.* 486.

The game called "equality" is a "device" prohibited by Md. act of 1797, ch. 110. United States *v.* Speeden, 1 *Cranch C. Ct.* 535.

An election is not a game, nor can betting on an election be deemed within a statute against gaming. Woodcock *v.* McQueen, 11 *Ind.* 14; State *v.* Henderson, 47 *Id.* 127; but see Gordon *v.* Casey, 23 *Ill.* 70.

Whether a faro bank is necessarily a common gaming-table, see United States *v.* Ringgold, 5 *Cranch C. Ct.* 378; United States *v.* Milburn, *Id.* 390; 4 *Id.* 719; United States *v.* Cooley, *Id.* 707.

A gift enterprise, in which a tradesman sets his wares at market value, and by way of inducement to purchase gives each purchaser a ticket whereby he is entitled to a chance to win certain articles, the result to be determined by chance, is gaming. Bell *v.* State, 5 *Sneed*, 507.

Horse-trotting or horse-racing is a game, within a statute to prevent gaming. Ellis *v.* Beale, 18 *Me.* 337; Tatman *v.* Strader, 23 *Ill.* 493; Cheesum *v.* State, 8 *Blackf.* 332; Wade *v.* Deming, 9 *Ind.* 35; Shropshire *v.* Glasscock, 4 *Mo.* 536; Boynton *v.* Curle, *Id.* 599; and see Haywood *v.* Sheldon, 13 *Johns.* 88.

Gaming includes betting on a horse-race. Garrison *v.* McGregor, 51 *Ill.* 473.

A horse-race is not a "game of hazard or skill," within the meaning of Gould's Dig. 371, §§ 9, 10. State *v.* Rorie, 23 *Ark.* 726.

Horse-racing is not a game of chance, within the meaning of the Iowa statute to prevent and punish gambling. Harless *v.* United States, 1 *Morr.* 169.

A horse-race is not a gambling device within the meaning of Mo. crimes act, art. 8, § 17. State *v.* Hayden, 31 *Mo.* 35.

Horse-racing along a public road is not gaming, in the sense of Tenn. Code, § 4882. Harrison *v.* State, 4 *Coldw.* 195.

Betting on a horse-race is not gaming, within the meaning of Va. crimes act of March 14, 1848, § 10. Shelton's Case, 8 *Gratt.* 592.

That "game," "gaming," and "gambling," include keno, see Miller *v.* State, 48 *Ala.* 122; Trimble *v.* State, 27 *Ark.* 355; Portis *v.* State, *Id.* 360; New Orleans *v.* Miller, 7 *La. Ann.* 651.

The game of loto is a gambling device, and keeping a loto-table at which the game is played for money is indictable. Lowry *v.* State, 1 *Mo.* 722.

Betting upon the game of pool is within the prohibition of a statute against gaming. State *v.* Jackson, 39 Mo. 420.

Selling prize candy-packages is gaming, and indictable. Eubanks *v.* State, 3 *Heisk.* 488.

A raffle held not to be within the prohibition of certain statutes against gaming. Norton *v.* State, 15 *Ark.* 71; Commonwealth *v.* Garland, 5 *Rand.* 652.

The game of rondo is not a gambling game within the statute prohibiting banking games, and is not an indictable offence by statute or at common law. State *v.* Hawkins, 15 *Ark.* 259.

When stocks are bought and sold, although upon speculation, if they are to be delivered, it is not a gambling transaction. Smith *v.* Bouvier, 70 *Pa. St.* 325.

A ten-pin alley at a watering-place, kept for public play, and used solely for the exercise and amusement of guests, without charge or profit, is within the statute against gaming. Spaight *v.* State, 29 *Ala.* 32.

A ten-pin alley, kept for hire by the game, where the practice of the loser of the game paying for the use of the alley is habitually suffered, is not on this account a common gaming-house. State *v.* Hall, 32 *N. J. L.* 158.

GAOL. See JAIL.

GARNISHMENT. Originally, a notice or warning of the pendency of a cause, given to a person not a party, to enable him to appear and explain his interest in the subject of the suit.

In suits involving collection of debts by attachment of funds which may be owing from a third person to the debtor, it is necessary to give the third person warning of the suit, that he may appear and disclose the nature and amount of his indebtedness. Hence, in several of the states, attachment is known in this branch of that remedy as garnishment. The third person warned is called a garnishee. He is said to be garnisheed, or, sometimes, garnished. There is some confusion in the use of these two orthographies; if there is a distinction, it seems to be that the person warned is "garnish*eed*," the fund or property sought to be secured is "garnish*ed*." See ATTACHMENT.

Garnishment was in use in England, in cases of detinue of charters, thus: a defendant might allege that certain deeds were delivered to him by the plaintiff and another person upon condition, and pray that the other person might be warned to plead with the plaintiff as to whether the conditions were performed or not, he, the defendant, being willing to deliver the property to the party entitled to it; and thereupon a process of garnishment, monition, or notice might issue, and all parties be brought before the court, that all the interests might be determined. It was thus analogous to interpleader. *Termes de la Ley;* 3 *Reeve Hist. Eng. Law*, 448.

Garnishment is a proceeding to apply the debt due by a third person to a judgment defendant, to the extinguishment of that judgment, or to appropriate effects belonging to a defendant, in the hands of a third person, to its payment. Strickland *v.* Maddox, 4 *Ga.* 393.

The object of garnisheeing is to know whether a party has funds in his hands belonging to another, against whom plaintiff either has or expects to get judgment; so that, after he has obtained judgment, he may also obtain judgment against the garnishee, for the amount of his judgment against the debtor, or for so much as there may be funds in the hands of the garnishee, due or belonging to the debtor. Rose *v.* Whaley, 14 *La. Ann.* 374.

The proceeding of garnishment, as regulated by the Arkansas statute, is anomalous, being partly legal and partly equitable. It is a civil suit, and not mere process of execution to enforce a judgment already obtained. Tunstall *v.* Worthington, *Hempst.* 662.

The word garnishee is especially applied in law to a debtor who is warned by the order of a court of justice to pay his debt, not to his immediate creditor, but to a creditor of that creditor. The order is called a garnishee order; and the process of laying hold of debts due to a judgment debtor, in order to satisfy the demands of the judgment creditor, is called attachment, or, in Scotland, arrestment. *Mozley & W.*

A garnishee is, in the eyes of the law, a mere stakeholder, a custodian of the property attached in his hands in the garnishment proceeding. Schindler *v.* Smith, 18 *La. Ann.* 476.

GAUGER. The title of an officer

employed chiefly in administration of customs, excise or internal revenue laws, whose function is to examine all tuns, pipes, hogsheads, barrels, and tierces of wine, oil, and other liquids, and, if found correct, to give them a mark of allowance, as containing lawful measure.

GAVELKIND. A species of tenure of lands which still governs throughout most of the county of Kent in England; and is also to be found in some other parts of the kingdom, and which is supposed to have been the general custom of the realm in Saxon times, or down to about A.D. 1066; since which the feudal law of primogeniture superseded it. The principal characteristics of this tenure are these:

At the age of fifteen, the tenant is of age sufficient to alien his estate by feoffment.

The estate never escheated in case of an attainder for felony.

The tenant may dispose of the lands by will.

The lands descend, on an intestacy, not to the eldest son, but to all the sons together.

The widow is endowed of half the lands of which her husband died seised, and the husband is tenant by curtesy of the half, although he may have no issue by his wife; but the estate of the husband or wife ceases by a second marriage. *Termes de la Ley; Cowel;* 1 *Bl. Com.* 74, 75; 2 *Id.* 84, 85; 4 *Id.* 408; 1 *Steph. Com.* 54, 210, 213; 4 *Id.* 483; *Wharton.*

GAZETTE. The official publication of the English government, also called the "London Gazette." It is evidence of acts of state, and of every thing done by the queen in her political capacity. Orders of adjudication in bankruptcy are required to be published therein; and the production of a copy of the "Gazette," containing a copy of the order of adjudication, is evidence of the fact. *Mozley & W.*

GEMOT, or GEMOTE. A Saxon word signifying meeting. It occurs in some old compounds, naming the various public meetings known in Saxon times. The principal ones were:

The folc-gemot, or general assembly of the people, held in a city or town, or consisting of the whole shire. It was held annually.

The shire-gemot, or county court, which met twice during the year.

The burg-gemot, which met thrice in the year.

The hundred-gemot, or hundred court, which met twelve times a year in the Saxon ages; but afterwards a full, perhaps an extraordinary, meeting of every hundred was ordered to be held twice a year.

The halle-gemot, or the court-baron.

The ward-gemot, or ward meeting.

The wittenagemot, or assembly of the wise men, now the parliament.

GENERAL. 1. In its vernacular sense of comprehensive; relating to a whole class, genus, or kind, general occurs in several technical phrases.

General agent. An agent (*q. v.*) whom the principal employs to transact all his business of a particular kind.

A general agent is one appointed to act in the affairs of his principal generally; a special agent is one appointed to act concerning some particular object. Wood *v.* McCain, 7 *Ala.* 800, 804.

A general agency exists where there is a delegation to do all acts connected with the particular business or employment. *Story Agency,* § 17; Trundy *v.* Farrar, 32 *Me.* 225; Farmers', &c. Bank *v.* Butchers', &c. Bank, 16 *N. Y.* 125, 148.

A general agent is not merely one substituted in the place of another for transacting all manner of business, but a person whom a man puts in his place to transact all his business of a particular kind; as to buy and sell certain kinds of wares, to negotiate certain contracts, and the like. (*Paley Agency,* ch. 3, § 5.) A person employed by another for a particular purpose, and acting under limited and circumscribed powers, is a special agent. Jaques *v.* Todd, 3 *Wend.* 83; Jeffrey *v.* Bigelow, 13 *Id.* 518.

General assembly. In some of the states, this is the title of the legislative body.

General average, expresses that contribution to a loss or expense voluntarily incurred for the preservation of the whole, in which all who are concerned in ship, freight, and cargo, are to bear an equal part, proportionable to their respective interests. And for the loss incurred by this contribution, however small in amount, the respective owners are to be indemnified by their insurers. Padelford *v.* Boardman, 4 *Mass.* 548.

Cases of general average arise where loss or damage is voluntarily and properly incurred in respect of the goods on board ship, or in respect of the ship, for the general safety of both ship and cargo; the loss

sustained by the particular owners having inured to the advantage of the owners generally, it is only equitable to distribute, *i.e.* adjust, the loss ratably over all the owners; and such adjustment is general average. The phrase, simple or particular average, is an inaccurate and misleading phrase, meaning nothing more than that a particular damage, *e.g.* the souring of a cask of wine, must rest where it falls. *Brown.*

General council. This name is sometimes applied to parliament.

General credit. The general credit of a witness is his character as a credit-worthy man; and his particular credit is his credit as a witness in the particular action. Bemis *v.* Kyle, 5 *Abb. Pr.* N. S. 232.

General damages, are those which by implication of law result from a wrong or breach of duty, and may be awarded in the sound discretion of the jury, without requiring evidence of the exact loss.

General demurrer. A demurrer which objects to a pleading in general terms as insufficient, without specifying the nature of the defect or objection. This is allowed in some cases. The rule allowing it varies in different jurisdictions, but the tendency is that a general demurrer presents substantial defects; while objections to matters of form must be specified.

General election. An election held throughout a state for state officers and officers pertaining to that organization of government which is operative throughout the state; as distinguished from an election of officers for a particular locality only.

General field. Several distinct lots or pieces of land enclosed and fenced in as one common field. Mansfield *v.* Hawkes, 14 *Mass.* 440.

General fund. This phrase, in New York, is a collective designation of all the assets of the state which furnish the means for the support of government and for defraying the discretionary appropriations of the legislature. People *v.* Board of Supervisors of Orange, 27 *Barb.* 575, 588.

General insurance. See INSURANCE.

General issue. This term is applied to the various pleas which rest the defence upon a general, that is, complete, unqualified denial of the substance of the declaration, information, or indictment, without offering any special matter whereby to avoid it. Such is the plea of not guilty in an action of tort or an indictment for a criminal offence; a plea of never indebted in an action of debt, &c. Such pleas are called the general issue, because, by importing an absolute and general denial of what is alleged in the declaration, they amount at once to an issue.

General jail delivery. See JAIL.

General jurisdiction. See COURT.

General land-office. A bureau in the department of the interior of the United States government, located at Washington, and charged with the general administration of the laws relative to the sale of the public lands, and with the custody of records pertaining thereto. It is termed the general land-office in distinction from the district land-offices, which are located in the several districts where lands are for sale, and have local duties to perform.

General legacy. See LEGACY.

General lien. The right of a bailee to detain a chattel from its owner until payment be made, not only in respect of that particular article, but of any balance that may be due, on a general account between the bailor and bailee, in the same line of business.

General orders, or rules. This phrase designates orders or rules of court, promulgated for the guidance of practitioners and the regulation of procedure in cases of a class, or falling under some head of jurisdiction, as all bankruptcy cases; in distinction from orders or rules made in a particular cause. But the term general is not always prefixed. What are usually cited as rules of court are the general rules.

General owner, or property. These phrases are used with reference to the principle that a thing may be owned by one person, subject to some interest or right in it, which is of the nature of ownership, vested in another. The person in whom the title is primarily and principally vested is called the general owner, and said to have the general property; while one who has a possession and interest, a lien, &c., is called special owner, or said to have a special property.

General (and special) property, are con-

stantly used to denote, not the chattel itself, but the different interests which several persons may have in it. Stief *v.* Hart, 1 *N. Y.* 20, 25.

General sessions. See COURT OF SESSIONS.

General ship. A vessel which is open to carry goods for all merchants who may apply; as distinguished from one which is chartered or let to particular parties.

A vessel in which the master or owners engage separately with a number of persons unconnected with each other, to convey their respective goods to the place of the ship's destination. Ward *v.* Green, 6 *Cow.* 173.

General tail. An estate-tail where one parent only is specified, from whom the issue must be derived, as in a grant to A and the heirs of his body.

General tenancy, in an enactment that "all general tenancies, in which the premises are occupied by the consent, either express or constructive, of the landlord, shall be deemed tenancies from year to year," was held to mean such tenancies only as are not fixed and made certain in point of duration, by the agreement of the parties. Brown *v.* Bragg, 22 *Ind.* 122.

General verdict. See VERDICT.

General warrant. A warrant to apprehend the persons suspected of a particular offence, without naming individuals, has been called a general warrant. Such a warrant is, however, illegal. See *Wharton; Bouvier.*

General warranty. This term is sometimes applied to the covenant of warranty, commonly inserted in conveyances in American practice, — that the grantor will warrant and for ever defend the title of the grantee to the premises conveyed, — by way of distinction from other special covenants for title. See COVENANT.

2. General, in military law, is also the title of an officer high in command; but the authority and rank must be ascertained by the governing law. In the United States, general, alone, is the highest title that has been bestowed in the army. Rev. Stat. § 1094. The word is compounded with others in some titles of lower rank; as lieutenant-general, brigadier-general.

Generalia verba sunt generaliter intelligenda. General words are to be understood in a general sense. A rule of construction; signifying that general words in an instrument or statute are to be taken in their broad and general sense, unless some special restriction or limitation of their meaning is plainly expressed.

Generalibus specialia derogant. Special provisions derogate from general. A rule of construction of general application to statutes, as well as to deeds and other instruments. Whereever general and special provisions relating to the same subject-matter are to be construed together, the special words or clauses may limit the operation and effect of the general language, but are not to be limited or explained by it. So, as between different statutes upon the same subject, a special statute is not derogated from by a general provision, even though, in some cases, the general statute is enacted subsequently. The maxim is sometimes expressed conversely, *generalia specialibus non derogant*, — general provisions do not derogate from special.

Generalis clausa non porrigitur ad ea quæ antea sunt comprehensa. A general clause does not extend to those things which have been previously included; a general provision is not applied to things provided for by a prior special provision. This rule of construction allows both general and special words in an instrument to have their due effect when construed together. It is a more limited statement of the rule expressed by the maxim, *generalibus speciala derogant.*

GENTLE. A warranty that a horse was "well broke" might include a warranty that he was "gentle," as the greater includes the less. But a declaration that a horse was warranted gentle, and that he proved to be otherwise, is not supported by proof that he was not so trained as to be suited to a particular kind of work. The word gentle does not, in its ordinary or legal sense, import that the horse has received any particular training or teaching, but only that he is docile, tractable, and quiet. He may be perfectly submissive and obedient, and yet not have been taught what to do, or how to do it, when set to plough out corn or potatoes, or to rake hay. Bodurtha *v.* Phelon, 2 *Allen*, 348.

GENTLEMAN, or GENTLEWOMAN. In England, the name of a condition or degree between that of yeoman

and that of esquire. It is also sometimes used as including all above the yeomanry; the nobility are gentlemen; but nobility and gentry is the more common expression.

Under the denomination of gentlemen are comprised all above yeoman; whereby noblemen are truly called gentlemen. *Smith de Rep. Ang.* lib. 1, c. 20, 21.

A gentleman is defined to be one who, without any title, bears a coat of arms, or whose ancestors have been freemen; and by the coat that a gentleman giveth, he is known to be, or not to be, descended from those of his name that lived many hundred years since. *Jacob.*

The word was not employed as a legal addition until about the time of Henry V.

The gentry may be divided into three classes: Those who derive their stock with arms from their ancestors are gentlemen of blood and coat-armor. They are, of course, the most noble who can prove the longest uninterrupted continuance of nobility in the families of both their parents.

Those who are ennobled by knighthood or otherwise, with the grant of a coat-of-arms, are gentlemen of coat-armor, and give gentility to their posterity. Such have been scornfully designated "gentlemen of paper and wax."

Those who, by the exercise of a liberal profession, or by holding some office, are gentlemen by reputation, although their ancestors were ignoble, as their posterity remains after them. These are not really gentlemen, though commonly accounted such. *Wharton.*

GENUINE. When used with reference to a note, imports nothing in regard to the collectibility of the note, or in regard to its legal effect or operation, other than that the note is not false, fictitious, simulated, spurious, counterfeit; or, in short, that the apparent maker did make and deliver the note offered for sale. Baldwin *v.* Van Deusen, 37 *N. Y.* 487.

Gestio pro hærede. Behavior as heir. This expression was used in the Roman law, and adopted in the civil law and Scotch law, to denote conduct on the part of a person appointed heir to a deceased person, or otherwise entitled to succeed as heir, which indicates an intention to enter upon the inheritance, and to hold himself out as heir to creditors of the deceased; as by receiving the rents due to the deceased, or by taking possession of his title-deeds, &c. Such acts will render the heir liable to the debts of his ancestor. *Mozley & W.*

GIFT. In modern law, signifies a transfer of property made without a consideration; also, the thing given is popularly called a gift.

A promise to give is not enforceable at law, for want of a consideration; but a gift executed by delivery will be, in general, valid and operative as between the parties, and as respects personal property. It does not, however, bar the claims of creditors of the donor.

As to the distinction between gifts between living persons and gifts in view of death, see DONATIO.

Gift and advancement are sometimes used interchangeably as expressive of the same operation. But while an advancement is always a gift, a gift is very frequently not an advancement. Dewee's Estate, 3 *Brews.* 314.

GIST. The expression, gist of an action, means the essential ground of the right to sue; the fact or matter without which the action could not be maintained. This may in some cases be distinct from the chief reason for damages. Thus, in an action for seduction, the loss of service is the gist of the action; but the injury to the feelings of the father, which only enters collaterally into the action, may be the main ground of damages.

GIVE. In their ordinary and familiar signification, the words sell and give have not the same meaning, but are commonly used to express different modes of transferring the right to property from one person to another. To sell means to transfer for a valuable consideration, while to give signifies to transfer gratuitously, without any equivalent. Parkinson *v.* State, 14 *Md.* 184.

Give is a good word to pass real estate in a deed of gift. Pierson *v.* Armstrong, 1 *Iowa*, 282.

Give implies transfer of title. Norton *v.* Woodruff, 2 *N. Y.* 153.

The word give, in a conveyance in fee, implies a warranty, but the word grant does not. But this distinction has now become merely technical. Frost *v.* Raymond, 2 *Cai.* 188, 195.

Give implies a personal warranty. Grant implies a covenant in law, when used in a lease for years, or, if it be not qualified by a covenant or warranty in fact, a general warranty. But, in an estate of inheritance, where the fee passes, then the word grant is neither a covenant in law nor a warranty. Grannis *v.* Clark, 8 *Cow.* 36.

Whether give implies a warranty, see 2 *Ala.* N. S. 555; 7 *Gill & J.* 311; 5 *Me.* 227; 23 *Id.* 219; 14 *Wend.* 38; 1 *Murph.* 343; 2 *Hill. Real Prop.* 366.

To give a reward by way of bribe, is to

pass or deliver the reward or bribe immediately to another. To offer it, is to present it for acceptance or rejection; to promise it, is to make a declaration or engagement that it shall be given; and to procure it, is to obtain it from others. State *v.* Harker, 4 *Harr.* (*Del.*) 559.

Give, in a statute prohibiting the giving of liquor to a minor, is synonymous with "furnish" or "supply," and includes a sale to the minor. Commonwealth *v.* Davis, 12 *Bush*, 240.

Give time. To accord extension or forbearance to a debtor.

GLEBE. The land of which a rector or vicar is seised in right of the church. (*Termes de la Ley.*) We most commonly (says *Cowel*) take it for land belonging to a parish church, besides the tithe. It is, in fact, a portion of land attached to a benefice as part of its endowment. *Mozley & W.*

GOD'S PENNY. See DENARIUS DEI.

Going off large. This is a nautical phrase, and signifies having the wind free on either tack. Ward *v.* The Fashion, 1 *Newb.* 8, 26, 6 *McLean*, 152, 170.

A vessel, in nautical technicality, "is going off large," when the wind blows from some point "abaft the beam;" is going "before the wind," when the wind is "free," comes over the stern, and the yards of the ship are braced square across. Hall *v.* The Buffalo, 1 *Newb.* 115.

For the reason that the impetus of steam vessels is controlled by human skill, they are considered as vessels navigating with a fair wind, or "going off large," and, therefore, bound to give way to sail vessels, beating to the windward on either tack. Ward *v.* The Fashion, 6 *McLean*, 152, 1 *Newb.* 8; The New Jersey, *Olc.* 415; The Neptune, *Id.* 483; The Washington Irving, *Abb. Adm.* 336; The Osprey, *Sprague*, 245; Red Bank Co. *v.* The John W. Gandy, 41 *Hunt's Merch. Mag.* (Nov. 1859), 577; 1 *Phila.* viii. 26.

GOOD. This vernacular word occurs in several phrases in frequent use in jurisprudence.

Writing the word good across the face of a check is the customary mode in which bankers at the present day certify that it will be paid, on presentation for that purpose. This practice of certification is of recent growth, but has assumed very great importance. The early decisions were not agreed upon the legal effect of thus certifying or stamping a check as "good." One view contended for was, that it was information given by the bank of the state of the drawer's account at the time, but did not control his future drafts against it; if the certificate was truthful when given, the bank was not in fault if after-checks diminished the deposit so that it became too small to pay the certified check when presented. Another view taken has been, that, by writing the check "good," the bank assumes the duty of protecting it; becomes bound to keep it good, and to that end may lawfully refuse to pay after-checks which would render the balance too small. The latter opinion has, upon the whole, prevailed. Mr. Daniel (2 *Dan. Neg. Inst.* § 1603) states the general result of the decisions to be, that, by giving the certificate good, the bank becomes at once the principal debtor. If it is agreed between the holder of the check, on a presentment of it, and the bank that the check shall be certified as "good," the legal effect is the same as if the fund had been paid by the bank to the holder, and by him redeposited to his own credit, and a certificate of deposit issued to him therefor. In other words, "a certified check is a short-hand certificate of deposit in favor of the holder." By it the bank ceases to be the debtor of the original depositor, and becomes the debtor of the holder of the check. It cannot say, on presentment of the check, that there were in fact no funds of the drawer to meet it; for its certificate is an assurance that there were such funds, and that it would apply them to the purpose. These doctrines (he says) are now universally settled. See also Willets *v.* Phœnix Bank, 2 *Duer*, 121; Farmers' & Mechanics' Bank *v.* Butchers' & Drovers' Bank, 4 *Duer*, 219; Meads *v.* Merchants' Bank, 25 *N. Y.* 143.

Thus the United States supreme court has held, in Merchants' Bank *v.* State Bank, 10 *Wall.* 648, that by the law-merchant of this country the certificate of a bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for non-payment. It is an undertaking

that the check is good then, and shall continue good; and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit, or any other obligation. The object of certifying a check is to enable the holder to use it as money.

The doctrine is, however, founded upon the principle of estoppel and the injustice of allowing the bank to deny its certificate to the prejudice of those who have acted in reliance upon it; and it is subject to corresponding limitations. As pointed out by the New York court of appeals, in Irving Bank *v.* Wetherald, 36 *N. Y.* 335, the certificate "good" possesses no extraordinary or hidden power. It is information that the maker has funds to meet the note. And if such a certificate is erroneously made, and the error is discovered and notice given to the presenter of the check, in time to make a re-presentation and charge the indorsers, the certifying bank is discharged from further liability.

Good abearance, or behavior. Conduct conformable to law. Security for good behavior may be required upon proof of a reasonable ground to suspect the party of intending the commission of an offence.

Blackstone speaks of good behavior as synonymous with good abearing, and as implying a restraint from acts that be *contra bonos mores*, as well as *contra pacem;* as the haunting of bawdy-houses; words tending to scandalize the government; and abuse of the officers of justice, especially in the execution of their office. 4 *Bl. Com.* 256.

Good and collectible, as used in a guaranty of a note, mean "capable of being collected;" but do not require the obtaining of a judgment, and an execution returned unsatisfied, as the only evidence that the demand is incapable of being collected. Sanford *v.* Allen, 1 *Cush.* 473.

Where a note was guaranteed to be "good and collectible two years," held, that the guarantor was liable upon his contract at any time after the note became due, within two years. Marsh *v.* Day, 18 *Pick.* 321.

A guaranty that the note "is good" is in law a contract that the maker is solvent, and that the amount can be collected by due course of law. Cook *v.* Nathan, 16 *Barb.* 342; Curtis *v.* Smallman, 14 *Wend.* 231.

Good and lawful. Return that the appraisers were "good and lawful freeholders," &c., imports that they were "disinterested" as required by statute. Day *v.* Roberts, 8 *Vt.* 417; and see Aldis *v.* Burdick, *Id.* 21.

Good cause, for setting aside a report of commissioners, imports some ground for action, clear and indubitable. Virginia, &c. R. R. Co. *v.* Henry, 8 *Nev.* 165.

Good consideration. In a very proper sense of the words, any consideration which will sustain the contract or conveyance is a good consideration; and the phrase, as used in the statute of frauds, is held to mean a valuable consideration. In another sense, it is opposed to valuable. Considerations are divided into good and valuable; a conveyance founded on relationship or natural love and affection, is said to be founded on a good, though not valuable, consideration.

In the statute of frauds (13 Eliz. ch. 5) the phrase "good consideration" excludes the consideration of nature or blood, and means only money or other valuable consideration. *Dwarris Stat.* 654.

It is construed to mean valuable consideration, as between existing creditors and others claiming under the debtor. Cunningham *v.* Dwyer, 23 *Md.* 219.

The meaning of "good consideration" in the statute of frauds is settled to be the same with "valuable." Hodgson *v.* Butts, 3 *Cranch*, 140; Killough *v.* Steele, 1 *Stew. & P.* 262.

Good faith. A creditor or purchaser in good faith is one who has loaned money or purchased property fairly, in the usual course of business, for an honest price, and without being cognizant of or implicated in any intent which the borrower or seller may have had to evade claims of his creditors or defraud some person interested in the matter. See PURCHASER.

Good order. In a bill of lading of bales of cotton, described therein as "in good order and well conditioned," these words have reference to the external condition of the cotton, importing that it was in good shipping condition at the time it was received on board of the vessel, but do not refer to or warrant the internal quality or condition of the cotton in the bales. Bradstreet *v.* Heran, 2 *Blatchf.* 116; The California, 2 *Sawyer*, 12.

The phrase, in good order, in a bill of lading of barrels of pork, refers to the good external condition of the packages, and not to the soundness of the pork. West *v.* Berlin, 3 *Iowa*, 532.

The words, in good order and well con-

ditioned, used in a bill of lading, refer to the exterior and apparent condition of the goods and to their internal condition only so as may be inferred from external appearances. Keith *v.* Amende, 1 *Bush*, 455.

Though a bill of lading acknowledging the goods to be in "good order" is open to explanation, still its recital cannot be overthrown nor qualified except by very clear evidence. Bond *v.* Frost, 6 *La. Ann.* 801.

GOODRIGHT; GOODTITLE. The fictitious plaintiff in the old action of ejectment, most frequently called John Doe, was sometimes called Goodright or Goodtitle.

GOODS. A word of general signification for all sorts of inanimate, movable property. It does not seem to be used in an exact and uniform sense, with regard to what specific things are included under it. In some connections or instruments it is construed as more extensive than in others; in a will, for instance, it has been held sufficient to pass all personal estate, if not restrained by the context. *Jarm. Wills.* 692; 1 *Rop. Leg.* 250; Taylor *v.* Barron, 35 *N. H.* 484. When found in penal statutes, it is construed as limited to movables belonging to the property of some person, which have an intrinsic value; and does not include securities, which are not valuable in themselves, but merely represent value. In construing agreements, the application of the term is often restricted; but, in its legal sense, it includes all tangible property, even living animals. Taylor *v.* Barron, 35 *N. H.* 4, 484.

Goods includes shares of manufacturing stock. Ayres *v.* French, 41 *Conn.* 142.

That "goods," in a contract or deed, will not, as a general thing, include fixtures, see 1 *Chitt. Gen. Pr.* 90.

Goods, in a statute giving an action on contracts for the transportation of goods, does not include money or bank-bills. Pumphry *v.* The Parkersburgh, 2 *West. L. Mo* 491.

The words "goods or movables," in a will, carry bonds and money, unless there are other parts of the will repugnant to that interpretation. Jackson *v.* Robinson, 1 *Yeates*, 101.

Goods and chattels. This phrase, in the fullest sense, includes any kind of property which is not freehold; but in practice is most frequently limited to things movable, especially things movable in possession. *Mozley & W.*

This phrase, in contracts, includes not only personal property in possession, but written instruments, at least such as are of value, relating to business matters. Gibbs *v.* Usher, 1 *Holmes*, 348.

It does not include dogs. State *v.* Lymus, 26 *Ohio St.* 400.

It is the generic denomination of things personal, as distinguished from things real, or lands, tenements, and hereditaments. *Wharton.*

It is not the proper descriptive phrase for bank-notes in an indictment for larceny; they should be laid as the property, not the goods and chattels, of the prosecutor; but "goods and chattels" may be stricken out as surplusage. Commonwealth *v.* Boudvie, 4 *Gray*, 418; Morris' Case, 2 *Leach*, 525.

In a statute regulating executions against property, it does not embrace real estate. Thompson *v.* Chauveau, 7 *Mart.* (*La.*) N. S. 331.

Goods and chattels equivalent to goods, wares, and merchandise. See Passaic Manuf. Co. *v.* Hoffman, 3 *Daly*, 495.

Goods and merchandise. This phrase includes specie. American Ins. Co. *v.* Griswold, 14 *Wend.* 399.

Shares in corporations are included in the statute of frauds requiring a written memorandum of a contract for the sale of goods, wares, or merchandise, by its terms as well as by its general policy. The words "goods" and "merchandise" are both of very large signification. *Bona*, as used in the civil law, is almost as extensive as personal property itself, and in many respects it has nearly as large a signification in the common law. The word merchandise also, including, in general, objects of traffic and commerce, is broad enough to include stocks or shares in incorporated companies. Tisdale *v.* Harris, 20 *Pick.* 9.

A policy on goods and merchandise will cover a curricle. Duplanty *v.* Commercial Ins. Co., *Anth. N. P.* 157.

Goods and merchandise, in the act of congress of March 3, 1851, relative to the liability of ship-owners for goods and merchandise, includes baggage of a passenger as well as goods shipped on freight. The general meaning of the term includes all personal estate. The cases in which an insurance of goods and merchandise has been held to cover only cargo depended upon a restricted usage of the word, with reference to the probable intention of the parties to a contract of insurance. Chamberlain *v.* Western Transp. Co., 44 *N. Y.* 305.

Goods, wares, and merchandise. Throughout the earlier duty laws of the United States, "goods, wares, and merchandise" is generally used as the proper, comprehensive clause for all descriptions of dutiable property. In the revision of the laws in 1873, merchandise alone was substituted as an equivalent, under a general provision

(Rev. Stat. § 2766) that "the word merchandise may include goods, wares, and chattels of every description, capable of being imported."

Silver dollars are "goods, wares, and merchandise" within section 50 of the revenue act of 1799, for the landing of which a permit from the custom-house is necessary. Landing them without permit involves the forfeiture of the vessel. The Elizabeth and Jane, 2 *Mas.* 407.

Appurtenances or equipments of a ship, as a chain cable, or other articles, purchased *bona fide* for the use of the ship, are not "goods, wares, or merchandise" requiring a permit before they are landed. United States *v.* Chain Cable, 2 *Sumn.* 362; s. p. Weld *v.* Maxwell, 4 *Blatchf.* 136; United States *v.* Twenty-three Coils of Cordage, *Gilp.* 299.

What was understood by the words "goods, wares, or merchandise," as used in the English statute of frauds requiring a note in writing of any agreement for the sale of goods, wares, or merchandise for the price of £10 or upwards, when that statute was enacted, and for a century afterwards, was the commodities bought and sold in trade and commerce. The early dictionaries define merchandise as "commodities or goods to trade with," and "goods" and "wares" by "merchandise" as a synonyme. Things made to order, pursuant to a contract for labor and materials to be furnished by the party who is to supply and be paid for the manufactured result, are not within these terms; and such a contract is not within the statute. Passaic Manuf. Co. *v.* Hoffman, 3 *Daly*, 495.

Goods, wares, and merchandise, as used in a statute of frauds, does not include an interest in an unpatented invention. Somerby *v.* Buntin, 118 *Mass.* 279.

This phrase held to include cattle. Weston *v.* McDowell, 20 *Mich.* 353.

That it includes gold coin, see United States *v.* American Gold Coin, 1 *Woolw.* 217.

That growing annual crops are within it, see 8 *Dowl. & R.* 314; 10 *Barn. & C.* 446; 4 *Mees. & W.* 347; and *contra*, 2 *Taunt.* 38.

That fixtures are not within the phrase, see 1 *Crompt. M. & R.* 275; 3 *Tyrwh.* 959; 1 *Tyrw. & G.* 4.

Whether it includes stocks and evidences of debt, see 20 *Pick.* 9; *Dudley*, 28; 2 *Pars. Cont.* 330; 2 *Kent Com.* 510, note.

Bank-bills are not within the meaning of a statute making carriers liable for the transportation of goods, wares, merchandise, &c. Sewall *v.* Allen, 6 *Wend.* 335, 355.

GOOD-WILL. The advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices. *Story Part.* § 99; Bell *v.* Ellis, 33 *Cal.* 620; Smith *v.* Gibbs, 44 *N. H.* 335, 343; Howe *v.* Searing, 6 *Bosw.* 354, 370; *Wharton.*

Good-will is the probability that the old customers will continue to come to the old place; the right to use trade-marks of the firm, or the name of the firm. Fenn *v.* Bolles, 7 *Abb. Pr.* 202.

The term good-will does not mean simply the advantage of occupying particular premises which have been occupied by a manufacturer, &c. It means every advantage, every positive advantage, that has been acquired by a proprietor, in carrying on his business, whether connected with the premises in which the business is conducted, or with the name under which it is managed, or with any other matter carrying with it the benefit of the business. Glen, &c. Manuf. Co. *v.* Hall, 61 *N. Y.* 226.

Inasmuch as the "good-will" of a business consists in the probability that customers will continue to come to the old place of business (17 *Ves.* 347), it is only coextensive with the business carried on; and the seller thereof may properly lease other property in the vicinity to another person who may carry on the same business, provided there is no collusion, and the lessor has no interest in the business. Bradford *v.* Peckham, 9 *R. I.* 250.

GRACE. This word is commonly used in contradistinction to right. Thus, in Stat. 22 Edw. III., the lord chancellor was instructed to take cognizance of matters of grace; being such subjects of equity jurisdiction as were exclusively matters of equity.

Again, days of grace (*q. v.*) is a phrase denoting extra days allowed by the custom of merchants, after the maturity of a bill or note, according to its letter, for the payment thereof. The number of days allowed is three in England and the United States. It varies in different countries. See *Wharton* for a table.

GRAIN. Even in a penal statute, includes millet and sugar-cane seed. Holland *v.* State, 34 *Ga.* 455.

It may include oats. A privilege, in a lease, of cultivating grain, confers the right to raise oats. Smith *v.* Clayton, 29 *N. J. L.* 357.

GRANARY. A building 21 by 15 feet, placed on a market garden, and used for storing tools and agricultural implements, and for storing grain and seed to be sown, fertilizers, and other things of a similar nature, was held not a warehouse or a granary, within the meaning of a statute making it a penal offence to enter such buildings in the night-time and commit larceny therein. State *v.* Wilson, 47 *N. H.* 101.

GRAND. Occurs in several compounds.

Grand assise. A peculiar species of trial by jury introduced in the time of Henry II., giving the tenant or defendant in a writ of right the alternative of a trial by battle, or by his peers. It was abolished by 3 & 4 Wm. IV. cb. 42, § 13. *Wharton.*

Grand bill of sale. An expression which is understood to refer to the instrument whereby a ship was originally transferred from the builder to the owner, or first purchaser. 3 *Kent Com.* 133.

Grand days. Certain festival days, in the customs of the English inns of court.

Grand distress. A more extensive kind of distress than ordinary, extending to all the goods and chattels of the party distrained within the county. It lay in those cases when the tenant or defendant was attached, and appeared not, but made default; and also when the other party made default after appearance. *Termes de la Ley; Cowel.*

Grand jury. A body of qualified persons, convened by the sheriff, according to law, to attend the session of designated criminal courts, make inquiry concerning all complaints of the commission of offences which may be submitted to them, and, in proper cases, return indictments therefor to the court.

By early English law, according to the Commentaries of Blackstone and Stephens, a grand jury must be composed from a body of twenty-four good and lawful men, which the sheriff of every county is bound to return to every session of the peace, and every commission of *oyer* and *terminer*, and of general jail-delivery, to inquire, present, do, and execute all those things which on the part of our lord the king shall be commanded them. As many as appear upon the panel are sworn upon the grand jury, to the amount of twelve at least, and not more than twenty-three; that twelve may be a majority. The grand jury are previously instructed in the articles of their inquiry by a charge from the judge who presides upon the bench. They then withdraw, to sit and receive indictments, to hear evidence on behalf of the prosecution, and to inquire, upon their oaths, whether there be sufficient cause to call upon the party accused to answer it. 4 *Bl. Com.* 302, 303; 4 *Steph. Com.* 361–363.

The general features of the English grand jury are preserved throughout the United States; but details are differently prescribed by the various statutes. The qualifications of a member of the grand jury are prescribed by the local law, and differ in different states; and the same may be said of the mode of summoning. Even the number is not uniform. In most of the states, the rule of from twelve to twenty-three is followed; but Mr. Bishop says (1 *Bish. Cr. Pro.* § 854), that in Louisiana the number is not to exceed sixteen; in California, it must not be less than seventeen; in Arkansas, not less than sixteen. The rule that at least twelve must concur in finding an indictment is probably universal.

According to Justice Field (charge to grand jury, 5 *Am. Law T. Rep.* 255), the grand jury, which is of very ancient origin in England, was at first a body which not only accused, but might try, offenders. But later it became, and was at the time of the settlement of this country, an informing and accusing tribunal only, without whose previous action no person charged with felony could (except in a few special cases allowed in England) be put upon trial. In England, it has been regarded as an important protection of the subject against oppression from unfounded prosecutions by the crown. In this country, it is maintained as a means not only of bringing to trial persons accused of offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether from the government, from partisan passion, or private enmity. It is the duty of the grand jury to see that parties against whom there is just ground to charge the commission of crime shall be held to answer the charge; and, on the other hand, a duty to the citizen to see that he is not subjected to prosecution upon accusations having no better foundation than public clamor or private malice.

Thus the theory and leading object in this country of the grand jury's investigation is the protection of accused persons from being put to the trouble and expense of a trial upon groundless

accusations. Upon a criminal complaint being made, before the accused can be compelled to go into his defence, the charge and depositions must be sent before the grand jury; the accuser and his witnesses must attend, and must satisfy twelve of the grand jury, according to former rules, that there is probable ground, in proof, for the accusation; or, according to later views, that, so far as the evidence within reach of the grand jury can show, the accused is guilty. If this is not established, they "throw out," as it is termed, the bill, and the accused is discharged, without having been required to make preparation of counter evidence. If, however, the proofs adduced sufficiently warrant, in the opinion of twelve members, a conviction, the bill of indictment prepared by the law officer is indorsed, "a true bill," and returned to the court as an indictment found. The charge then comes for public trial before a petit jury. The proof on the part of the accuser must be formally put in anew. If it still presents a case of guilt, the accused must meet it by proof upon his behalf.

The proceedings of the grand jurors are under oath, and private, except that they have the advice of the district attorney; and, as a general rule, secrecy is enjoined upon them, as to all their acts and deliberations.

Grand larceny. From the earliest times, in England, larceny has been divided into grand and petit, according to the value stolen; the common-law rule being that the offence was grand larceny if the goods were over the value of twelve pence; petit larceny, if they were of twelve pence or under. Mr. Bishop says (1 *Bish. Cr. L.* § 679), that in this country this distinction has been recognized as having a common-law existence, and in some of the states it seems fully to prevail, though, perhaps, more or less modified by legislation; in other states, it has ceased to be of importance.

Grand serjeanty. One of the feudal tenures, the characteristic of which was that the tenant was bound, instead of serving the king generally in the wars, to do some special honorary service to the king in person, as to carry his banner, his sword, or the like; or to be his butler, champion, or other officer, at his coronation. It was in most other respects like knight-service. *Termes de la Ley; Cowel;* 2 *Bl. Com.* 73, 74; 1 *Steph. Com.* 200, 201, 210.

Grandchild. Grandchildren is used rather in opposition to and exclusive of children, than as confined to the next descent. It may include great-grandchildren. Hussey *v.* Berkeley, 2 *Eden*, 194.

Grandchildren does not include great-grandchildren, without something further to extend its signification. Hone *v.* Van Schaick, 3 *Barb. Ch.* 488, 505; 3 *N. Y.* 538.

Grandchildren, in a bequest, means legitimate grandchildren, to the exclusion of illegitimates. Ferguson *v.* Mason, 2 *Sneed*, 618.

GRANT, *v.* To convey; to transfer property by writing; to vest title. Grant, *n.*: the act of transferring property; also the instrument by which such transfer is made. Grantor: the person by whom property is transferred to or vested in another. Grantee: the person to or in whom property is transferred or vested.

1. As a term of ordinary conveyancing, grant, in its largest sense, comprehends every transfer from one person to another of any species of property; and by modern writers it is frequently used with this signification. But, as originally used, it denoted a species of common-law conveyance appropriate to the transfer of incorporeal rights only. The ordinary mode of conveyance at common law was by livery of seisin, to constitute which an actual delivery of the possession was requisite, and which was therefore applicable only to corporeal things. Incorporeal rights, existing only in idea, could not be so transferred; and for them a mode of conveyance by writing was adopted, and the title passed by the delivery of the writing. Hence the distinction between hereditaments and estates said to lie in livery, and those said to lie in grant. See CONVEYANCE. The latter included not only hereditaments and estates absolutely incorporeal, such as rents, but also estates in expectancy, reversions, and remainders, incapable of immediate delivery. The term, although seldom applied to ordinary personal property, was not restricted to real estate: it was especially applied to letters-patent, to titles of honor, advowsons, and other subject-

matters not capable of manual delivery. Thus the word came to include any transfer of property by an instrument in writing without the delivery of the possession; and it is in this sense that it is commonly used, nearly always, too, with reference to realty, a grant of personalty being usually termed an assignment or a bill of sale.

This wider signification has been adopted or confirmed by several important English and American statutes. Thus the statute 8 & 9 Vict. ch. 106, provided that all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery. So that the method of conveyance by deed of grant is, in England, no longer confined to incorporeal hereditaments and future estates. In New York (by 2 Rev. Stat. 3d ed. 22, § 142), deeds of bargain and sale have long been deemed grants; and in the western states it seems to be a general term for all conveyances. McVey *v.* Green Bay, &c. Ry. Co., 42 *Wis.* 532.

A like use of the word prevails in the New England states, and many others; but in some states it is still limited to conveyances of incorporeal hereditaments, and to letters-patent from government.

The words appropriate to constitute a grant are "have given and granted." See DEDI ET CONCESSI. As a technical word of conveyance, grant was formerly held to imply a warranty of title, unless followed by a covenant imposing on the grantor a less liability. In England, however, under the statute 8 & 9 Vict. already mentioned, the word grant is not to imply any covenant, except so far as it may do so by force of any act of parliament. In some of the United States, as New York, no implied covenants in deeds of conveyance are recognized; and in the others, the rule by which a warranty may be implied from this word has been variously construed and applied, according to the nature of the estate conveyed, — as whether of freehold or for years, or whether the word grant is used alone, or in connection with "give," "bargain and sell," "demise," &c. The tendency of the decisions appears to be towards the doctrine that "grant" does not constitute a warranty of title in conveyances of freehold estates; and that in conveyances of estates for years, — that is to say, leases, — if a warranty is implied, the implication is drawn from the words of leasing rather than from the word grant.

According to Blackstone, a grant is distinguished from a gift as being made upon some consideration or equivalent, whereas a gift is gratuitous. But the soundness of this distinction is fairly open to question. *Mozley & W.*

The term grant, in Scotland, is used in reference, 1, to original dispositions of land (as when a lord makes grants of land among tenants); 2, to gratuitous deeds. *Paterson.* In such case, the superior or donor is said to grant the deed; an expression totally unknown in English law. *Mozley & W.*

As distinguished from a mere license, a grant passes some estate or interest, corporeal or incorporeal, in the lands which it embraces; can only be made by an instrument in writing, under seal; and is irrevocable, when made, unless an express power of revocation is reserved. A license is a mere authority; passes no estate or interest whatever; may be made by parol; is revocable at will; and, when revoked, the protection which it gave ceases to exist. Jamieson *v.* Millemann, 3 *Duer*, 255, 258.

The general word grant may comprehend both the incipient and the complete title. United States *v.* Clarke, 8 *Pet.* 436, 450.

The word grant is not a technical word, like enfeoff, and although, without limitation, it will carry an estate in the thing granted, yet, if used in a restricted sense, the grantee will take but a naked trust for the benefit of the grantor. Rice *v.* Railroad Co., 1 *Black*, 358.

Grant was anciently used as applicable more particularly to a conveyance of incorporeal hereditaments, or of such property or rights as could not be transferred by livery of seisin; but the term has a more comprehensive signification, and includes a demise or lease. Darby *v.* Callaghan, 16 *N. Y.* 71, 75.

The word grant, in a lease for years is a warranty of the lessor's title. Grannis *v.* Clark, 8 *Cow.* 36.

If an estate for years be granted by an indenture of lease, the words "grant and demise" import covenants of warranty and for quiet enjoyment; and such covenants may be stated in the declaration, although not contained in the lease in express terms. Barney *v.* Keith, 4 *Wend.* 502.

The words "make over and grant" are sufficient to convey the grantor's interest under the statute of uses. Jackson *v.* Alexander, 3 *Johns.* 484.

Grant, bargain, and sell. The words "grant, bargain, sell," &c., in a deed of bargain and sale, do not imply a warranty of title. Rickets *v.* Dickens, 1 *Murph.* 343; Powell *v.* Lyles, *Id.* 348.

The words "grant, bargain, and sell," in a conveyance, do not imply that the grantor is the absolute owner of the premises conveyed. Taggart *v.* Risley, 4 *Oreg.* 235.

The words "grant, bargain, and sell," in a deed, imply a covenant against incumbrances. Blossom *v.* Van Court, 34 *Mo.* 390.

But not a covenant of seisin. Carter *v.* Soulard, 1 *Mo.* 576.

The words "grant, bargain, and sell," in a deed, amount to an express covenant that the grantor was seised of an indefeasible estate in fee-simple in the premises conveyed, and also a covenant for quiet enjoyment in favor of the grantee. Hawk *v.* McCullough, 21 *Ill.* 220.

The words "grant, bargain, and sell," in a deed, do not import an absolute or general covenant of seisin or against incumbrances, but amount only to a covenant that the grantor has done nothing to defeat the estate granted. Roebuck *v.* Duprey, 2 *Ala.* 535; Whitehill *v.* Gotwalt, 3 *Pa.* 313; Freeman *v.* Pennock, *Id.* 317; Gratz *v.* Ewalt, 2 *Binn.* 95; Seitzinger *v.* Weaver, 1 *Rawle*, 377; Prettyman *v.* Wilkey, 19 *Ill.* 235; Latham *v.* Morgan, 1 *Smed. & M. Ch.* 611.

Under the statute of Alabama, the words "grant, bargain, sell," are all necessary in a deed to create the statute covenant that the grantor was seised of an indefeasible estate in fee-simple, &c., and for quiet enjoyment; that one or two of them are used is not enough. Gee *v.* Pharr, 5 *Ala.* 586; Claunch *v.* Allen, 12 *Ala.* 159.

Where a person executes a conveyance for land, to which he has no title, by deed containing the operative words, "grant, bargain, and sell," a title subsequently acquired by him will inure to his grantee without there being any covenant of general warranty expressed in such deed. The words "grant, bargain, sell," of themselves, under the statute, import a sufficient warranty to pass an after-acquired title. And this rule applies, notwithstanding the grantor acquires the title subsequent to the commencement of a suit by the grantee to recover damages for a breach of the covenants of seisin and of good right to convey, contained in his deed, if acquired prior to the assessment of damages in such action; and notwithstanding the deed, by means of which the grantor thus acquires title, was not recorded, or was improperly withheld, or has been lost or destroyed. When the land is conveyed to the grantor, the title vests in his prior grantee, and remains in him, whatever may become of the deed. King *v.* Gilson, 32 *Ill.* 348.

A deed which "grants, bargains, and sells all the right, title, and interest" of the grantor is merely a quitclaim conveyance, and inoperative to convey an after-acquired title. Butcher *v.* Rogers, 60 *Mo.* 138.

The words "grant, bargain, sell, and convey," in a deed, operate not merely to release, but to transfer, any interest which the grantor had in the granted premises at the date of the deed. Muller *v.* Boggs, 25 *Cal.* 175.

Grantee. Means the purchaser of an estate, and does not include a mortgagee. Van Rensselaer *v.* Sheriff of Albany, 1 *Cow.* 501, 509.

The grantee of a patent is one who has transferred to him, in writing, the exclusive right, under the patent, to make and use, and to grant to others to make and use, the thing patented, within and throughout some specified part or portion of the United States. Such right must be an exclusive sectional right excluding the patentee therefrom. Potter *v.* Holland, 1 *Fish.* 327, 4 *Blatchf.* 206.

2. Grant is, in modern usage, frequently employed to designate a transfer by a government of some portion of the public domain, as opposed to a conveyance or deed by an individual. In this use it often means, in the American cases, the act of a state, or of the United States, or of a government formerly sovereign within our territory, in transferring some parcel of public lands induced by motives of public policy, as to stimulate settlement, to aid a railroad, to endow schools, &c.; and also the instrument by which such transfer is made; rather than a disposal of the public lands for money, which is usually by letters-patent. These grants by government are often called government grants or public grants, to distinguish them from deeds. They are the origin and foundation of private titles to land, in various parts of the country, and are subject to some peculiar rules; as to which see *U. S. Dig.* tit. Grants.

GRATIS DICTUM. A voluntary assertion. A statement which a party is not bound to make, and as to which, therefore, he is not held to precise accuracy, nor liable in damages for an injury to one misled thereby.

Naked assertions, though known to be false, are not a ground of action, as between vendor and vendee. Such are assertions by the vendor, — that his estate is worth so much, that he gave so much for it, that he has been offered so much for it, or has refused such a sum for it; which, though known by him to be false, and though uttered with a view to deceive, are

not actionable. But fraudulent misrepresentations of particulars in regard to the estate, which the buyer has not equal means of knowing, and where he is induced to forbear inquiries that he otherwise would have made, are not to be viewed in the light of assertions *gratis dicta;* and therefore, where damage ensues, the party guilty of the fraud will be liable for the injury sustained. Medbury *v.* Watson, 6 *Metc.* (*Mass.*) 246.

GRAVAMEN. 1. When we speak of the gravamen of a charge or accusation, we mean that part of it which weighs most heavily against the accused.

2. The word is applied specially to grievances alleged by the clergy, and made by them a subject of complaint to the archbishop and bishops in convocation. *Mozley & W.*

GREAT SEAL. A seal by virtue of which a great part of the royal authority is exercised. The office of the lord chancellor, or lord keeper, is created by the delivery of the great seal into his custody. *Mozley & W.*

GREENBACK. The popular and almost exclusive name applied to all United States treasury issues. It is not applied to any other species of paper currency; and, when employed in testimony by way of description, is as certain as the phrase "treasury notes." Hickey *v.* State, 23 *Ind.* 21.

GRETNA-GREEN MARRIAGES. An expression formerly applied to marriages contracted in Scotland by parties who had gone there for the purpose of being married without the delay and formalities required by the law of England. They were usually celebrated at Gretna Green, in Dumfriesshire, as being the nearest and most convenient place for the purpose. They have been practically abolished by Stat. 19 & 20 Vict. ch. 96, passed in 1856, which requires that one at least of the parties contracting it should have, at the date thereof, his or her usual place of residence in Scotland, or should have lived there for twenty-one days preceding such marriage. 2 *Steph. Com.* 259, note.

GROSS, *adj.* Signifies, generally, great, large, entire, undiminished; thus, gross receipts are the receipts at large, before they are diminished by any deduction for expenses, to ascertain profits. The word has some technical uses in special connections.

In gross, signifies, in English real-property law, the independent ownership of incorporeal property. A right in gross is one which is annexed to or inheres in the person of the proprietor, and not in virtue of his being the owner or occupier of specifically determined land. It applies to a right unconnected with any thing corporeal, and existing as a separate subject of transfer; thus the cases speak of a common in gross, an advowson in gross, &c.

Gross average, in maritime law, is sometimes used for general average; being that kind of average which falls upon the gross amount of ship, cargo, and freight. 3 *Kent Com.* 232.

Gross negligence. Gross has been employed to designate that degree of negligence which is extreme, which exceeds ordinary carelessness or imprudence. The idea is scarcely capable of exact definition. Story says that it is the want of even slight diligence; and Sir William Jones, that it is the want of such care as even the most inattentive man bestows upon his own concerns. *Story Bailm.* § 17; *Jones Bailm.* 118; Neal *v.* Gillett, 23 *Conn.* 437. It is defined as meaning, not a malicious intention or design to produce a particular injury, but a thoughtless disregard of consequences; the absence, rather than the actual exercise, of volition with reference to results.

As respects actions founded on negligence, the tendency of later cases is to relinquish the attempt to draw sharp distinctions between degrees of negligence, and to allow each case to be decided on its own circumstances. Thus, in Wilson *v.* Brett, 11 *Mees. & W.* 113, which was an action against a bailee, Baron Rolfe said he could see no difference between negligence and gross negligence, the latter being the same thing, with the addition of a vituperative epithet; and he left it to the jury to say whether under the circumstances the defendant was chargeable with culpable negligence. So in McPheeters *v.* Hannibal, &c. R. R. Co., 45 *Mo.* 22, where the question was of negligence on the part of a railroad in running over live-stock, the court observed that the word gross, often used in discussing these cases, was wholly unnecessary; the question is, was there actual negligence which the jury find sufficient?

But stipulations in contracts sometimes provide against gross negligence; in a case of this sort the English exchequer chamber, in Beal *v.* South Devon R. Co., 3 *Hurlst. & C.* 337, defines gross

neglect as the failure to exercise reasonable care, skill, and diligence ; such care, &c., as is reasonably to be expected from the party in the circumstances and under the duty resting upon him. This definition certainly differs but little from that usually given of ordinary negligence, and develops little meaning from the adjective gross.

Gross negligence is not fraud, though evidence tending to show fraud. Lincoln *v.* Buckmaster, 32 *Vt.* 652; Wilson *v.* Railroad Co., 11 *Gill & J.* 58; *Shearm. & R. Negl.* § 3.

GROUND. Land; the soil.

The term does not exclude buildings; or, rather, is not confined to land which is not built upon. Ferree *v.* Sixth Ward School District, 76 *Pa. St.* 376.

Ground rent. Where the land-owner, instead of erecting buildings upon his land and leasing the two, leases the land only, allowing the tenant to erect such buildings as he requires, the rent reserved is often called a ground rent.

GUARANTEE, *v.* To assure or engage that another person shall pay or perform what he has promised; to undertake to be answerable for the duty or obligation of another.

Guaranty, *n.* : an agreement to answer for payment of a debt or performance of a duty or obligation by another. Guarantor: one who agrees to be responsible for another's payment or performance of a debt or duty. Guarantee, *n.*: one to whom such an agreement is made.

There is want of uniformity in the orthography of these words. There is fair authority for using guaran*tee* as the name of the engagement, and the verb is sometimes spelled guaran*ty*. But we recommend the spelling above given, using guaran*ty* for the noun denoting the engagement, and guaran*tee* for the verb, and for the noun denoting the person to whom it is given.

A guaranty may be for a single debt or obligation, or it may be for the successive transactions which the principal may have with the guarantee. This last kind is called a continuing guaranty.

Where A became bound to B for any debt which C might contract with him not exceeding £100, this was held a continuing guaranty. Merle *v.* Wells, 2 *Camp.* 413.

Guaranty and warranty are derivatives from the same root, and are identical in signification and effect, the former usually, but not always, denoting a parol promise, and the latter a covenant in a conveyance. Ayres *v.* Findley, 1 *Pa. St.* 501.

A guaranty is a promise to answer for the debt, default, or miscarriage of another person, for which that other person remains liable. It is usually a simple contract; and the agreement or memorandum expressing or evidencing it must be in writing, by the English statute of frauds, and must contain all the material terms (Saunders *v.* Wakefield, 4 *B. & Ald.* 595), excepting that under the Stat. 19 & 20 Vict. ch. 97, § 3, the consideration need not appear in the writing. *Brown.*

A guaranty is an undertaking by one person to be answerable for the payment of some debt, or the due performance of some contract or duty by another person who himself remains liable to pay or perform the same. *Story Prom. N.* § 457.

It is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is in the first place liable to such payment or performance. *Fell Merc. Guar.* 1; 3 *Kent Com.* 121.

The primary meaning of guaranty is, a collateral undertaking; not an original one. Dole *v.* Young, 24 *Pick.* 250.

A guaranty is a contract that some particular thing shall be done exactly as it is agreed to be done, whether it is to be done by one person or another, and whether there be a prior or principal contractor or not. Redfield *v.* Haight, 27 *Conn.* 31.

The terms guaranty and suretyship are sometimes used interchangeably; but they should not be confounded. The contract of a surety corresponds with that of a guarantor in many respects; yet important differences exist. The surety is bound with his principal as an original promisor; he is a debtor from the beginning, and must see that the debt is paid, and is held ordinarily to know every default of his principal, and cannot protect himself by the mere indulgence of the creditor, nor by want of notice of the default of the principal, however such indulgence or want of notice may in fact injure him. On the other hand, the contract of a guarantor is his own separate contract; it is in the nature of a warranty by him that the thing guaranteed to be done by the principal shall be done, — not merely an engagement jointly with the principal to do the thing. The original contract of the principal is not his contract, and he is not bound to take notice of its non-performance; therefore the creditor should give him notice; and it is universally held, that if the guarantor can prove that he has suffered damage by the failure to give such notice, he will be discharged to the extent of the damage thus sustained. It is not so with a surety. McMillan *v.* Bull's Head Bank, 32 *Ind.* 11; S. P. Durham *v.* Manrow, 2 *N. Y.* 533.

The use of the future tense, "I will guarantee," does not necessarily imply a mere offer to guarantee, but when acted upon may well operate as a present undertaking. McNaughton *v.* Conkling, 9 *Wis.* 316.

In Pennsylvania, it has been held that guaranty imports an obligation to pay, &c., provided due diligence has been used to collect from the principal. Johnson *v.* Chapman, 3 *Pa.* 18; Parker *v.* Culbertson, 1 *Wall. Jr.* 149.

GUARDIAN. In a general sense, a custodian, keeper, or protector. It usually signifies, in jurisprudence, a person who, in virtue of a lawful appointment for the purpose, has the care of the person or property of another deemed disqualified to act for himself. The disqualification which most frequently gives rise to this appointment is that of infancy. "Guardianship" may well be used for the care authorized over idiots, lunatics, habitual drunkards, spendthrifts, and the like; but a guardian of this class is, under many of the statutory systems authorizing the appointment, styled "committee."

The term guardian, or, in the old spelling, *gardian*, seems the same, etymologically and in original meaning with warden, — *g* and *w* being interchangeable letters in a number of law French words; and in the correlative, ward, the person under guardianship, the initial *w* is retained.

The word guardian suggests the idea of an appointment, an authority conferred by distinct judicial act. It is, indeed, common and not incorrect to say that the father is natural guardian of his child; and without any appointment the father exercises all of, and even more than, the powers involved in guardianship, and in that sense is a guardian without having been judicially designated. But the parental relation is not within the notion usually conveyed by the term guardianship. There may, however, be an appointment of the father to act as guardian to the child, as where the child in infancy inherits property for the care of which letters must be issued. In these cases the father acts in the double capacity.

The law of guardianship is most naturally divided into guardianship of the person and of the estate. That of the person is a relation essentially the same with that of parent and child; and the guardian has been called a temporary parent. That of the estate bears a closer resemblance to trusteeship. The same person is often guardian of both the person and the estate of the ward; but not necessarily, for these may be kept distinct. So, too, there may be joint guardians, as in other trusts. *Schouler Dom. Rel.* 389.

Various species of guardianship have been recognized in English law. Several have become obsolete, or are for other reasons unimportant in this country. The chief kinds of guardians retained in use are guardians by *nature*, guardians for *nurture*, guardianship in *socage*, *testamentary* guardianship, and *chancery* guardianship. The first two scarcely differ from the natural right of parents to care for and control their offspring; Mr. Macpherson in England (*Macphers. Inf.* 52, 58), and Mr. Schouler in this country (*Schouler Dom. Rel.* 391), consider them, we think with good reason, as practically one. This guardianship extends to the person only.

Guardianship in socage arises, at common law, when an infant under fourteen acquires legal title to real property; it does not exist if the property is merely personal, nor upon an equitable title only. The guardian in socage is charged with the custody of the young heir's person and estate, with the collection of rents and profits, care of title-deeds, and maintenance. His powers are, in general, commensurate with these duties. But this form of guardianship has fallen into disuse.

Testamentary guardianship was instituted by Stat. 12 Car. II. ch. 24, and guardians of this class are sometimes called statute guardians. The statute conferred upon the father a power not accorded by the common law, to designate by deed or will a guardian for the person and estate of his child. See Lord *v.* Hough, 37 *Cal.* 660, for the relative powers of a guardian of this class.

Guardianship by appointment of a court of equity has, in recent times, nearly superseded the other kinds. The court of chancery is, speaking generally, the judicial conservator of the property

interests of infants, and will appoint, upon a bill or petition showing the proper facts, a guardian of the person and estate, or, where the interests of the ward in a pending suit are alone involved, a guardian of the person only.

Throughout the United States, guardianship is simpler than in England, and more definitely regulated by statutory directions, varying in their details in the different states. The parental right of custody generally takes the place of any distinct relation of guardianship by nature and nurture. Guardianship in socage is scarcely known. Testamentary guardians may, in most of the states at least, be created; and so may chancery guardians, applying that term to guardians appointed by a court, such as in many of the states exists (usually the supreme court), clothed with the general equitable powers of the English chancery. Besides these are a class which Mr. Schouler considers, with good reason, should be distinguished from chancery guardians, and to which he applies the name probate guardians. These are such as are appointed by the court of probate jurisdiction, by whatever name known: ordinary, orphan's, probate, or surrogate's court, in the exercise of the statutory powers conferred upon it. These guardians are, in general, of the person, of the estate, or of both. Their powers, duties, and liabilities are such as are prescribed by the local law. This form of the relation is the one most generally known and used throughout the United States.

A guardian is one that legally has the care and management of the person or the estate, or both, of a child, during his minority, whose father has deceased. *Reeves Dom. Rel.* 311; Bass *v.* Cook, 4 *Port.* 390.

Of guardians of children there are several species:

1. *A guardian by nature.* A father is so called in respect of the guardianship which belongs to him over the person of his heir-apparent, or of his heiress presumptive.

2. *Guardian for nurture.* A father is so called in respect of the guardianship of all his children; and, after the father's decease, the mother. This guardianship is said to last only to the age of fourteen years. But though after that age the father or mother may not be properly designated as guardian for nurture, yet the parent is understood to stand substantially in the capacity of guardian to his children so long as they are minors, by having the care and control of their persons during that period.

3. *Guardian in socage* is one who has the care of the estate as well as the person of a minor. This species occurs where the legal estate in lands or other hereditaments held in socage descends upon a minor; in which case the guardianship devolves upon his next of blood, to whom the inheritance cannot descend. This guardianship lasts till the age of fourteen years.

4. *Guardian in chivalry.* If the heir of an estate held by chivalry (or knight-service) was under twenty-one, or, being a female, was under fourteen, the lord of whom the land was held was entitled to the wardship of the heir, and was called guardian in chivalry. This kind of guardianship entitled the lord to receive the profits of the heir's land without accounting for them. It ceased to exist in 1660, when the military tenures were abolished by Stat. 12 Car. II. ch. 24.

5. *Guardian by statute* is a guardian appointed by virtue of Stat. 12 Car. II. ch. 24, passed in 1660, which provides that a father may, by deed or will, dispose of the custody, after his death, of such of his children as should be infants (*i.e.* under age) and unmarried at his death, or should be born posthumously, to any person he pleases, in such manner as to be effectual against all persons claiming as guardians in socage or otherwise.

6. *Guardian by election* is one appointed by an infant having lands in socage, when the guardianship in socage has terminated by the infant attaining the age of fourteen. This guardianship is now almost wholly disused.

7. *Guardian by appointment of the court of chancery.* This happens where a father has died without exercising his power of appointing guardians; also where the father's misconduct is such as to make it improper that his children should continue under his control. But the court will not in general appoint a guardian to an infant not possessed of property.

8. *Guardian by custom.* A guardian who is such by local custom. In copyholds, this belongs of common right to the next of blood, to whom the copyhold cannot descend; and, in London, to the mayor and aldermen. It is said, however, to have fallen into disuse. 2 *Steph. Com.* 329; *Mozley & W.*

Guardian ad litem. A person appointed by a court of justice to appear for and represent a minor whose interests require that he should bring a suit, or who is a necessary or proper party defendant. Such an appointment does not seem to involve any relation of guardianship in any full or significant sense of the term, so little is any custody of person or estate involved. The guar-

dian *ad litem* merely represents or acts for the ward in the various steps and stages of the suit. The term next friend, also employed to designate such a representative, seems better to correspond with his real position and duties; but guardian *ad litem* is in settled use.

Guardian of the cinque ports. Another name for the warden of the cinque ports.

Guardian of the peace. A person intrusted with the keeping of the peace, as conservator thereof.

Guardian of the poor. Persons having the management of parish workhouses and unions are, in England, styled guardians of the poor. The guardians are elected by the owners of property and rate-payers in the parish; and, in the case of two or more parishes being consolidated into one union for the relief of the poor, are elected by the owners and rate-payers of the component parishes. 3 *Steph. Com.* 47, 50.

Guardian of the spiritualities. The person to whom the spiritual jurisdiction of a diocese is committed during the vacancy of a see. *Cowel; Tomlins.*

Guardian of the temporalities. The person to whose custody a vacant see or abbey was committed by the king. *Tomlins.*

GUEST. The rules of law, that an innkeeper must receive as guests all who apply, that he is liable for their baggage, that he has a lien upon it for his charges, &c., have given rise to some decisions as to who is deemed a guest at an inn.

In order to constitute one a guest at a hotel, it is not necessary that he should be there in person: it is sufficient if his property is there in charge of his wife, agent, servant, or some other member of his family. But the property must be there under such circumstances that the law will presume the possession to be in him, and not in the bailee in charge of it. Coykendall *v.* Eaton, 55 *Barb.* 188.

A townsman or neighbor may be a traveller, and therefore a guest at an inn, as well as he who comes from a distance, or from a foreign country. Walling *v.* Potter, 35 *Conn.* 183.

A guest, as distinguished from a boarder, is bound for no stipulated time. He stops at the inn for as short or as long time as he pleases, paying, while he remains, the customary charge. Stewart *v.* McCready, 24 *How. Pr.* 62.

The fact that a traveller who is received at an inn as a guest makes an agreement with the innkeeper for the price of his board by the week, does not impair or affect his rights as a guest. Berkshire Woollen Co. *v.* Proctor, 7 *Cush.* 417; Shoecraft *v.* Bailey, 25 *Iowa*, 553.

If a person puts up his horse at an inn, it makes him a guest; and the relation extends to all his goods left at an inn, by his taking a room and taking some of his meals at the inn, and lodging there a portion of the time. He need not take all his meals or lodge every night there. McDaniels *v.* Robinson, 26 *Vt.* 316.

A traveller who enters an inn as a guest does not cease to be a guest by proposing to remain a given number of days, or by ascertaining the price that will be charged for his entertainment, or by paying in advance, or as his wants are supplied. Pinkerton *v.* Woodward, 33 *Cal.* 557.

Temporary absence of a guest from the inn does not suspend the innkeeper's liability. McDonald *v.* Edgerton, 5 *Barb.* 560.

One who, lodging at another house, merely leaves his horse at the inn, for shelter, provender, and care, both parties understanding that he himself does not ask or receive any personal accommodation, is not a guest. Ingalsbee *v.* Wood, 36 *Barb.* 452.

GUILD. This word signifies, primarily, tribute; and, secondarily, the fraternity or company that is subject to the tribute. It thus came to signify a voluntary association or fraternity of persons, united for co-operation and mutual protection in carrying on their trade or vocation. Such a company is a body of persons bound together by orders and laws of their own making, the king's license having been first had to the making thereof. A guild of merchants may be incorporated by grant of the sovereign; and such incorporation, without more, is sufficient to establish them as a corporation for ever. Guilds have, however, diminished in prominence and importance, with the advance in the systematic organization of municipal corporations. Guild-hall is the name given to the hall of meeting of a guild. The term was always generically applicable to the public place of meeting of the mayor, aldermen, and commonalty of any city and borough, but has been applied *par excellence* to the place of meeting of the lord-mayor, aldermen, and commonalty of the city of London.

H.

HABEAS CORPUS. That you have the body. These were the emphatic words of several writs in common-law practice, issued for the purpose of bringing a party into court; even forming a part of the common *capias*. As usual, these words were adopted as the name of each of such writs; but the term *habeas corpus* is now applied exclusively to designate a few special writs, and, when used alone, without qualification, is always understood as denoting the remedy for deliverance from unlawful imprisonment or detention. This is the writ technically termed *habeas corpus ad subjiciendum*, — that you have the body to submit to.

It is directed to any person who detains another in custody, and commands him to produce the body, with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the judge or court awarding such writ shall direct. This writ existed at common law, though it has been improved and modified by statute, both in England and the United States.

With respect to this writ as employed by the national judiciary, the power to issue it was at first granted in but a limited way, but has been extended by subsequent acts of congress (see act of Sept. 24, 1789, § 14; act of March 2, 1833, § 7; act of Aug. 29, 1842; act of Feb. 5, 1867, § 1), and is now defined anew in the Revised Statutes, §§ 751, 752. They give to the courts of the United States, and the justices and judges of those courts within their jurisdictions, the power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty.

Section 753, however, imposes an important limitation. It provides that "The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the constitution, or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order or sanction, of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify." This new enactment of the power seems to set at rest some embarrassing questions of construction attending the former acts.

In the employment of the writ in the United States jurisprudence, the cases are to the effect that although the writ is a writ of right, it is not granted as a matter of course, but upon cause shown; and if, upon the statements of the application for the writ, the ground relied on is seen to be undoubtedly insufficient, the application may be denied in the first instance.

The usual course of proceeding is for the court, on the application of the prisoner for a writ of *habeas corpus*, to issue the writ, and, on its return, to hear and dispose of the case; but where the cause of imprisonment is fully shown by the petition, the court may, without issuing the writ, consider and determine whether, upon the facts presented in the petition, the prisoner, if brought before the court, would be discharged.

Another restriction which is recognized by the supreme court (being, however, supported by and fully illustrated in the decisions of England and of the several states upon the subject), in cases where the writ is issued by that court as an act of appellate jurisdiction, is, that the action of the court is restrained by the limits which attach to the na-

ture of appellate power. Where the cause shown for the restraint of the prisoner is a commitment by a judicial tribunal, the court inquires not whether the commitment ought to have been made, but whether it is a legal commitment. The proceeding is in the nature of a writ of error, to examine the legality of the commitment. By means of it the body of the prisoner, with the cause of confinement, is brought before the court. The court can, undoubtedly, inquire into the legal sufficiency of that cause. But if it be the judgment of a court of competent jurisdiction, that, in itself, is sufficient cause. *Exp.* Watkins, 3 *Pet.* 193; see also Matter of Metzger, 5 *How.* 176; Johnson *v.* United States, 3 *McLean*, 89; Nelson *v.* Cutter, *Id.* 326; 1 *West. Law J.* 357; United States *v.* Johns, 4 *Dall.* 412; *Exp.* Smith, 3 *McLean*, 121; 6 *Monthly Law Rep.* 57.

The distinguishing incidents of the proceeding, as regulated by further provisions of the revised statutes, or established by the course of decisions, are, when the proceeding is before a United States court or judge, the following: The application of the person restrained of liberty, for a writ of *habeas corpus*, must be in writing and verified by affidavit, and must set forth the facts concerning the detention of the party applying, in whose custody he or she is detained, and by virtue of what claim or authority, if known. It is made the duty of the justice or judge to whom such application is made to forthwith award a writ of *habeas corpus*, unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the constitution or laws of the United States. The writ shall be directed to the person in whose custody the party is detained, who shall make return of said writ, and bring the party before the judge who granted the writ, and certify the true cause of the detention of such person within three days thereafter, unless such person be detained beyond the distance of twenty miles; and, if beyond the distance of twenty miles and not above one hundred miles, then within ten days; and, if beyond the distance of one hundred miles, then within twenty days. Upon the return of the writ of *habeas corpus*, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning shall request a longer time. The petitioner may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is in contravention of the constitution or laws of the United States, which allegations or denials shall be made on oath. The return may be amended by leave of the court or judge before or after the same is filed, as also may all suggestions made against it, that thereby the material facts may be ascertained. The court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested. And provision is made for an appeal from the decision.

The writ of *habeas corpus ad subjiciendum*, or *habeas corpus*, as it is commonly called, is also a remedy of high importance and frequent employment in the jurisprudence of each of the several states. In that aspect, it is subject to regulation by the state statutes, as to matters of detail. And there are differences in the employment of the writ under the national and under the state governments, arising out of the differences between the powers of the two forms of government, and the jurisdictions of the two systems of courts. Making a proper allowance for these causes of variation, the account above given of the employment of the writ in federal tribunals will serve as a general outline of its features as a remedy under state laws.

Other varieties or forms of the writ of *habeas corpus* are the following:

Habeas corpus ad faciendum et recipiendum. That you have the body, to do and receive. A writ which issues when one sued in some inferior jurisdiction desires to remove the action into a superior court. It commands the judges below to produce the body of defendant with the cause of detention, to do and receive what the superior court shall adjudge. It is called a *habeas corpus cum causa*, — that you have the body

with the cause, — because it requires the judges below to certify the grounds of holding. *Wharton.* Hence it is peculiarly applicable where one needs a review of a record of judicial proceedings, in order to establish his right to a discharge, and may not consider a simple *habeas corpus ad subjiciendum*, adequate.

Habeas corpus ad respondendum. That you have the body for prosecuting. The name of a writ issued to remove a prisoner in order to prosecute him in the jurisdiction where the crime was committed.

Habeas corpus ad respondendum. That you have the body to answer. A writ issued to bring up a prisoner confined by the process of an inferior court, to charge him with a fresh action or criminal prosecution in the court above.

Habeas corpus ad satisfaciendum. That you have the body to satisfy. The name of a writ issued to bring up a prisoner confined by process of an inferior court, to charge him upon execution on a judgment of a superior court.

Habeas corpus ad subjiciendum. See *supra.*

Habeas corpus ad testificandum. That you have the body to testify. The name of a writ issued to bring up a prisoner detained in any jail or prison, to testify in a cause before any court of competent jurisdiction.

Habeas corpus cum causa. See *supra.*

HABEAS CORPUS ACT. The English statute of 31 Chas. II. ch. 2, is the original and prominent *habeas corpus* act, being the one which provided that great remedy for unlawful imprisonment. It was amended and supplemented by Stat. 56 Geo. III. ch. 100. There are acts of the same general nature and objects, in the various states of the Union. For the United States judiciary, the present act is contained in Rev. Stat. tit. xiii. ch. 13.

HABENDUM. To have. The initial and most emphatic word in that clause of a deed which follows the granting part of the premises, and defines the extent of the ownership or interest granted. The formal words *et tenendum* were generally annexed, and the whole phrase is literally translated in the English phrase "for having and holding."

Holding, as a technical term, relating to ownership, embraces two ideas, — that of actual possession of some subject of property; and that of being invested with legal title. It may be applied to any thing which is the subject of property. Hence, in a constitutional provision protecting as separate property "the real and personal property of a woman, held at the time of marriage." "held" does not exclude equitable interests. Witsell *v.* Charleston, 7 *S. C.* 88.

Habere facias possessionem. That you cause to have possession. The emphatic words of the usual writ of execution upon a judgment for the plaintiff in ejectment, commanding the sheriff to put the plaintiff in possession of the premises. The phrase is used as a name for the writ, which is also sometimes termed a *habere facias*, or, by abbreviation, a *hab. fa. poss.*, or a *hab. fa.*

Habere facias seisinam. That you cause to have seisin. The emphatic words of the writ of execution in real actions, upon judgment for the demandant, directing the sheriff to cause the demandant to have seisin of the lands which he has recovered. It was the proper process for giving seisin of a freehold, as distinguished from a chattel interest in lands. The phrase was also used as a name for the writ, often abbreviated to *hab. fa. seis.*

Habere facias visum. That you cause to have a view. This was the characteristic phrase of a writ directing the sheriff to take a view of lands; as is necessary in some real-property suits. It was also the name of the writ.

HABITANCY. It is difficult to give an exact definition of habitancy. In general terms, one may be designated as an inhabitant of that place which constitutes the principal seat of his residence, of his business, pursuits, connections, attachments, and of his political and municipal relations. The term, therefore, embraces the fact of residence at a place, together with the intent to regard it and make it a home. The act and intent must concur. Lyman *v.* Fiske, 17 *Pick.* 231. See INHABITANT.

HABITUAL CRIMINALS ACT. In England, a statute, the 32 & 33 Vict. ch. 99, passed in 1869, for the purpose of giving to the police a greater control over convicted criminals who were at large, and providing for the registra-

tion of criminals. It was repealed, and other provisions substituted for it, by Stat. 34 & 35 Vict. ch. 112, known as the prevention of crime act, passed in 1871.

HABITUAL DRUNKARD. It was said in Commonwealth *v.* Whitney, 5 *Gray*, 85, that the terms "drunkard" and "habitual drunkard" mean the same thing; for drunkard alone imports a person whose habit is to get drunk, whose ebriety has become habitual.

But the term has long been in statutory use in New York, to designate persons who have become so confirmed in customary intoxication as renders them proper subjects of legal guardianship analogous to that exercised over insane persons. A proceeding may be taken, formerly, in the court of chancery, since 1846 (when law and equity proceedings were merged) in the supreme court, for the appointment of a committee of a person alleged to have become a "habitual drunkard." The proceeding involves an inquest into the character and habits of the person in question, analogous to that obtainable in cases of alleged insanity, and results in the appointment of a committee, charged not only with the care of the estate of the drunkard, but also with the control of his person; thus the committee, subject to judicial control, may determine his residence. Matter of Lynch, 5 *Paige*, 120. This proceeding is deemed a proceeding *in rem*, in the respect that it is public and notorious, and conclusive upon all the world; any persons afterwards dealing with the subject of it being chargeable with notice. Wardsworth *v.* Sharpsteen, 8 *N. Y.* 388. The effect of the appointment is to suspend continuously the capacity of the subject to dispose of property, or bind himself by contracts; he cannot, even in sober moments, act in these matters, but his gifts and contracts made after actual finding of an inquisition are void, L'Amoreux *v.* Crosby, 2 *Paige*, 422; Wardsworth *v.* Sharpsteen, 8 *N. Y.* 388; but he is not, by force of it, placed in the category of persons of "unsound mind," who cannot make a will, Lewis *v.* Jones, 50 *Barb.* 645. To warrant the court in discharging the committee and restoring to the drunkard his estate and civil capacity, there must be proof of permanent reformation; in general, at least one year's voluntary and total abstinence from intoxicating liquors must be shown. Matter of Hoag, 7 *Paige*, 312. And there are special prohibitions of statute upon the sale of liquor to habitual drunkards.

HACKNEY-COACH. May include coaches standing for hire in the streets, as well as those kept in stables for hire. Masterson *v.* Short, 33 *How. Pr.* 481.

Hæreditas nunquam ascendet. An inheritance never ascends; the right to an inheritance does not lineally ascend. A rule of the feudal law, which applied only to exclude the ancestors in a direct line from inheriting: the inheritance might ascend indirectly. The rule has been qualified by statute.

Hæres legitimus est quem nuptiæ demonstrant. The lawful heir is he whom marriage points out as such; the law regards as a son him only who is born in wedlock. This maxim is the foundation of the rules governing legitimacy and inheritance. Bastards are not accepted as heirs.

Hæretico comburendo. The name of an English writ, long since obsolete, which lay against a heretic, who, having been convicted of heresy by the bishop, and abjured it, afterwards fell into the same again, or some other, and was thereupon delivered over to the secular power. (*Fitz. N. B.* 69.) By this writ, grantable out of chancery, upon a certificate of such conviction, heretics were burnt; and so were likewise witches, sorcerers, &c. *Jacob.*

HALF BLOOD. The relationship between persons who have one parent only in common. See FULL BLOOD.

HAMESUCKEN. This word, which etymologically is house-breaking, is a Scotch and old English term nearly equivalent to burglary. Briefly, it is invasion of a dwelling coupled with violence to the occupant. The word is differently spelled: hamsecken, hamesecken, haimsucken, &c.

HANAPER OFFICE. The hanaper office and the petty-bag office were offices connected with the common-law side of the court of chancery. According to several writers, writs, with the returns thereto, were kept in the hamper, or hanaper, in all cases in which

the question was one affecting the subject only; while writs with the returns in which the crown had an interest, mediate or immediate, were kept in the petty-bag, which phrase is accordingly used in contradistinction to the hanaper. See Yates *v.* People, 6 *Johns.* 337, 363. Burrill, following Spelman, says that not the writs themselves, but the fees arising upon them, were kept in the hanaper.

HANSE. An old word of German origin, signifying an association of merchants formed to secure the good usage and safe transportation of merchandise from one town to another.

Hanse towns. There were certain cities which received this name during the middle ages, from their having formed a hanse, or confederacy, for mutual protection of their commerce against the pirates which then infested the Baltic. This league or confederacy acquired great power and importance, and at one time embraced seventy or eighty commercial cities.

Hanseatic. Pertaining to a hanse; but, generally, the union of the Hanse towns is the one referred to, as in the expression, the Hanseatic league.

Laws of the Hanse towns. A code of commercial law established by the cities forming the confederacy above described.

HARBOR, *v.* To conceal, spoken of persons; to receive a person for the purpose of defeating another of a right to the custody of the one sheltered.

To harbor often means to secrete. Jones *v.* Vanzandt, 5 *How.* 215, 227.

Harboring, as used in the act of Feb. 12, 1793, relative to fugitive slaves, meant entertaining or sheltering a fugitive, with the purpose of encouraging him in his desertion of his master. Van Metre *v.* Mitchell, 2 *Wall. Jr.* 311, 317.

HARBOR, *n.* An expanse of navigable water, so sheltered by surrounding shores as to form a place where ships may lie in safety.

Harbor and port are nearly synonymous; the first, however, presents more prominently the idea of safety of the vessel; the last, the idea of delivery and reception of cargo.

The term "port" of Boston, or "harbor" of Boston, as used in the Massachusetts acts for the regulation of pilotage, is not satisfied by restricting its meaning and application to the city of Boston, and to vessels entering its docks and lying at its wharves, or in the stream between them and the inner islands of the harbor. It at least includes all those ports which use the several channels leading to the city of Boston itself; and this embraces the mouths of the various rivers which empty into the harbor. Martin *v.* Hilton, 9 *Metc.* (*Mass.*) 371.

HARD LABOR. In modern criminal law, the punishment of imprisonment is often coupled with hard labor; the convict is, by authority of statute, sentenced to be confined at hard labor in a designated prison for a specified term. The expression is pleonastic rather than significant. The labor imposed is not, in any emphatic sense, hard, nor is the idea to increase the severity of the punishment by hardship in tasks required. Ordinary, continuous industry, at common mechanical trades, is all that is intended or exacted.

HAVE. See HABENDUM.

HAWKER. A person who practises carrying merchandise about from place to place, for sale; as opposed to one who sells at an established shop. It is equivalent to pedler, which is more used at the present day.

It is perhaps not essential to the idea, but is generally understood from the word, that a hawker is to be one who not only carries goods for sale, but seeks for purchasers, either by outcry, which some lexicographers conceive as intimated by the derivation of the word, or by attracting notice and attention to them, as goods for sale, by an actual exhibition or exposure of them by placards or labels, or by a conventional signal, like the sound of a horn for the sale of fish. Commonwealth *v.* Ober, 12 *Cush.* 495.

HAYBOTE. See BOOT.

HAZARD. An unlawful game at dice; and those who play at it are called hazardors. *Jacob.*

HAZARDOUS. Exposed to or involving danger; perilous; risky. In the law, this word is chiefly used in connection with contracts of insurance, more particularly of insurance against fire. Thus, insurances on buildings which, from their materials or construction, are more susceptible of ignition than others, or buildings which, though not objectionable on that account, are occupied by persons who carry on trades subject to more than ordinary risk of fire, or which contain goods or machinery of a

character to create such risk, are called hazardous insurances. When all of these objectionable qualities are attributable to a building, it is a double hazardous insurance. The effect in both cases is to increase the amount of the premium required. The word and its compounds, "extra hazardous," "specially hazardous," and "not hazardous," are well-understood technical terms in the business of insurance, having distinct meanings. Although what goods are included in each designation may not be so known as to dispense with actual proof, the terms themselves are distinct, and known to be so; so that an insurance upon goods "hazardous" does not include goods "extra hazardous" or "specially hazardous;" and an insurance on goods "extra hazardous" does not include goods "specially hazardous." "Extra hazardous" and "specially hazardous" are not subdivisions or classifications of goods under the more general term "hazardous," but distinct classes of goods. Pindar *v.* Continental Ins. Co., 38 *N. Y.* 364.

HEAD. In its sense of chief or principal, occurs in some technical expressions.

Head of a family. The exemption laws of several of the states accord exemption of certain property to a debtor who is the head of a family; which fact has called forth some decisions on the meaning of this phrase. See FAMILY; HOUSEHOLD.

Head of a family, in the New Hampshire exemption law of 1851, applies to a widower having a minor child residing with him and supported by him at his own dwelling-place; and the father's rights as head of the family are not lost by his only child becoming of age, and removing from the homestead, the father remaining as before. Barney *v.* Leeds, 51 *N. H.* 253.

Under Georgia homestead act of 1868, the wife, having no children of her own, is not the head of a family of the children of her husband by a former marriage. Lathrop *v.* Soldiers' Loan & Building Assoc., 45 *Ga.* 483.

An unmarried man, whose indigent mother and sisters live with him, and are supported by him, is the head of a family. Marsh *v.* Lazenby, 41 *Ga.* 153; Wade *v.* Jones, 20 *Mo.* 75.

A bachelor having no persons dependent upon him, and none residing with him except servants and employes, is not the head of a family, in the sense of the term as used in the South Carolina constitutional provision with reference to homestead exemption. Garaty *v.* Du Bose, 5 *S. C.* 493; S. P. Sallee *v.* Waters, 17 *Ala.* 482; Bachman *v.* Crawford, 3 *Humph.* 216.

A bachelor furnished the means for housekeeping and living to his brother and sister-in-law, who lived with and kept house for him. Held, that he was not head of the family, within the exemption laws (Laws 1854–55, ch. 61). Whalen *v.* Cadman, 11 *Iowa*, 266.

Head-borough. The title of an officer who, in Saxon times, was chief of the frankpledge tithing or decennary. This office was afterwards, when the petty constableship was created, united with that office.

HEALTH. That condition of the human body in which the vital functions are well performed.

Health laws. Laws having for their chief object the conservation of the health of the community.

Health officers. Officers charged with the administration of health laws.

Healthy. Free from disease or bodily ailment, or any state of the system peculiarly susceptible or liable to disease or bodily ailment. Bell *v.* Jeffries, 13 *Ired. L.* 356.

The health ordinarily enjoyed by men in health, and the physical and bodily ability which men of sound bodies ordinarily possess, constitute the "healthy and able-bodied," within the meaning of that phrase used in the poor-laws; although there may have been a casual and temporary illness, or bodily unsoundness, which produced an occasional and temporary effect upon the person's capacity to gain a livelihood by bodily exertion. Starksboro' *v.* Hinesburgh, 15 *Vt.* 200.

HEARING. In chancery practice, the session of the court for the purpose of considering the proofs and determining the issues is called the hearing.

Hearing, as applied to equity cases, means the same thing that the word trial does at law. Akerly *v.* Vilas, 24 *Wis.* 165; Vannevar *v.* Bryant, 21 *Wall.* 41; Galpin *v.* Critchlow, 112 *Mass.* 339.

HEARSAY. A term applied to that species of testimony which consists in a narration by one person of matters told him by another.

The general rule is, that a repetition of the statements of another person is not competent evidence; and the phrase commonly used to express the objection to it is, that it is hearsay, or hearsay evidence. Some exceptions are

allowed, particularly as to questions of custom, pedigree, and prescription; to matters where reputation is a constitutive fact or element, such as marriage and partnership; to cases where not the truth of the declaration, but the fact that it was made, is the point of importance, as is sometimes the case where an estoppel is to be established, or the inducement or motive of a party in performing an act is made clear by what was told him, irrespective of its truth, and where declarations accompanying and involved in the act under inquiry are admitted as "part of the *res gestæ*." Outside of these exceptions, the rule is established, and important, that a witness cannot be heard to repeat the statements of a third person; that person must be called and interrogated directly as to the facts, as known to him. See *U. S. Dig.* tit. Evidence, VI.

Hedge-bote. See BOOT.

HEIR. A person who, on the death of another, is indicated by right of blood and by operation of law to succeed to the deceased's estate. Under the common law, the heir succeeds to and acquires by operation of law the estate of his ancestor in lands and tenements only; and this is the only proper technical meaning of the word, which is wholly inapplicable to personal estate. The heir is therefore to be distinguished from a devisee, who takes lands and tenements by will, as well as from an alienee, who takes them by deed. It is true, heir or heirs is frequently construed in wills as meaning children, or issue, or next of kin, or those who take personal property under a statute of distribution, or, sometimes, devisees; but such interpretations of testamentary provisions do not enlarge the real signification of the word, — they rest upon the principle that the intention of the testator, as gathered from the whole instrument, is to have effect, rather than the strict technical meaning of the language employed. In both deeds and wills, the word heirs is usually considered as *nomen collectivum*, comprehending heirs of heirs *ad infinitum;* and heir, in the singular, may operate in the same manner.

The word heirs was formerly considered necessary, as a technical word of conveyance, to pass a fee; and, although in wills a fee might pass without that word where the intention to give the fee could be clearly ascertained from the will, or where a fee was necessary to sustain the charge or trust created by the will, yet in a deed, however clearly the intent of the parties might be expressed, a fee could not be conveyed without that word. Thus a man who purchased lands "to himself for ever," or "to him and to his assigns for ever," took but an estate for life. This rule has been abolished by statute in many of the United States, providing that neither the word heirs nor other words of inheritance shall be requisite to create or convey an estate in fee, either in grants or devises of lands. In other states, similar provisions have been enacted with respect to wills, but not extending to deeds.

Under the principle known as the rule in Shelley's Case, which applies, in general, wherever an estate is given to one person for life with remainder to his heirs, by one act or instrument, the word heirs is regarded as a mere word of limitation, not as a word of purchase, and the entire estate is vested in the first taker. Heirs is considered as expressing merely an intention as to a certain line of succession; and, if the first taker dies intestate, his heirs take by descent from him, not as purchasers under the original limitation. See SHELLEY'S CASE.

In the Roman law, and in the modern civil law, *hæres* or heir has a more extended signification than in the common law. The term is applied to all persons entitled to succeed to the estate of one deceased, whether by act of the party or by operation of law, and whether the property be real or personal in its nature; and the heir has most of the powers and functions of the executor or administrator at common law. In the Scotch law, the term heir comprehends not only those who succeed to lands, but also successors to personal property.

Various well-established expressions have been formed by annexing qualifying words or phrases to the term heir.

Thus, notwithstanding that, strictly speaking, the heir can only be determined upon the death of the ancestor, and that no person can be the heir of one living, he who, if he survive his ancestor, must certainly be his heir is called the *heir apparent; e.g.*, the eldest son, in England, during the lifetime of his father, as he must, by the course of the common law, be heir to the father whenever the latter happens to die. So he who, if the ancestor were immediately to die, would succeed, but whose right of succession may be defeated by some event other than his own death before the ancestor, is termed the *heir presumptive*. Again, an *heir by custom*, or *customary heir*, is an heir whose right of inheritance depends upon a particular and local custom, such as gavelkind or borough English. The general heir, who, upon the decease of the ancestor intestate, is entitled to all lands, tenements, and hereditaments which belonged to the ancestor, or of which he was seised, is usually termed the *heir at law*, sometimes the *heir general*. *Heir special* is sometimes applied to issue in tail.

Heir means next of blood, on whom the law casts the inheritance, on the death of the ancestor. Sugg *v.* Tyson, 2 *Hawks*, 472.

Heirs is used to denote the persons who are entitled, by descent, to the real estate of a deceased ancestor. It is appropriated to that purpose, and when used in pleading, in reference to personal estate, it has no meaning, and must be rejected as surplusage. Henry *v.* Henry, 9 *Ired. L.* 278.

Heir is not confined in meaning to one to whom an estate has descended from his immediate ancestor. A person is the heir of one from whom he has inherited through several successive descents. Ward *v.* Stow, 2 *Dev. Eq.* 509; Castro *v.* Tennent, 44 *Cal.* 253; and see Brownell *v.* Brownell, 10 *R. I.* 509.

Heirs may mean those inheriting according to the existing laws of the state, as distinguished from those who would inherit at common law. Aspden's Estate, 2 *Wall. Jr.* 368; Larabee *v.* Larabee, 1 *Root*, 555; Mace *v.* Cushman, 45 *Me.* 250.

Heirs of the body include all persons who are in the line of lineal descendants, to the most remote generation. Roberts *v.* Ogbourne, 37 *Ala.* 174.

Under the rule that courts will give to statutes of legitimation, whether private or public, a fair if not a liberal construction, the words "inherit," "heir," and "joint heir," will be construed to give to legitimated children all the rights of inheritance and succession that would attach to them had they been born in lawful wedlock. Swanson *v.* Swanson, 2 *Swan*, 446.

The term heir is capable of an abstract sense, without any subject to be inherited, as well as of a concrete one, clothed with lands or rent, in respect of which the word is used. Aspden's Estate, 2 *Wall. Jr.* 368, 445.

Heirs, when used in reference to a living person as the ancestor, means, in its popular sense, children who are heirs apparent. Feltman *v.* Butts, 8 *Bush*, 115; Vannorsdall *v.* Van Derventer, 51 *Barb.* 137.

Aliens are not within the term heirs at law. See Orr *v.* Hodgson, 4 *Wheat.* 453.

An heir in law is simply one who succeeds to the estate of a deceased person. In this sense, the wife is an heir of her deceased husband, and, when her deceased son has no wife, child, or father, she is his heir. McKinney *v.* Stewart, 5 *Kans.* 384.

The term heir at law presents no such ambiguity as to let in parol evidence as to the sense in which a testator, under particular circumstances, used it. Aspden's Estate, 2 *Wall. Jr.* 368.

The signification of the word heir, used in a will, is in all cases a question of intention; and, if the testator uses other expressions which clearly indicate what his intention was, and show that he did not intend what the word in its legal acceptation imports, that intention must prevail. Williamson *v.* Williamson, 18 *B. Mon.* 329; Love *v.* Buchanan, 40 *Miss.* 758; Den *v.* Zabriskie, 15 *N. J. L.* 404; Bailey *v.* Patterson, 3 *Rich. Eq.* 156.

In a will, the word heirs, when unexplained and uncontrolled by the context, is to be construed according to its strict technical import, in which sense it designates the persons who would by the statute succeed to the real estate in case of intestacy. Where a testator devised property to his sons for their lives, and, on the death of either, to his heirs, held, that the word was used to designate the persons who are to take the real and personal estate as independent objects of the gift. It is therefore to be interpreted as a mere term of description of a class of persons who in the prescribed contingency are to take the estate. There being nothing in the will to vary or change the natural and ordinary sense of the word heirs, it must be held to describe those persons who on the death of the sons would take the real estate, if it had been held in their right, and had not been the subject of a devise. Clarke *v.* Cordis, 4 *Allen*, 466.

Upon the devise of real estate to a particular person, and to his heirs at law, which is to vest the estate at a future time, upon the occurrence of some designated contingency, the words heirs at law have their common-law signification, and are not to be construed as meaning next of kin. And the same rule prevails where there is a devise and bequest of the whole

real and personal estate embraced in one common provision, or where, there being different provisions, the same expressions are used in reference to each kind of estate; and more particularly where, in administering the estate under the will, the real estate may be blended with and made a part of the share or proportion of the personal estate given to a particular legatee. Lombard *v.* Boyden, 5 *Allen*, 249.

A devise to one's "heir at law" or "lawful heir" passes the estate to such person as, at the time of the testator's death, answers by the then existing law that description; and contemplates not only changes from death in the persons designated by the term, but changes in the laws regulating successions and descent. Aspden's Estate, 2 *Wall. Jr.* 368; and see Abbott *v.* Bradstreet, 3 *Allen*, 587.

A devise to heirs designates not only the persons who are to take, but also the manner and proportions in which they take; the rules of descent are presumed to be the intended guide. Rand *v.* Sanger, 115 *Mass.* 124.

Heirs may mean next of kin, or heirs at law, according to the nature of the property given. Ingram *v.* Smith, 1 *Head*, 411.

When personal property is given by will to heirs, that word may be construed as meaning next of kin. Rusing *v.* Rusing, 25 *Ind.* 63; Drake *v.* Pell, 3 *Edw.* 251; Wright *v.* Meth. Ep. Church, *Hoffm.* 202.

Under such a bequest, those persons only will take who would, by law, succeed to the testator's personalty. Freeman *v.* Knight, 2 *Ired. Eq.* 72.

The word heirs, in a will, as applied to personalty, signifies those who would take under the statute of distributions. McCabe *v.* Spruil, 1 *Dev. Eq.* 189; Corbitt *v.* Corbitt, 1 *Jones Eq.* 114; Kiser *v.* Kiser, 2 *Id.* 28.

Where personal estate is bequeathed to a person for life, and at his decease to his "heirs" or "lawful heirs," the word heirs should be interpreted to mean either those persons who are strictly heirs by the common law, or those who are next of kin and take under the statute of distributions, according to the intention of the testator, if his intention relative thereto has been manifested in his will. Loring *v.* Thorndike, 5 *Allen*, 257.

Under a devise of real and personal estate in trust, with directions to divide and pay over the rents, dividends, income, and profits thereof to the testator's sons, until they severally shall reach a certain age, and then to convey to each his share of the principal, or, in case of his death before reaching that age, to convey the same to his heirs at law, and with other expressions, showing that the testator intended no distinction between the disposition of the real and personal estate, the words heirs at law will be construed according to their common-law interpretation, and will not include those who would be entitled to a share of personal property under the statute of distributions. Lombard *v.* Boyden, 5 *Allen*, 249.

In a deed, as well as in a will, heirs may be construed as meaning distributees. Sweet *v.* Dutton, 109 *Mass.* 589.

Heirs, in a will, may be construed to mean legatees, where such intention is manifest. Scudder *v.* Vanarsdale, 13 *N. J. Eq.* 109; Eisman *v.* Poindexter, 52 *Ind.* 401; and see Cushman *v.* Horton, 59 *N. Y.* 149.

In a bequest by a testator of his residuary estate, "to be equally divided amongst the whole of heirs already named in this my will, proportioned agreeably to the several amounts given to each in the body of this my will," the word heirs is to be taken in its technical signification, as referring to those named in the will who would have been his legal heirs had he died intestate, and not to legatees who were strangers to his blood. Porter's Appeal, 45 *Pa. St.* 201.

The word heirs includes all persons who take real estate by operation of law, upon the death of the person last seised, and consequently includes the widow of the ancestor. Seabrook *v.* Seabrook, 1 *McMull. Ch.* 201; see Gibbon *v.* Gibbon, 40 *Ga.* 562.

Where a testator, by one clause of his will, gave all his property of every description to his wife for her life, and by another clause provided that any children born during the marriage should be "coequal heirs" with their mother, the testator having died childless, it was held that his wife by the will took an absolute estate in the whole property. Turner *v.* Kittrell, 1 *Wins.* 39.

The word heirs, when applied to the successors to personal property in the construction of a will, is usually held to mean those who take under the statute of distributions, and, as such, the widow is generally included; yet where the context plainly shows that children only are meant, she will be excluded. Henderson *v.* Henderson, 1 *Jones L.* 221.

If it clearly appears from the will that the word heir, as used therein, means heir apparent, it will be so considered in giving a construction to it. Morton *v.* Barrett, 22 *Me.* 257.

When uncontrolled by context, heirs has a fixed technical meaning. But it is often used as meaning only children or issue. How it is used in a will is a question of intention. Haley *v.* Boston, 108 *Mass.* 576.

To effectuate the clear intention of testators, we habitually construe the words heir, issue, children, interchangeably. Braden *v.* Cannon, 1 *Grant Cas.* 60.

When added to "children," as in a bequest "to the children who may be the surviving heirs of K," the word heirs cannot be treated as equivalent to children, but confines the payment to those children who survive K. Houghton *v.* Kendall, 7 *Allen*, 72.

In a testamentary paper, the term heirs may be construed children, where such is

the evident intent of the testator. Shepherd *v.* Nabors, 6 *Ala.* 631; King *v.* Beek, 15 *Ohio*, 559; Eby *v.* Eby, 5 *Pa. St.* 461; Cruger *v.* Heyward, 2 *Desau.* 94; Thomas *v.* White, 3 *Litt.* 177; Bowers *v.* Porter, 4 *Pick.* 198; Ellis *v.* Essex Merrimack Bridge, 2 *Id.* 243; Bryant *v.* Deberry, 2 *Hayw.* 356; Moon *v.* Henderson, 4 *Desau.* 359.

Where property is conveyed in trust for the benefit of "the present as well as the future heirs of A," the word heirs will be construed to mean children, as a party can have no heirs until he is dead. Read *v.* Fite, 8 *Humph.* 328.

In a deed of gift to the grantor's wife and heirs, where it is clearly shown by the instrument that the word heirs is used as a synonyme of children, the deed will be held to convey a beneficial interest to the children during the life of the mother, with remainder at her death. Twelves *v.* Nevill, 39 *Ala.* 175.

Where a clause in a will directed that a portion of the proceeds of the sale of a certain farm be equally divided, share and share alike, "between the heirs of C, my brother-in-law," no estate whatever being given to C, and he being alive, and his children also, it was held that the children of C were entitled to the money. Crosby *v.* Lee, 3 *West. L. Gaz.* 173.

The term heirs of testator's children, &c., was held to be intended to designate lawful issue of such children, contradistinguishing from and not including his own children. Persons *v.* Snook, 40 *Barb.* 144.

Heirs is more comprehensive than issue, since it embraces collateral kindred, and is not confined to lineal descendants. Kingsbury *v.* Rapelye, 3 *Edw.* 1, 9.

Heirs, as used in the expression in a will, "if any of my sons and daughters die without lawful heirs," means lawful issue. Biddle's Appeal, 69 *Pa. St.* 190.

The word heirs, in a conveyance to a trustee by a husband, to be held in trust for the wife, should have its usual signification, and not be held to mean issue only; and the wife, uniting with the husband, and without the trustee, can dispose of this estate, in any legal mode. Whitaker *v.* Blair, 3 *J. J. Marsh.* 236.

A devise was made to two illegitimate children, and, in case either should die without heirs, then her part to the survivor. Held, that the word heirs meant issue, and not heirs generally; and that, on the death of one without issue, her sister was entitled to the whole estate. Pratt *v.* Flamer, 5 *Har. & J.* 10.

Where land was devised to A, his heirs and assigns, but in case he should die without heirs, then to his widow while she should remain his widow, and then to the testator's surviving children or their heirs, it was held that by the word heirs in the clause, "in case he should die without heirs," the testator intended heirs of his body or issue; that A took an estate in fee-tail general, and he could bar the entail by a conveyance in fee-simple. Fisk *v.* Keene, 35 *Me.* 349.

The word heirs was held to denote issue, in a will granting a residuary devise to the testator's sister "and her heirs for ever, and, in failure of heirs, all to fall and be bequeathed to the minor children" of a deceased brother named, where it appeared that such sister and the testator were both unmarried and lived together with their mother when the will was made, and until the testator died, and that he had five brothers and one sister, besides the devisee named, living when the will was made, and, also, besides the minor children of the deceased brother named in the will, above twenty nieces and nephews, all of whom survived him. Goodell *v.* Hibbard, 32 *Mich.* 47.

"Heir of his body lawfully begotten," is synonymous with issue. Raborg *v.* Hammond, 2 *Harr. & G.* 42; Den *v.* McPeake, 2 *N. J. L.* 291.

A limitation by will to the heirs, or the heirs of the body, of one known by the testator, at the time of the making of the will, to be alive, is construed to mean the children and the descendants of deceased children of such person. Knight *v.* Knight, 3 *Jones Eq.* 167.

Where a testator bequeathed the use of the residue of his personal estate to his wife, and after her death he gave the same "to the heirs of her body, to them and their heirs and assigns for ever," it was held that the term "heirs of her body" included children, and the children of deceased children, living at the termination of the life-estate, and that they took by purchase, *per capita*. Lemacks *v.* Glover, 1 *Rich. Eq.* 141.

By a bequest to "the heirs proceeding from the body" of a person in being when the will was made, the children of the person named, whether born before or after the death of the testator, are intended. Bullock *v.* Bullock, 2 *Dev. Eq.* 307.

The word heirs, in a limitation over in case the beneficiary should die without heirs, although generally presumed to be used in the extended sense, including collateral as well as lineal heirs, may be construed in the more restricted sense, as including lineal descents only, where, upon a view of the whole will, it appears that the testator used it with that meaning. Bundy *v.* Bundy, 38 *N. Y.* 410.

Where a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the word "heirs" or "issue" shall be construed to mean heirs or issue living at the death of the person named as ancestor. 1 *N. Y. Rev. Stat.* 724, § 22.

The word heirs, in a devise, is to be construed to be a word of limitation, not of purchase. Daly *v.* James, 8 *Wheat.* 495; Smith *v.* Folwell, 1 *Binn.* 546.

The words "his heirs" and "their heirs," occurring in the will of one dying in New York before the revised statutes took effect,

are words of limitation, not of purchase. Schoonmaker *v.* Sheely, 3 *Den.* 485.

In a devise to H, "to hold during her life, and then to descend to the heirs of her body, and their heirs and assigns for ever," the words "heirs of her body" are words of limitation and not of purchase, according to the rule in Shelley's case; and the addition of the words "and their heirs," &c., does not suffice to take the case out of that rule. Brown *v.* Lyon, 6 *N. Y.* 419; and see Brant *v.* Gelston, 2 *Johns. Cas.* 384; Barlow *v.* Barlow, 2 *N. Y.* 386.

Heirs may be used as a word of purchase. Murphy *v.* Harvey, 4 *Edw.* 131; Burtis *v.* Doughty, 3 *Bradf.* 287.

Whenever in an instrument it is certain that the word heirs is used with the intent that the devisee should take as purchaser, the instrument should be so construed, and the rule in Shelley's case is not to be applied. Doe *v.* Jackman, 5 *Ind.* 283.

Heirs male, in a will, may be construed as words of purchase and not of limitation. Hamilton *v.* Wentworth, 58 *Me.* 101.

Heirs of the body may be construed words of purchase whenever any thing in the instrument shows that they were used to designate certain persons answering the description of heirs at the death of the party. Williams *v.* Allen, 17 *Ga.* 81.

Those words are usually construed in wills as words of purchase, giving an independent interest to the children, and not as words of limitation, annexed to and describing the estate of the mother. Prescott *v.* Prescott, 10 *B. Mon.* 56; Jarvis *v.* Quigley, *Id.* 104.

HEIRLOOM. A name applied to a species of chattel, which, by reason of its special relation to or connection with the realty, descends to the heir, instead of passing with other personal property to the executor.

The most reasonable derivation of the word is, that the syllable loom is from the Saxon *leoma*, a limb or member; and that the meaning is something which is a limb or member of the inheritance. The term differs from fixture, in that it does not import any corporal annexation to the land. Title-deeds, family portraits, fish alive in a fish-pond, deer in a park, &c., are mentioned as instances. Heirlooms are little known in the United States.

The term heirlooms is often applied in practice to certain chattels — for example, pictures, plate, or furniture — which are directed by will or settlement to follow the limitations thereby made of some family mansion or estate. But the word is not here employed in its strict and proper sense, nor is the disposition itself beyond a certain point effectual; for the articles will in such case belong absolutely to the first person who, under the limitations, would take a vested estate of inheritance in them, supposing them to be real estate; and, if he die intestate, will pass to his personal representative, and not to his heir. (2 *Steph. Com.* 234.) *Wharton.*

HEPTARCHY. A government exercised by seven persons, or a nation divided into seven governments.

In the year 560, seven different monarchies had been formed in England by the German tribes: namely, that of Kent by the Jutes; those of Sussex, Wessex, and Essex, by the Saxons; and those of East Anglia, Bernicia, and Deira, by the Angles. To these were added, about the year 586, an eighth, called the kingdom of Mercia, also founded by the Angles, and comprehending nearly the whole of the heart of the kingdom. These states formed together what has been designated the Anglo-Saxon Octarchy, or more commonly, though not so correctly, the Anglo-Saxon Heptarchy, from the custom of speaking of Deira and Bernicia under the single appellation of the kingdom of Northumberland. *Wharton.*

HERALD. Anciently, a messenger between princes. This was an important post; the incumbents gradually made it their function to know the descent of the various noble families, register genealogies, determine coats of arms, examine and settle questions of pedigree and precedence, and also to superintend public pageants. Heraldic: relating to armorial bearings or insignia of birth or descent. Heraldry: the art or system of rules for tracing descents and genealogies, and composing armorial bearings.

Herald's college. An organization or incorporation of authorized heralds, in England. Their records are of high authority in the determination of questions of genealogy.

HERBAGE. Not only growing grass or green vegetation, but also, in jurisprudence, the right in the nature of common of one person to pasture his cattle in the land of another.

HERBAGIUM ANTERIUS. The first crop of grass or hay, in opposition to aftermath (*q. v.*) and second cutting. (*Paroch. Antiq.* 459.) *Tomlins.*

HEREDITAMENT. A very comprehensive term for any property which may be transmitted by the law of descent; not only that which has come to its owner by descent, but any thing of such nature that it may descend.

Hereditaments are such things, whether

corporeal or incorporeal, as a man may have to himself and his heirs by way of inheritance. The word includes every thing which may descend to the heir. *Brown.*

The word hereditament is almost as comprehensive as "property." 3 *Kent Com.* 401.

An heirloom, or implement of furniture which by custom descends to the heir, together with a house, is neither land nor tenement, but a mere movable, yet, being inheritable, is comprised under the general word hereditament. 2 *Bl. Com.* 17.

A condition, if descendible, is a hereditament; though not embraced in a forfeiture of all hereditaments. Queen *v.* Winchester, 3 *Coke*, 2 *b.*

Hereditaments are of two kinds, corporeal and incorporeal. Corporeal consist of such as affect the senses; such as may be seen and handled by the body: incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation. Corporeal hereditaments consist wholly of substantial and permanent objects, all which may be comprehended under the general denomination of land only; for land, in the legal signification, includes not only the soil, but edifices built upon it; also water, which is, in law, land covered by water; also mines and minerals beneath the surface of the earth. An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal), or concerning, or annexed to, or exercisable within the same. It is not the thing corporate itself, but something collateral thereto; as a rent issuing out of lands, &c., or an office belonging to jewels, &c. *Jacob.*

HERESY. This offence, which was not a total denial of Christianity, but was defined as being the holding a false opinion repugnant to some point of doctrine clearly revealed in the Scriptures, and either absolutely essential to a man's salvation, or of essential importance in the Christian faith, was anciently subject to severe civil penalty, even death (see HÆRETICO COMBURENDO); but now only exposes the members of the clergy to ecclesiastical correction.

HERETOFORE. Simply denotes time past, in distinction from time present or time future. Hence, an averment in pleading, that defendants heretofore did an act alleged, cannot be regarded as a compliance with a rule that the time when the act occurred must be alleged. Andrews *v.* Thayer, 40 *Conn.* 156.

The word heretofore, in a constitution adopted in 1846, means before 1846, and cannot, to limit its meaning, be carried back to the date of a previous constitution. Wynehamer *v.* People, 13 *N. Y.* 378, 427, 458.

Heretofore, in a recording act providing for recording of mortgages heretofore given, construed to include mortgages which ought to have been recorded under a previous law. Den *v.* Goldtrap, 1 *N. J. L.* 272.

HERIOT. A species of tribute, originating in Saxon times, rendered from the estate of a tenant, upon his death, to the lord of the manor; afterwards exacted by the lords as matter of right. It seems to have been, at first, the best beast, afterwards the lord's choice of the tenant's personal property; but local custom had much to do with determining what the lord might claim. Heriots were divided into heriot *service* and heriot *custom.* The former expression denotes such as are due upon a special reservation in a grant or lease of lands, and therefore amount to little more than a mere rent; the latter arise upon no special reservation whatever, but depend solely upon immemorial usage and custom. The heriot of a military tenant was his arms and habiliments of war, which belonged to the lord, for the purpose of equipping his successor. Heriots from freeholders are rare; but heriots from copyholders remain to this day, in many manors, a badge of the ancient servility of the tenure. But the right of the lord, in this as in other respects, is controlled by the custom of the manor. In some manors, the best chattel may be exacted (under which term a jewel or piece of plate is included), and which, immediately on the death of the tenant being ascertained, by the option of the lord, becomes vested in him as his property, and is no charge on the lands, but merely on the goods and chattels of the tenant. *Brown; Mozley & W.*

HERITABLE. Capable of being taken by descent. A term chiefly used in Scotch law, where it enters into several phrases:

Heritable bond. A bond for money, joined with a conveyance of land or heritage, to be held by a creditor as security for his debt.

Heritable jurisdiction. Grants of criminal jurisdiction, anciently bestowed on great families in Scotland, with a view to the more easy administration of justice, but abolished by 20 Geo. II. ch. 43.

Heritable rights. All rights to land, or whatever is connected with land, as mills, fishings, tithes, &c.

The natural division of things is into corporeal and incorporeal, movable and immovable: the first including things corporeal and the objects of touch, the latter things incorporeal, as rights of property, succession, &c. In the Scotch law, these distinctions are lost in those of heritable and movable, drawn more from the rights of the heir and executor, than from the nature of the things themselves. In this view, all rights to land, or whatever is connected with land, as mills, fishings, tithes, &c., are called heritable. And whatever moves itself or can be moved, and is not united to land, is movable. These general rules are, however, subject to exception and modification. The corresponding distinction, in the law of England, is between real and personal property; real property answering nearly to the heritable rights in Scotland, and personal property to the movable rights. *Jacob.*

HERMENEUTICS. The art or science of interpretation. Legal hermeneutics is an expression which has been employed to designate the rules, as a system, which guide in the interpretation or construction of legal writings.

HIGH. This vernacular word occurs in several compounds and titles:

High commission court. A court of ecclesiastical jurisdiction, in England, erected and united to the regal power by Stat. 1 Eliz. ch. 1, passed in 1558–59, though it did not attain permanent organization and full powers until many years later. It then consisted of forty-four commissioners, twelve of whom were bishops, twelve were privy councillors, and the rest might be either clergymen or laymen. The object of creating the court was to vindicate the peace of the church, by reforming, ordering, and correcting the ecclesiastical state and persons, and all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities; and it was directed and empowered by jury or by witnesses, or by other means of trial, to inquire into all offences or misdemeanors against or contrary to the acts of supremacy (1 Eliz. ch. 1), and uniformity (1 Eliz. ch. 2).

The procedure of the court was wholly founded on the canon law, and the accused was subjected to a series of interrogatories of an exhaustive and searching character, which he was compelled to answer on oath (called the oath *ex officio*), without evasion, not being allowed the benefit of the common-law maxim, that no one is bound to criminate himself. Any three of the commissioners, one of them being a bishop, were empowered thus to examine suspected persons on oath, and to punish the refractory by spiritual censures, fines, or imprisonments, at their discretion. The exercise of these powers by the court was harsh and oppressive, and it incurred odium by abusing its authority and exceeding its jurisdiction. It was at length, in 1641, by Stat. 16 Car. I. ch. 11, abolished, at about the same time and for the same general reasons as the court of star chamber. *Brown; Mozley & W.*

High constable. See CONSTABLE.

High court of admiralty. The name of the court in England which formerly had jurisdiction in maritime causes, developed out of the authority of the lord high constable in admiralty matters. Its rules of procedure and of decision were largely derived from the civil law; and its judgments were chiefly *in rem*, and binding upon all the world as well as the parties in the particular cause. By the supreme court of judicature acts all the jurisdiction of this court is transferred to the high court of justice created by those acts.

High court of chancery. The name of the former highest court of equity in England, usually held before the lord chancellor. Although the office of chancellor is of great antiquity, and judicial functions of increasing importance seem to have been exercised from an early day by the chancellor, the form of a court exercising a peculiarly equitable jurisdiction was not attained until the ordinance of 22 Edw. III., which directed the chancellor to inquire of matters of grace; after which the ordinary forms of procedure by bill and subpœna were gradually adopted, and the jurisdiction and rules of decision in equity established and defined.

By the supreme court of judicature acts of 1873 and 1875, the jurisdiction of this court is vested chiefly in the chancery division of the high court of

justice; a portion of its powers is distributed among the other divisions of that court; and its appellate jurisdiction is transferred to the court of appeal. See CHANCERY; COURTS.

High court of justice. The name of one of the divisions of the supreme court of judicature in England. The judges of the court, as first constituted, are the chancellor, the chief justice of England, the master of the rolls, the chief justice of the common pleas, the chief baron of the exchequer, the vice-chancellors, the judge of the court of probate and of the court for divorce and matrimonial causes, the puisne judges of the queen's bench, the puisne judges of the common pleas, the junior barons of the court of exchequer, and the judge of the high court of admiralty. The lord chancellor, and in his absence the lord chief justice of England, is the president of the court. Generally speaking, the jurisdiction, original and appellate, previously belonging to the courts whose judges have been mentioned, and several inferior tribunals (see COURTS), is now vested in the high court of justice. The court is subdivided into the chancery division, queen's bench division, common pleas division, exchequer division, and probate, admiralty, and divorce division; to each of which divisions respectively are assigned such causes as would formerly have been within the jurisdiction of the respective courts from which they derive their names. An appellate jurisdiction, in respect to all judgments and orders of the high court of justice, or any judge or judges of the court, is vested in the court of appeal, — the other permanent division of the supreme court of judicature.

High court of parliament. See PARLIAMENT.

High seas. Crimes committed upon the high seas are especially the subject of definition and punishment by acts of congress; hence the expression high seas has been a subject of discussion in several cases applying particularly to these criminal statutes. The general meaning of the expression is the unenclosed waters of the ocean on the seacoast, outside of *fauces terræ*. The high seas begin at low-water mark. De Lovio *v.* Boit, 2 *Gall.* 398, 428; United States *v.* Hamilton, 1 *Mas.* 152. The term is used in its proper and natural sense, and in contradistinction to mere tide-waters flowing in ports, havens, and basins that are landlocked in their position and subject to territorial jurisdiction. United States *v.* Grush, 5 *Mas.* 290, 297; United States *v.* Wilson, 3 *Blatchf.* 435; United States *v.* Robinson, 4 *Mas.* 307; Johnson *v.* Twenty-one Bales, 2 *Paine*, 601; *Van Ness*, 5; 6 *Am. Law J.* 68; 3 *Wheel. Cr. Cas.* 433. It does not include a foreign river only half a mile wide, and running into the interior of a country, United States *v.* Wiltberger, 5 *Wheat.* 76; but it does include the mouth of a foreign river a mile and a half wide, United States *v.* Smith, 3 *Wash. C. Ct.* 78, note; also Long Island Sound, The Martha Anne, *Olc.* 18; and it has been held competent, on an indictment for piracy, for a jury to find that a vessel within a marine league of the shore, at anchor in an open roadstead, where vessels only ride under the shelter of the land at a season when the course of the wind is invariable, is upon the high seas, United States *v.* Pirates, 5 *Wheat.* 184, 200. So a vessel which, while in the harbor of a foreign port, is fastened to the shore by cables, and communicates with the land by her boats, and is not within an enclosed dock, or at a pier or wharf, is, within the common acceptance of the term, on the high seas, outside of low-water mark on the coast. United States *v.* Seagrist, 4 *Blatchf.* 420. It has been held that the waters of havens where the tide ebbs and flows are not properly the high seas, unless without low-water mark. United States *v.* Hamilton, 1 *Mas.* 152; S. P. The Abby, *Id.* 360. But an indictment for confining the captain, and for an assault with a dangerous weapon, committed on the high seas in the outer road off St. Domingo, in a vessel belonging to citizens of the United States, was held supported by proving those offences to have been done in the inner road, and in port. United States *v.* Stevens, 4 *Wash.* 547. The great lakes are not "high seas" within the meaning of act of July 29,

1850, punishing the burning of vessels. Miller's Case, 1 *Brown Adm.* 156.

High steward. An expression used —

1. Of the lord high steward, who holds a court appointed, *pro hac vice*, during the recess of parliament, for the trial of a peer indicted for treason or felony, or for misprision of either. 4 *Bl. Com.* 261, 262; 4 *Steph. Com.* 302–307.

2. Of the lord high steward of the royal household. 4 *Bl. Com.* 276, 277; 4 *Steph. Com.* 325.

3. Of the lord high steward of the University of Oxford or Cambridge, an officer of the university appointed to preside at the trial of any scholar or privileged person of the university, on any indictment for treason or felony, of which the vice-chancellor of the university may have claimed and been allowed cognizance. Before the office of the high steward is called into action, he must have been approved by the lord high chancellor of England. 4 *Bl. Com.* 277, 278; 4 *Steph. Com.* 325–328.

High treason. See TREASON.

High-water mark. The line reached by the waves of the sea at flood tide. See LOW-WATER MARK.

High-water mark, used of a mill-pond, means the highest point to which the dam will raise the water in the ordinary state of the stream. Brady *v.* Blackinton, 113 *Mass.* 238.

HIGHWAY. A road free to the public; a passage open to all persons.

There is a difference in the shade of meaning conveyed by two uses of the word. Sometimes it signifies right of free passage, in the abstract, not importing any thing about the character or construction of the way. Thus a river is called a highway; and it has been not unusual for congress, in granting a privilege of building a bridge, to declare that it shall be a public highway. Again, it has reference to some system of law authorizing the taking a strip of land, and preparing and devoting it to the use of travellers; in this use, it imports a roadway upon the soil, constructed under the authority of these laws.

Highways exist, also, by dedication of the necessary land from private landowners, by prescription, and by necessity.

A highway is a public road which all the subjects of the realm have a right to use. The term also, for some purposes at least, applies to ways common to the inhabitants of some parish or district only, as in the case of church-paths. A highway may exist in a place which is not a thoroughfare. Highways exist by prescription, by local act of parliament, or by dedication to the public on the part of individuals. *Mozley & W.*

A highway is a public way open to all the king's subjects, and leading between two public termini. Young *v.* Cuthbertson, 1 *Macq. H. L.* 455.

Highway means a public road over which all citizens are at liberty to pass and repass, on foot, on horseback, and in carriages and wagons. State *v.* Johnson, *Phill. L.* 140.

The legislature of New Jersey have habitually used the term highway as synonymous with a lawful public road. Hence the phrase, "the highways within my limits and division," as employed by an overseer of roads in an official paper, may be taken as sufficiently descriptive of a public road, regularly laid out, according to the provisions of the statute. Vantilburgh *v.* Shann, 24 *N. J. L.* 740.

The term highway, when used in a statute, is restricted to county roads and county ways. Cleaves *v.* Jordan, 34 *Me.* 9.

Highway includes town ways. Jones *v.* Andover, 6 *Pick.* 59; Commonwealth *v.* Hubbard, 24 *Id.* 98.

The word highway is a term applicable to all great roads leading from town to town, to markets, and to public places, and denotes a way that is common to all passengers. But it is also especially used, in our statutes, as applicable to county roads or roads leading from place to place, in distinction from town or private ways, as to which the provisions are different in several respects. When used in a popular sense, it includes all public travelled ways, whether county or town. Harding *v.* Inhabitants of Medway, 10 *Met.* 465.

A way may be a highway although it lies wholly in one town, and is not connected with any county road. Blackstone *v.* County of Worcester, 108 *Mass.* 68.

A road laid off by commissioners, under an order of a township board of trustees, who appoint an overseer of the same, is a public highway; and to obstruct it wilfully is a misdemeanor. State *v.* Davis, 68 *N. C.* 297.

To constitute a highway, the way must be one over which all the people of the state have a common and an equal right to travel, or, at least, a general interest to keep unobstructed. People *v.* Jackson, 7 *Mich.* 432.

A way, to be a highway, must be so used as to show that the public require it for their accommodation, and that the owner of the land has intentionally dedicated it for that purpose. State *v.* Nudd, 23 *N. H.* 327.

A street in a town is a highway. Conner *v.* President, &c. of New Albany, 1 *Blackf.* 68; and see Brace *v.* N. Y. Central R. R. Co., 27 *N. Y.* 269; Common Council of Indianapolis *v.* Croas, 7 *Ind.* 9; State *v.* Mathis, 21 *Id.* 277.

The streets and alleys of a town are highways. Morris *v.* Bowers, *Wright*, 749.

A street is a subject of common use, and

not of exclusive possession; an incorporeal hereditament, in which all persons possess an equal right, — the right of passing over it; and is, in its nature, incapable of being reduced into possession. But it is a subject of government; and the regulation of it is placed in the hands of the corporation Conner *v.* President, &c. of New Albany, 1 *Blackf.* 88.

A plank-road — unless there be a reservation to the contrary in the dedication implied in its charter — is a public highway. Craig *v.* People, 47 *Ill.* 487.

Highway does not include turnpike. Seneca Road Co. *v.* Auburn & Rochester R. R. Co., 5 *Hill*, 170.

As used in a statute authorizing the impounding cattle found astray upon a highway, the word highway includes a turnpike. Pickard *v.* Howe, 12 *Met.* 198.

A railroad is not a highway, in the sense of that word as used in N. C. Rev. Code, ch. 34, § 2, punishing with death robbery in or near a public highway. State *v.* Johnson, *Phill. L.* 140.

A navigable river within this state is not a highway, within the provision of Ala. Code, § 3243, against gaming. Glass *v.* State, 30 *Ala.* 529.

Highway, as used in R. I. Rev. Stat. ch. 176, § 16, making carriers liable for loss of life of a person crossing upon a highway, includes the crossing of navigable waters, the same being a public highway. Chase *v.* American Steamboat Co., 10 *R. I.* 79.

To be a public highway, a road must be laid out, and recorded as such, according to law. United States *v.* King, 1 *Cranch C. Ct.* 444; United States *v.* Schwarz, 4 *Id.* 160; United States *v.* Emery, *Id.* 270; State *v.* Marble, 4 *Ired. L.* 318.

Every way is a highway which has been used as such for fifty years, and repaired within that time by the town. Reed *v.* Northfield, 13 *Pick.* 94.

A road of which a survey has been filed and recorded by the highway commissioners, between 1805 and 1826, is a public highway, notwithstanding irregularity in laying it out. Parker *v.* Van Houten, 7 *Wend.* 145.

To constitute a highway, it must at least be of public utility, if not of necessity. Witter *v.* Harvey, 1 *McCord*, 67.

A town-way is not substantially the same thing as a highway, within the meaning of Me. Rev. Stat. 1871, ch. 18, § 39. Waterford *v.* Oxford County, 59 *Me.* 450.

In New Hampshire, since the revised statutes, no way is to be deemed a public highway, unless it has been laid out agreeably to statute, or has been used by the public for at least twenty years. Northumberland *v.* Atlantic, &c. Railroad, 35 *N. H.* 574.

Highway acts, or laws. The body or system of laws governing the laying out, repair, and use of highways.

Highway crossing. This may mean, doubtless, a crossing of two highways. But as special provision is necessary against collisions, wherever a railroad crosses a highway, the term has come to be very frequently used, in railroad laws and cases, to designate a place where a railroad crosses a highway.

Highway officers. These are the officers who have charge of the highways. In some localities this duty devolves on officers of more general name and character, as upon supervisors of the county, or selectmen of the town. In others there is a distinct board, known as highway overseers, or by like name, to whom the making and repair of roads is committed.

Highway robbery. In England, from the time of Henry VIII. to William and Mary's reign, robbery in or near a highway was a capital offence; while, if committed elsewhere, the punishment was less severe. The same distinction was formerly made in North Carolina. It is obsolete in England, and has never been of general importance in this country.

Highway tax. A tax for and applicable to the making and repair of highways. Under the highway laws in several localities the tax-payer has the option of paying it in money, or by his labor on the roads, under direction of the highway officers.

Highwayman. When highway robbery was a distinct offence, the term highwayman was in use to denote one guilty of robbery on the highway.

Hiis testibus. These being witnesses. Words used at the beginning of the attestation clause in ancient deeds and charters, followed by the names of the witnesses, written by the clerk or scrivener, and after their names the concluding phrase, *et aliis ad hanc rem convocatis*, — and others for this purpose assembled.

HIRE, *v.* To contract for the use of property or for services. Hire, *n.*: the name of a species of bailment the subject of which is property furnished for use, or personal services. Also, the compensation agreed upon for the services; or wages; and sometimes, though rarely, the compensation for the use of a chattel (this is more often called rent).

Hired is applied to a thing taken for use upon compensation, in distinction from a thing bought or borrowed; or to a person employed to serve for wages; or to services engaged for wages. Hirer: the person who obtains the use of a thing, or employs services for a compensation. Hiring: the act or transaction of contracting for personal services, or for the use of property, for a compensation.

Locatio (q. v.) is the term of the civil law which stands generally for this species of bailment; and writers who follow the language of the civil law have divided the contract of hiring into *locatio operis faciendi*, or hiring services, and *locatio rei*, or hiring a thing. The first of these divisions is further subdivided; but the subdivisions do not fully correspond with the wants and uses of modern transactions.

The views and modes of statement of the civil law have, however, been widely adopted by writers in English and American jurisprudence, in explaining the relative obligations of the parties to contracts of hire.

Hire of things. According to these views, the party who lets a thing to hire comes under an implied obligation to deliver the thing to the hirer; to refrain from every obstruction to the use of it by the hirer during the period of the bailment; to do no act that shall deprive the hirer of the thing; to warrant the title and right of possession to the hirer, in order to enable him to use the thing, or to perform the service; to keep the thing in suitable order and repair for the purposes of the bailment; and, finally, to warrant the thing free from any fault inconsistent with the proper use or enjoyment of it. It is the duty of the person letting to hire, according to the Roman law, to disclose the faults of the thing hired, and practise no artful concealment, to charge only a reasonable price therefor, and to indemnify the hirer for all expenses, which are properly payable by the letter. The rights of the hirer are that he acquires the right of possession only of the thing for the particular period or purpose stipulated (but he acquires no property in the thing); and that he also acquires the exclusive right to the use of the thing during the time of the bailment. His duties are to put the thing to no other use than that for which it is hired; to use it well; to take care of it; to restore it at the time appointed; to pay the price or hire; and, in general, to observe whatever is prescribed by contract, or by law, or by custom. The contract may be dissolved or extinguished in respect to future liabilities in various ways: 1, By the mere efflux of the time, or the accomplishment of the object for which the thing is hired; 2, by the loss or destruction of the thing by any inevitable casualty; 3, by a voluntary dissolution of the contract by the parties; and, 4, by operation of law, as where the hirer becomes proprietor by purchase or otherwise of the thing hired.

Hire of services. The contracts classed under this head are either contracts for work, contracts for safe-keeping of personal property, or contracts for carriage of persons or property.

In contracts for work, it is of the essence of the contract: 1, That there should be work to be done; 2, that it should be to be done for a price or reward; and, 3, that there should be a lawful contract between parties capable and intending to contract. The obligations and duties on the part of the employer, as deduced in the foreign law, are principally these: 1, To pay the price or compensation; 2, to pay for all proper, new, and accessorial materials; 3, to do every thing on his part to enable the workman to execute his engagement; 4, to accept the thing when it is finished. If before the work is finished the thing perishes by internal defect, by inevitable accident, or by irresistible force, without any default of the workman, then, 1, if the work is independent of any materials or property of the employer, the manufacturer has the risk, and the unfinished work perishes to him; 2, if he is employed in working up the materials, or adding his labor to the property of the employer, the risk is with the owner of the thing, with which the labor is incorporated; 3, if the work has been performed in such a way as would afford a defence to the

employer against a demand for the price, if the accident had not happened (as if it were defectively or improperly done), the same defence will be equally available to him after the loss. The obligations or duties on the part of the workman or undertaker are thus summed up in the foreign law; to do the work; to do it at the time agreed on; to do it well; to employ the materials furnished by the employer in a proper manner; and, lastly, to exercise a proper degree of care and diligence about the work.

In respect to contracts for safe-keeping, and for carriage, the tendency of thought and usage in recent times seems to be strongly towards a departure from the civil-law nomenclature and classification, in which these were placed under the head of contracts of hire. In respect to the first class, persons who do not cling strongly to the civil-law language would be more likely to say of merchandise placed in the care of a warehouseman that it was deposited with him, intrusted to him, or stored, than to call the engagement a hiring. As "deposit" has been practically extended with respect to money intrusted to banks to embrace an engagement, leaving the depositary at liberty to return other money of the same value (see DEPOSIT), so it has been extended to include an engagement for safe-keeping for a compensation. The restriction upon the old definition, which limited deposit to a *gratuitous* engagement to keep and return, is now often ignored; noticeably, for instance, in the corporate name "Safe Deposit Company," widely adopted by companies organized for the safe custody of valuables. Storage and carriage, again, are in more common use than any inflections of hire, to designate a contract for the custody of ordinary merchandise, or for the transportation of either persons or property from place to place.

What is now ordinarily understood in the United States by contract of hire, is either a contract for the privilege of using a thing, or for personal services.

HOG. May designate the dead as well as the living animal. A contract for the delivery of a certain number of hogs, held, in the absence of explanatory evidence, to mean dead hogs; as they were to be paid for at a fixed price per hundred pounds, net. Whitson *v.* Culbertson, 7 *Ind.* 195; S. P. Alexander *v.* Dunn, 5 *Id.* 122.

Hog, as used in a statute punishing the shooting any hog, &c., of another person, includes sows. Shubrick *v.* State, 2 *S. C.* 21.

HOLD. 1. To adjudge, decide, decree; as in saying, "if the court should hold that the defendant is liable, then," &c.

2. To bind, confine, oblige, or restrain; as in the expressions, "to hold a person to his contract," "the obligor is held and firmly bound," "persons held to service."

3. To possess in virtue of a lawful title; as in the expression, common in grants, "to have and to hold" (see HABENDUM); or in that applied to notes, "the owner and holder."

An expression in a deed, "that I" (the grantor) "hold a life-interest" in the land conveyed, means "reserve" a life-interest, &c. Hurst *v.* Hurst, 7 *W. Va.* 289.

The term holding, in a statute concerning partition of lands, does not require actual occupancy, but is equivalent to owning or having title to the lands, &c. Godfrey *v.* Godfrey, 17 *Ind.* 6.

The term holder, within the rule that, when holder and indorsee of a note reside in the same place, notice of dishonor must be personally served, includes the bank at which the note is payable, and the notary who may hold the note as agent of the owner for the purpose of making demand and protest. Bowling *v.* Harrison, 6 *How.* 248.

Upon a power to a corporation to hold property, and the distinction between a power to purchase and a power to hold, see Lasure *v.* Hillegas, 7 *Serg. & R.* 313; Runyan *v.* Coster, 14 *Pet.* 122; Chautauque County Bank *v.* Risley, 4 *Den.* 480; Baird *v.* Bank of Washington, 11 *Serg. & R.* 411; Goundie *v.* Northampton Water Co, 7 *Pa. St.* 233; Martin *v.* Branch Bank at Decatur, 15 *Ala* N. S. 587; Bank of Michigan *v.* Niles, 1 *Doug.* 401.

Hold over. To hold over, applied to a tenancy, signifies that the tenant retains possession of the leased premises after the expiration of his tenancy, and does not surrender them to the landlord. As a tenant is, in general, under express covenant or implied obligation to surrender peaceably, at the end of the term, his holding over is presumably wrongful. In most of the states, the statutes provide a summary proceeding

(*q. v.*) to obtain possession of demised premises, by which he may, at suit of the landlord, be ousted.

To hold over, applied to an office, signifies that one who has been in office, in virtue of a lawful appointment or election to the end of the term designated by law, continues to exercise its functions after the term has expired. This is not always wrongful. In many cases the statute, and in others common-law rules, to prevent an interregnum in an office, authorize a previous incumbent to hold over until a successor has been duly qualified.

HOLIDAY; HOLYDAY. A secular day upon which the usual obligations of labor, attendance upon court, and attention to notices and service in legal proceedings, are, by law, remitted.

In early times, various days besides Sunday were set apart for religious commemoration and ceremonies, and were, in the literal sense, called holydays. In modern usage, days have been designated for rest and festivity, from other than religious reasons. Webster advises applying holyday especially to a day of religious commemoration, holiday to a secular festival. But the two are not always easily distinguishable; and the distinction, if it could be definitely drawn, has not, in the administration of law, any practical importance. The important thing is that the days in question are excepted, by common understanding and without express reservation, from many contracts for labor; the business of courts and public offices is suspended; presentment of commercial paper and service of legal notices and civil process is disallowed or excused; and, in general, the law, while it does not require, encourages the appropriation of the day to rest and festivity.

In a sense, Sunday is a holiday; but as the latter word is usually employed, it does not include Sundays; thus Sundays and holidays is a common and correct expression.

There may be holidays by local custom or the usage of a particular trade or class of persons, as the holidays of schools. To avoid including these, the expression legal holidays is often used for the days prescribed by authority of a general law.

Throughout the United States, the subject of holidays is regulated partly by local usage, and also, to a considerable extent, by state statutes. Thus, in New York, the act of 1873, ch. 577, amending act of 1870, ch. 370, directs, in effect, that the first day of January (New Year's day), the twenty-second day of February (Washington's birthday), the thirtieth day of May (Decoration day), the fourth day of July (Independence day), the twenty-fifth day of December (Christmas day), any general election day, and any day appointed or recommended by the governor or president as a day of thanksgiving, or of fasting and prayer, shall, for all purposes connected with presentment, protest, and notice of dishonor of bills, notes, and checks, be treated as Sunday, and as public holidays. When either of these days falls on Sunday, the Monday following is observed as a holiday.

The subject is regulated in England by the bank holidays act of 1871, Stat. 34 Vict. ch. 17, and the holidays extension act of 1875, Stat. 38 Vict. ch. 13.

A statute declaring a specified day a legal holiday, imports, *ex vi termini*, that it shall be *dies non juridicus*. The act of a clerk in docketing a judgment on that day is void, notwithstanding there are no words in the statute prohibiting it. (38 *Wis.* 673.) *Re* Worthington, 14 *Bankr. Reg.* 388.

HOLOGRAPH. An instrument written by the grantor, testator, &c., entirely in his own hand. Spelled also Olograph.

HOLY ORDERS. In ecclesiastical law, the orders or dignities of the church. Those within holy orders in the English church are archbishops, bishops, priests, and deacons. The Roman canonists had somewhat different grades.

HOMAGE. A term in the feudal law, designating the ceremony of reverence by which a tenant or vassal, upon being invested with feudal lands, publicly avowed the tenure upon which he was to hold them. The tenant kneeling, being ungirt, uncovered, and holding up his hands both together between those of his lord, who sat before him, he professed that "he did become his *man*,

from that day forth, of life and limb and earthly honor;" and then he received a kiss from his lord.

Homage is to be distinguished from fealty, another incident of feudalism, and which consisted in the solemn oath of fidelity made by the vassal to the lord, whereas homage was merely an acknowledgment of tenure. If the homage was intended to include fealty, it was called liege homage; but otherwise it was called simple homage.

Homage jury. A jury in a court-baron (*q. v.*), consisting of tenants that do homage to the lord of the fee; they were authorized to inquire and make presentment of defaults and deaths of tenants, admittances, and surrenders, in the lord's court, &c.

HOME. Abode; actual domicile; dwelling-place. See ANODE; DOMICILE; DWELL; RESIDENCE.

That the word home, in the poor-laws of Maine, means some actual abode, adopted with intent to remain, and does not embrace any place considered as home constructively, see Jefferson *v.* Washington, 19 *Me.* 293; Turner *v.* Buckfield, 3 *Id.* 229.

One home or dwelling-place does not necessarily continue until another is acquired. A man may abandon his home, and thereby cease to have any. Exeter *v.* Brighton, 15 *Me.* 58; Jefferson *v.* Washington, 19 *Id.* 293; and see Wilmington *v.* Somerset, 35 *Vt.* 232.

Where a testator directed that no charge should be made to his children for expenses while they "remained at home," it was held that by "home" was meant that household of which the testator was the head while living, and the government whereof he committed to his wife upon his death. Manning *v.* Woff, 2 *Dev. & B. Eq.* 12.

HOMESTEAD. In a general sense, designates the land and dwelling appropriated as a permanent residence of a family; the home-place, or place of a home. Cook *v.* McChristian, 4 *Cal.* 23; Ackley *v.* Chamberlain, 16 *Id.* 181; Hoitt *v.* Webb, 36 *N. H.* 158; Austin *v.* Stanley, 46 *Id.* 52; Barney *v.* Leeds, 51 *Id.* 253.

Independent of the homestead exemption laws, the word has received some judicial interpretation in this country. The word homestead, used in a will of property in Iowa, before the word had acquired a technical meaning in that state, was held to include all the land appurtenant to the farm upon which the testator resided. Hopkins *v.* Grimes, 14 *Iowa*, 73. "Homestead," in a will, was held not to include the original dwelling-house, where the testator had built a new dwelling on another part of the land, and had moved into it, and had enclosed the old building as a distinct residence, and leased it. Backus *v.* Chapman, 111 *Mass.* 386. In a conveyance of lands described as the grantor's "homestead farm," it was held that homestead by no means necessarily included four parcels of land which the grantor owned, though they lay and were occupied together. Homestead means nothing more than home-place. What was intended must be determined by considering any words of particular description accompanying the general description in the deed. Woodman *v.* Lane, 7 *N. H.* 241.

The word has more recently acquired an important technical meaning, under laws of the states allowing a head of a family to designate by public record a house and land as his homestead, and exempting such homestead from execution for general debts. Such exemptions are not allowed in all the states. Down to 1875, Connecticut, Delaware, Indiana, Maryland, Oregon, Pennsylvania, and Rhode Island, also the District of Columbia, appear not to have passed laws of this kind. Throughout the other states this privilege is allowed. If the property is a farm, the privilege is limited, in about half the states, by number of acres; forty, eighty, or one hundred and sixty is a common limit. In other states, the restriction is by value; often five thousand dollars or two thousand dollars, or sometimes less. If the property is a town or city lot, the exemption is generally limited by a value corresponding to the value allowed for farms, or the quantity is closely restricted, as to a quarter or half an acre. The homestead laws usually give the wife of the proprietor some control over any sale or mortgage of the property.

These homestead laws do not usually give any specific description of the kind of property which may be exempted. They impose a limit of value; but as to what sort of property is included they

generally use the word homestead, leaving its meaning to be determined by the courts. Decisions upon the term, in this statutory connection, are not altogether consistent, for the reasons that the statutes themselves differ in policy and language somewhat in the different states; and that the courts have been guided, in different jurisdictions, by opposite principles of construction. Some cases treat the homestead law as an innovation upon the common law, subject to strict construction; others consider it in the light of a remedial law, which must be liberally construed.

The cases under these homestead laws, however, agree in requiring the premises claimed as a homestead to be occupied for family purposes as a home, by one who is a resident thereon, and makes them the dwelling-place of his family. *Washb. Real P.* 352. General definitions given have been: homestead means the home-place; the place where the house is; the house and the adjoining land, where the head of the family dwells; the home farm. Hoitt *v.* Webb, 36 *N. H.* 158. A homestead, within the intent of the Arkansas statute, is the place of a house or home; that part of a man's landed property which is about or contignous to his dwelling-house. Tumlinson *v.* Swinney, 22 *Ark.* 400. The word, as used in the constitution and statute of California, represents the dwelling-house at which the family resides, with the usual and customary appurtenances, including outbuildings of every kind necessary for family use, and land used for the purposes thereof. If situated in the country, it may include a garden or farm; if in a city or town, it may include one or more lots or blocks. It need not be in a compact body or circumscribed by fences. The only tests are use and value. Gregg *v.* Bostwick, 33 *Cal.* 220; Estate of Delaney, 37 *Id.* 176.

With respect to the buildings necessary, it is said that there can be no homestead without a dwelling-house. Coolidge *v.* Wells, 20 *Mich.* 79. There must be a home or residence, whether house, cabin, or tent, to constitute a homestead. Franklin *v.* Coffee, 18 *Tex.* 413.

With respect to the residence requisite, it is said that actual residence by the family is necessary to constitute a homestead. Benedict *v.* Bunnell, 7 *Cal.* 245; and see Spaulding *v.* Crane, 46 *Vt.* 292. A person can have but one homestead exempt, and that must be his place of actual residence. Tourville *v.* Pierson, 39 *Ill.* 446. The homestead exemption accorded by the laws of Iowa does not attach to property until it is actually occupied and used as a home. A mere intention to occupy, though subsequently carried into effect, is not enough. See cases cited 7 *U. S. Dig.* 89, ¶ 142. A homestead is a place where a man eats and sleeps, surrounds himself with the insignia of home, and enjoys its immunities and privileges. A house used as a grocery, in the back room of which a man sleeps and keeps his trunk, &c., eating his meals at a tavern, cannot be considered his homestead. Philleo *v.* Smalley, 23 *Tex.* 498. For a single man to occupy a house, by day only, as a law office, does not make it a homestead. Stanley *v.* Greenwood, 24 *Tex.* 224. A workshop used for storage of furniture, or a pew in a meeting-house, cannot be deemed a homestead. True *v.* Morrill, 28 *Vt.* 672; compare Brettun *v.* Fox, 100 *Mass.* 234. And the statutory occupation necessary to create a homestead must be personal: it cannot be by a tenant. True *v.* Morrill, 28 *Vt.* 672. A house and lot occupied by an unmarried man as a sleeping-place, without servants or other persons connected with him there residing, and rented by him at the time of levy of execution, is not within the Texas exemption. Wilson *v.* Cochran, 31 *Tex.* 677.

With respect to adoption and change of occupancy, the homestead is the place of family residence, or the property dedicated as such. The husband, as the head of the family, chooses and establishes it; and, when he has done so, it becomes the wife's homestead, whether she is willing or unwilling. When he sees fit to change it, and dedicates another, such new homestead then becomes that of the wife and family also. Holliman *v.* Smith, 39 *Tex.* 357. Occupancy by the husband and family is

presumptive evidence of appropriation as a homestead, and removal is presumptive evidence of abandonment; though this latter presumption will be rebutted by proof of a temporary purpose in the removal. Harper *v.* Forbes, 15 *Cal.* 202; compare Titman *v.* Moore, 43 *Ill.* 169; Matter of Phelan, 16 *Wis.* 76; Herrick *v.* Graves, *Id.* 157; Woodward *v.* Till, 1 *Mich.* (*N. P.*) 210; Wiggins *v.* Chance, 54 *Ill.* 175. A homestead does not become such until actual residence and occupation by the family as a home; but, after that character has been impressed, temporary absence, *animo revertendi*, will not constitute such an abandonment as to forfeit the exemption. Campbell *v.* Adair, 45 *Miss.* 170.

With respect to the mode of use, some of the decisions have indicated a very liberal rule, that a building need not be occupied exclusively as a residence, to constitute a homestead. Phelps *v.* Rooney, 9 *Wis.* 70. Whatever is used, being necessary or convenient as a place of residence for the family, as contradistinguished from a place of business, constitutes the homestead, within the statutory limit as to value; and if it is also used as a place of business by the family, it need not therefore cease to be a homestead. Estate of Delaney, 37 *Cal.* 176. Notwithstanding the fact that a building and grounds are adapted to be used in part as a boarding-house or hotel, yet if they are also prominently designed and used for the residence of the owner and his family, they may be protected as a homestead. Achley *v.* Chamberlain, 16 *Cal.* 181; see also Taylor *v.* Hargous, 4 *Id.* 268; Layell *v.* Layell, 8 *Allen*, 575. A homestead may include the whole of a dwelling-house, although a portion of it is occupied by a third person paying rent therefor to the owner. Mercier *v.* Chace, 11 *Allen*, 194. A homestead exemption, in Illinois, includes the entire lot upon which the debtor resides, whatever else may be there, and for whatever else used, if the value is not too great. Hubbell *v.* Canady, 58 *Ill.* 425. In Kansas, the whole house occupied by the debtor is exempt, though a portion of it was constructed and is used for a brewery. *Re* Tertelling, 2 *Dill.* 339. But, in Wisconsin, it is held that the homestead laws have regard to the purpose for which the property is used. No more of a lot in a city or village can be held as a homestead than is actually occupied for the purpose. Stores and offices rented by the debtor, together with the portion of his lot on which they stand, are not embraced within the exemption. Casselman *v.* Packard, 16 *Wis.* 114. A homestead in a town may include several lots; and if used, or by reasonable presumption to be used, for the convenience of the family, they need not be contiguous. Hancock *v.* Morgan, 17 *Tex.* 582; S. P. Reynolds *v.* Hull, 36 *Iowa*, 394. A tract of land not connected with the dwelling may be held as a part of the homestead; but both lots must be habitually and in good faith used as a part of the same homestead. That they are occupied and used by the same owner is not enough. Reynolds *v.* Hull, 36 *Iowa*, 394. Where a parcel of land was used to furnish feed to a cow kept at the house of the plaintiff, it was held a part of the homestead, although about a mile distant from the dwelling; as the house and both pieces of land did not exceed the statutory limit. Buxton *v.* Dearborn, 46 *N. H.* 43. Under Wagn. (Mo.) Stat. 697, § 1, parcels of land comprising a homestead need not be contiguous, if they are used in connection. Perkins *v.* Quigley, 62 *Mo.* 498. That, in North Carolina, two tracts of land, although not contiguous, may constitute a homestead, if the aggregate value does not exceed the limit allowed, see Martin *v.* Hughes, 67 *N. C.* 293; Mayho *v.* Cotton, 69 *Id.* 289. So in Texas. Williams *v.* Hall, 33 *Tex.* 212; Rayland *v.* Rogers, 34 *Id.* 617.

With respect to whether homestead may include distinct parcels of land, the rule varies in different states. A homestead should consist of but a single tract. Several adjoining and united pieces may be considered as one tract; but, to warrant this, they must be contiguous, though the titles under which they are held may differ. Randall *v.* Elder, 12 *Kan.* 257. The homestead exemption may extend to contiguous land occupied and improved under a verbal contract of purchase made before

the debt was incurred, although the title was not completed until afterwards, if such land is improved and used as part of the homestead. Fyffe *v.* Beers, 18 *Iowa*, 4. Two contiguous city lots, one of which contains the residence, and the other is used as appurtenant to it, for drying clothes, as an access to the street, &c., may be included in one exemption. Engelbrecht *v.* Shade, 47 *Cal.* 627. In Florida, the shop, store, or mill in which one pursues his usual trade or avocation, if connected with and adjacent to his dwelling, is included within his homestead. But a lumberman running a saw-mill cannot claim portions of land adjacent to his dwelling which are not auxiliary to his homestead. Greeley *v.* Scott, 2 *Woods*, 657; 12 *Bankr. Reg.* 248. The homestead exempted cannot be deemed to embrace a tract of land distinct from the grounds around the dwelling, although such tract is used to supply the dwelling with necessary fuel, and both tracts do not exceed the statutory limit of value. Walters *v.* People, 18 *Ill.* 194; S. P. True *v.* Morrill, 28 *Vt.* 672. To warrant regarding a lot adjoining the grounds of a dwelling, as part of a homestead, the two must be substantially connected. Twenty acres of timber land, situated a mile from the owner's dwelling, cannot be claimed as a part of his homestead. Bunker *v.* Locke, 15 *Wis.* 635; S. P. Kresin *v.* Mau, 15 *Minn.* 116. The use of a tract of land two miles and a half from a homestead farm, in connection with that farm, by the owner of both, for pasturing cattle of himself and others, was held not sufficient to exempt it from execution as part of his homestead. Adams *v.* Jenkins, 16 *Gray*, 146. The term does not extend to tenements or lots other than the home-place, which are not occupied personally by the owner and his family; to houses in which they do not dwell, and farms on which they do not live. Nor does it necessarily mean all those parcels of land which may adjoin and be occupied together; for the homestead is the place of the house. Still less can it apply to property occupied by tenants, and where the owner does not dwell. Hoitt *v.* Webb, 36 *N. H.* 158.

HOMICIDE. Man-killing; the taking the life of a human being. Homicidal: involving or pertaining to man-killing; as homicidal monomania, an insane impulse to kill.

Homicide, as a term, does not import crime: it includes crimes, such, for instance, as murder and manslaughter. But a homicide may be innocent, may even be in the performance of a duty. The execution of the sentence of death upon a criminal by the officer of the law is a homicide. The term homicide embraces all man-killing. Burns *v.* People, 1 *Park. Cr.* 182, 186.

Homicide is of various kinds, named according to the relations of the parties, — as regicide, the killing one's king; parricide or matricide, the killing a parent; fratricide or sororicide, the killing a brother or sister; fœticide, the killing an unborn child; infanticide, the killing a child after birth; suicide, the killing one's self. But these distinctions are not important (with some exception as to suicide) in the administration of the criminal law throughout the United States.

A division of the subject, which is of great practical importance, is one founded upon the legal character of the act. This distinguishes three kinds: justifiable, excusable, and felonious.

Justifiable homicide embraces those cases in which the killing is committed in the performance of a duty or the exercise of a right. Instances are, where a sheriff executes a criminal in strict conformity to his sentence; where a policeman kills a person who resists capture; or, sometimes, where a private person commits the act in self-defence.

Excusable homicide embraces cases of killing in which the party cannot justify the act by virtue of a duty or right, but is excused by the law from any punishment, in view of his innocence of any criminal intent. Instances are, where a death is caused by accident or misadventure, or through ignorance; also, perhaps, where, though wilfully committed, it is done in obedience to a mere instinct of self-preservation, excited by circumstances of extraordinary peril, overwhelming and disabling the judgment. And homicides in the exercise of self-

defence are sometimes placed under this head, in view of any circumstances placing the party slightly in fault for the creation of the necessity, so that he cannot be said strictly to be justified.

Felonious homicide includes murder, manslaughter, and suicide. See those titles.

Whether words imputing the commission of homicide, without a distinct implication that it was felonious, are actionable, as importing a charge of an offence, see Taylor *v.* Casey, *Minor*, 258; O'Conner *v.* O'Conner, 24 *Ind.* 218; Eckart *v.* Wilson, 10 *Serg. & R.* 44; Hays *v.* Hays, 1 *Humph.* 402; Montgomery *v.* Deeley, 3 *Wis.* 709.

HOMOLOGATION. Confirmation; ratification. It is used in civil and Scotch law to denote a judicial sentence confirming some previous proceeding; or an act of a grantor establishing a deed previously made, but, as originally made, not obligatory. *Bouvier; Burrill.*

Honeste vivere. To live honorably. One of the three general precepts adopted by Justinian as the fundamental principles of the law.

HONOR. 1. To honor a bill of exchange or promissory note, is to accept the bill, or pay the bill or note, according to its tenor. To accept for honor is a phrase applied to the act of a friend of the drawer of a bill, who, upon the failure of the drawee to accept, intervenes and accepts it, for the friendly purpose of protecting the credit of the drawer, and not upon any obligation resting upon himself.

2. In old English law, honor, besides its vernacular meaning, signifies a seigniory of the higher class.

Honorable. A title of quality conferred, by English usage, upon the younger children of earls, and the children of viscounts and barons; to persons enjoying trust and honor; and, collectively, to the house of commons and the East India Company. In American usage, it is bestowed on those who hold, or have held, any of the higher public offices; but is a title of courtesy merely.

Honorarium. A gratuitous payment for services rendered. An honorary gift, as a matter of gratitude, and not as compensation by way of hire. Among the ancient Romans, fees to lawyers were of this nature. So, in England, are fees to lawyers and to physicians. An *honorarium* is so much in the nature of a gift, that it cannot be recovered by action. Attorneys, on the other hand, may enforce payment of their costs or compensation by legal remedies. This distinction does not prevail throughout the United States.

An *honorarium* is a voluntary donation, in consideration of services which admit of no compensation in money; in particular, to advocates at law, deemed to practise for honor or influence, and not for fees. McDonald *v.* Napier, 14 *Ga.* 89.

HORSE. In construing a statute which defines what animals may be treated as estrays, particularly specifying horse, mare, colt, mule, &c., it would be unreasonable to suppose that the legislature intended to exclude from among animals which might be estrayed what is called a gelding; since these may, as a general rule, be considered the most valuable animal of their kind, and at least as liable to estray from their owners. The word horse is used in a *quasi* generic sense, to include every description of the male, in contradistinction to the female or mare, whether stallion or gelding. Owens *v.* State, 38 *Tex.* 555.

Upon trial of an indictment which charged the defendant with having stolen a horse, it was proved that he had stolen a gelding. It was held that, as the statute upon which the indictment was founded made a distinction between the terms "horse" and "gelding," the variance was not cured by proof that, in the common understanding of the community, the term horse includes a gelding. Turley *v.* State, 3 *Humph.* 323.

Horse, in an indictment for larceny, excludes a mare. Taylor *v.* State, 44 *Ga.* 263.

"Horses" may fairly be construed to include mares, as being a *nomen generalissimum.* State *v.* Dunnavant, 3 *Brev.* 9.

Mules are included in the terms of a statute giving a remedy against railroad companies for injuries to horses and cattle. Toledo, &c. R. Co. *v.* Cole, 50 *Ill.* 184.

The exemption of a horse from execution includes not only the subject itself, but every thing absolutely essential to its beneficial enjoyment, as shoes, saddle, &c. Cobbs *v.* Coleman, 14 *Tex.* 594; Dearborn *v.* Phillips, 21 *Id.* 449.

HOSPITAL. The name of a class of eleemosynary corporations devoted especially to the care and support of the aged, the infirm, or the sick.

HOSTAGE. In the law of war, is a person left in the hands of one belligerent, as a surety that the other will perform some engagement or stipulation.

HOTCHPOT. A vernacular word for a mixture, some say for a pudding, composed of several ingredients; other-

wise spelled hodgepodge, hotspot, &c.; and borrowed by the law to express the casting several portions or shares into a common stock, preliminary to a more equal or just division of the whole.

The chief use of the term in the American cases is in the law of advancement (*q. v.*), where the shares of several children in the father's estate are adjusted by charging each child who has received any thing by way of advancement with the value of the thing advanced (not, however, with interest or profits), and giving him credit for his proper share of the whole estate, reckoning these charges as assets. This is as if the children advanced had returned their advancements, and the estate, as a whole, had then been divided anew. See *U. S. Dig.* tit. Advancement. In this use of the term, it corresponds closely with the *collatio* (q. v.) of the civil law.

Hotchpot originally means a confused mingling of divers things together, and among the Dutch it signifies flesh cut into pieces, and sodden with herbs or roots; but, by a metaphor, it is a blending or mixing of lands given in marriage with other lands in fee falling by descent; as if a man seised of thirty acres of land in fee hath issue only two daughters, and he gives with one of them ten acres in marriage to the man that marries her, and dies seised of the other twenty acres; now she that is thus married, to gain her share of the rest of the land, must put her part given in marriage into hotchpot, *i e.* she must refuse to take the sole profits thereof, and cause her land to be mingled with the other, so that an equal division may be made of the whole between her and her sister, as if none had been given to her; and thus for her ten acres she shall have fifteen, otherwise the sister will have the twenty acres of which her father died seised. (*Lit.* 55; *Co. Lit.* lib. 3, ch. 12.)

There is also a bringing of money into hotchpot, upon the clauses and within the intent of Stat. 22 & 23 Car. II. ch. 10, for distribution of intestates' estates. Where a certain sum is to be raised, and paid to a daughter for her portion, by a marriage settlement, this is decreed to be an advancement by the father in his lifetime, within the meaning of the statute, though future and contingent; and if the daughter would have any further share of her father's personal estate, she must bring this money into hotchpot, and shall not have both the one and the other. (1 *Eq. Abr.* 253.) *Tomlins.*

HOTEL. The legal definition of hotel and inn are, in this country, substantially the same. An inn or hotel is a house where all who conduct themselves properly, and who are able and ready to pay for their entertainment, are received, if there is accommodation for them, and who, without any stipulated engagement as to the duration of their stay, or as to the rate of compensation, are, while there, supplied at a reasonable charge with their meals, their lodging, and such services and attention as are necessarily incident to the use of the house as a temporary home. Cromwell *v.* Stephens, 3 *Abb. Pr.* N. S. 26; see also act of congress of July 13, 1866, § 9, 14 *Stat. at L.* 118.

Plaintiff occupied a large building of eight stories, each story consisting of lodging-rooms adapted to one person. Above the basement it was used exclusively as a lodging-house. The rooms were let to lodgers at a fixed rate per night. There were no arrangements for boarding or cooking for guests, nor was there any bar or restaurant connected with plaintiff's occupation of the building. The Croton water was partially supplied throughout the building, but during half of the day did not usually rise above the basement, so that the residue was obtained by a tank for rain-water under the roof. Held, that this structure was not chargeable, as a "hotel," with the Croton water tax. *Ib.* See INN.

HOUSE. 1. In its sense of a habitation, the most frequent occasions for using it in jurisprudence involve the two ideas of an edifice or structure, and abode or residence of human beings. State *v.* Powers, 36 *Conn.* 77. It generally means an ordinary building for the residence of a family. But the usage of the term is not uniform; the circumstances or the context may import a wider meaning to the word, in particular instances. In other words, house means, presumptively, a dwelling-house; a building divided into floors and apartments, with four walls, a roof, and doors and chimneys; but it does not necessarily mean precisely this. Surman *v.* Darley, 14 *Mee. & W.* 181; Daniel *v.* Coulsting, 7 *Man. & G.* 122.

House, in an indictment at common law, is equivalent to dwelling-house. Thompson *v.* People, 3 *Park. Cr.* 208; Commonwealth *v.* Posey, 4 *Call*, 109.

House, in a covenant restricting the owner of lands from building, has been held to mean dwelling-house, and to exclude stable. Schenck *v.* Campbell, 11 *Abb. Pr.* 292, 294.

House, in a statute punishing whoever shall break into the house of another, should be understood in its ordinary meaning of a mansion or dwelling-house. Buildings connected with a mansion or dwelling may be deemed a part of it. But a smoke-house, storehouse, warehouse, or the like, unconnected with a dwelling, is not within such a statute. Nevills *v.* State, 7 *Coldw.* 82.

House is not synonymous with dwelling-house. While the former is used in a broader and more comprehensive sense than the latter, it has a narrower and more restricted meaning than the word building. State *v.* Garity, 46 *N. H.* 61.

The word house, as used in an amendatory statute defining burglary, was held to include every structure which has sides, walls, and a roof, regardless of the fact whether it is at the time, or ever has been, inhabited by members of the human family; upon the ground that the statute was not intended to narrow the previous definition, but to exclude the idea that entry into an unoccupied room or apartment of a dwelling-house was not burglary. People *v.* Stickman, 34 *Cal.* 242.

A building which had never been inhabited, but which was constructed as and intended for a dwelling-house, but which contained straw, boards, and implements of husbandry, was held not a house, an outhouse, or a barn, within 9 Geo. IV. ch. 22, § 7. Elsmore *v.* St. Briavels, 2 *Man. & R.* 514; 8 *Barn. & C.* 461.

A building erected not for habitation, but for workmen to take their meals and dry their clothes in, which has four walls, a roof, a door, but no window, but in which a person slept with the knowledge, but without the permission, of the owner, is not a house the setting fire to which is felony, within 7 Wm. IV. & 1 Vict. ch. 89, § 3. Reg. *v.* England, 1 *Car. & K.* 533

A common jail is a house, within 9 Geo. I. ch. 22. Rex *v.* Donnevan, 2 *W. Bl.* 683; 1 *Leach*, 69; 2 *East*, 1021; but see Rex *v.* Connor, 2 *Cox Cr. Cas.* 65.

House, in a statute which forbids keeping a disorderly house, should not be restricted to mean a dwelling. Criminal statutes constantly use "house" as merely equivalent to "building;" and in such compounds as state-house, court-house, county-house, poor-house, meeting-house, school-house, &c., a term indicating the particular purpose to which some building is applied, is prefixed, for distinction. So in the compound "out-house," buildings that are not dwellings, but merely appendages to some dwelling, are included. On the other hand, when a dwelling is meant, "dwelling-house," or "mansion-house," is usually and properly employed. Hence any building kept and occupied as a shelter for disorderly persons and conduct may be a disorderly house. State *v.* Powers, 36 *Conn.* 77.

A statute punishing keeping houses of ill-fame may be violated by maintaining a flat-boat, kept on a river, and fitted up as an abode of men and women. State *v.* Mullen, 35 *Iowa*, 199.

A statute punishing the keeping a house for specified unlawful purposes, may be violated by hiring and keeping one story, or even a single room, of a building for the purpose or in the manner prohibited. Commonwealth *v.* Bullman, 118 *Mass.* 456; Commonwealth *v.* Hyde, *Thach. Cr. Cas.* 19.

House does not necessarily mean a whole building, within statutes punishing the keeping of disorderly houses. A single room devoted to the carrying on of illegal business by the tenant of the whole house may stamp the entire structure with the character of a disorderly house. State *v.* Garity, 46 *N. H.* 61.

A church may be included under the term house, in a statute relating to setting houses back from the street. Folkestone *v.* Woodward, *L. R.* 15 *Eq.* 159.

A policy on an unfinished house does not cover materials for finishing the house, which are not in the house itself. Ellmaker *v.* Franklin Fire Ins. Co., 5 *Pa. St.* 183.

House may embrace the land upon which the building is erected. McMillan *v.* Solomon, 42 *Ala.* 356.

In the devise of a house, the word house is synonymous with messuage, and conveys all that comes within the curtilage. Rogers *v.* Smith, 4 *Pa. St.* 93.

Such a devise of a house has been held to pass the whole lot appertaining, and not merely the ground on which the building was erected. Common Council of City of Richmond *v.* State, 5 *Ind.* 334.

But whether an enactment exempting houses of worship from taxation includes the land whereon they stand, see Lefevre *v.* Detroit, 2 *Mich.* 586; Trinity Church *v.* Boston, 118 *Mass.* 164.

2. A body of persons organized for public business or duties; as in the titles, house of commons, house of delegates, house of representatives.

In a constitutional provision as to what proportion of a house of the legislature shall constitute a quorum, "house" means the entire number possible, without deduction for vacancies, by death, resignation, or failure to elect. Matter of Executive Communication, 12 *Fla.* 653.

The word house, in a constitutional provision requiring a two-thirds vote of either house to the passage of an act, means the members present doing business, there being a quorum, and not a majority of all the members elected. An act passed by two-thirds of the members present, there being a quorum, is constitutionally passed. Southworth *v.* Jackson, &c. R. R. Co., 2 *Mich.* 287; s. p. Frellsen *v.* Mahan, 21 *La. Ann.* 79; Green *v.* Weller, 32 *Miss.* 650.

House-bote. See BOOT.

House of commons. The more popular branch of the English parliament, composed of representatives elected from the commonalty.

House of correction, or of refuge. A name bestowed upon a place for the confinement of offenders of inferior grade, or for juvenile delinquents.

In former English usage the term signified a species of prison, designed for the

penal confinement, after conviction, of paupers refusing to work, and other persons falling under the legal description of vagrants. It was not under the sheriff's charge, but was governed by a keeper, wholly independent of the sheriff. *Mozley & W.; Wharton.*

The house of correction is chiefly for the punishing of idle and disorderly persons, parents of bastard children, beggars, servants running away, trespassers, rogues, vagabonds, &c. Poor persons refusing to work are to be there whipped, and set to work and labor; and any person who lives extravagantly, having no visible estate to support him, may be sent to the house of correction, and set at work there, and may be continued there until he gives the justice satisfaction in respect to his living. *Tomlins.*

House of ill-fame. A bawdy-house; a brothel; a dwelling allowed by its chief occupant to be used as a resort of persons desiring unlawful sexual intercourse.

House of ill-fame is synonymous with bawdy-house or brothel. McAlister *v.* Clark, 33 *Conn.* 91.

The phrases "house of ill-fame" and "public house" do not necessarily import a bawdy-house such as is indictable. A plaintiff, in an action of slander founded on the use of them, must aver, by way of inducement, facts which show they were used in such sense. Dodge *v.* Lacey, 2 *Ind.* 212.

House of lords. The upper house of the English parliament. It consists of the lords spiritual and the lords temporal. The lords spiritual consist of the archbishops of Canterbury and York; the bishops of London, Durham, and Winchester; and twenty-one other bishops. The lords temporal sit, for the most part, in virtue of hereditary right; but a certain number of them are elected, under the acts of union with Scotland and Ireland, to represent the body of the Scottish and Irish nobility, respectively. The Scottish representative peers are sixteen in number, and are elected for one parliament only. The Irish representative peers are twenty-eight, and are elected for life. The aggregate number of the lords temporal is indefinite, and may be increased at will by the crown. 1 *Bl. Com.* 155–158; 2 *Steph. Com.* 328–332; *May's Parl. Pract.*

The house of lords anciently exercised a certain original jurisdiction in judicial matters; but this, it is said, has not been claimed since the case of Skinner *v.* The East India Company, in the reign of Charles II. They have long exercised an appellate jurisdiction without question over the common-law courts, and which has not been disputed, it is said, as to the courts of equity, since the case of Shirley *v.* Flagg, about the year 1675. See *Brown, Dict.*, for a sketch of these jurisdictions.

House of representatives. The name of the more popular branch of the congress of the United States; also, of the similar branch in many of the state legislatures.

House-breaking. The offence of breaking and entering the dwelling-house of another with intent to commit a felony therein, considered irrespective of whether the breaking and entering is done by day or night. Compare BURGLARY.

Household, *n.* In general, persons dwelling together and composing a family. Household, *adj.*: Appropriated to the use of or pertaining to a family keeping house; domestic; as household furniture or servants. Householder; housekeeper: the head of a family keeping house. 7 UCLJ 152

Householder means a master or chief of a family; a person having and providing for a household. Woodward *v.* Murray, 18 *Johns.* 401; Bowne *v.* Witt, 19 *Wend.* 475; Griffin *v.* Sutherland, 14 *Barb.* 456.

Householder, as used in 2 Rev. Stat. 367, means the head, master, or person who has the charge of and provides for a family; and does not apply to the subordinate members or inmates of the household. Bowne *v.* Witt, 19 *Wend.* 475.

The term includes one who rents a house in which he lives and takes boarders, though he has no family. Hutchinson *v.* Chamberlin, 11 *N. Y. Leg. Obs.* 248.

One having and providing for a household is a householder; and he does not lose that character by ceasing housekeeping, and storing his property, if with intent to resume housekeeping in a while. Griffin *v.* Sutherland, 14 *Barb.* 456; Cantrell *v.* Conner, 51 *How. Pr.* 45.

By the Ky. Rev. Stat., "one work beast" is exempt from execution in the case of a "housekeeper." It has been held that the latter term means housekeeper with a family, and that a practising physician, to exempt his horse from execution, must prove that he is a housekeeper with a family. Gunn *v.* Gudehus, 15 *B. Mon.* 447.

A widower with two children of tender age, whom he kept in the care of his mother, providing for them, and sending one of them to school from his mother's

house, while he himself occupied a single room, about one mile distant, as an office and dwelling, without servants or other family than his children, who were sometimes with him at his office, where he lodged and cooked and ate his meals, was held to be a housekeeper within the meaning of the Kentucky exemption laws. Seaton *v.* Marshall, 6 *Bush*, 429.

The provision of chapter 227 of the N. Y. act of 1815 — exempting from execution certain articles owned by any person being a householder — is to be construed as extending to every family, so long as they remain together as such, and this although for the time being they are houseless. This was held where the father, or head of the family, had left the state, leaving his wife and children living together, and they were in the act of removing their residence when the levy was made. Woodward *v.* Murray, 18 Johns. 400; S. P. declared by 2 *Rev. Stat.* 367, § 22.

The fact that a woman keeps a house of ill-fame does not prevent her from being considered a householder within the meaning of the exemption law. Bowman *v.* Quackenboss, 3 *Code R.* 17.

Householder, in a statute requiring jurors to be householders, means something more than occupant of a room or house. It implies the idea of a domestic establishment; of the management of a household. One who is merely tenant and occupant of rooms used as sleeping-apartments is not qualified to be a juror. Aaron *v.* State, 37 *Ala.* 106, 113.

Servants necessarily employed and residing in the family are part of the household, within the meaning of the Alabama statute relative to liability of wife's separate property for price of necessaries for the household; and necessaries purchased for them can be charged upon the wife's statutory separate estate. Pippin *v.* Jones, 52 *Ala.* 161.

One who rents and occupies a portion of a building as an office for business purposes, has been held a householder, for the purposes of bail. Somerset Savings Bank *v.* Huyck, 33 *How. Pr.* 323.

Under English laws as to qualification of bail, it has been held that to make a person a housekeeper he must have actual possession and occupation of the whole house. 1 *Chitty Bail*, 288.

A person who occupies every room in the house, under a lease, except one, which is reserved for his landlord, who pays all the taxes, is not a housekeeper. Nor is a person a housekeeper who takes a house which he afterwards underlets to another, whom the landlord refuses to accept as his tenant. 1 *Chitty Bail*, 502.

Housekeeper means a person actually occupying part or the whole of the house, being the party responsible to the landlord for the entire rent, and assessed or liable for parochial rates and king's taxes. 3 *Petersd. Abr.* 103, note.

Household goods, or furniture. The words household goods, in wills, will pass every thing of a permanent nature, *i.e.* articles of household use which are not consumed in their enjoyment, that were used in or purchased, or otherwise acquired, by a testator, for his house; but goods in the way of his trade will not pass. 1 *Roper Leg.* 253.

The words household goods or furniture, as used in a will, may mean the character of the goods or furniture wherever, or in the possession of whomsoever, they may be, or may indicate whatever is connected with the testator's domestic establishment, and employed as articles of use or ornament, although not what is ordinarily known as furniture. Books, wines, paintings, and statues, curiosities, specimens of minerals, may or may not be household goods or furniture, according to their connection with the owner's residence, and his own and his family's habitual use of and access to them. Dayton *v.* Tillou, 1 *Robt.* 21.

The term household, as applied to furniture, in a bequest of household furniture, although not susceptible of strict definition, has acquired a definite meaning, by which that phrase includes every thing contributing to the use or convenience of the householder or the ornament of the house, such as plate, linen, china, pictures, &c. It may include a portrait of the testator, painted after the making of the will, and at the time of his death still in possession of the artist, in another city. McMicken *v.* Directors of McMicken University, 2 *Am. L. Reg.* N. S. 489.

The words household furniture, in a will, are sufficient to pass all the testator's personal chattels; such as plate, linen, china, pictures, &c., which contribute either to the use or convenience of the household or the ornament of the house itself; but only what is kept for domestic use, not articles kept in the house for purposes of trade or merchandise. Le Farrant *v.* Spencer, 1 *Ves. Sr.* 97; Bunn *v.* Winthrop, 1 *Johns. Ch.* 329.

They do not pass a watch which the testator was accustomed to carry on his person, although they might pass a watch kept hung up for use in the house, like a clock. Gooch *v.* Gooch, 33 *Me.* 535.

A bequest of household furniture ordinarily comprises every thing that contributes to the convenience of the householder, or the ornament of the house. Where the testatrix kept a boarding-school, held, that the furniture of the school-room was not included; but that articles used for the comfort and convenience of the pupils as boarders were embraced by the bequest, equally with those kept by the testator for her personal use. Hooper's Appeal, 60 *Pa.* 220.

HUE-AND-CRY. An old English phrase, in which, as has been explained, "hue" signifies the complaint of a party injured by a felony, and "cry,"

the pursuit of the felon upon the highway upon that complaint; for if the party robbed, or any in the company of one robbed or murdered, came to the constable of the next town, and desired him to raise the hue-and-cry, — that is, make the complaint known, and follow in pursuit after the offender, describing the party, and showing as near as he can which way he went, — the constable ought forthwith to call upon the parish for aid in seeking the felon, and if he were not found there, then to give the next constable notice, and the next, until the offender were apprehended, or at least pursued unto the seaside. Jacob devotes a long article to the law regulating this proceeding, indicating that it must have been of considerable importance in England.

HUNDRED. The name of a civil division of English counties, in Saxon times. It is one of a series of divisions the introduction of which has been very generally attributed to King Alfred; who, according to many accounts, constituted each ten families or households into a tithing (*q. v.*), and each ten tithings into a body called a hundred; establishing also a law of responsibility of the whole body for the acts or defaults of individual members. Other explanations of the name are, however, given; as that a hundred was a territorial division equal to one hundred "hides" (a Saxon measure) of land; that it was a division estimated to furnish one hundred able-bodied men to the sovereign, in time of war.

Hundred court. The name of an English court, similar in most respects to a court-baron (*q. v.*), but larger and more important, being held for all the inhabitants of a particular hundred, instead of a manor. Under modern laws, its jurisdiction has devolved on the county court, *q. v.*

Hundred gemote. The public meeting of the inhabitants of a hundred. See GEMOTE. In the earliest times, it seems to have had jurisdiction as a court over civil, criminal, and ecclesiastical matters.

Hundredor, is used as meaning, 1, An inhabitant of a hundred; 2, a person qualified by residence within the hundred where land involved in an action lay, to serve upon a jury in the cause; 3, the officer who had jurisdiction over a hundred, and held the hundred court; 4, the bailiff of a hundred.

HUSBAND. Etymologically, house bond; the man who, according to Saxon ideas and institutions, held around him the family, for whom he was in law responsible. It now signifies a man who is married; one legally bound in wedlock to a wife.

The terms "husband" and "wife" are descriptive of persons connected together by the marriage tie, and are significant of those mutual rights and obligations which flow from the marriage contract. When an absolute divorce is decreed, the relation ceases, and the terms are no longer applicable. Therefore a subsequent marriage by either party is not a marriage by a person having a husband or wife living, within the purview of a statute punishing bigamy, although such marriage is expressly forbidden by the terms of the decree. The offence, in such case, is contempt. People *v.* Hovee, 5 *Barb.* 117.

HUSBANDMAN. An agriculturist; one who makes the raising provisions by cultivation of the soil his business.

Farmer has long been popularly used in this sense in the United States, and has lately been somewhat recognized in law; but originally its meaning was different. See FARM.

HUSBANDRY. Agriculture; cultivation of the soil for food; farming, in the sense of operating land to raise provisions.

HUSTINGS COURT. See COURT OF HUSTINGS.

HYPOTHEC. In Scotland, the term hypothec is used to signify the landlord's right, which, independently of any stipulation, he has over the crop and stocking of his tenant. It gives a security to the landlord over the crop of each year for the rent of that year, and over the cattle and stocking on the farm for the current year's rent; which last continues for three months after the last conventional term for the payment of the rent. *Bell.*

The word is also improperly used for a law agent's right over the title-deeds of his employer. This is more properly termed a lien, or right of retention. *Mozley & W.*

HYPOTHECA. The civil-law name for a species of contract; being a kind of pledge in which the pledgor or debtor retained possession and enjoyment of the thing. It corresponded to the sub-

stance of the modern contract of mortgage.

Hypotheca was a term of the Roman law, and denoted a pledge or mortgage. As distinguished from the term *pignus*, in the same law, it denoted a mortgage, whether of lands or of goods, in which the subject in pledge remained in the possession of the mortgagor or debtor; whereas in the *pignus* the mortgagee or creditor was in the possession. Such an hypotheca might be either express or implied: express, where the parties upon the occasion of a loan entered into express agreement to that effect; or implied, as, *e.g.*, in the case of the stock and utensils of a farmer, which were subject to the landlord's right as a creditor for rent; whence the Scotch law of hypothec.

The word has suggested the term hypothecate, as used in the mercantile and maritime law of England. Thus, under the factor's act, goods are frequently said to be hypothecated; and a captain is said to have a right to hypothecate his vessel for necessary repairs. *Brown.*

Hypothecary action. The name of an action allowed under the civil law for the enforcement of the claims of a creditor by the contract of hypotheca.

HYPOTHECATION. Is frequently used in English and American cases, particularly those upon the law of bottomry and maritime liens, for the contract that a creditor may cause some specific thing, over which, however, he has no corporal control as pledgee, to be sold for the satisfaction of his demand; thus a vessel is said to be hypothecated for the demand of one who has advanced money for supplies.

In the common law, there are but few, if any, cases of hypothecation, in the strict sense of the civil law; that is, a pledge without possession by the pledgee. The nearest approaches, perhaps, are cases of bottomry bonds and claims of materialmen, and of seamen for wages; but these are liens and privileges, rather than hypothecations. *Story Bailm.* § 288.

HYPOTHEQUE. In French law, is the mortgage of real property in English law, and is a real charge, following the property into whosesoever hands it comes. Such a charge may be either *légale*, or *judiciaire*, or *conventionnelle*. It is *légale*, as in the case of the charge which the state has over the lands of its accountants, or which a married woman has over those of her husband; it is *judiciaire*, when it is the result of the judgment of a court of justice; and it is *conventionnelle*, when it is the result of an agreement (which must be express) of the parties. *Brown.*

I.

I O U. A memorandum of debt, consisting of these letters, a sum of money, and the debtor's signature, is termed an I O U, those letters representing the words "I owe you." As this contains no direct promise of payment, it is not a promissory note.

IBIDEM. In the same place. Used by law writers to signify in the same book, in the same division or page of a book, or, sometimes, the same subject; often abbreviated to *ibid.*, *ib.*, and perhaps *id.* See IDEM.

Id certum est quod certum reddi potest. That is certain which can be made certain; whatever can be reduced to certainty is sufficiently certain. This maxim is particularly applicable to the construction of written instruments, an uncertainty in which may be removed by another instrument referred to, or by the happening of a particular contingency, or by evidence explanatory of the intention, or by mere computation. Such an instrument is regarded as sufficiently certain to be acted upon.

ID EST. That is. A phrase in common use, to introduce an explanation of a preceding word or clause; usually abbreviated to *i.e.*

IDEM. The same. Used by law writers for purposes of reference, in the same manner as *ibidem*, q. v.; often abbreviated to *id.* In a strict use of the two words, *idem* may well be confined to references to the same book, while *ibidem*, meaning in the same place, may properly refer to the same page or section of a book. The distinction is not, however, uniformly made, either of the words or their abbreviations being used indifferently, to avoid a repetition of a previous reference.

Idem sonans. Sounding the same;

having the same sound. A term applied to names having substantially the same sound, though differing in spelling. Wrongly spelling a name, if the two names are *idem sonantia*, does not amount to a fatal variance; and this rule is sometimes called the doctrine of *idem sonans*.

Ideo consideratum est. Therefore it is considered. The initial words of the Latin form of the entry of judgment in an action at law. The phrase is sometimes translated in the modern forms, and is also used as a name for that portion of the record.

It is not a conclusive criterion, whether a definitive judgment has been rendered, that the entry employs or omits the usual form of *ideo consideratum est*. Judgments are final and subject to review by writ of error, as well when entered without as when entered with that clause. Whitaker *v.* Bramson, 2 *Paine*, 209.

IDES. A designation of certain days of the month, used in the Roman calendar. They were the eight days immediately after the nones. In the months of March, May, July, and October, these eight days begin at the eighth day of the month, and continue to the fifteenth day; in other months they begin at the sixth day, and last till the thirteenth. But it is observable that only the last day is called ides, the first of these days is the eighth ides, the second day the seventh, the third the sixth, *i.e.*, the eighth, seventh, or sixth day before the ides, and so it is of the rest of the days; wherefore, when we speak of the ides of any month in general, it is to be taken for the fifteenth or thirteenth of the month mentioned. *Jacob.*

IDIOCY. Natural lack of reason; a congenital want of mental power. Idiot: one whose mind has never been developed; a natural fool; a person without understanding, from birth.

The rules of the early common law, which were founded on but limited observations of the causes and manifestations of mental unsoundness, made only a very general classification of persons of unsound mind, or the *non compotes mentis*, calling those persons idiots (according to most of the definitions) who had never enjoyed reason at all; and those lunatics, who, having attained some natural development of mental power, had afterwards been deprived of it. The progress of our jurisprudence, following the development of medical knowledge, has been in the direction of relaxing any strict classification of the insane, and discarding any uniform or specific tests as means of determining legal capacity or responsibility, and of allowing each case to be determined upon its own circumstances; on the proofs which may be adduced as to the mental condition of the individual in relation to his act under consideration. See INSANITY; LUNATIC. Less than the former stress, therefore, is now to be laid upon the term idiocy, as distinctly marking, for all legal purposes, a definite status. The recognition of the fact that there are all degrees and grades of natural incapacity has modified the view that the lack of mind implied in the term is absolute, complete, and irremediable. The line of distinction which applies the term to an original or natural incapacity, rather than to one superinduced after development, is retained.

The early decisions proffer definitions of these terms which are not definitions at all, but only tests for determining what persons may be classed as idiots; such as these: one who has not understanding to tell his age, or who is his father or mother; one who is incapable to learn the alphabet; one who cannot count or number twenty; presumably one born deaf and dumb; and, *a fortiori*, one born deaf, dumb, and blind. See *Fitzh. Nat. Brev.* 233; *Id.* 583; *Hale Pl. Cr.* 34; *Com. Dig.* tit. Idiot; 1 *Bl. Com.* 304; 2 *Id.* 497; *Chitt. Contr.* 130; 12 *Petersd. Abr.* 390; and authorities cited in Brower *v.* Fisher, 1 *Johns. Ch.* 441.

More accurate views of the sense now attached to idiocy are gained by attending to the explanations of modern writers upon insanity.

Esquirol (*Treat. Insanity*, Am. ed. 1845, 29) defines imbecility or idiocy as including cases in which "the conformation of the organs has never been such that those who are thus afflicted could reason justly." And he afterwards (*Id.* 446) says: Idiocy is not a disease, but a condition in which the mental faculties are never manifested, or have never been developed sufficiently to enable the idiot to acquire such an amount of knowledge as persons of his own age, and placed in similar circum-

stances with himself, are capable of receiving. Idiocy commences with life, or at that age which precedes the development of the intellectual and affective faculties; which are, from the first, what they are doomed to be during the whole period of existence. Every thing about the idiot betrays an organization imperfect, or arrested in progress of development. We see no possibility of changing this state. Nothing teaches us how to impart, for a few moments even, to the wretched idiot an increase of reason or intelligence. He never reaches an advanced age; and, on laying open the brain, we almost invariably discover vices of conformation. Dementia and idiocy differ essentially: a man in a state of dementia is deprived of advantages which he formerly enjoyed; he was a rich man, but has become poor; the idiot, on the contrary, has always been in a state of want and misery. Idiots may be classed in two series, — imbeciles and idiots, properly so called. In the first class, the organization is more or less perfect; the sensitive and intellectual faculties are somewhat developed; sensations, ideas, and memory, as well as the affections, inclinations, and even passions, exist, but only in a slight degree; they feel, think, speak, and are capable of acquiring a certain amount ef education. In the second class, the organization is incomplete; the senses are scarcely developed; and sensibility, attention, and memory are null, or nearly so.

Dr. Ray says, in substance (*Med. Jur. Insanity*, 86), that idiocy is that condition of mind in which the reflective, and all or a part of the affective, powers are either entirely wanting, or are manifested to the slightest possible extent. There is considerable variety in the manifestations of this condition. No particular physical trait can be considered as inseparable from idiocy, though after infancy the physical organization never fails to give notice of its presence. The head is almost always too large or too small. The senses are more or less imperfect, if not entirely wanting; the subject is either blind, or incapable of fixing or changing the direction of vision; or else deaf, or not able to listen; or else mute, or unable to articulate, &c. The whole physical economy indicates a depraved and defective constitution. In reasoning power, many idiots are below the brute; others manifest one or more of the intellectual faculties, always excepting the reflective. Various propensities they often manifest in an inordinate degree of vigor and activity. Modern efforts have shown that idiots are not entirely beyond the reach of all education.

Dr. Hammond (*Diseases of the Nervous System*, 338) distinguishes "idiocy and dementia; the first due to the fact that there are original structural defects in the brain; the second resulting from the supervention of organic changes in a brain originally of normal power."

IGNOMINY, as used in Iowa Rev. § 3989, limiting excuse of witness from answering, means public disgrace or dishonor. A plaintiff in an action for seduction need not answer whether, before the alleged seduction, she ever had intercourse with other men than the defendant. Brown *v.* Kingsley, 38 *Iowa*, 220.

IGNORAMUS. We do not know; we ignore it. This Latin word was formerly written by the grand jury upon the back of a bill presented them, when they considered the evidence insufficient to sustain an indictment. Now, since proceedings are in English, the words indorsed on the bill in such cases are "no bill," "no true bill," or "not found;" but the jury are still said to ignore the bill.

IGNORANCE. Lack of information; want of knowledge.

The most important division of ignorance is into ignorance of *fact* and ignorance of *law*. The former, ignorance of matter of fact, qualifies a person's responsibility for, and limits the obligation of acts done under its influence, — if influence can be predicated of a negative state; the latter, ignorance of matter of law, as a general rule, does not.

Ignorance is not a state of the mind in the sense in which sanity and insanity are. When the mind is ignorant of a fact, its condition still remains sound; the power of thinking, of judging, of willing, is just as complete before communication of the fact as after, — the essence or texture, so to speak, of the mind, is not, as in the case of insanity, affected or impaired. Ignorance of a particular fact consists in this, that the

mind, although sound and capable of healthy action, has never acted upon the fact in question, because the subject has never been brought to the notice of the perceptive faculties. Boylan *v.* Meeker, 28 *N. J. L.* 274.

Ignorantia facti excusat; ignorantia juris non excusat. Ignorance of fact excuses; ignorance of the law does not excuse. Ignorance or mistake in respect to a matter of fact may be an excuse or ground of relief to a party from the consequences of his conduct; but ignorance or mistake in regard to the law is not an excuse or ground of relief. This maxim expresses one of the rudimentary principles of the law, and rests upon the fundamental theory that every man is bound at his peril to know the law, and is therefore conclusively presumed to know it. This idea is expressed in one of the various forms of the maxim, *ignorantia juris, quod quisque tenetur scire, neminem excusat*, — ignorance of the law, which every one is bound to know, excuses no one.

ILLEGAL. Contrary to law; illicit; unlawful. Illegality: an act or quality of an act contrary to law.

Sometimes this term means, merely, that which lacks authority of or support from law; but more frequently it imports a violation. Etymologically, the word seems to convey the negative meaning only. But in ordinary use it has a severer, stronger signification; the idea of censure or condemnation for breaking law is usually presented. But the law implied in illegal is not necessarily an express statute. Things are called illegal for a violation of common-law principles. And the term does not imply that the act spoken of is immoral or wicked: it implies only a breach of the law. People *v.* Kelly, 1 *Abb. Pr.* N. S. 432; Chadbourne *v.* Newcastle, 48 *N. H.* 196; Palmer *v.* Concord, *Id.* 211; State *v.* Hayworth, 3 *Sneed*, 64.

Thus an illegal act is, generally, something done which violates law. An illegal consideration or contract is one which infringes law, so that the contract is void, or the party incurs a penalty. Illegal sales, trade, or traffic are such as are carried on in contravention of prohibitions of law, and may be deemed an offence.

Illegal trading, or traffic. These phrases are sometimes used of domestic buying and selling, irrespective of any obligations arising from the existence of war. But they are used in the decisions upon the laws of war in a special sense, signifying buying and selling which a subject of a government engaged in a war carries on with the enemy or enemy subjects, in violation of his allegiance. This is to be distinguished from traffic which a subject of a neutral nation carries on in violation of the obligations of neutrality only.

ILLEGITIMACY. Bastardy, in its sense of a social condition; the status of a child whose parents were not intermarried at the time of its birth. Illegitimate: bastard; born out of wedlock.

The Louisiana code divided illegitimate children into two classes: 1, Those born from two persons who, at the moment when such children were conceived, could have lawfully intermarried; and, 2, those who are born from persons to whose marriage there existed at the time some legal impediment. Both classes, however, could be acknowledged and take by devise. Compton *v.* Prescott, 12 *Rob.* (*La.*) 56.

ILLICIT. Illegal; unlawful.

Illicit trade. In marine insurance, the warranty against illicit trade means trade which is made unlawful by the laws of the country to which the vessel is bound. "It is not," says Parsons, "the same with contraband trade, although the words are sometimes used as synonymous. Illicit or prohibited trade is one which cannot be carried on without a distinct violation of some positive law of the country where the transaction is to take place." 1 *Pars. Mar. Ins.* 614. Compare ILLEGAL TRADING.

ILLICITE. Unlawfully.

This was the technical word, corresponding with "unlawfully," used in the Latin forms of indictments.

ILLUSORY APPOINTMENT. In case a person, having a power to appoint any real or personal property among a limited class of persons, appointed to any one of them a merely nominal share (as one shilling) of the property subject to the power of appointment, this has been called an illusory appointment. Thus, if a father had power to appoint one thousand pounds among two children, and he appointed a shilling to one and the rest to the other, the appointment would be held illusory and void. This doctrine was abolished by Stat.

11 Geo. IV. & 1 Wm. IV. ch. 46, passed in the year 1830. But the entire exclusion of any object of a power not in terms exclusive was illegal, notwithstanding that act, until the year 1874. Now, by Stat. 37 & 38 Vict. ch. 37, passed in that year, it is provided, that, under a power to appoint among certain persons, appointments may be made excluding one or more of the objects of the power. *Mozley & W.*

IMBARGO. An old form of the word embargo, *q. v.*

IMBEZZLE. An old form of the word embezzle, *q. v.*

IMBRACERY. An old form of the word embracery, *q. v.*

IMBRASING. An old English term for mixing specie with an alloy below the standard of sterling money; "which," says Tomlins, "the king by his prerogative may do, and yet keep it up to the same value as before." Debasing or depreciating the coin are words now in more frequent use for this.

IMMATERIAL. Not important; collateral or subsidiary; not pertinent or needful to the matter in question.

Immaterial averment has been defined to be an averment alleging with needless particularity or unnecessary circumstances what is material and necessary, and which might properly have been stated more generally, and without such circumstances and particulars; or, in other words, to be a statement of unnecessary particulars in connection with and as descriptive of what is material. *Gould Plead.* ch. 3, § 188; Pharr *v.* Bachelor, 3 *Ala.* 237, 245.

The expression is also used to signify an averment of matter which is unimportant to the cause of action or defence intended to be set up; an averment which may be omitted without rendering the pleading insufficient.

Immaterial issue. An issue joined upon some matter or question the decision of which will not determine the action is called immaterial.

IMMEDIATE; IMMEDIATELY. 1. These words, used in relation to time, signify brevity or shortness of time allowed; celerity or quickness of action; that a thing is done promptly or without delay. Compare FORTHWITH.

Immediately is of relative signification, and is never employed to designate an exact portion of time. McLure *v.* Colclough, 17 *Ala.* 89, 100.

Immediately does not, in legal proceedings, necessarily import the exclusion of any interval of time. It is a word of no very definite signification, and is much in subjection to its grammatical connections. Gaddis *v.* Howell, 31 *N. J. L.* 313.

It allows such convenient time as is reasonably requisite for doing the thing. Burgess *v.* Boetefeur, 7 *Man. & G.* 481.

In a stipulation as to time of paying instalments of purchase-money, it has been construed as used merely in contradistinction to a credit, and to allow a reasonable time. Fitzhugh *v.* Jones, 6 *Munf.* 83.

In a contract to deliver the possession of premises, it does not necessarily mean "as soon as can practicably be done." Streeter *v.* Streeter, 43 *Ill.* 155.

A statute requiring a judge's certificate that an action was really brought for a certain purpose, to be given "immediately" after the verdict is delivered, does not mean as soon as ever the verdict is delivered; the judge must necessarily have some little time for reflection. Thompson *v.* Gibson, 8 *Mees. & W.* 281.

Immediate delivery has been held to mean, among coal shippers and dealers, a delivery within the present, or, in some cases, the succeeding month. Neldon *v.* Smith, 36 *N. J. L.* 148.

2. These words sometimes signify nearness of relation; and imply that two persons or subjects are connected directly and without any third one between them. Thus an action is said to be prosecuted for the immediate benefit of a person; a devise is made to immediate issue.

An action cannot be said to be prosecuted for the "immediate" benefit of a person, unless such person would have a right to the amount recovered, or some portion of it, as soon as it is recovered by the nominal plaintiff. It should at least be a case where he could maintain an action against such nominal plaintiff for money had and received by him to the witness's use. Every such case may not be within the exception; but unless the witness's connection with the cause of action will entitle him to bring a suit as soon as the nominal plaintiff has collected the money, he is not disqualified by the provision under consideration. Butler *v.* Patterson, 13 *N. Y.* 292.

The word issue, without the qualifying word immediate, would, undoubtedly, include grandchildren and great-grandchildren of the person to whose issue the bequest is made. But the qualifying word immediate prefixed to it in a statute forbidding lands to be given by deed or will to any persons but such as are in being, or to the immediate issue or descendants of such as are in being at the time of making the deed or will, limits the phrase to the children merely of the

person in being, &c.; while the remoter lineal descendants, if living at the death of the person in being when the will was made, are included in the phrase immediate descendants. Turley *v.* Turley, 11 *Ohio St.* 173.

IMMORAL. Contrary to good morals; inconsistent with the principles established by common consent for securing decency, good order, and propriety of conduct throughout the community. Immorality: a practice which violates the ordinary rules of good conduct.

IMMUNITY. An exemption from some duty, obligation, penalty, or service, which is generally imposed or prescribed by law.

A striking illustration of the use of the word is found in the acts of congress regulating the review of decisions of state courts by the supreme court of the United States. Section 25 of the judiciary act of 1789 gave this jurisdiction in any case where the decision of the state court is against a title, right, privilege, or *exemption* specially set up or claimed under the constitution, laws, &c., of the United States. A substitute for this provision was enacted in 1867, declaring the jurisdiction in any case of a decision against a title, right, privilege, or *immunity*, specially set up or claimed, &c., importing that there is a difference of some importance between "immunity" and "exemption." We do not find that the difference intended has been made the subject of judicial explanation. What is included under the whole phrase, title, right, privilege, or immunity, has been considered in a few decisions of the supreme court; for which see *Abb. Nat. Dig.* tit. Error.

IMPAIR. To diminish, injure, relax, weaken.

Statutes which confirm contracts which by the existing law were not valid, are not obnoxious to the constitutional prohibition upon state laws impairing contracts. To create a contract and to impair one do not mean the same thing. And the fact that the law is retrospective does not bring it into conflict with this provision of the constitution. Satterlee *v.* Matthewson, 2 *Pet.* 380; S. P. Watson *v.* Mercer, 8 *Id.* 88; but see explanations of Satterlee *v.* Matthewson in Martindale *v.* Moore, 3 *Blackf.* 275.

Thus, a statute confirming deeds of married women previously executed, but not so acknowledged as to have been valid, is not repugnant to that provision of the constitution which forbids laws impairing the obligation of contracts. The object of such a statute is to confirm contracts; and the objection that it interferes with vested rights does not render it repugnant to the constitution; and the courts of the United States, therefore, cannot pronounce it void on that ground. Watson *v.* Mercer, 8 *Pet.* 88.

IMPANEL. In English practice, to impanel signifies the writing and entering into a parchment schedule, by the sheriff, the names of a jury. *Jacob; Wharton.*

In American practice, the term is applied not only to the general list of jurors returned by the sheriff, but sometimes also to the list of jurors drawn by the clerk for the trial of a particular cause. *Bouvier; Burrill.*

Impanelling has nothing to do with drawing, selecting, or swearing jurors, but means simply making the list of those who have been selected. Porter *v.* People, 7 *How. Pr.* 441.

IMPARLANCE. Originally, a parley; an opportunity for talking. 1. In early English practice, when an enlargement of defendant's time to plead was desired, it was asked and granted, upon a theory of giving defendant time to speak with the plaintiff, in hope of compromising the action. This, doubtless, was at first the real ground of this species of application. Later, it became the usual fiction upon which extensions of time were obtained. And thus at last imparlance came to signify time given to plead; a designation by the court of a day for defendant to advise and consider what answer he should make to the action; a continuance or postponement. The term was formerly in frequent use; and the older books give considerable space to the topic of the practice in granting imparlances. It seems to have been gradually disused in England, and to have been at length formally abolished by Stat. 2 Wm. IV. ch. 39, and *Reg.* 31 *of Trin. T.* 1853, at least in its general sense of a continuance.

2. The word has also been used in the sense of stay of execution. Thus section 2 of act of congress of May 19, 1828, provided that where by the laws of the state defendants are entitled in the state courts to an imparlance of one term or more, defendants in actions in courts of the United States shall be entitled to an imparlance of one term. In the revision, "stay of execution" was substituted

for imparlance in this enactment. *Rev. Stat.* § 988.

IMPARTIALLY. The words "fairly and impartially," in a statute requiring officers to take an oath to execute their office "faithfully, fairly, and impartially," add something to the force of the word faithfully, and should not be omitted from the oath. They are a part of the substance of the oath. They mean something more than "faithfully." That word, used of temporal affairs, means diligently, without unnecessary delay. An agent may be very faithful, yet very partial, to his employer. Perry *v.* Thompson, 16 *N. J. L.* 72.

Under a statute requiring a public officer to give a bond "for the faithful performance of his duties," a bond given, conditioned that he shall well and truly, faithfully, firmly, and impartially, execute and perform the duties of his office, is not invalid as varying from the statute. The expressions do not differ in substance. The words "well, truly, firmly, and impartially" are simply redundant. Mayor, &c. of Hoboken *v.* Evans, 31 *N. J. L.* 342.

IMPEACH. To accuse, call to account, find fault with, sue. Impeaching: applies to evidence or proceedings upon an accusation or charge of fault, particularly one against an officer or witness. Impeachment: an act or proceeding for the purpose of depriving a person of capacity as an officer, or of credibility as a witness.

1. Applied to an officer, these words designate a proceeding involving an accusation, trial, and judgment, for misconduct which renders removal from office proper. The proceeding by impeachment differs from indictment in important respects. It relates more particularly to official misconduct, or offences for which the person should no longer hold office; hence the charges which will warrant impeachment are not necessarily the same with those which will sustain an indictment. The accusation in impeachment is preferred, and prosecuted by some branch of the political power, instead of by the grand jury and district attorney. It is tried, in most jurisdictions, before a *quasi* political tribunal, instead of in the courts of justice. And it results, if sustained, in a decision the chief element of which is the removal of the officer from his office, though by positive law a sentence of disqualification from any future holding of office may in many cases be added.

Thus, in respect to impeachments of officers of the United States, the constitution confers upon the house of representatives the sole power of impeachment, and on the senate the sole power to try all impeachments. The general mode of proceeding has been, that a resolution is first moved in the house of representatives directing appointment of a committee to consider the charges. If, on their report, the house directs an impeachment, a committee is appointed to impeach the party at the bar of the senate; to state that the articles against him will be exhibited in due time and made good before the senate, and to demand that the senate take order for the appearance of the party to answer to the impeachment. This having been done, articles are prepared, by committee, under the direction of the house, and presented to the senate; and a committee of managers is appointed (from the house) to conduct the impeachment. The articles having been presented, the senate issues process, summoning the party to appear at a given day before them, to answer to the articles. The process is served by the sergeant-at-arms of the senate, and due return is made thereof under oath.

The articles need not be in the strict form of an indictment, but must be drawn with sufficient certainty to enable the officer to make defence, and to avail himself of an acquittal as a bar to a second impeachment.

When the return-day arrives, the officer is called to appear and make answer. Great strictness in drawing this is not required. A replication on the part of the house, joining issue, usually follows.

Trial is conducted much according to the methods of courts of justice; but any debate which arises is usually had in secret session, and the final vote is taken by putting the question, Guilty or not guilty? to each member of the senate a two-thirds vote being necessary to a conviction. *Cushing*, § 2563.

2. Applied to a witness, these words signify introduction of proof, during the trial of a cause, impugning the credibility of a witness who has been called by the adverse party; as by showing that he is generally reputed to be unworthy

of belief; that he has previously made statements inconsistent with his present testimony, &c.

To impeach, as applied to a person, is to accuse, to blame, to censure him. To impeach his official report or conduct is to show that it was occasioned by some partiality, bias, prejudice, inattention to or unfaithfulness in the discharge of that duty, or that it was based upon such error that the existence of such influences may be justly inferred from the extraordinary character or grossness of that error. Bryant *v.* Glidden, 36 *Me.* 36, 47.

A witness cannot be said to have been "impeached" because of a mere conflict between his testimony and the testimony of another witness in regard to the same fact. Baker *v.* Robinson, 49 *Ill.* 299.

Impeachment of waste, signifies liability to be called to account for committing waste; also, a demand or suit for compensation for waste wrongfully committed.

IMPEDE. An obstacle — *e.g.* a pile of rubbish — which renders access to an enclosure inconvenient, impedes the entrance thereto, but does not obstruct it, if sufficient room be left to pass in and out. Keeler *v.* Green, 21 *N. J. Eq.* 27.

IMPERTINENCE. Irrelevance; immateriality. Impertinent: not important; not material; not relevant; superfluous.

The terms are chiefly used to denote that fault in equity pleading which consists in introducing into a bill, answer, &c., matters which are not useful in presenting the cause of action or defence.

IMPLEAD. To sue or prosecute in course of law. Impleaded: sued; prosecuted.

In an action where there are more defendants than one, and one answers separately, his name is sometimes stated thus in the title of his answer or plea: Richard Roe impleaded with John Doe; signifying that the two are sued together, but one only interposes the plea.

IMPLEMENT. Something necessary or appropriate to be used in performing any description of work or service, in carrying on a business or trade, in exercising one's vocation.

Probably the most important instance of the use of the term in law is in statutes exempting implements of a debtor's trade from execution.

A threshing-machine, used by a farmer to thresh the grain of other people, as well as his own, is not within the exemption of "proper tools or implements of a farmer." Meyer *v.* Meyer, 23 *Iowa*, 359.

The tools, implements, materials, stock, and fixtures of a paper-mill are not within an exemption of "the tools and implements, materials, stock and fixtures of the debtor, necessary for carrying on his trade or business," to the amount of $500. Smith *v.* Gibbs, 6 *Gray*, 298.

Implements, in a penal statute, cannot be deemed to include animals. In the law dictionaries it is thus defined: "Things necessary in any trade or mystery, without which the work cannot be performed; also, the furniture of a house, as all household goods, implements, &c. And implements of household are tables, presses, cupboards, bedsteads, wainscot, and the like." And it does not appear ever to have been used to denote animals or beings having life. Thus game-cocks are not "implements of gaming," and cannot be lawfully seized on a warrant commanding the seizure of such implements. Coolidge *v.* Choate, 11 *Metc.* (*Mass.*) 79.

A horse used by a tanner is not an implement of his trade exempt from execution. Wallace *v.* Collins, 5 *Ark.* 41.

IMPLY. In the proper sense, language is said to imply a meaning which it conveys but does not express. That is said to be implied which would be received from the reasonable construction and understanding of the terms employed, though it is not directly stated. An implication is an inference drawn from language of something which is not said, but may fairly be considered as meant.

If these words were employed strictly in the above-explained sense, when applied to dealings and instruments, they would designate obligations which arise not by the express terms employed, but by inference and construction. An implied contract would mean, always, one gathered from language, although not expressed in it. The expression implied trust would import that, although the transaction in question did not expressly declare a trust, there was fair ground to presume that there was an intention to create one.

"Implied," in all such phrases, would stand opposed to "expressed," upon the one hand, and "constructive" or "imputed," upon the other; for there is a large class of cases of unexpressed obligations which are imposed by the law, not because the language used fairly

indicates an intention which, though unexpressed, warrants the obligation on the ground of a presumption that it was designedly assumed, but because, in view of the facts, justice and fair dealing require that the party's obligation should be enforced irrespective of any evidence of intent. It would be well if these two classes of obligations were always discriminated by employing "implied" to designate those which rest upon an inference from language or a presumption of intent, and "constructive," to distinguish those which are imputed irrespective of probable intention. See CONSTRUCTIVE.

But this discrimination is not uniformly, or even generally, made. The phrase implied contract is applied by legal writers, sometimes indiscriminately, to all those events which in law are treated as contracts, whether they arise from a presumed mutual consent or not, provided only they be not express contracts. Thus it is used to signify a genuine consensual contract not expressed in words, or signs equivalent to words; and sometimes to signify an event to which, though not a genuine consensual contract, the law annexes most or all of the incidents of a genuine contract as against any person or persons. So "implied request" may mean a request inferrible from the transaction, or one imputed, notwithstanding it cannot be inferred. A request is said to be "implied by law" sometimes when it has been in fact made, though not in express words; sometimes when it has never been made at all, but, by a fiction of law, is supposed or imagined to have been made. So implied trusts have been distributed into two classes: those depending upon the presumed intent of the parties, as where property is delivered by one to another to be handed over to a third person, the receiver holds it upon an implied trust in favor of such third person; and those not depending upon such intention, but arising by operation of law, in cases of fraud, or notice of an adverse equity. See EXPRESS.

Implied malice. Malice which has no existence in fact, but which the law imputes to the guilty party. This implication of malice was invented for the purpose of bringing cases of constructive murder, so called, within the legal definition of the crime. It was supposed that malice meant, in all cases, ill-will, and hence that the words malice aforethought, used in indictments for murder, imputed a charge of premeditated design to kill. This was not required to be proved in cases of constructive murder, the law imputing malice. Darry *v.* People, 10 *N. Y.* 120, 138.

IMPORT. Used in relation to merchandise, signifies to bring it into one jurisdiction from another. Importation: the act or business of bringing foreign goods into the country as a mercantile adventure. The plural forms, "imports" and "importations," are used of the goods or merchandise brought in.

The laws of the United States, in relation to commerce and revenue, use the term "to import" in its commercial sense, — which is, to bring from a foreign jurisdiction into this jurisdiction merchandise not the product of this country. Goods shipped from one port of the United States to another are not to be deemed imported by reason of an intermediate stoppage at a foreign port. United States *v.* The Forrester, 1 *Newb.* 81, 94.

To constitute an importation, so as to create a right to duties within the revenue laws of the United States, it is necessary that there should be not merely an arrival within the limits of the United States, and of a collection district, but an arrival within some port of entry. United States *v.* Vowell, 5 *Cranch*, 368; Arnold *v.* United States, 9 *Id.* 104; Meredith *v.* United States, 13 *Pet.* 486, 494.

To constitute an importation, there must be a voluntary arrival within some port of the United States, with the intent to unlade the cargo. An involuntary arrival, by stress of weather, does not constitute an importation. The Mary, 1 *Gall.* 206.

It is not an importation within the revenue laws if the vessel enters a port and then goes to sea without landing her cargo. Kohne *v.* Insurance Co. of North America, 1 *Wash. C. Ct.* 158.

The term "imports," as used in the clause of the constitution, that no state shall lay any imposts on imports, &c., does not include goods which were brought within the port of entry, sold by the consignee to the purchaser, passed through the custom-house at the expense and under the management of the consignee, and are held by the purchaser for sale still in the original packages. Warring *v.* Mayor, 8 *Wall.* 110.

The term signifies articles imported from foreign countries into the United States, and does not include goods brought from one state into another. Woodruff *v.* Parham, 8 *Wall.* 123.

The term can cover nothing which is not

actually brought into our limits; that is, the whole amount which is entered at the custom-house, and all which goes into the consumption of the country. Marriott *v.* Brune, 9 *How.* 619, 632.

Although "imports," in the constitution, means articles imported, yet the exemption from taxation continues only until the first wholesale disposition of them. After such disposition, or after the packages are broken up and the goods appropriated to private use or offered for sale at retail, or in any peculiar manner, they cease to be "imports" or "articles imported," within the meaning of the constitution. Wynne *v.* Wright, 1 *Dev. & B. L.* 19.

Imports does not include persons. A state law requiring a payment of head-money from masters of vessels bringing immigrant passengers, is not a violation of the constitutional provision that no state shall lay any imposts or duties on imports, &c. Norris *v.* City of Boston, 4 *Met.* 282, 296.

IMPOST; IMPOSITION. A duty or tax; an obligation to pay money laid upon various descriptions of property, for public uses and purposes.

Impost is a tax received by the prince for such merchandises as are brought into any haven within his dominions from foreign nations. It may in some sort be distinguished from customs, because customs are rather that profit the prince maketh of wares shipped out; yet they are frequently confounded. *Cowel.*

Impost means a duty on imported goods and merchandise. In a larger sense, any tax or imposition. (*Story Const.* § 474.) It is synonymous with duty. (1 *Story Const.* 669, note.) It comprehends every species of tax or contribution not included under the ordinary terms "taxes and excises." Pacific Ins. Co. *v.* Soule, 7 *Wall.* 433.

An impost, tax, or duty is an exaction to fill the public coffers, for the payment of the debts and the promotion of the general welfare of the country. An assessment to defray the expense of constructing bridges or causeways, or removing obstructions in a watercourse, to be paid by those only who are benefited thereby, is neither an impost, tax, or duty. Worsley *v.* New Orleans, 9 *Rob. (La.)* 324.

Impotentia excusat legem. Inability excuses performance of a legal requirement. Where a person, without default of his own, is disabled from performing an act required by law, and has no remedy over, the law will, in general, excuse him. The maxim is expressed in another form in the phrase, *lex non cogit ad impossibilia*, signifying that what a man cannot possibly perform, the law will not compel him to perform. This principle operates in various ways, according to the accidents and changing circumstances of life; as where a lessee covenants to leave a wood in as good a plight as the wood was at the time of the lease, and afterwards the trees are blown down by a tempest, the law will excuse the lessee from performance of the covenant. Shelley's Case, 1 *Coke*, 93 *a*. But where the impossibility of the performance is due to the default of the party engaging to do an act, the above maxim does not apply.

IMPOUND. Is applied to things, to signify that they are placed in custody of the law; analogous to imprison, in the case of persons. Animals estray are impounded; that is, confined in an enclosure called a pound. An instrument discovered in the course of a trial to be forged is sometimes ordered to be impounded; that is, retained in custody, with a view to a prosecution of the forger.

IMPRIMATUR. Let it be printed. The emphatic word in the Latin form of the license formerly required in England for the printing of a book; from which the license was termed the *imprimatur*.

IMPRIMIS. First; in the first place. A word formerly in common use to denote the first clause in an instrument, particularly in wills. *Item* was used to introduce each subsequent clause. That the use of *imprimis* does not, however, import a precedence of the bequest to which it is prefixed over others, see Everett *v.* Carr, 59 *Me.* 325.

IMPRISONMENT. The detention of another against his will, depriving him of the power of locomotion. United States *v.* Benner, *Baldw.* 234, 239.

Any forcible detention of a man's person, or control over his movements, is imprisonment. Lawson *v.* Bazines, 3 *Harr. (Del.)* 416.

It extends not only to confinement in a jail, but to a house, stocks, or holding a man in the street, &c.; for in all these cases the party so restrained is said to be a prisoner, so long as he has not his liberty freely to go about his business, as at other times. *Co. Litt.* 253.

A person charged in execution is deemed a person imprisoned, notwithstanding he is allowed the liberty of the jail limits. Coman *v.* Storm, 26 *How. Pr.* 84.

IMPROPRIATION. Before the reformation, numerous advowsons and benefices were attached to religious houses, who

applied but a small part of the incomes to the officiating priests, and appropriated the rest to their own fraternity. The appropriators were, therefore, in the first instance, persons spiritual. These appropriations were, it seems, spoken of as impropriations. But the word impropriation is restricted by Sir Henry Spelman and subsequent writers, so as to denote the appropriation by laymen of these properties, on receiving grants of the same from the crown after the dissolution of the monasteries; and the laymen so appropriating them were called lay impropriators. *Mozley & W.*

IMPROVED. Spoken of lands, may mean "occupied" or "held." It is not a technical word having a precise legal meaning. Bond *v.* Fay, 8 *Allen*, 213.

Improved land is such as has been reclaimed, is used for the purpose of husbandry, and is cultivated as such, whether the appropriation is for tillage, meadow, or pasture. Improve is synonymous with cultivate. Clark *v.* Phelps, 4 *Cow.* 190.

The term improved land, as used in the Pa. road laws and rules of court, includes the ground appropriated for a railroad. Road in Lancaster City, 68 *Pa. St.* 396.

IMPROVEMENT. 1. In reference to real property, improvement is much used — generally in the plural form, improvements — to signify work done or things built or placed upon land, rendering more fit for use, and more capable of producing an income. Thus it is said that in some cases one who is dispossessed of lands under a paramount title may claim compensation for his improvements, made in good faith.

Improvement, in a mechanic's lien law, may mean repairs or additions to buildings. I may make improvements to my house by painting it or by adding another story to it. The term also implies erections, as fences, houses, barns, &c. It is a very common expression to say of one who is building on his land, that he is making improvements thereon. Getchell *v.* Allen, 34 *Iowa*, 559; a. p. Schenley's Appeal, 70 *Pa. St.* 98.

Improvements, in a lease, embraces every addition, alteration, erection, or annexation made by the lessees during the demised term, for their own profit or use. It is more comprehensive than "fixtures," and necessarily includes it. French *v.* Mayor, &c. of N. Y., 16 *How. Pr.* 220.

Improvements, in a contract for the sale, among other things, of the improvements on a certain piece of land, was held, in the absence of any thing in the agreement or the evidence, to show that something else was intended, to mean work and labor generally of the owner enhancing the value of the premises. Spencer *v.* Tobey, 22 *Barb.* 260.

Improvements, in the Pennsylvania mechanic's lien law of 1858, covers only useful and important erections constituting part of the works placed there by the tenant. Schmidt *v.* Armstrong, 72 *Pa. St.* 355.

A devise to a wife in lieu of dower of the use and improvement of one-third of testator's real property, with personalty, should be construed as passing a life-estate only, not a fee. These words are not, ordinarily, selected to convey a permanent interest in land, nor is such their natural import or meaning. Fay *v.* Fay, 1 *Cush.* 93.

Improvement, in a statute regulating damages for property taken for roads, &c., which contained a provision that the jury should not take into consideration any advantage that may result to the land-owner on account of the improvement for which it was taken, was held to relate to work done, the road itself when constructed, as well as, to its uses and purposes; to cover benefits accruing on account of the road itself, as well as on account of its uses. Frederick *v.* Shane, 32 *Iowa*, 254.

2. In patent law, an improvement is generally used to present an invention as being auxiliary or collateral to another. A machine substantially new, having been invented and patented by one person, an addition to or beneficial modification of it, made by another person, is often called and patented as an improvement. But the use of the word in this connection is not exact or uniform.

IMPROVIDENCE. As used in a statute excluding one found incompetent to execute the duties of an administrator by reason of improvidence, means that want of care and foresight in the management of property which would be likely to render the estate and effects of the intestate unsafe, and liable to be lost or diminished in value, in case the administration should be committed to the improvident person. Coope *v.* Lowerre, 1 *Barb. Ch.* 45.

It refers to such habits of mind and conduct as render a man generally, and under all ordinary circumstances, unfit for the trust or employment of an executor. Emerson *v.* Bowers, 14 *N. Y.* 449, 454.

IMPUNITIVE. A verdict for "$100 impunitive damages," declared unintelligible. Dillon *v.* Rogers, 36 *Tex.* 152.

IN. In; into; upon; against. A Latin preposition, used in many phrases and maxims, among which are the following:

In adversum. Against an adverse, resisting, or unwilling party. A term applied to proceedings contested by the opposite party; such as the entry of a judgment *in adversum*, as distinguished from a judgment entered by consent.

In æquali jure, melior est conditio

possidentis. In cases of equal right, the condition of the party in possession is the better. Where the rights of adverse parties are equal, the claim of him who is in actual possession of the subject-matter shall prevail.

This is a maxim of equity jurisprudence, and the sphere of its application is in those cases where a plaintiff seeks the interposition of a court of equity to establish his claims to property, against defendant, but, on consideration, it appears that defendant has an equally good equitable right with plaintiff. In such cases the court will not disturb defendant's possession. Thus the equities are esteemed equal between persons who have been equally innocent and intelligent. It is upon this ground that equity constantly refuses to interfere against a *bona fide* purchaser of the legal title, for value and without notice; or against one who originally bought an equitable title only, without notice, but who, after being charged with notice, bought the legal estate to protect his equity. *Story Eq. Jur.* §64.

Other maxims must be considered, also, in determining how the one under consideration will be applied; thus, if complainant and defendant have equal equities, the one who acquired title earlier may prevail; for he who is first in time is first in right. On the other hand, if one has also a legal title, he may prevail, notwithstanding the other's possession; for, when equities are equal, equity follows the law.

In arcta et salva custodia. In close and safe custody.

In articulo mortis. In the article of death; at the point of death.

In auter droit. In another's right; as representing another. A better form is *en auter droit.*

In banco. In bank; in the bench. A term applied to proceedings in the court in bank, as distinguished from proceedings at *nisi prius.* Also, in the English court of common bench.

In capita. Among heads. According to the number of individuals, or to the polls.

In capite. In chief. A tenant holding directly from the crown was termed, in old English law, a tenant *in capite.*

In commendam. 1. In English law, a living *in commendam* is a vacant living, commended to the care of some one.

2. In Louisiana civil law, a partnership *in commendam* is a species of limited partnership.

In criminalibus sufficit generalis malitia intentionis cum facto paris gradus. In criminal cases, general malice of intention is sufficient, with an act of equal degree. To constitute a crime, a general criminal intent, united with a particular criminal act, is sufficient, although malice directed against the victim of the crime may be wanting.

By fundamental principles of criminal law, a criminal intent and an unlawful act must both exist to warrant punishment. Cases have arisen in which both did exist, but were independent of each other; *i.e.*, the intent was not to do the act precisely as performed. This maxim teaches that they need not correspond with exactness. Thus, in Reg. *v.* Smith, 33 *Eng. Law & E.* 567, Smith seeing T, but supposing he was M, whom he designed to murder, shot at and wounded T. A conviction for wounding T with intent to kill was sustained. So it has been held (independent of any statute such as have been passed in recent years, declaring the possession of counterfeit money an offence) that acts, however slight, of obtaining counterfeit money, counterfeiting implements, burglars' tools, &c., with intent to pass the money or use the tools in counterfeiting or burglary, may be considered as constituting an offence; although here the criminal intent is independent of the criminal act. *Russ. Crimes*, 48.

In cujus rei testimonium. In testimony whereof. The initial words of the concluding clause of ancient deeds in Latin, literally translated in the English forms.

In disjunctivis, sufficit alteram partem esse veram. In disjunctives, it suffices that either part is true. Where a condition is in the disjunctive, performance of either alternative is sufficient.

In esse. In being; in existence. An event which may happen is said to be *in posse;* but when it has happened, it is

in esse. So a child only contemplated as perhaps one day to come into being is spoken of as merely *in posse;* but after birth, and, for some purposes after it is conceived, it is considered as *in esse*.

An unborn child, if subsequently born alive, and capable of living, is considered as *in esse* from the time of conception, where, so considering it is for the benefit of the child, as for the purpose of enabling it to take a devise or legacy. Hone *v.* Van Schaick, 3 *Barb. Ch.* 488.

In extremis. In the last (moments); at the point of death.

In facie ecclesiæ. In the face of the church.

In favorem libertatis. In favor of liberty. **In favorem vitæ.** In favor of life. Liberal presumptions are indulged in aid of a defence against a capital charge, or of a claim to freedom.

In fictione juris semper æquitas existit. In a fiction of law there is always equity; a legal fiction is always consistent with equity. A fiction of law is a legal assumption that a thing is true which is either not true, or which is as probably false as true; the rule on this subject being that the court will not endure that a mere form or fiction of law, introduced for the sake of justice, should work a wrong contrary to the real truth and substance of the thing. Johnson *v.* Smith, 2 *Burr.* 962. While a fiction of law cannot be contradicted so as to defeat the end for which it was invented, for every other purpose it may be. Its proper operation is to prevent a mischief, or remedy an inconvenience which might result from applying some general rule of law. The maxim is sometimes written *in fictione juris subsistit æquitas.*

In fieri. In being done; in process of completion. Proceedings in a suit are said to be *in fieri*, until judgment is entered.

In forma pauperis. In the manner of a pauper. Describes permission given to a poor person to sue without liability for costs.

In foro conscientiæ. In the tribunal of conscience; conscientiously; considered from a moral rather than a legal point of view.

In fraudem legis. In fraud of the law. With the intention of evading the law.

In futuro. In the future; at a future time; the opposite of *in presenti.*

In gremio legis. In the breast of the law. A figurative expression, importing that the subject to which it is applied is in suspense.

In hac parte. On this side.

In hæc verba. In these words.

In initio. In the beginning; from the beginning.

In integrum. To the unbroken state; the uninjured condition.

In invitum. Against an unwilling party. A term applied to proceedings against an adverse party, to which he does not consent.

Proceedings to take land in right of eminent domain are an instance.

In itinere. On a journey; on the way; in eyre; upon circuit. A term applied to justices in England going on circuits throughout the kingdom to try causes; and also to proceedings before such justices.

In judicio. In a judicial proceeding; in court.

In jure. In law; in right; according to right; rightfully.

In jure, non remota causa, sed proxima, spectatur. In law, not the remote, but the proximate cause is considered. The law regards the immediate, not the remote causes of an event; otherwise it would be drawn into the consideration of the causes of causes to an indefinite extent.

The ordinary case where slanderous words are repeated, or a libel is republished, and the first promulgator is not held liable for any special damages caused by the repetition; also the case where a manager of a theatre sued defendant for a libel on an opera singer, who was under an engagement with plaintiff to sing at his theatre, but was deterred by the libel, whereby plaintiff lost the profits of her services, and the damage was held too remote, are cited as examples of the application of the maxim. *Whart. Max.*

It is applicable to cases arising out of marine insurance, where negligence for

losses may be referred in some instances to a variety or combination of causes. But the courts will look only to that from which the loss immediately followed. Thus, where a ship was delayed by the perils of the sea from pursuing her voyage, and the master was compelled to put into port for repairs, but, having no other means of raising money, sold part of the goods and applied the proceeds in payment of the expenses, the court held that the underwriter was not answerable for this loss; for the damage was to be considered according to the above rule, as not arising immediately from, although in a remote sense it might be said to have been brought about by, a peril of the sea. Powell *v.* Gudgeon, 5 *Mau. & S.* 431; *Broom Max.* The rule also includes those cases where an injury is sustained as the natural and necessary consequence of the original act done, but where intermediate causes have also contributed to the injury.

In limine. Upon the threshold; at the beginning; preliminarily.

In loco parentis. In the place of a parent; instead of a parent; having a parent's rights, duties, and responsibilities.

In misericordia. In mercy; subject to amercement; liable to a penalty in the discretion of the king, lord, or judge. Sometimes contracted to *in m'ia.*

In mitiori sensu. In the milder sense; in the most favorable acceptation. This phrase was formerly much used in expressing the rule of construction prevailing in regard to defamatory words, that they should be construed *in mitiori sensu.* The rule itself having been abandoned, and defamatory words being now construed according to their usual meaning and acceptation, this phrase is falling into disuse.

In mora. In delay; in default. A term of the civil law, in common use in Louisiana.

In mortua manu. In a dead hand; in mortmain. A term applied to property held by religious societies, regarded as dead in law, as ecclesiastics were *civiliter mortuus.*

In nubibus. In the clouds; in abeyance; in suspension; in the custody of the law. In cases where property is in abeyance, the inheritance is figuratively said to be *in nubibus*, or *in gremio legis.*

In nullo est erratum. In nothing is there error. The emphatic words of the Latin form of joinder in error, by which the defendant alleges that there is no error. The words are also used as the name of the pleading.

In pari causa. In an equal cause. In a cause where the parties on each side have equal rights.

In pari delicto. In equal fault; equally worthy of blame; equal in guilt.

In pari delicto, potior est conditio defendentis. In a case of equal fault, the condition of the party defending is the better. Or, **In pari delicto, potior est conditio possidentis.** In a case of equal fault, the condition of the party in possession is the better. Where adverse parties are equally in fault, the party who has the actual possession of the subject-matter should prevail. Where the fault is mutual, the law leaves the case as it finds it.

The law does not encourage either of two persons who have colluded in an unlawful act to sue the other for a determination of their claims upon each other growing out of the violation of law. Thus, if a principal has engaged an agent to render "lobby services," contrary to public policy, in procuring the passage of a bill or the allowance of a claim, and it becomes necessary for the agent to sue for the promised compensation, his suit is liable to be defeated, on the ground that, the transaction being unlawful, the court will not aid either. On the contrary, if the position of affairs is such that the principal must sue the agent, the same maxim may defeat him. In general, where both parties to a contract void as against public policy are equally at fault, the law will leave them where it finds them. If the contract is still executory it will not be enforced, nor will damages be awarded for a breach. If it has been executed, the price paid or property delivered cannot be recovered back. Setter *v.* Alvey, 15 *Kan.* 157.

In pari materia. Upon the same subject; in regard to the same matter. This phrase is applied to statutes, gen-

erally in reference to the rule that statutes *in pari materia* are to be construed together. Statutes which relate to the same person or thing, or to the same class of persons or things, are *in pari materia*.

Statutes are *in pari materia* which relate to the same person or thing, or to the same class of persons or things. The word *par* must not be confounded with the term *similis*. It is used in opposition to it, as in the expression, *magis pares sunt quam similes*, intimating not likeness merely, but identity. It is a phrase applicable to the public statutes or general laws, made at different times and in reference to the same subject. Thus the English laws concerning paupers are construed together as if they were one statute, and as forming a united system; otherwise, the system might, and probably would, be inharmonious and inconsistent. So of the bankrupt acts. Such laws are *in pari materia*. But private acts of the legislature, conferring distinct rights on different individuals, which can never be considered as being one statute, or the parts of a general system, are not to be interpreted by a mutual reference to each other. As well might a contract between two persons be construed by the terms of another contract between different persons. United Society *v.* Eagle Bank, 7 *Conn.* 456.

In perpetuam rei memoriam. In perpetual memory of a matter; for the purpose of preserving a record of a matter. The phrase is sometimes applied to depositions taken in order to preserve the testimony of the deponent.

In personam. Against the person. Used of proceedings against a person, in distinction from proceedings against or concerning a particular piece of property, which are termed proceedings *in rem*, q. v.

In posse. In possibility; not in actual existence. A term applied to things which may be, but are not yet, in existence, or to events which are possible, but have not yet occurred; as distinguished from things *in esse*.

In præsenti. At the present time; at present. Distinguishing things present from things *in futuro*.

In propria persona. In his own person; himself. This phrase is applied to appearances and other acts by a party in person, and not by attorney.

In re. In the matter; in the matter of. This phrase is generally used in entitling judicial proceedings other than actions between party and party, particularly such proceedings as relate chiefly to the distribution or other disposition of property; as proceedings in bankruptcy or insolvency.

In rem. Against a thing; against property. This phrase is used of proceedings against or concerning some particular thing or piece of property, in distinction from proceedings against a person, termed *in personam*. The judgment or decree sought in the proceeding marks the distinction between the two classes of remedies; proceedings *in personam* seeking the recovery of a personal judgment, and proceedings *in rem* a judgment which does not bind the parties personally, and the operation of which is confined to the subject-matter *in specie*.

Proceedings *in rem* include not only those instituted to obtain decrees or judgments against property as forfeited in the admiralty or the English exchequer, or as prize, but also suits against property to enforce a lien or privilege in the admiralty courts, and suits to obtain the sentence, judgment, or decree of other courts upon the personal status or relations of the party, such as marriage, divorce, bastardy, settlement, or the like. *Bouvier.*

In rerum natura. In the nature of things; in existence. A plea that there is no such person *in rerum natura*, imported that the plaintiff was a fictitious person.

In solido. For the whole; as a whole; exclusive of others. A term of the civil law, and in common use in Louisiana. As applied to obligations or contracts, it is equivalent to the expression "joint and several" in the common law; that is, an obligation *in solido* is one by which each of several obligors is liable for the whole amount, and a payment by one is a payment by all. The phrase is used in the same sense in the law of partnerships. Possession *in solidum* is possession of the whole, — exclusive possession. The form *in solidum* was used by Roman

writers, but *in solido* is the form preferred in the modern civil law.

In specie. In form; in its own form; in its identical state; identically; specifically. A thing remains *in specie* so long as it retains its form, the arrangement of its parts, and its adaptation for its particular use; as a ship, which no longer exists *in specie* when broken in a mere congeries of planks.

In terrorem. In warning; by way of warning; as a threat. The phrase is applied to legacies bequeathed upon condition that the legatee shall not dispute the validity of the will or of the disposition of property made by it. Such a condition is said to be merely *in terrorem*, and is often treated as a mere threat, the forfeiture not being always enforced though the condition be broken.

In totidem verbis. In so many words; in precisely the same words; word for word.

In transitu. In transit; on the way; during passage or removal from one place to another. See STOPPAGE *in transitu*.

INADMISSIBLE. Not entitled or proper to be admitted or received. See ADMIT.

The word is most frequently employed to characterize evidence which is incompetent, and ought to be altogether excluded by the court, as distinguished from such as must be received and submitted to the jury, though it may not deserve much credence.

INALIENABLE. Not subject to alienation, surrender, or transfer. See ALIEN.

INAUGURATE. Among the Romans, in ancient times, to consult the *augurs*, as the prophets and soothsayers were called, was a necessary preliminary ceremony to any important public act, such as the installation of a sovereign or chief magistrate. Hence the words to inaugurate and inauguration, which are used to designate the ceremonies usually attending the assumption of office by a new president, governor, &c. For the most part, however, these ceremonies have no legal importance or efficacy. They are observed by custom merely, and have their foundation only in the general interest which attaches to the event. All that is necessary to vest official authority in a president elect is, that he should take the prescribed oath of office; and the same is believed to be generally true as to the governors of states.

INCAPACITY. Want of capacity, competency, or power. See CAPACITY.

Incerta pro nullis habentur. Uncertain things are held for nothing; what is uncertain is of no effect, and void.

INCEST. Sexual intercourse between persons so related in consanguinity that a marriage between them would be unlawful.

This does not seem to have been a punishable offence at the common law, though it was cognizable as one in the English ecclesiastical courts, under the canon law. *Bish. Cr.* § 502; *Jacob;* 4 *Bl. Com.* 64.

By statute, it has very extensively been made punishable. The statutory definition, of course, governs within each jurisdiction.

The definition above given is, of course, subject to the general principle of criminal law, that ignorance of fact or compulsion may deprive an act of all criminal intent. Ignorance of the relationship, and of any facts which should put the party on inquiry, would doubtless exempt a person from punishment for incest; and a woman subjected to rape by a relative could not be convicted of incest. But these rules do not seem necessary to be incorporated in the definition of the offence. The fact that the form of a marriage had been solemnized between two persons related within the prohibited degrees would have no effect to relieve intercourse between them of the character of incest.

Incestuous adultery. The elements of this offence are, that defendant, being married to one person, has had sexual intercourse with another related to the defendant within the prohibited degrees. Cook *v.* State, 11 *Ga.* 53.

INCHOATE. Commenced, but not complete; partially but not fully in existence or operation.

The term characterizes rights during the period which elapses between the occurrence of the various facts which

must concur to give them full existence. Thus, to acquire full enjoyment of right of dower, marriage and the death of the husband must both have occurred. Between the marriage and the husband's decease the wife is said to have an inchoate right of dower. A contract may be called inchoate between the time when it is negotiated and in fact agreed to or signed by one of the parties, and the time when the papers are completely executed and delivered.

INCIDENT, *n.* A thing which is presented as accessory or subordinate to some other thing deemed more independent in existence. Incident (*adj.*) and incidental: accessory; collateral; connected in a subordinate position.

Incident is properly used to denote any thing which is inseparably belonging to, connected with, or inherent in, another thing which is called the principal. Thus a court-baron is incident to a manor, and it is inseparably incident, so that it cannot be severed from it by grant. Again, rent is said to be incident to a reversion; *i.e.*, one of the inseparable qualities, or one of the necessary characteristics of a reversion. But the word is also used less properly to denote any thing which is connected with another thing, even separably. Thus, in the common phrase, "costs of and incidental to" any suit or legal proceeding, the word can only be taken as meaning properly incurred in connection therewith. Also, the incidents of property may be either inseparable or separable; *e.g.*, the right of alienation is separable in equity, although probably inseparable at law, from a fee-simple or fee-tail estate in lands, or an absolute interest in personal estate. *Brown.*

Incipitur. It is begun. This word was used in English practice as the name of any entry of record, in an action at law, made by giving merely the commencement of the pleading or other proceeding, without entering it at length.

The phrase "entering the *incipitur* on the roll" may be thus explained: when the contending parties in an action have come to an issue, the plaintiff, in strictness, should enter the same, together with all the pleadings prior thereto, on a roll of parchment called the issue-roll; but this is now seldom done, the commencement of the pleadings only being entered thereon, which is termed entering the *incipitur*, *i.e.* the beginning, on the roll. The entry even of the *incipitur* is now, however, by a recent rule of court, rendered unnecessary. *Brown.*

INCLOSURE. See ENCLOSURE.

INCOME. Gains received from business, invested property, or other sources of pecuniary returns.

The word is usually applied to what is received by individuals and to their receipts, before deduction of expenses or offsets. The funds accruing to government are generally called revenue; and surplus of an individual's receipts, after deduction of expenses, is ordinarily called profits, or distinguished as net income. 15 Gray 1 Chy 361.

Advance in value of government bonds has been held not taxable as "gains, profits, or income," under the internal revenue act of 1867. Gray *v.* Darlington, 15 *Wall.* 63; compare Haight *v.* Pittsburg, &c. R. R. Co., 3 *Pittsb.* 105.

Whether promissory notes, book-accounts, &c., accruing during a given year, enter into the "income" of the year, subject to the United States income tax, depends upon their intrinsic value or convertibility into money, property, or available assets. United States *v.* Frost, 9 *Int. Rev. Rec.* 41.

The meaning of the word income, in the La. act of March 19, 1856, is, money received in compensation for services, such as wages, commissions, brokerage, &c.; and is totally different from the fruits of capital invested in merchandise, stocks, &c. New Orleans *v.* Hart, 14 *La. Ann.* 815.

Income, in a state statute exempting incomes from taxation, means the creation of capital, industry, and skill. Wilcox *v.* Middlesex County, 103 *Mass.* 544.

The "income of an estate" means the profit it will yield after deducting the charges of management, or the rent which may be obtained for the use of it. The rent and profits of an estate, the income, or the net income of it, are all equivalent expressions. Andrews *v.* Boyd, 5 *Me.* 199.

Income means that which comes in or is received from any business or investment of capital, without reference to the outgoing expenditures; while profits generally means the gain which is made upon any business or investment when both receipts and payments are taken into account. Income, when applied to the affairs of individuals, expresses the same idea that revenue does when applied to the affairs of a state or nation. People *v.* Supervisors of Niagara, 4 *Hill* (*N. Y.*), 20; 7 *Id.* 504.

The words "until income should be realized from the road," in a contract respecting a railroad, was held to mean profits over expenses, arising from the operation of the entire completed road. Manice *v.* Hudson River R. R. Co., 3 *Duer*, 426.

A testator directed an investment to be made for the benefit of his wife, the income thereof, only, to be paid to her. The investment was made in part in the stock of a bank, the charter of which afterwards expired, and it was reorganized under the

general law. A final dividend of eighteen per cent was paid to the trustees in stock of the new bank. It was held that so much of this dividend as was in excess of the premium paid by the trustees upon their purchase of the old stock was income to be paid to the widow. Simpson *v.* Moore, 30 *Barb.* 637.

INCOMPETENT. Not able, competent, or qualified. See COMPETENT. Incompetency: incapacity; want of legal power or efficacy.

When used with reference to the action of persons in private or official relations, these words generally signify want of legal, not of actual or physical, power to perform the act in question; they import, not that the person cannot do the act in form, but that he cannot do it with legal efficacy, or so that it shall have valid operation. Thus an infant is said to be incompetent to contract; an executor to be incompetent to bring suit in certain cases; a judge to be rendered incompetent to try a cause by an interest in the subject-matter.

As applied to evidence, whether documents or testimony, the words mean, not proper to be received; inadmissible, as distinguished from that which the court should admit for the consideration of the jury, though they may not find it worthy of credence.

INCORPORATE. To form or unite in one body. Incorporation: the act of bringing several elements into one body; the legislative act of uniting natural persons in one artificial one. Incorporated: constituted as one; formed into one body; made a legal entity.

The most important application of these terms is in reference to creation by the sovereign power of corporations. See CORPORATION. They are sometimes found used, incorporate, as an adjective, in such expressions as incorporate existence; and incorporation, in the sense of a body incorporated, in such expressions as a joint-stock company is not an incorporation. This use of the words is undesirable. "Corporate" and "corporation" express these ideas fully, and should be used where these are the ideas intended. "Incorporate" and "incorporation," should be reserved to signify, as verb and noun, the act of creating a corporation.

Incorporated company. While a sole officer may be a corporation, he cannot be deemed within the term incorporated company, in a statute punishing embezzlement by any clerk, &c., of any private person, or any agent, &c., of any incorporated company. Hence a keeper of a county poor-house, employed as such by a superintendent of the poor, cannot be convicted under such statute of an embezzlement of the funds coming into his possession in his employment. Such superintendent, in his relations to the keeper, cannot be deemed a private person; for the whole relation between the two is of a public nature. And a superintendent of the poor cannot be deemed such an incorporated company as is intended by the provision. Coats *v.* People, 22 *N. Y.* 245.

INCORPOREAL. Without body; not of material nature; the opposite of corporeal, *q. v.*

The same distinction is observable between the civil and common-law uses of incorporeal, as applies to corporeal, *q. v.*

Incorporeal chattels, is a phrase which has been applied to bodiless interests arising out of or incident to personal property, analogous to non-material rights connected with land, which are called incorporeal hereditaments. Copyrights and patent-rights, stocks and personal annuities, have been mentioned as coming within the designation incorporeal chattels. Boreel *v.* Mayor, &c. of N. Y., 2 *Sandf.* 552, 559; 2 *Steph. Com.* (6th ed.) 9.

Incorporeal hereditaments, is a phrase embracing all those hereditaments which have no bodily existence or material substance, and cannot be known by the senses. It signifies the interests and rights which may be inherited, but are not physical or tangible.

Various lists of the principal incorporeal hereditaments have been given. Brown's classification, which is elaborate and instructive, is substantially as follows:

Incorporeal hereditaments, simply so called, comprise the following varieties:

1. Reversions.

2. Remainders, which, again, are either vested remainders or contingent remainders.

3. Executory interests.

Purely incorporeal hereditaments comprise the following varieties:

1. Appendant incorporeal hereditaments. These are such hereditaments of an incorporeal character as are necessarily, and therefore, from the earliest of times, have been attached to some corporeal hereditament, and are never separated therefrom. They are, a seigniory appendant, a right of common appendant, and an advowson appendant.

2. Appurtenant incorporeal hereditaments. These are such hereditaments of an incorporeal character as are not necessarily or originally attached to some corporeal hereditament, but have been attached thereto, either by some express deed of grant, or by prescription, which presumes a grant. The only example of an appurtenant incorporeal hereditament which need be given is, a right of common appurtenant.

3. Incorporeal hereditaments in gross. These are such hereditaments of an incorporeal character as are not attached to any corporeal hereditament, but stand separate and alone. They comprise the following six varieties among others: a seigniory in gross, a rent-seck, a rent-charge, a right of common in gross, an advowson in gross, and tithes.

Many of these incorporeal hereditaments in gross may have been at one time incorporeal hereditaments, either appendant or appurtenant to some corporeal hereditament, from which, in some manner or other, they have been separated; and it is a rule of law that when an appendant incorporeal hereditament (*e.g.* an advowson) is once separated from the corporeal hereditament to which it was theretofore attached, it can never become appendant again, but must always for the future either remain in gross, or become appurtenant by some grant, express or presumed.

INCUMBENT. Originally an adjective, but now often used as a noun, signifying a person in possession and exercise of an office.

Appointment or election to an office, alone, does not constitute the person an incumbent. An incumbent of an office is one who is legally authorized to discharge the duties of that office. For instance, a man who is elected county treasurer is required to give bonds and take an oath of office. These things must be done before he can discharge the duties of the office; and, if they are not done in due time, the office itself is vacant: there is no incumbent. So, where a man is elected judge, he does not, by the election, become a judge. He must receive a commission, as evidence of his authority to act; must take an oath of office, and have it indorsed on his commission. When this is done, and not before, he is an "incumbent" of the office. State *v.* McCollister, 11 *Ohio*, 46.

In England, the term is especially used of ecclesiastical persons. An incumbent is a clerk duly possessed of or resident on his benefice, with cure. It is said that four things are necessary to the being a complete incumbent: Presentation; that is, the patron's free gift or commendation of his clerk to the parsonage or vicarage, by presenting or offering him to the bishop. · Admission of such clerk by the bishop, by his allowance or approbation of him after due examination, and by making record of his name accordingly. See ADMIT. Institution of such clerk to such benefice by the bishop or collation. Introduction or induction, *q. v.*

INCUMBRANCE. An interest in or charge upon land, which may subsist in or in favor of a third person consistently with a transfer of the fee, but diminishes the value of the estate to the occupant. It is an estate, interest, or right in lands, diminishing their value to the general owner; a paramount right in or weight upon land, which may lessen its value. Newcome *v.* Fiedler, 24 *Ohio St.* 463. Incumbrancer: a person entitled to enforce a charge or right upon or against real property.

One of the most important uses of the application of the word is in what is termed the covenant against incumbrances; a stipulation on the part of a grantor in a deed that there are no charges or claims upon the land (except those specified) which may diminish its value to the grantee.

INCUR. Men contract debts, they incur liabilities. In the one case, they act affirmatively; in the other, the liability is incurred or cast upon them by act or oper-

ation of law. Incur means something beyond contracts, — something not embraced in the word debts. Crandall *v.* Bryan, 15 *How. Pr.* 48; 5 *Abb. Pr.* 162.

A bond to indemnify plaintiff against "all costs, charges, and expenses which he shall incur," is not broken by his merely becoming liable for costs, &c.; but he must first be damnified by their payment. Scott *v.* Tyler, 14 *Barb.* 202.

The phrase, damages incurred, as used in Laws of 1838, 253, making an owner who neglects to fence liable therefor, means damages brought on, *i.e.* by one's own negligence. Deyo *v.* Stewart, 4 *Den.* 101.

Indebitatus assumpsit. Being indebted, he undertook. These were the emphatic words of the Latin forms of the old common counts in the action of assumpsit, which, after setting forth an indebtedness of the defendant to the plaintiff, alleged that, being so indebted, he undertook and promised the plaintiff to pay, &c. The phrase came to be commonly used as the distinctive name of that species of the action of assumpsit in which the declaration set forth an indebtedness between the parties and a promise to pay by the defendant in consideration of such indebtedness. The promise relied on was generally an implied one merely; an express promise not being necessary to sustain the action.

INDEBTED. Under obligation to pay money. Indebtedness: the condition of owing money.

The words imply an absolute or complete liability; a contingent liability, such as that of a surety before the principal has made default, does not constitute indebtedness. On the other hand, the money need not be immediately payable; obligations yet to become due constitute indebtedness as well as those already due. St. Louis Perpetual Ins. Co. *v.* Goodfellow, 9 *Mo.* 149. Thus "indebted" includes one's obligation upon notes which have not yet matured, Grant *v.* Mechanics' Bank, 15 *Serg. & R.* 140; Sewall *v.* Lancaster Bank, 17 *Id.* 285; and includes a liability to pay for stock subscribed, though the instalments have not yet been called in, Pittsburg, &c. R. R. Co. *v.* Clarke, 29 *Pa. St.* 146. Compare DEBT; DUE.

INDECENCY. It is said to be an established doctrine of the criminal law that whatever openly outrages decency and is injurious to public morals is punishable upon common-law principles as a misdemeanor. Whatever scandalizes the public by shocking its sense of decency is a nuisance. See 1 *Russ. Crimes*, 326; 2 *Whart. Crim. Law*, § 2385; *Id.* § 2544. Statutes have greatly aided this jurisdiction in recent years. But we do not find that the cases or textbooks concur in any distinct definition of indecency, in this connection, or even put forth any specific criteria by which it may be determined. The judgment of the court and jury upon the acts or publication proved, in the particular case, gives the decision as to whether it is indecent.

INDEFEASIBLE. That which cannot be defeated or made void; an engagement or transfer which is absolute, as distinguished from one which gives the party a privilege to escape, or cancel it by performing something else.

INDEMNIFY. To make free of loss. The word is used with two shades of meaning: 1. To make compensation for a loss already sustained; 2. To give assurance or security that one shall have compensation for a loss anticipated. Weller *v.* Eames, 15 *Minn.* 461. Thus one may speak of indemnifying an owner of land taken for public use, meaning to pay him the value; or of indemnifying the sheriff, meaning to give a bond to reimburse any damages which may be collected from him.

INDEMNITY. 1. Something given in compensation for a loss already incurred.

2. An assurance or engagement to make good an anticipated loss. Thus it is said that insurance is a contract of indemnity. A bond to repay a sheriff any damages he may sustain by complying with directions as to levy of an execution is called an indemnity; strictly, it is a bond of indemnity.

It is usual to insert in settlements and wills a clause of indemnity for the protection of the trustees acting in the trusts created therein. And where (as not infrequently happens) the trustees, at the urgent request of their *cestuis que trust*, commit what is technically a breach of trust, but the act is done *bona fide* and for a present advantage, it is not

unusual to give, and the trustees have a right to demand from the *cestuis que trust* requiring them so to act, an express deed of indemnity. Such deed may either consist in the personal covenant of the parties, or not only in such personal covenant, but also in the setting apart a fund, called an indemnity fund, to recoup the trustees any outlay which they may have to incur or be put unto in consequence of their having so acted.

3. A legislative act, assuring a general dispensation from punishment or exemption from prosecution to persons involved in offences, is called an indemnity; strictly, it is an act of indemnity.

Acts of indemnity are such as are passed for the relief of those who have neglected to take the necessary oaths, or to perform other acts required to qualify them for their offices and employments. So acts of indemnity, after rebellions, have been passed for quieting the minds of the people, and throwing former offences into oblivion. *Brown.*

INDENT. To cut in the similitude of teeth. Indenture: originally, a written instrument cut on the margin, in teeth, as it were; more lately, a sealed instrument executed between two or more parties, as opposed to a deed-poll.

In the forms of ancient conveyancing, when an instrument was to be executed in counterparts between two or more parties, it was customary to engross the two counterparts on one piece of paper, leaving a blank strip between them, and then to cut them apart with a notched, crooked, or waving line. See CHIROGRAPH. This was an additional precaution against offering a pretended false substitute for either counterpart; for it was not likely that any cutting of the edge of the substitute would correspond with either of the genuine ones, whereas the two edges of the genuine would match precisely. The use of this device gradually declined; and it has been formally declared needless by statute in England, and we think has now been generally disused in the United States, though Mr. Burrill (Dict., ed. of 1850) says that "careful conveyancers continue to notch or scallop the edge of the paper at the tops of deeds."

But the word indenture has been retained to signify an instrument of the class which in old times was usually indented; that is, one which was to be executed by two (or more) parties, each of whom should retain a counterpart. In the case of a deed by one party where one copy only was made, indenting was inapplicable; hence indented deed, or indenture, and deed-poll, were apt terms to describe the two kinds.

Indentures is often used as a short expression for indentures of apprenticeship, the instrument by which a youth is bound apprentice to a master.

An indenture is a deed; that is, a writing sealed and delivered. It takes its name from being indented or cut on the top or on the side, either by a waving line or a line of indenture, — *instar dentium*, — so as to fit or aptly join the counterpart from which it is supposed to have been separated. A seal is necessary to constitute an indenture. Overseers of Hopewell *v.* Overseers of Amwell, 6 *N. J. L.* 169.

Indenture is not a technical term; and the use of it in a declaration does not necessarily imply that the instrument in question was sealed. That is only effected by the use of the terms "deed" or "writing obligatory." Magee *v.* Fisher, 8 *Ala.* 320.

INDEPENDENT. Where the obligation to perform a covenant within an instrument rests entirely upon the requirements of the covenant itself, without regard to others, the covenant is termed an independent one.

Index animi sermo. Language is the exponent of the intention. The language of a statute or iustrument is the best guide to the intention.

INDIAN. It is matter of somewhat familiar history that the discoverers of this continent in the fifteenth century applied the name Indians to the aboriginal inhabitants, from the erroneous supposition that India had been reached. The name, retained in common use notwithstanding the error in which it originated, is equally established in the statutes and in legal usage to designate this race.

The term Indian, in a statute, should not be restricted to persons of full Indian blood, unless there is something to show affirmatively that such restriction was intended. As generally used, it includes descendants of Indians who have an admixture of blood with white or negro blood, if they still retain their distinctive character as members of the tribe from which they trace descent. Wall *v.* Williams, 11 *Ala.* 826.

Half-breed Indians are to be treated as Indians in all respects, so long as they re-

tain their tribal relations. 7 *Op. Att.-Gen.* 746.

The child of a white woman, though born of an Indian father, is legally of the white race. United States *v.* Sanders, *Hempst.* 483.

A person having three-eighths Indian blood was held, under peculiar circumstances, an Indian, within the meaning of Ind. Rev. Stat. 1843, 414, § 3. Lafontaine *v.* Avaline, 8 *Ind.* 6.

In Indian treaties, the words "Indians by descent" have been often used to designate not only persons of mixed Indian blood, but as collectively applicable to both those of the full blood and of mixed white and Indian blood. Campau *v.* Dewey, 9 *Mich.* 381.

It does not follow, because an individual is the chief of an Indian tribe, that such person is an Indian. Harris *v.* Barnett, 4 *Blackf.* 369.

A white man, who is incorporated with an Indian tribe at mature age, by adoption, does not thereby become an Indian, so as to cease to be amenable to the laws of the United States, or to lose the right to trial in their courts. United States *v.* Rogers, 4 *How.* 567; *Hempst.* 450; United States *v.* Ragsdale, *Id.* 497; 2 *Op. Att.-Gen.* 693; 4 *Id.* 258; 7 *Id.* 174.

"The Indian country," within the meaning of the act declaring it a crime to introduce spirituous liquors therein, is only that portion of the United States which has been declared to be such by act of congress; and a country which is owned or inhabited by Indians in whole or in part is not therefore a part of "the Indian country." United States *v.* Seveloff, 2 *Sawyer*, 311; 17 *Int. Rev. Rec.* 20.

INDICIA. Appearances; indications; marks; signs. Thus, circumstances attending a transaction which excite a suspicion that fraud was intended, are called *indicia* of fraud.

INDICTMENT. A formal, written accusation or charge of crime, preferred upon oath by a grand jury, at the suit of the government, upon a complaint made, and as a basis for a trial of the accused.

To indict, is spoken of the act of the grand jury in preferring such an accusation. Indicted, is used to characterize the person against whom it is preferred. Old books call the person who indicts another man of an offence the indictor, and he who is indicted the indictee; but those terms are not now in use.

The proceeding by indictment is to be distinguished from other modes of accusation or prosecution of crimes, particularly presentment and information. A presentment differs from an indictment in that it is an accusation made by a grand jury of their own motion, either upon their own observation and knowledge, or upon evidence before them; while an indictment is preferred at the suit of the government, and is usually framed in the first instance by the prosecuting officer of the government, and by him laid before the grand jury, to be found or ignored. An information resembles in its form and substance an indictment, but is filed at the mere discretion of the proper law officer of the government, without the intervention or approval of a grand jury. *Story Const.* §§ 1784, 1786.

In the ordinary form, an indictment consists of a caption or commencement, a statement or charge of the offence, and a conclusion. The caption is generally considered not strictly a part of the indictment, although the matters usually contained in it form an essential portion of the record of the proceedings. Its office is to state with reasonable certainty the style of the court, the term or time and place where and by whom it is held, the time and place where and the jurors by whom the indictment is found.

In charging the offence, the accused must be designated with certainty by his name, if known, and formerly by the proper addition for his estate, degree, or mystery; although such additions are now usually dispensed with by provisions of statute in most of the United States. The parties injured or other third parties are also to be certainly designated, although no addition is necessary. Time and place must be attached to every material fact averred; stating, as to the time, the day, month, and year, the time of the day not being requisite except where it is one of the constituent parts of the offence, as in burglary; and as to place, the venue of the offence must be so described as to show that it was within the jurisdiction of the court. The statement of the offence must be such that the offence may judicially appear, and its description must be technically exact. The charge must not be in the alternative or disjunctive, or so made as to leave any un-

certainty as to what is really intended to be relied on to support the accusation. The rules as to the sufficiency of the description of personal chattels, written instruments, &c., vary with the different subject-matters, and the degree of particularity appropriate. Various technical words which are considered essential to the proper description of certain crimes, or certain classes of crimes, must be used in indictments for those offences. Thus the word feloniously is essential in all indictments for felony, whether common-law or statutory. The offence may be set forth in different ways in different counts of the same indictment. To a limited extent, different offences arising out of the same act or transaction are allowed by statutes in many of the United States to be joined in the same indictment; but, with some few exceptions, a joinder in one count of two or more distinct offences renders the indictment bad for duplicity. Where one material averment is contradictory to another, the repugnancy renders the whole indictment bad.

In the conclusion of an indictment, the offence charged is, in most of the United States, stated to be against the peace and dignity of the state or commonwealth; or, where the offence is created or defined and prohibited by statute, an indictment should conclude against the form of the statute in such case made and provided.

In many of the states, it is usual, or even essential, that an indictment should be signed by the prosecuting officer, or by the foreman of the grand jury. The finding of an indictment by the grand jury is expressed by indorsing upon it the words "a true bill," usually with the signature of the foreman.

Indictment means a written charge of a crime or misdemeanor, preferred to and presented by a grand jury upon oath, irrespective of details of form usually observed. A constitutional provision that no person shall be put upon trial except upon an indictment, does not confine the legislature to the exact form of an accusation by a grand jury, which was in use when the constitution was promulgated; but they may change the incidents of form, preserving the substance. Wolf *v.* State, 19 *Ohio St.* 248.

INDIFFERENT. Impartial; unbiased. That an arbitrator or a juror ought to be indifferent between the parties is a common legal expression.

Indifferent has the same meaning in legal as in popular usage. It requires that the person of whom it is predicated shall be impartial and free from bias. This cannot, in general, be affirmed of the father, brother, or nephew of a party. Near relationship raises a presumption of partiality. A nephew of a party should be deemed excluded by a statute which requires that appraisers shall be indifferent persons. Fox *v.* Hills, 1 *Conn.* 294.

Upon the same principle, a tenant of a party ought not, under such a statute, to be appointed appraiser. Mitchell *v.* Kirtland, 7 *Conn.* 229.

INDORSE. To write upon the back. Indorsed: having something written upon it. Indorsing and indorsement: the act of writing something additional or collateral to an instrument, upon the back of it. Indorsement, also, sometimes means the thing so written.

The orthography *endorse*, has been strongly recommended by some authorities; but the general tendency, in recent years, seems to be in favor of *indorse*.

These words have a general use in application to all sorts of writings. The recipient of a letter is said to indorse upon it a memorandum of the writer's name and date. Deeds are indorsed with date of recording and reference to book and page of record. Papers officially filed are indorsed with the date of receipt. Under some systems of practice, a plaintiff must procure a person to indorse his writ; that is, write his name upon it, in token that he guarantees the defendant's costs. A warrant of arrest for crime, issued in one county, but requiring to be executed in another, must in many states be indorsed by a magistrate of the latter county.

There is a special application, and one of great and familiar importance, in the law of bills and notes; and under this head the words indorser, meaning the person by whom an instrument is transferred by indorsement, and indorsee, meaning the person to whom one is so transferred, must be added. The use of these terms is practically confined to parties to transfer of negotiable instruments.

Etymologically, to indorse, spoken of

a bill or note, means simply to write some memorandum or name upon its back. But by the custom of merchants and the familiar rules of the law-merchant, commercial paper is transferred by the owner's writing his own name upon the back, and delivering the instrument to the transferee intended; and this transaction implies an engagement that, if the obligation of the paper is not met at maturity, the party who has indorsed and transferred it will, on condition of receiving notice of dishonor as prescribed by law, make payment in place of the maker. As generally used, and where nothing in the circumstances or context show a more restricted meaning, indorsement of a bill or note means a transfer made by a holder's writing his name on the back, under an implied engagement that, upon notice of dishonor, he will pay it. To indorse means to transfer under this engagement; and indorser and indorsee are the parties who make and receive such transfer. But the words may be used of the transfer only, without including the engagement to be liable. The two are separable; the writing may be done with intent only to pass the title, or even only to enable the recipient to collect the money. Where, however, the various forms of indorse are used, meaning a transfer only, there is generally something in the context to disclose the restriction, as by using the phrase to indorse without recourse. Used unqualifiedly, they generally import both the transfer and the engagement of guaranty.

As the intent to transfer and guarantee is the substance of indorsement, and the placing the name on the back of the instrument is mere matter of form and accidental convenience, it seems that indorse might be used of an equivalent transfer made in other ways; as by writing upon the face of the note, or upon a separate slip to be attached to it. See ALLONGE. Such a writing, upon proof of the intent of the parties, would undoubtedly create the rights and liabilities of an indorsement, and hence might be called an indorsement; but such is not the usual signification.

A *blank* indorsement is one where the name of the indorser only is written, leaving the person to whom the paper is transferred at liberty either to write in his own name, or to transfer the paper by mere delivery, as he pleases. A *full* indorsement is one in which the indorser writes a direction to "pay to the order of ———," naming the indorsee, and signs his name; the effect of which is, that the indorsee can transfer only by another indorsement.

Indorsements are called *qualified* when they embody a restriction or modification of the liability of the indorser. Perhaps the most common instance is the indorsement "without recourse," which signifies that the indorser merely transfers the title, and disclaims liability for non-acceptance or non-payment. It is made by prefixing to the indorser's signature the words, "without recourse."

Another modification of the liability which is opposite in its nature consists in a waiver of the right to strict demand and notice, which is made by prefixing to the indorser's signature the words, "holden without demand or notice."

Mr. Daniels (1 Dan. Neg. Inst. 498) explains the import of the ordinary, unrestricted contract of indorsement to be, as to a bill, that the indorser will pay it at maturity, if on presentment for acceptance it is not accepted, and he is duly notified of the dishonor; and, as to a bill or note, that the indorser will pay it if it is not duly paid by the acceptor or maker, and the indorser is duly notified. It further imports that the bill or note is in every respect genuine; that the signatures of the immediate parties, and, according to the better opinion, of any prior indorsers, are genuine. Further, that the bill or note is a valid and subsisting obligation, binding all prior parties according to their ostensible relations. Further, that the original parties, and, according to the better opinion, prior indorsers, were competent to bind themselves, as they have assumed to. Further, that the indorser has the lawful title to the instrument, and the right to transfer it.

To indorse means to put a name on the back of a paper. Hartwell *v.* Hemmenway, 7 *Pick.* 117.

Indorse is a technical term, having sufficient legal certainty without words of more particular description. Brooke *v.* Edson, 7 *Vt.* 351.

Indorsed may mean, merely, written upon. Commonwealth *v.* Butterick, 100 *Mass.* 12.

Indorsement implies a transfer by a writing upon the instrument transferred. Keller *v.* Williams, 49 *Ind.* 504; Bradley *v.* Trammel, *Hempst.* 164.

Indorsed may import both indorsement and delivery. Higgins *v.* Bullock, 66 *Ill.* 37.

Indorsement is a technical, mercantile term, denoting the act by which bills and notes drawn payable to order are transferred. It is used, not in its strict etymological sense, which would imply a writing *on the back*, as is evident from the consideration that what is, in legal signification, an indorsement of a bill or note need not be written on the back of it; but in an artificial sense, to signify the transfer of the legal title to these instruments. It is therefore a contract, and, so far as it operates as a transfer of the bill or note, is of that class of contracts which are termed executed. An indorsement, however, in addition to being such a conveyance, imports, unless restricted, a future liability of the indorser, and, so far as respects that liability, it is an executory contract. Now, it is a universal principle applicable to every contract, whether executed or executory, evidenced by a written instrument, that the instrument must be delivered and accepted. Hence the mere act of writing the name of the payee on the back of the note is not sufficient to constitute an indorsement of it; to complete it as such, the further act of a delivery of it to the person to whom title is to be transferred is necessary. It has been judicially settled in repeated cases that "indorse" and "indorsed" import delivery. (12 *Ad. & E.* 455; 8 *Mee. & W.* 494; 1 *Id.* 389.) And in pleading it is now usual to state merely that the payee indorsed the instrument to the indorsee, omitting any express allegation of delivery; and this is sanctioned on the ground that indorsing imports delivery. Clark *v.* Sigourney, 17 *Conn.* 511.

Indorsement imports not simply a transfer of the paper, but a new and substantive contract which imposes upon the indorser a liability to the holder, for damages, according to the law of the place where the indorsement is made. Slacum *v.* Pomery, 6 *Cranch*, 221; s. p. Root *v.* Wallace, 4 *McLean*, 8.

It is not impossible for one to become an indorser by placing his name upon the face of a note. This is not the usual mode of transfer, and the word indorse conveys the idea of writing upon the back. But the payee's name may be written on the face, and it be held an indorsement. Haines *v.* Dubois, 30 *N. J. L.* 259.

To indorse is to write upon; and a bill or note is indorsed by writing the matter, whatever it is, across the face or back of it. 2 *Bish. Cr. L.* § 570 *a.*

INDUCEMENT. 1. Motive; that which leads a person to act.

Confessions of crime are spoken of as sometimes made under inducement of hope or fear. When these motives operate to produce the confession, it cannot be received in evidence.

In the case of contracts, inducement is nearly equivalent to consideration. There is, however, a shade of difference: consideration presents the idea of an element in the contract; inducement, of a motive or desire in the mind.

So, in respect to any other act which the law has occasion to review, the inducement to it is the cause which led to it, presented as a motive or desire acting in or upon the mind of the actor.

2. In pleading, inducement is applied to that portion of a declaration, complaint, plea, answer, &c., in an action, which is brought forward by way of explanatory introduction to the main allegations. In form it is usually somewhat like the preamble in an act, or the recitals in a deed, and commonly commences with the word whereas. Thus, in a declaration for libel, that introductory part which states "that whereas the plaintiff was a good, true, honest, just, and faithful subject of the realm, and as such had always conducted and behaved himself," &c., is the inducement, and the matter thus brought forward was thence termed "matter of inducement." In declarations on contract there is not, in general, any inducement, as they usually begin by alleging the contract; on the other hand, in actions on many of the torts, all that part of the declaration which precedes in logical order the statement of the act which is complained of as wrongful, comprising the allegation of the right, or of the circumstances of the right, is commonly known as the inducement. The importance of stating matter of inducement, and the rules as to the form of introducing it, have been much relaxed by modern legislation upon pleading.

INDUCTION. In ecclesiastical law, is the ceremony of giving the clerk or

parson corporal possession of the temporalities of the benefice. A usual form has been to lead the person to be inducted within the church building, where he tolls the bell, or does some other act in token of taking possession. The intention of it is, that the parishioners may have due notice and sufficient certainty of their new minister, to whom their tithes are to be paid. Induction, therefore, is the investiture of the temporal part of the benefice, as institution is of the spiritual.

INEVITABLE. Fortuitous; that which cannot be avoided or prevented. Applied to events which so overwhelm and frustrate human powers and exertions as to excuse from the performance of even the more stringent contract obligations. . See ACCIDENT; ACT OF GOD.

Inevitable accident. An inevitable accident is one produced by an irresistible physical cause; an accident which cannot be prevented by human skill or foresight, bnt results from natural causes, such as lightning or storms, perils of the sea, inundations or earthquakes, or sudden death or illness. By irresistible force is meant an interposition of human agency, from its nature and power absolutely uncontrollable. Brousseau *v.* Hudson, 11 *La. Ann.* 427.

Inevitable or unavoidable accident is defined to be "that which a party charged with an offence could not possibly prevent, by exercise of ordinary care, caution, and maritime skill." (2 *Dods.* 83; 2 *W. Rob.* 205; *Flanders Mar. L.* 298.) Lucas *v.* The Swann, 6 *McLean*, 282; 1 *Newb.* 158.

The inevitable accident which constitutes a proper case for allowing the loss to rest where it falls, must be understood to mean a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident. (3 *W. Rob.* 318; 21 *How.* 184; 6 *Notes of Cases*, 634; 5 *Id.* 558; 7 *Jur.* 381; 40 *Eng. L. & Eq.* 25; 2 *Id.* 564.) Union Steamship Co. *v.* New York & Virginia Steamship Co., 24 *How.* 307; S. P. The Morning Light, 2 *Wall.* 550.

Inevitable accident is where a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident occurs. The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances; such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view, — the safety of life and property. The Grace Girdler, 7 *Wall.* 196.

Inevitable accident is distinct from act of God, which is some natural necessity. Trent, &c. Nav. Co. *v.* Wood, 4 *Doug.* 287.

The words inevitable accident, which are preferred by some to "act of God," because more reverent, are not adequate to express the ground of a common carrier's excuse; for accidents arising from human force or fraud are sometimes inevitable. McArthur *v.* Sears, 21 *Wend.* 190, 198.

Inevitable accident is now used as a phrase synonymous with "act of God." Neal *v.* Saunderson, 3 *Miss.* 572.

Whether the phrases inevitable accident and unavoidable accident are synonymous, see Fowler *v.* Davenport, 21 *Tex.* 626; Neal *v.* Saunderson, 3 *Miss.* 572; Merritt *v.* Earle, 31 *Barb.* 45; Fish *v.* Chapman, 2 *Ga.* 349.

INFAMY. A qualification of one's legal status, imposed as a consequence of conviction of one of the graver crimes. In many jurisdictions, infamy involves, by force of statute provisions, other disabilities; it may affect the right to hold office, the qualification for jury duty, &c. For these rules the statutes of the state or country must be consulted.

Infamous crime. The term infamous — *i. e.* without fame or good report — was applied at common law to certain crimes upon the conviction of which a person became incompetent to testify as a witness, upon the theory that a person would not commit so heinous a crime unless he was so depraved as to be unworthy of credit. These crimes are treason, felony, and the *crimen falsi;* but as to what or whether all species of the *crimen falsi* are to be considered infamous, there is some apparent disagreement among the authorities. That term is borrowed from the civil law, where it included every species of fraud and deceit or wrong involving falsehood. The better opinion seems to be that the common law has not used the term in this connection in so extensive a sense; and that a crime is not infamous (within the meaning of the prohibitions contained in the 5th amendment to the federal constitution) unless it involves a charge of such falsehood as may injuriously affect the public administration of justice by the introduction therein of falsehood and fraud, such as forgery, perjury, subornation, bribery, or conspiracy to procure the absence of a witness. United States *v.* Block, 4 *Sawyer*, 211.

Other authorities give somewhat dif-

ferent lists; but the general idea has been to include the offences which from their heinous character, or from their peculiar character as involving deception and dishonesty, forbid confidence in the truthfulness of the person convicted of them. There are many instances in which a statute defining and punishing a crime declares that it shall be deemed infamous.

But the question what is to be deemed an infamous crime cannot be determined without examining the law of the jurisdiction; for the cases, while they agree on the general principle, differ somewhat in the application of it to particular offences. And statutory definitions may cover the ground for a particular state. Thus, in New York, by 2 Rev. Stat. 702, § 31, "infamous crime," used in any statute, means any offence punishable with death or imprisonment in a state prison.

By *infamia juris* is meant infamy established by law as the consequence of crime; *infamia facti* is where the party is supposed to be guilty of such crime, but it has not been judicially proved. Commonwealth *v.* Green, 17 *Mass.* 515, 541.

Infamous, as used in the fifth amendment to the United States constitution, in reference to crimes, includes those only of the class called *crimen falsi*, which both involve the charge of falsehood, and may also injuriously affect the public administration of justice by introducing falsehood and fraud. United States *v.* Block, 15 *Bankr. Reg.* 325.

Where a statute imposed punishment for falsely accusing another of an infamous crime, it was held that such crimes only were to be deemed infamous as subjected a man to infamous punishment, or incapacitated him from being a witness; and therefore a threat to accuse a man of having made overtures to a prisoner to commit sodomy with him did not amount to a threat to charge him with an infamous crime. Hickman's Case, cited *Tomlins Dict.*

INFANCY. The condition, disability, or status of a person who has not attained the age of general legal capacity, usually twenty-one years; minority; non-age. Infant: a person not yet twenty-one years old; a minor; a person under age.

In the civil law, the corresponding term *infantia* comprised the period under the age of seven years.

The full age of twenty-one years is completed on the day preceding the anniversary of a person's birth; and as, in the computation of time, the law in general allows no fraction of a day, it follows that, if an infant is born on the 1st of January, he is of an age to do any legal act on the morning of the last day of December, though he may have lived nearly forty-eight hours (or two days) short of the twenty-one years.

INFANTICIDE. See HOMICIDE.

INFERIOR. Is usually employed in law to designate the lower of two grades of authority, jurisdiction, or power. In the vernacular, it has wider use, it may relate to grades of any attribute or quality under consideration; a subject may be presented as inferior in beauty, in moral qualities, in value, &c. But, in law, the most frequent occasions to use the term are to designate some officer or tribunal as having a lower degree of authority or jurisdiction than another, termed, relatively, the superior.

Inferior courts. This expression has two meanings which require to be carefully distinguished. 1. It means subject to appellate jurisdiction. In the decisions of a court of appeal, the court below is often spoken of as the inferior court. The expression inferior courts is used to designate, as a class, all the tribunals of a state which are subject to have their judgments revised by a court of last resort. Thus a court named the superior court, as the superior court of Indianapolis, may be one of the inferior courts of the state, using that phrase to denote all the tribunals not of last resort.

2. It is used to designate that class of tribunals whose jurisdiction is so limited or dependent on existence of facts prescribed by express statute, that the circumstances warranting its action must appear by the record of its proceedings, else its judgment is void. The distinction between courts of original and general jurisdiction over any particular subject, and courts of special and limited jurisdiction, otherwise called inferior courts, is this: the former are competent by their constitution to decide upon their own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence upon which it is rendered. Their records import absolute verity, and cannot be impugned by averment or proof to the contrary; there can be

no judicial inspection behind the judgment, save by appellate power. The latter are so constituted that their judgments may be looked through for the facts and evidence necessary to sustain them; their decisions do not furnish evidence of themselves to show jurisdiction and its lawful exercise; every requisite for either must appear upon the face of their proceedings, or they are nullities. Grignon *v.* Astor, 2 *How.* 319, 341.

The two uses of the phrase are well illustrated by the course of decisions as to the circuit and district courts of the United States. They are inferior courts in the sense that their judgments are usually subject to the revision of an appellate tribunal, the supreme court. But they are not inferior courts in the second sense of that expression. Although they are wholly the creatures of statute, and are courts of limited jurisdiction, so that their proceedings are erroneous if the jurisdiction be not shown upon them, and judgments rendered in such cases may be reversed, yet their proceedings are not nullities which may be entirely disregarded if the jurisdictional facts are not shown therein. *Exp.* Walkins, 3 *Pet.* 193. Apart from the specific question of the quality of the parties or nature of the controversy, they are to be deemed, in respect to the force and effect of their judgments and decrees, as standing upon the same footing as courts of general jurisdiction. If the jurisdictional facts do not appear upon their records, their judgments and decrees may be re-examined in due course of procedure for that purpose. But such defect does not make them nullities which may be disregarded in a collateral proceeding, as is the case with those courts of limited and special jurisdiction which are dependent for the validity of every step upon the statute authority. Ruckman *v.* Cowell, 1 *N. Y.* 505; Chemung Canal Bank *v.* Judson, 8 *Id.* 254; McCormick *v.* Sullivant, 10 *Wheat.* 192; Kennedy *v.* Georgia State Bank, 8 *How.* 586; Huff *v.* Hutchinson, 14 *Id.* 586.

In England, speaking of usage before the enactment of the judicature acts, the courts of justice were classed, generally, under two heads; viz., the superior and the inferior, — the former division comprising the courts at Westminster; the latter comprising the other courts in general, many of which, however, are far from being of inferior importance in the common acceptation of the word. Those courts which are generally understood by the phrase "the superior courts at Westminster" are the court of chancery, king's bench, common pleas, and exchequer.

Stephens enumerates the following nine classes of inferior courts, of some of which, however, the jurisdiction is obsolete: the courts-baron; the hundred courts; the sheriffs' county courts; the modern county courts, established in 1846 by Stat. 9 & 10 Vict. ch. 95; courts in cities and boroughs held by prescription, charter, or act of parliament; the courts of the commissioners of sewers; the stannary courts; the university courts; the ecclesiastical courts.

The phrase inferior tribunals, as used in Iowa Laws 1868, ch. 86, § 5, and 1870, ch. 153, § 2, does not apply to the *quasi* judicial bodies from which appeals in special proceedings for the assessment of damages upon the location of highways, railroads, and other improvements are authorized to be taken to the district court. Davey *v.* Burlington, &c. R. R. Co., 31 *Iowa*, 553.

INFORMATION. Communicated knowledge. In law, a complaint or accusation in proceedings on behalf of the goverment in civil cases, and in criminal cases, as a substitute for an indictment.

In English practice, informations were used in the following civil cases: informations in chancery, differing from bills only in being instituted in the name of the attorney-general, instead of being brought in the name of a subject merely; informations in the exchequer to recover money or damages for the crown; informations in the queen's bench in the nature of a *quo warranto*, for the purpose of trying the right to a franchise; and informations on penal statutes, which give the informer a share in the penalty, commonly called informations *qui tam.* Criminal informations were filed in the queen's bench, usually by the attorney-general *ex officio*. The term information was also applied to a proceeding

before a justice of the peace, with a view to a summary conviction.

The mode of proceeding by information is said to be as old as the common law itself. In all civil suits immediately concerning the crown or government only, the proceeding was in the name of the attorney-general alone; but in other cases, an individual interested in the maintenance of the public right sought to be enforced was named as relator, and became responsible for the conduct of the suit and for the costs. Criminal informations were restricted to cases of misdemeanors.

In the United States, the proceeding by information has been adopted in many of the states in civil cases similar to those above mentioned, so far as such cases arise under their different political institutions; the more familiar examples are informations in the nature of a *quo warranto*, and *qui tam* informations. As remedies, these proceedings are frequently authorized and regulated by statute. Under the statutes of the United States, also, imposing forfeitures for violations of the customs and revenue laws, the proceedings are by way of information, or of libel in the nature of an information. As a mode of criminal prosecution, informations are not common in the United States, although authorized by law in cases of misdemeanors in many of the states; the proceeding by indictment being ordinarily preferred.

In form and substance, an information resembles in civil suits the bill, declaration, petition, or other pleading or proceeding whose place it supplies; in criminal prosecutions, it resembles the indictment; and in each class the subsequent proceedings are in the usual mode.

A complaint exhibited before a justice of the peace by a tithing-man, for a breach of the Sabbath, is not an information, within the common-law meaning of that term. Although in form and nature such a complaint may differ but little from an information filed by the attorney-general, it does not come from the source which can give it that character; and it can only be called an information in the sense in which every accusation of one person by another to a magistrate is information to that magistrate. Goddard *v.* State, 12 *Conn.* 448.

Informatus non sum. I am not instructed. See NON SUM INFORMATUS.

INFRA. Below; beneath; under; the opposite of *supra*. This word is used by writers as a means of reference to something subsequent in a book or article.

The meaning of *intra*, within, has also been attached to *infra* by law writers, although incorrectly. See *Burrill* for a history of this corruption. The use of *infra* with that signification has become established, particularly in some of the expressions given below.

Infra ætatem. Under age; not of age. Applied to minors.

Infra annos nubiles. Under marriageable years; not yet of marriageable age.

Infra annum luctus. Within the year of mourning. See ANNUS LUCTUS.

Infra brachia. Within her arms. A term applied to a husband after consummation of the marriage, in reference to rights of the wife; as, anciently, her right to an appeal for his murder.

Infra corpus comitatus. Within the body of a county. This term is used in defining the limits of the jurisdiction of the English admiralty, which does not extend to waters within the body of a county.

Infra dignitatem curiæ. Beneath the dignity of the court. The subject of a suit in equity has sometimes been held so trivial, on demurrer for that cause, as to be *infra dignitatem curiæ*.

Infra hospitium. Within the inn. This phrase is applied to the property of a guest, for the safe-keeping of which the innkeeper becomes responsible after it comes under his charge.

Infra præsidia. Within the defences; in a place of safe custody. This term is applied in international law to property captured and carried within the defences of the capturing power, out of any probable danger of recapture; particularly to prizes brought completely within the power of the captors.

Infra quatuor maria. Within the four seas; within the kingdom of England; within the jurisdiction. Compare BEYOND SEAS.

INFRINGEMENT. Breaking; infraction; violation.

It is sometimes used of a violation of a law or regulation, but more often of a usurpation of a monopoly or exclusive right. Thus it has acquired a use which is almost technical, in reference to the law of copyrights, patents, and trade-marks; an infringement of either of these consists in making, selling, or using something which trespasses upon or violates the exclusive right which another has secured.

Infringement of copyright. To show that one literary work may have been suggested by another, or that some parts or pages of it have resemblances, either in method, details, or illustrations, is not sufficient to establish infringement; the complainant must further show that such resemblances are so close, full, uniform, and striking, as to lead to the conclusion that the one is a substantial copy of the other, or mainly borrowed from it. The question is, whether the work complained of is a servile, evasive imitation of the plaintiff's; whether it is substantially the same with the one copyrighted. Emerson *v.* Davies, 3 *Story C. Ct.* 768, 787; 4 *West. Law J.* 261. And mere colorable variations intended to evade liability for infringement will not destroy the identity of the two books. If a material part of the copyrighted publication is used, the alleged piratical work, though it may be in some respects an improvement, is an infringement. Drury *v.* Ewing, 1 *Bond*, 540.

The determination of the question of infringement varies somewhat with the nature of the work under consideration. In the case of a work of purely original authorship, much less imitation, similarity, or quotation can be tolerated than in works belonging to the class called compilations. Some similarities, and some use of prior works, even to the copying of small parts, are tolerated in such books as dictionaries, gazetteers, grammars, maps, arithmetics, almanacs, concordances, cyclopedias, itineraries, guide-books, and similar publications, if the main design and execution are in reality novel and improved, and not a mere cover for important piracies. In compiling such works, the materials of all, to a considerable extent, must be the same. Novelty and improvement can be substantial in scarcely any case, unless the matter is abridged, or a material change made in the arrangement, or more modern information is added, or errors are corrected, or omissions supplied. But while a prior compiler cannot monopolize what was not original with himself, and what must be nearly identical in all similar works on the same subject, a subsequent compiler cannot employ a prior arrangement and materials so much as amounts to a substantial invasion of the former compilation. Webb *v.* Powers, 2 *Woodb. & M.* 497, 512. A second compiler cannot use the labors of a previous compiler, *animo furandi*. He may work on the same original materials, but he cannot exclusively and evasively use those already collected and embodied by the skill, industry, and expenditures of another. He may examine previous works, but must not take their substantial contents for the purpose of saving himself labor. Banks *v.* McDivitt, 13 *Blatchf.* 163. It is not a matter of importance upon the question of infringement in what form the works of another are used, whether by a simple reprint, or by incorporating the whole or large portions in some other work. Gray *v.* Russell, 1 *Story C. Ct.* 11. The question to be decided is, whether defendant has used the plan, arrangements, and illustrations of the previous work as the model of his own book, with colorable alterations and variations only, to disguise the use thereof, or whether his book is the result of his own labor, skill, and use of common materials and common sources of knowledge, the resemblances either being accidental or arising from the nature of the subject. Lawrence *v.* Cupples, 9 *Off. Gaz. Pat.* 254.

The question of the motive of defendant has not much to do with the question of infringement, except in balanced cases. If a comparison of the two works indicates clearly that the defendant, in the preparation of his work, has in fact made use of the plaintiff's to an extent unwarranted by law, the absence of an intent to violate the law will not relieve him from the consequences of his acts.

Drury *v.* Ewing, 1 *Bond*, 540. If doubtful whether much of plaintiff's work has been copied, and whether the new work is a mere substitute, the intent not to pilfer from another, colorably or otherwise, the substantial parts of the new work, may be important. Webb *v.* Powers, 2 *Woodb. & M.* 497, 512.

A fair abridgment of a copyrighted book is held not to be an infringement. What constitutes a fair abridgment is a question of difficulty, and does not admit of decision by reference to general rules. It is said, however, that to keep within the privilege there must be a real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon, and not merely the facile use of the scissors, or extracts of the essential parts of the original work; for to copy certain passages from a book, omitting others, is in no just sense an abridgment, as the judgment is not exercised in condensing the views of the author; his language is copied, not condensed. See ABRIDGMENT.

The question of infringement by making extracts from a work does not depend so much on the length of the extracts as upon their value. Extracts may be taken, to a reasonable extent, and for a purpose consistent with the plaintiff's rights, as where they are taken by a reviewer; but the privilege cannot be so exercised as to supersede the original book. Story *v.* Holcombe, 4 *McLean*, 306; Folsom *v.* Marsh, 2 *Story*, 100.

A translation of a copyrighted book prepared in good faith as a means of bringing the ideas of the original work before the readers of another language is not an infringement, even though the author has previously made and copyrighted a translation into the same tongue. For copyright is the exclusive right to multiply "copies;" now a translation is not a copy. Stowe *v.* Thomas, 2 *Wall. Jr.* 547; but see Rev. Stat. § 4952.

To photograph an engraving has been held an infringement. Rossiter *v.* Hall, 5 *Blatchf.* 362.

Infringement of patents. This subject is governed by principles very analogous to those which obtain with respect to copyrights; the decisions are, however, much more numerous, and the law is settled in greater detail. As in respect to copyright, so as to patents, the question of infringement is not a question of motive or intent, so much as it is a question of effect or result. If the acts of the defendant do in fact deprive the plaintiff of his exclusive right, to his injury, the defendant is not excused from compensatory damages, or an accounting, by the fact that he did not intend to impair, or even that he did not know of the patent-right. Parker *v.* Hulme, 7 *West. Law J.* 417; 1 *Fish.* 44; Hawes *v.* Washburne, 5 *Off. Gaz. Pat.* 491. But there should be an intent to do acts which deprive or tend to deprive the owner of the lawful rewards of his discovery. Sawin *v.* Guild, 1 *Gall.* 485. The making of a patented machine, merely for philosophical experiments, or for the purpose of ascertaining the sufficiency of the machine to produce its described effects, is not an infringement of the right. Whittemore *v.* Cutter, 1 *Gall.* 429; Poppenhusen *v.* Falke, 2 *Fish. Pat. Cas.* 181. But the making of a patented machine, fit for use, and with a design to use it for profit, if in violation of the patent-right, is an infringement. Whittemore *v.* Cutter, 1 *Gall.* 429.

In patent cases, the question of infringement usually hinges upon the identity or difference between the thing patented by the plaintiff and that made by the defendant. To constitute an infringement, the thing used by the defendant must be such as substantially to embody the patentee's mode of operation, and thereby attain the same kind of result as was reached by his invention. But the rule does not require that the defendant should employ the plaintiff's invention to as good advantage as he employed it, or that the result should be precisely the same in degree, nor that the thing patented should be adopted in every particular; if the patent is adopted substantially by the defendant, he is guilty of an infringement. Winans *v.* Denmead, 15 *How.* 330; Root *v.* Ball, 4 *McLean*, 177; Alden *v.* Dewey, 1 *Story C. Ct.* 336. Under this head, the prominent consideration is, whether the machine used by the defendant is substan-

tially, in its principle and mode of operation, like the plaintiff's. If so, if the principle on which the machinery works is the same, and the effect is similar in both, in contemplation of law the machines are identical, and the defendant is chargeable with infringement. Odiorne *v.* Winkley, 2 *Gall.* 51; Howe *v.* Abbott, 2 *Story C. Ct.* 190; Grant *v.* Mason, 1 *Law Int. & Rev.* 22; Parker *v.* Haworth, 4 *McLean*, 370; Brooks *v.* Bicknell, 3 *Id.* 250; 1 *West. Law J.* 150. The rules have become elementary that the fact that defendant has made improvements upon or additions to the invention patented by plaintiff, gives him no right to use the plaintiff's invention; but, in so far as he has made new and substantial improvements in the thing patented, he cannot be condemned for the use of these improvements. A patent for an improvement embraces nothing more than the improvement described and claimed as new, and any one who afterwards discovers a method of accomplishing the same object, substantially and essentially differing from the one described, has a right to use it. O'Reilly *v.* Morse, 15 *How.* 62, 119. If the plaintiff's invention be but an improvement on a known machine, he cannot treat another as an infringer who has improved the original machine by using a different form or combination, performing the same functions. McCormick *v.* Talcott, 20 *How.* 402. An improvement in the principle of a machine is no invasion of the rights of the inventor and patentee of such machine; otherwise, if it is only an improvement in the form. Reutgen *v.* Kanowrs, 1 *Wash.* 168; Park *v.* Little, 3 *Id.* 196; Smith *v.* Pearce, 2 *McLean*, 176.

What constitutes form, and what principle, is often a nice question to decide. The safest guide to accuracy in making the distinction is to ascertain what is the result to be obtained by the discovery; and whatever is essential to that object, independent of the mere form and proportions of the thing used for the purpose, may generally, if not universally, be considered as the principle of the invention. Treadwell *v.* Bladen, 4 *Wash.* 703, 706; Gray *v.* James, *Pet. C. Ct.* 394; Olcott *v.* Hawkins, 2 *Am. Law J.* N. S. 321. And where two machines operate in the same way, so as to produce the same result, they are considered as the same in principle, in deciding whether the later is an infringement of the earlier. It is an infringement to make and use a machine which may operate, if the owner is disposed to use it so, in the manner pointed out by the patent, Holbrook *v.* Small, 10 *Off. Gaz. Pat.* 508; and if a later machine produces the same results as an earlier one, it is an infringement, notwithstanding it also produces other and different results, N. Y. Rubber Co. *v.* Chaskel, 9 *Off. Gaz. Pat.* 923. On the other hand, if the later invention produces the desired result better than the earlier one, and has driven it out of the market, this is *prima facie* evidence that it is a new invention and no infringement. Smith *v.* Woodruff, 1 *McArthur*, 459; 6 *Fish. Pat. Cas.* 476. For, in order to constitute an infringement, it is not necessary that the arrangement and combination used by the party charged with infringement should be the same to the eye as the patented invention. If they embody the ideas of the patentee, and the machinery of the defendant operates by such adoption and appropriation, then, though the arrangement may be apparently different, in reality and in judgment of law an infringement exists. Smith *v.* Higgins, 1 *Fish. Pat. Cas.* 537. Slight variations, changes in form merely, or the substitution of one mechanical element for another, do not relieve from the charge of infringement. Winans *v.* Denmead, 15 *How.* 330, 342; Wyeth *v.* Stone, 1 *Story*, 273; Sargeant *v.* Larned, 2 *Curt.* 340; Blanchard *v.* Beers, 2 *Blatchf.* 411; American Pin Co. *v.* Oakville Co., 3 *Id.* 190; Sickels *v.* Borden, *Id.* 535; Dixon *v.* Moyer, 4 *Wash.* 68. Nor will a charge of infringement be avoided by making an unnecessary and useless addition to the invention. Poppenheusen *v.* Falke, 5 *Blatchf.* 46. Variations in form have, however, exceptional importance in those cases where form is of the essence of the invention.

Where the patent under which the plaintiff claims was issued for a new combination of old parts, infringement

is not shown unless the defendant has used all the elements of the combination; if the defendant has used some of the parts only, omitting one or more, he has not used the combination, and there is no infringement. This rule is established by many decisions, and has become elementary. Upon the other hand, if the whole of a combination is taken, there is an infringement although something is added. Pitts *v.* Wemple, 6 *McLean*, 558. So substitution of mere equivalents for one or some of the elements does not relieve from the charge of infringement. But where the combination as first patented proved useless, and another inventor, by adding to the combination another element, made the whole practically useful, it was held no infringement for him to make and use the whole. Robertson *v.* Hill, 4 *Off. Gaz. Pat.* 132; 6 *Fish. Pat. Cas.* 465. And the doctrine which forbids substitution of mere equivalents applies to chemical compositions equally with machines. Woodward *v.* Morrison, 5 *Fish. Pat. Cas.* 357; 2 *Off. Gaz. Pat.* 120.

In respect to the employment of a specific or individual machine or article manufactured under a patent, the general rule is, that it is an article of property, and is subject to the ordinary laws of property in the hands of its proprietor. The patentee and those claiming under him have the exclusive right to make and to sell the thing covered by the patent. But when a machine or product has once been lawfully made and sold, it is no longer under the special protection of the patent laws. It is simply an item of property in the hands of its successive owners; and they may use it or dispose of it, substantially as they might use or dispose of property brought into existence in any other manner without infringing. Thus, if one has a right to a patented machine, and to the use of it, he has a right to work it himself, or by his servants, or to lease it out to any other person. He may use it, repair it, improve it, &c., in the same manner as any other chattel belonging to him. So the sale of a thing manufactured by a patented machine is no violation of the exclusive right to use, construct, or sell the machine itself. The product cannot be reached except in the hands of some one in some manner connected with the use of the patented machine.

Infringement of trade-marks. Trade-marks are now extensively protected by legislation and equitable remedies upon principles very analogous to copyrights and patents. See TRADE-MARKS. But the term infringement, though apparently quite appropriate, does not seem to have come into much use with respect to trade-marks. It is used in the English legislation, but not in the United States law on the subject.

INHABITANT. An indweller; one who has his abode, domicile, or residence within a place. Inhabitancy: the condition of living within a place.

The words are used with various shades of meaning, and the sense intended often depends on the context and attending circumstances. The following are representative decisions upon various uses:

A person may be an inhabitant without being a citizen, and a citizen may not be an inhabitant, though he retains his citizenship. Picquet *v.* Swan, 5 *Mas.* 35, 47.

By inhabitant is meant one who has his domicile or fixed residence in a place, in opposition to one who is a mere sojourner. It by no means follows that an inhabitant is a subject or citizen; a foreigner permanently resident is as much an inhabitant as if he were a citizen or subject. By the term inhabitants, in an act of congress authorizing the inhabitants of a territory to organize a state government, should be understood the mass of persons constituting the body politic. Such act does not affect the question of citizenship.

One who temporarily visits the state cannot be deemed an inhabitant so as to be subject to the attachment law; nor does one who, having an established residence within the state, leaves it temporarily, cease thereby to be an inhabitant. Barnet's Case, 1 *Dall.* 153.

While a man remains in the state, though avowing an intention to withdraw from it, he must be considered an inhabitant, and therefore not subject to a foreign attachment. Lyle *v.* Foreman, 1 *Dall.* 480.

Inhabitancy is equivalent to residence, and means a fixed and permanent abode, or dwelling-place for the time being, as contradistinguished from a mere temporary locality of existence. Matter of Wrigley, 8 *Wend.* 134, 140.

The words "inhabitant" and "resident" mean the same thing. An "inhabitant" or "resident" is a person coming into a place

with an intention to establish his domicile or permanent residence, and who in consequence actually resides there; engages a house or lodgings, and takes any steps preparatory to business, or in execution of this settled intention. Length of time is not so essential as the intent executed, by making or beginning the actual establishment, even though it is abandoned in a short or longer period. United States *v.* The Penelope, 2 *Pet Adm.* 438, 450.

"Inhabitant" and "resident" are used in the tax laws as convertible terms. In making residence a test of taxability, the statute looks only to an actual inhabitancy for some permanent period and purpose, at a prescribed time. Bell *v.* Pierce, 48 *Barb.* 51.

The terms "resident" and "inhabitant" are not synonymous; the latter implies a more fixed and permanent abode than the former, and frequently imports many privileges and duties to which a mere resident could not lay claim or be subject. Tazewell County *v.* Davenport, 40 *Ill.* 197; S. P. Bartlett *v.* City of New York, 5 *Sandf.* 44; Chaine *v.* Wilson, 1 *Bosw.* 673; Matter of Hawley, 1 *Daly*, 531.

"Inhabitant" and "resident" should be construed in connection with the matter to which they are applied. In statutes designed to give creditors prompt remedies against absent debtors, it is just to consider the word resident as meaning an actual resident merely. In provisions relating, however, to testamentary cases, which depend upon the law of domicile, it is equally rational to construe the term otherwise; and under the N. Y. act of 1840 (Laws 1840, ch. 384, § 2), authorizing reception of foreign probate of a will made by a non-resident, one having an actual residence abroad, but a domicile here, is not a non-resident. Isham *v.* Gibbons, 1 *Bradf.* 69.

As used in that part of the Massachusetts constitution which confers authority on the general court to levy taxes upon all "the inhabitants of and persons resident and estates lying" within the commonwealth, the term residents has a broader meaning than inhabitants, and includes persons who have no permanent home in, and who are not strictly inhabitants of, the state. Lee *v.* City of Boston, 2 *Gray*, 484.

The term inhabitant means something more than a person having a mere temporary residence. It imports citizenship and municipal relations. When used as the designation of the class of persons liable to taxation, it is to be construed, according to its legal import, one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor. And where the question is one upon which certain municipal privileges and obligations depend, such as taxation, settlement, and voting, this definition is generally adopted. For these purposes, a person cannot be considered an inhabitant of more than one state at one and the same time. State *v.* Ross, 23 *N. J. L.* 517, 527.

A statute providing for the taxation of all personal property of the inhabitants of the state, may be held to embrace corporations, as well such as hold for charitable trusts as for the benefit of the members. Inhabitants of Baldwin *v.* Trustees of Ministerial Fund, 37 *Me.* 369.

A corporation in a village is to be deemed within a provision taxing inhabitants. Ontario Bank *v.* Bunnell, 10 *Wend.* 186.

A corporation cannot be deemed an inhabitant within a statute taxing inhabitants. Inhabitant implies a habitation, an abode, a place of dwelling. In this sense, a corporation resides nowhere. It is an artificial person, a creature of the imagination, subsisting only in intendment. In a figurative sense, it may be said to inhabit where the members of it reside; and, in a legal sense, it may be an occupier of land, and thus corporations occupying lands by servants have, in England, been by a figure of speech called inhabitants. But an ordinary business corporation (in this case an insurance company) keeping an office, not as necessarily its property, but merely as a place for making contracts and transacting business, cannot be said to reside or be an inhabitant in the town where the office happens to be. Hartford Fire Ins. Co. *v.* Hartford, 3 *Conn.* 15, 24.

A bank, as to its capital stock, is not an inhabitant of any county, and therefore the capital is not to be taxed for county purposes, under the Ga. statute of 1821, authorizing the inferior courts of the state to levy taxes for county purposes upon the inhabitants of such counties. Cherokee Ins. & Banking Co. *v.* Justices of Whitfield Co., 28 *Ga.* 121.

The words "all the inhabitants" of a town, in the act incorporating the town, mean persons who are of full age and *sui juris*. Minors within the town, whose parents live or have settlements in other towns, are not included. Marlborough *v.* Hebron, 2 *Conn.* 20.

Inhabitants, in a statute prescribing notice of a town meeting, is satisfied by giving notice to the persons who are qualified to act in the town meeting. Baldwin *v.* North Branford, 32 *Conn.* 47.

Inhabitants, in a grant by congress of lot No. 16 of the public lands of each township, to the inhabitants of the township, means the aggregate mass of the people, men, women, and children, resident in the township, excluding mere sojourners or transient persons. Long *v.* Brown, 4 *Ala.* 622.

An act granting a right to the inhabitants of a certain territory, *e.g.* a township, excludes from participation in the right conferred by the act all inhabiting beyond those limits. State *v.* Springfield Township, 6 *Ind.* 83.

A conveyance "to the inhabitants of a town, to be held by them as a body politic

and corporate, and to their successors for ever," vests the title in the town as a corporation. New Market *v.* Smart, 45 *N. H.* 87.

INHIBIT. To forbid. Inhibition: forbidding; also, a name applied in English and Scotch law to a writ or process which forbids a judge from exercising jurisdiction, or forbids an individual from doing some act; analogous to a writ of prohibition.

Inhibition is most commonly a writ issuing out of a higher court Christian to a lower and inferior, upon an appeal; and *prohibition* out of the king's court to a court Christian, or to an inferior temporal court. *Termes de la Ley; Cowel.*

In the Scotch law, inhibition is a process to restrain sale of land in prejudice of a debt; also, a writ to prohibit credit being given to a man's wife at the creditor's peril. *Wharton.*

INJUNCTION. The name of a remedy which consists in a writ, order, or decree issued by chancery or a court of equitable jurisdiction, forbidding the person against whom it is issued to do, or allow his agents or servants to do, some act therein specified.

Injunctions are generally granted to restrain or prevent action, so that injunctions are in general applicable only where it is sought to preserve matters *in statu quo;* although occasionally what are called mandatory injunctions are issued, by which a person is commanded to cease to allow things to remain as they are, although, as he can obey this command only by being active in bringing about an alteration, the effect is to compel an act to be done. But even in mandatory injunctions, the form of prohibition is retained; and, generally, the subject of a mandatory injunction is the undoing of something which defendant has wrongfully done, as where he has built a wall without right, and the injunction forbids him to allow it to continue, in consequence of which he must pull it down. The remedy is preventive, prohibitory in its nature, and its office is to restrain performance, not to compel it. In general, it cannot be employed to correct or repair an injury already done. It does not authorize action, and hence is not subject to the action of a *supersedeas.* McMinniville, &c. R. R. Co. *v.* Huggins, 7 *Coldw.* 217; Lexington City Nat. Bank *v.* Guynn, 6 *Bush,* 486. A preliminary injunction has been held, in Pennsylvania, necessarily inapplicable when the thing sought to be restrained has already been done, or when the object is to take property out of the possession of one party and put it into the possession of another. Farmers' R. R. Co. *v.* Reno, &c. R. R. Co., 53 *Pa. St.* 224. And in Audenried *v.* Lehigh Valley R. R. Co., 68 *Id.* 370; and several cases there cited; in Camblos *v.* Philadelphia, &c. R. R. Co., 4 *Brews.* 563, 589; and Cole Silver Mining Co. *v.* Virginia, &c. Water Co., 1 *Sawyer,* 685; the practice of allowing mandatory interlocutory injunctions was stringently criticised and limited.

Mr. High says (*High Inj.* § 1) that the writ of injunction may be defined as a judicial process operating *in personam,* and requiring the person to whom it is directed to do or to refrain from doing some particular thing. In its broadest sense, the process is restorative as well as preventive, and it may be used both in the enforcement of rights and the prevention of wrongs; in general, however, it is used to prevent future injury rather than to afford redress for wrongs already committed, and it is therefore to be regarded more as a preventive than as a remedial process. According as injunctions command defendant to do or to refrain from doing, they are called mandatory or preventive. Mr. High's definition seems correct, as far as the writ of injunction is concerned; but it is open to the suggestion that, verbally, it leaves out of view the remedy injunction, as regulated in a majority of the states by codes of reformed procedure, under which preliminary injunction is an order, and final injunction a judgment; neither is a writ or process.

An injunction is called *preliminary* or *provisional,* or an injunction *pendente lite,* when it is granted at the outset of a suit brought for the purpose of restraining the defendant from doing the act threatened, until the suit has been heard and the rights of the parties determined. It is called *final* or *perpetual,* when granted upon a hearing and adjudication of the rights in question, and as a measure of permanent relief.

Injunctions, in English practice, have been divided into *common* and *special;* the common injunction being issued as of course, upon a default, &c., and the special, upon proofs, and generally upon notice, to the adverse party. But this distinction is said to have been much modified by recent legislation. See *Mozley & W.* And Brown says, that, by the common-law procedure and judicature acts, every court may issue injunctions of all kinds. In the courts of the United States, as injunctions are grantable only upon notice to the adverse party, all interlocutory injunctions are regarded as within the class of special injunctions; and this is believed to be also the practice of the state courts generally.

Injuria absque damno. Wrong without damage. A wrong done, but from which no loss or damage results, and which, therefore, will not sustain an action. As to the distinction between *injuria* and *damnum*, see the latter word, and also DAMNUM ABSQUE INJURIA.

INJURY. In ordinary language, means any loss; but, when employed in its strict legal sense, it imports a loss caused unlawfully; a privation of one's right; a wrong. Every injury involves loss, but every loss does not involve injury. There may be loss without injury; that is, without fault or neglect of any one, and for this no action lies. But there can be no such thing as an injury without damage. Parker *v.* Griswold, 17 *Conn.* 288, 302.

A loss occasioned by the operation of a judicial proceeding according to the forms of law is not an injury in the legal sense. McGune *v.* Palmer, 5 *Robt.* 607.

Where poison is administered, and operates to derange the healthy organization of the system, temporarily or permanently, it is an injury within the statute of Michigan providing against the administration of poisons "with intent to kill or injure." People *v.* Carmichael, 5 *Mich.* 10.

Whether the injury is great or small is not material. Thus, where morphine was administered in a dose sufficient to cause deep sleep, but not death, it was held that this was an injury within the statute. People *v.* Adwards, 5 *Mich.* 22.

Injuring, as used in a state statute punishing the malicious killing or injuring of horses, &c., means lessening the value. Oviatt *v.* State, 19 *Ohio St.* 573.

The phrase, injuries to property, includes fraud in inducing a person to buy property for more than its worth, by means of false representations. Cleveland *v.* Barrows, 59 *Barb.* 364.

Under the New York code, according to which a woman can be arrested for wilfully, wantonly, or maliciously injuring property, but not for detention or conversion of it, the concealment, removal, and disposal of a piano, by a woman, does not subject her to be held to bail. Tracy *v.* Leland, 2 *Sandf.* 729.

The complaint showed that a female defendant had aided her co-defendants in taking from the plaintiffs certificates of stock, and in disposing of the same, and in converting them into money, which the defendants retained to their own use. It was held that this was a wilful injury to property, for which a woman could be arrested under section 179 of the code. Such a conversion is an actual destruction of plaintiff's property. Northern Railway Co. of France *v.* Carpentier, 3 *Abb. Pr.* 259; 13 *How. Pr.* 222.

A false warranty, or a deceit in the sale of personal property, is not "an injury to the property of another" for which an attachment can be issued under Rev. Code, ch. 7, § 16. Webb *v.* Bowler, 5 *Jones L.* 362.

INHERIT. To take by descent. Inheritance and inheriting: taking by descent. Inheritance also signifies the estate or property transmitted by descent. Inheritable, applied to property, denotes that it is of a character to pass by descent. In the phrase inheritable blood, it means blood through which property may be transmitted; capacity to take by descent.

In popular use, inherit and its derivatives are frequently applied to the acquiring of real property from a parent or ancestor otherwise than by descent, as by devise or gift. Sometimes, too, these terms are extended to include personal property; and, when used in instruments such as wills, where the intention may control the technical meaning of the language employed, this popular and liberal construction may be given to inherit and the words derived from it, if such construction is necessary to give effect to the intention. Compare HEIR.

An estate is acquired by inheritance when it descends to the heir, and is cast upon him by the single operation of law. A devisee does not inherit in the technical sense of the term: he takes by purchase, not by descent. Estate of Donahue, 36 *Cal.* 329.

Inheritance, in its popular acceptation,

embraces all the methods by which a child or relation takes property from another at his death, except by devise. It includes succession as well as descent. Horner *v.* Webster, 33 *N. J. L.* 387, 413.

Where the word inherit is employed in a will in such a connection that to give it its strict technical meaning would defeat the intention of the testator apparent from the will, it may be taken in its popular sense, and held applicable to lands devised or conveyed by a parent or ancestor to a child or other descendant, as in ordinary parlance property received by devise or in any other form from a parent is said to come by inheritance. De Kay *v.* Irving, 5 *Denio*, 646.

In the construction of a will, the words inheriting and inheritance may be held to apply to a distributive share of the proceeds of the sale of lands, where such an intention is fairly inferrible from the language of the will, independently of all canons of interpretation; although such a distributive share is not an inheritance in the technical sense of that word. Ridgeway *v.* Underwood, 67 *Ill.* 419.

INLAND. In modern legal usage, inland generally signifies domestic; interior; within the country or territorial sovereignty. Thus an inland bill of exchange means the same as a domestic bill, *i.e.* a bill the drawer and drawee of which reside in the same country, or, in the United States, within the same state, and is opposed to foreign bill, *q. v.* The word does not necessarily imply upon the land in distinction from on the water; the phrase inland navigation is used to denote employment of vessels sailing into the interior of the country, upon its rivers. Domestic seems preferred to inland, in recent years.

In old English law, inland was used for the demesne (*q. v.*) of a manor; that part which lay next or most convenient for the lord's mansion-house, as within the view thereof, and which, therefore, he kept in his own hands for support of his family and for hospitality; in distinction from outland or utland, which was the portion let out to tenants. *Cowel; Kennett; Spelman.*

Inland navigation does not include navigation on the great lakes. Moore *v.* American Trans. Co., 24 *How.* 1.

In 1865, a vessel was captured on the Roanoke river, about one hundred and thirty miles from its mouth, by a naval force detached from two steamers that had proceeded up the river nearly a hundred miles, to a point where they stopped owing to difficulties in navigation, and from which the detachment was sent which made the capture. It was held that this was a capture upon "inland waters" within the meaning of the act of July 2, 1864 (13 *Stat. at L.* 277), and therefore not a maritime prize. The Cotton Plant, 10 *Wall.* 577.

Inland bill of exchange. By Stat. 19 & 20 Vict. ch. 97, passed in 1856, an inland bill of exchange is a bill drawn in any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of her majesty, and made payable in or drawn upon any person resident in any part of the said United Kingdom or islands. Before this enactment, an inland bill was a bill drawn by a person resident in England upon another person resident in England. *Mozley & W.*

INMATE. Physicians who contract to attend to "all the inmates of a county infirmary who may be subjects of medical or surgical treatment," at a fixed price, cannot recover any thing beyond such price for services in attending patients who had been removed to a building apart from the infirmary proper. Johnson *v.* Santa Clara County, 28 *Cal.* 545.

INN. A house kept to furnish food and shelter, at reasonable charges, to whomsoever may visit it; a public house; tavern. Innholder or innkeeper: one who makes a business to keep a house of public entertainment, or to furnish food and lodging to applicants generally, and without a special contract.

An inn is a public house of entertainment for all who choose to visit it. Wintermute *v.* Clark, 5 *Sandf.* 242; Walling *v.* Potter, 35 *Conn.* 183.

"Inn" and "tavern," also "innholder" and "tavern-keeper," are synonymous. Overseers, &c. *v.* Warner, 3 *Hill*, 150.

The words "inn," "tavern," and "hotel" are used synonymously to designate what is ordinarily and popularly known as an inn or tavern, or place for the entertainment of travellers, and where all their wants can be supplied. A restaurant where meals only are furnished is not an inn or tavern. People *v.* Jones, 54 *Barb.* 311; S. P. Carpenter *v.* Taylor, 1 *Hilt.* 193.

An inn is a house where a traveller is furnished with every thing which he has occasion for while on his way. Thompson *v.* Lacy, 3 *Barn. & Ald.* 283.

The above definition is comprehensive enough to include every description of inn,

but a house that does not fill the full measure of this definition may be an inn. It is not essential to an inn that intoxicating liquors should be sold, or provender and care for horses furnished. Pinkerton *v.* Woodward, 33 *Cal.* 557, 596.

That selling liquors is essential to the idea of an inn, with reference to the construction of a statute requiring inns to be licensed, see Bonner *v.* Welborn, 7 *Ga.* 296, 304.

It is not necessary that the keeper should put up a sign as a keeper of an inn; if, in fact, he keeps one, he is liable to all the responsibilities of an innkeeper. Dickerson *v.* Rodgers, 4 *Humph.* 179.

A hotel in a city which receives transient guests is a common inn. Taylor *v.* Monnot, 4 *Duer*, 116.

A public house designated as a "hotel," where all comers register their names and are furnished with rooms without special agreement, and where meals are furnished on the "European plan," is an inn, and the proprietor an innkeeper, with all the responsibilities of such a character, in respect to the guests who lodge in his house. Krohn *v.* Sweeney, 2 *Daly*, 200; s. p. Pinkerton *v.* Woodward, 33 *Cal.* 557.

A licensed grocery in the city of New York is an inn or tavern in contemplation of 1 Rev. L. of 1813, 178, § 8; and to keep a shuffle-board in such a grocery, whether gambling or playing for money is permitted or not, is in direct violation of the statute. Cuscadden's Case, 2 *City H. Rec.* 53.

The leading ideas of all the definitions of "inn" are, that it is a house for the entertainment of travellers or wayfarers; for the entertainment of all travellers, at all times and seasons, who may properly apply and behave with decency, and this as guests for a brief period, not as lodgers or boarders by contract or for a season. It is because inns and innkeepers have to do with the travelling public, and under circumstances which render it impossible for each customer to contract for the terms of his entertainment, and because of their compulsion to afford entertainment to anybody, that the law has imposed their peculiar liabilities and privileges. Hence one who keeps an establishment at the site of famous mineral springs, to furnish lodging, board, and attention, not to travellers as such, but to persons visiting the springs to remain for a season, for health, is not an innkeeper such that he must take out a license; and that he calls his establishment a hotel makes no difference. Yet it is not the location of the house at springs, but its character, which determines whether it is an inn. Bonner *v.* Welborn, 7 *Ga.* 296, 306. To nearly same effect, Parkhurst *v.* Foster, 1 *Salk.* 389; 5 *Mod.* 427; Parker *v.* Flint, 12 *Id.* 254; 1 *Ld. Raym.* 479.

A person who merely keeps a lodging-house for strangers for a season, at a watering-place, is not an innkeeper. Southwood *v.* Myers, 3 *Bush*, 681.

A restaurant is not an inn, nor can the liabilities of innkeepers to the guests be extended to the proprietors of such establishments. Carpenter *v.* Taylor, 1 *Hilt.* 193.

That a house kept for letting lodging rooms, without any arrangements to provide board or meals, is not, although called a hotel, an inn, see Cromwell *v.* Stephens, 2 *Daly*, 15.

History of the words "inn," "hotel," and several affiliated words, elaborately reviewed. *Ib.*

An inn is distinguished from the private boarding-house mainly in this, that the keeper of the latter is at liberty to choose his guests, while the innkeeper is obliged to entertain and furnish all travellers of good conduct and means of payment with what they may have occasion for as such travellers, whilst on their way. Pinkerton *v.* Woodward, 33 *Cal.* 557.

The distinction between a boarding-house and an inn is, that in the former the guest is under an express contract for a certain time at a certain rate; in the latter, the guest is entertained from day to day upon an implied contract. Willard *v.* Reinhardt, 2 *E. D. Smith*, 148.

Innkeeper. One who receives as guests all who choose to visit his house, without any previous agreement as to the time of their stay, or the terms. His liability as innkeeper ceases when his guest pays his bill, and leaves the house with the declared intention of not returning, notwithstanding the guest leaves his baggage behind him. Wintermute *v.* Clarke, 5 *Sandf.* 242.

The possession of a license does not make, nor the want of it prevent, a person from being an innholder at common law. Norcross *v.* Norcross, 53 *Me.* 163.

Statutes requiring inns to be licensed to sell intoxicating liquors do not prevent one from keeping a common-law inn without being licensed; but if the innkeeper desires to sell liquor, he must take out a license. Overseers of Crown Point *v.* Warner, 3 *Hill*, 150; State *v.* Chamhless, 1 *Chev.* 220; Bonner *v.* Welborn, 7 *Ga.* 296, 305.

A person who does not hold himself out as an innkeeper, but entertains travellers occasionally for pay, is not an innkeeper, nor liable as such; and he is responsible only for negligence in respect to property of travellers intrusted to his care. Lyon *v.* Smith, 1 *Morr.* 184.

One who entertains company occasionally is no innkeeper, and cannot be indicted for keeping a disorderly house. State *v.* Mathews, 2 *Dev. & B. L.* 424.

One who keeps a boarding-house, but occasionally entertains travellers, although he may be liable as a common-law innkeeper to such travellers, is not liable in that capacity to his boarders. Kisten *v.* Hildebrand, 9 *B. Mon.* 72.

A man had a house on the high road much visited by travellers, who were uniformly entertained and charged; these facts

were notorious, and relied on by travellers; on the other hand, he often declared that he did not keep an inn, he refused to take boarders, and often entertained his friends and countrymen free of charge. Held, though he lived in a sparsely settled country, that on this evidence the jury might find him an innkeeper. Howth *v.* Franklin, 20 *Tex.* 798.

The fact that the contract for carriage of a passenger on a steamship is for a round sum, to include carriage, state-room, and meals, as is usual on ocean steamers, does not render the owners liable as innkeepers. Clark *v.* Burns, 118 *Mass.* 275.

Inns of court. The societies of the Middle Temple, Inner Temple, Lincoln's Inn, and Gray's Inn, are so called because the students therein do study the law to fit them for practising in the courts at Westminster or elsewhere. These, together with the Inns of Chancery and the two Serjeants' Inns, are said to have formed one of the most famous universities in the world for the study of law; and here exercises were performed, lectures read, and degrees conferred in the common law, as they are at other universities in the present day in the canon and civil laws. The Inns of Chancery, being Clifford's Inn, Symond's Inn, Clement's Inn, and others, are subordinate to the Inns of Court properly so called. *Brown.*

INNUENDO. Insinuating; meaning; signifying. This word was used as the initial and emphatic word, in the Latin forms of declarations for slander and libel, of every clause in which the application of the alleged slanderous or libellous matter to the plaintiff was pointed out, by explaining the meaning attached to the words actually used. The word is translated in the corresponding English forms by "meaning;" and the whole clause introduced by that word is termed an innuendo. The object of the clause is to explain, in connection with previous clause, termed the *colloquium*, the meaning of the defamatory matter, or its application to the plaintiff, not appearing fully from the words themselves alone. See COLLOQUIUM. The innuendo is merely explanatory of what is already set forth; it cannot serve for a new charge, nor even add to, enlarge, or change the sense of the words charged. If not warranted by preceding allegations, it may be rejected as superfluous.

The use of the innuendo is not confined to actions for defamation. For instance, an innuendo may be inserted in a declaration to explain the true meaning of the language of a written instrument set forth in the declaration. See Whitsett *v.* Womack, 8 *Ala.* 466.

Innuendo means nothing more than the words *id est*, or *scilicet*, or meaning, or aforesaid, as explanatory of a subject-matter sufficiently expressed before; as such a one, meaning the defendant; or such a subject, meaning the subject in question. But as an innuendo is only used as a word of explanation, it cannot extend the sense of the expressions in the libel beyond their own meaning, unless something is put on the record for it to explain. As in an action upon the case against a man for saying of another, "he has burnt my barn," the plaintiff cannot there, by way of innuendo, say, meaning his barn full of corn; because that is not an explanation of what was said before, but an addition to it. But if in the introduction it had been averred that the defendant had a barn full of corn, and that in a discourse about that barn the defendant had spoken the words charged in the libel of the plaintiff, an innuendo of its being the barn full of corn would have been good; for by coupling the innuendo in the libel with the introductory averment, "his barn full of corn," it would have made it complete. . . . An innuendo is an averment that such a one means such a particular person, or that such a thing means such a particular thing; and, when coupled with the introductory matter, it is an averment of the whole connected proposition, by which the cognizance of the charge will be submitted to the jury, and the crime appear to the court. Rex *v.* Horne, 2 *Cowp.* 672.

An innuendo is merely explanatory of something already expressed. It cannot render certain words which would otherwise be uncertain, give a criminal meaning to innocent words, or add to, extend, or change the sense of the words previously stated. But it may give a technical meaning to a slanderous charge, from the obvious import of the words spoken, taken in connection with the *colloquium*. Coburn *v.* Harwood, *Minor*, 93.

The office of an innuendo in pleading is to explain, not to enlarge, and is the same in effect as, that is to say. It is used almost exclusively in practice in actions for defamation; and in such a case the plaintiff cannot merely, by force of an innuendo, apply the words to himself. The innuendo means no more than "the words aforesaid." The introduction of facts under it will not be deemed a sufficient averment of them; that which comes after it is not issuable. If an innuendo is repugnant, it may be rejected, or, if intended to enlarge, it will be treated as surplusage. It is immaterial whether the innuendo is used for the purpose of enlarging or other unauthorized purpose; it is not issuable, and furnishes no warrant for sustaining a demurrer to the declaration. Whitsett *v.* Womack, 8 *Ala.* 466.

Although an innuendo can never enlarge the meaning of an expression, yet where words are ambiguous, and admit of different applications, it may confine or direct them. Stow *v.* Converse, 4 *Conn.* 17.

An innuendo is not, ordinarily, the subject of proof. This follows from the very nature and office of an innuendo; it being merely explanatory of that which is already sufficiently expressed. Mix *v.* Woodward, 12 *Conn.* 262, 290.

An innuendo only gives an application to words, and cannot extend their meaning beyond their ordinary acceptation. Stevens *v.* Handly, *Wright*, 121.

The proper office of an innuendo is to explain doubtful words, where there is matter sufficient in the declaration to maintain the action. Sheely *v.* Briggs, 2 *Har. & J.* 363.

The office of the innuendo in the declaration for slander is to explain the words spoken, and annex to them their proper meaning. It cannot extend their sense beyond their usual and natural import, unless something is put upon the record by way of introductory matter, with which they can be connected. That being done, words which are equivocal or ambiguous, or fall short, in their natural sense, of importing any libellous charge, may have affixed to them a meaning which is certain and defamatory, extending beyond their ordinary import. Beardsley *v.* Tappan, 1 *Blatchf.* 588.

INOPS CONSILII. Destitute of counsel; without legal counsel. A term applied to the acts or condition of one acting without legal advice, as a testator drafting his own will.

INQUEST. A judicial inquiry; particularly an inquiry or examination into any cause or matter, by a jury summoned for the purpose. The finding of the jury upon such inquiry is sometimes called an inquest; and the term is also applied to the jury or other body making the inquiry, particularly to a grand jury, which is often termed the grand inquest. And Blackstone speaks of the English house of commons, in preparing an impeachment, as the most solemn grand inquest of the whole kingdom. 4 *Bl. Com.* 259.

A familiar application of the term is to the inquiry by a coroner, termed a coroner's inquest, into the manner of the death of any one who has been slain, or has died suddenly or in prison. It is held before a jury, which, at common law, must consist of at least twelve. See CORONER.

The word also occurs in the phrase "inquest of office," which denotes an inquiry made by the king's officer, his sheriff, coroner, or escheator, either *virtute officii* or by writ to him sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels. This is done by a jury of no determinate number, being either twelve, or less, or more. These inquests were devised as a means to give the king his right by matter of record, but are seldom used since the abolition of military tenures. They were sometimes called simply office, *q. v.*

The term inquest is also applied to a proceeding allowed under the practice in the courts of New York, by which, upon an issue of fact in an action at common law, a cause may be taken up out of its regular order, on motion of the plaintiff, and a trial had, in which no affirmative defence is admitted. This proceeding is authorized where the defendant has failed to file an affidavit that he has a good defence upon the merits, and has also failed to verify his answer. *N. Y. Code Civ. Pro.* § 980. The defendant may appear, and object to the evidence offered by the plaintiff, except to rulings of the court, and cross-examine the plaintiff's witnesses; but he cannot introduce testimony on his own behalf, nor make out, even by cross-examination, an affirmative defence. The name inquest is also given, though perhaps incorrectly, to a trial, upon the default of the defendant in failing to appear when the cause is called in its order for trial; even where, a jury being held to be waived by the defendant's failing to appear, such trial is had before the court without a jury. But, in the strict meaning of the word, an inquest seems to imply the summoning and action of a jury.

An inquest is a trial of an issue of fact where the plaintiff alone introduces testimony. The defendant is entitled to appear at the taking of the inquest, and to cross-examine the plaintiff's witnesses; and, if he do appear, the inquest must be taken before a jury, unless a jury be expressly waived by him. Haines *v.* Davis, 6 *How. Pr.* 118.

An inquest of office, or inquisition, is an inquiry made by some king's officer, con-

cerning any matter that entitles the king to the possession of lands or tenements, goods and chattels; as to inquire whether the king's tenant for life died seised, whereby the reversion accrues to the king; whether A, who held immediately of the crown, died without heirs, in which case the lands belong to the king by escheat; whether B be attainted of treason, whereby his estate is forfeited to the crown; whether C, who has purchased lands, be an alien, which is another cause of forfeiture; whether D be an idiot, *a nativitate*, and, therefore, together with his lands, appertains to the custody of the king; and other questions of like import, concerning both the circumstances of the tenant and the value or identity of the lands. These inquests of office were more frequently in practice than at present, during the continuance of the military tenures, when, upon the death of every one of the king's tenants, an inquest of office was held, called an *inquisitio post mortem*, to inquire of what lands he died seised, who was his heir, and of what age, in order to entitle the king to his marriage, wardship, relief, *primer seisin*, or other advantages, as the circumstances of the case might turn out. To superintend and regulate these inquiries, the court of wards and liveries was instituted by Stat. 32 Hen. VIII. ch. 46, which was abolished at the restoration, together with the tenures upon which it was found.

With regard to other matters, the inquests of office still remain in force, and are taken upon proper occasions, being extended not only to lands, but also to goods and chattels personal, as in the case of wreck, treasure-trove, and the like, and especially as to forfeitures for offences. Every jury which tries a man for treason or felony, every coroner's inquest that sits upon a *felo de se*, or one killed by chance-medley, is, not only with regard to chattels, but also to real interests, in all respects an inquest of office; and, if they find the treason or felony, or even the flight of the party accused (though innocent), the king is thereupon, by virtue of his office found, entitled to have his forfeitures; and also, in the case of chance-medley, he or his grantees are entitled to such things by way of deodand as have moved to the death of the party. So whether a criminal be a lunatic or not shall be tried by an inquest of office, returned to the sheriff of the county. Where a person stands mute without making any answer, the court may take an inquest of office, by the oath of any twelve persons present, if he do so out of malice, from a perverse or obstinate disposition, &c. If a person attainted of felony escapes, and, being retaken, denies he is the same man, inquest is to be made of it by a jury before he is executed. *Jacob.*

INQUIRY. A writ directed to the sheriff, commanding him to summon a jury, and to inquire into the amount of damages due from the defendant to the plaintiff in a given action, is termed a writ of inquiry. It is proper in actions at common law, in which the defendant has suffered judgment to pass against him by default or *nil dicit*, by confession, or *cognovit actionem*, &c., but the damages are not ascertained nor ascertainable by mere computation, so that the damages must be assessed by a jury. In form, the writ is directed to the sheriff of the county in which the venue in the action is laid, reciting the former proceedings, and the judgment thereon, that the plaintiff ought to recover his damages, and commanding the sheriff that, "because it is unknown what damages the plaintiff has sustained by means of the premises," he, by the oath of twelve good and lawful men of his county, diligently inquire the same, and return the inquisition which he shall thereupon take into court. In proceeding under the writ, the sheriff, usually by his undersheriff, presiding, the jury ascertain by the evidence of witnesses, as in a trial at *nisi prius*, what damages the plaintiff has sustained; and after their verdict the sheriff returns the inquisition, upon which the judgment is entered. As the inquest, however, merely informs the court, the court may, in all cases, if it pleases, assess the damages, and thereupon give final judgment.

INQUISITION. Inquiry. Particularly, an examination and finding of certain facts by a jury summoned for the purpose. Frequently applied to an inquest by a coroner's jury, and to the proceeding by a sheriff's jury under a writ of inquiry. See INQUEST; INQUIRY.

INSANITY. In any attempt to explain the meaning of this term, it is important to distinguish between the objects and uses of a definition in medical science, which regards insane persons chiefly as subjects of treatment, with reference to the amelioration of symptoms and in the hope of cure; and those of a definition for jurisprudence, which has to deal with them chiefly as limited in capacity and responsibility. For the purposes of jurisprudence, a useful explanation can best be made by first inquiring what elements enter into the nature of insanity, and then consid-

ering to what degree they must exist, in order to affect the status of the individual before the law.

To give an accurate and exhaustive definition of insanity, one which shall exclude all who are sane and include all who are not, has been deemed by some writers to be nearly impracticable. Others have proffered definitions, the most instructive of which are collected and reviewed by Dr. Hammond (*Diseases of the Nervous System*, 332), who himself, after remarking that as the healthy mind results from a healthy brain, so a disordered mind comes from a diseased brain, defines insanity to be a manifestation of disease of the brain, characterized by a general or partial derangement of one or more faculties of the mind, and in which, while consciousness is not abolished, mental freedom is perverted, weakened, or destroyed. Further explanations show that "disease," in this definition, is to be taken in a broad sense, and as including many causes perverting the mental action, which might not be deemed disease as that term is often popularly understood; for our author proceeds to say that an essential feature of the definition is that insanity depends directly upon a diseased condition of the brain, which may consist of structural changes due to injury, malformation, malnutrition, besides many other causes enumerated, which are of a character more clearly embraced by the word disease. As "disease" is very commonly used and understood among non-medical writers and readers, it does not embrace mechanical injuries or non-development, if not attended by any morbid action of the organs. Lameness, induced by the amputation of a limb, is not esteemed disease; neither is the short stature of a dwarf. In like manner, if aberration of mind, caused by the mechanical removal of a portion of the brain, or if congenital idiocy, attributable merely to low development of the organ, is to be included in insanity, "disease," in Dr. Hammond's definition, must be given a very broad signification. This is his intention, as his accompanying explanations plainly show; and, thus explained, the definition becomes quite sufficient to bring clearly to view the two ideas suggested by "insanity," which are important in the legal aspect of the subject, — viz., disease and mental duress. For the term is used in jurisprudence, not as a precise delineation of a condition or status which is distinctly marked and definitely known, but as a general term, embracing all grades and kinds of mental disorder which are uncontrollable by the will, and sufficiently serious and influential to be recognized as diminishing legal capacity or responsibility. Disease, in the broad sense of an involuntary, abnormal condition, and limitation of mental freedom, are, however, of the nature of the idea, and are always to be discerned. Unless these exist, insanity, for any purposes important in law, is not shown. There must be disease, in the sense that the disturbance of mental action, which may be produced by the temporary influence of intoxicating liquors, narcotic drugs, and the like, is not insanity, while a morbid condition superinduced by long continued excess in the use of these may be so. And a limitation upon the free normal action of the mind in some of its faculties is likewise involved, since restraints upon physical action, whatever may be their legal aspects or importance, are not discussed under the head of insanity. Neither the moral incapacity of an angry or a drunken man, nor the physical incapacity of one whose muscles are useless from fever or paralysis, is, in a legal sense, insanity.

The nature of what is meant by insanity is further shown by considering the subdivisions under which it is discussed. Many of the careful classifications of its forms which have been made by physicians and physiologists have, indeed, but little practical bearing upon the administration of the law of insanity, but they confirm the explanations which have been made of its nature. In legal authorities, two classes of insane persons have been from early times recognized, — idiots (*q. v.*), being, generally, those who never possessed reason; and lunatics (*q. v.*), being those who have become deprived of reason once possessed. Then, in later years, a slighter degree of mental alienation than used to be

required has been thought enough to involve legal consequences, so that what would not be deemed idiocy or lunacy according to old definitions or standards, may, upon present views, be a qualification of a person's legal status; hence "unsoundness of mind" is often used as if it denoted a distinct kind of insanity. This phrase, however, really denotes a milder, lighter degree of mental impairment, a lesser grade of either idiocy or lunacy, than would be considered meant by those terms as formerly understood.

In addition to the old division of the insane into idiots and lunatics, the modern cases often refer to or employ a classification originating with Esquirol, and which has been widely approved. As restated by Dr. Hammond, it is as follows:

Melancholia. Perversion of the understanding in regard to an object or a small number of objects, with the predominance of sadness and depression of mind.

Monomania. Perversion of understanding limited to a single object or a small class of objects, with predominance of mental excitement.

Mania. A condition in which the perversion of understanding embraces all kinds of objects, and is attended with mental excitement.

Dementia. A condition in which those affected are incapable of reasoning, from the fact that the organs of thought have lost their energy, and the force necessary for performing their functions.

Imbecility or *Idiocy.* A condition in which the organs have never been sufficiently well-conformed to permit those affected to reason correctly.

Proceeding now from the question of nature to that of degree, we consider it impracticable to give any single, precise definition, for the reason that the degree in which aberration must exist varies with the different purposes for which inquiry is made. There are many distinct purposes for which, within the sphere of jurisprudence, sanity may be questioned, or insanity imputed.

Particular attention may well be given to what is the test of insanity, where the inquiry is made for either of the following purposes:

1. For placing the person or property of the individual under legal restraint or care.

2. For exempting him from punishment for crime.

3. For ascertaining his ability to prosecute or defend a judicial proceeding.

4. For determining the validity of his contracts, including in this expression all varieties of lawful dealings and transactions in life, except testamentary acts.

5. For determining the validity of his testament.

These, indeed, are not all. Others may be mentioned which call for distinct standards. What, for instance, is the measure of that degree of insanity which avoids the marriage of the subject; or which may warrant a divorce in jurisdictions where insanity is a ground; or which affects the power of an officer, so that his vice or substitute may act in his stead, or a vacancy be declared; or renders a person incompetent as a witness or unworthy of credit; or exposes one to confinement under a statute regulating custody of insane criminals; or disables a woman from giving such a consent to sexual intercourse as will reduce the man's act from rape to seduction; or warrants the removal of the subject from a trusteeship or guardianship? The rule for determining the degree of insanity varies, according to modern views, with the nature of the purpose for which the inquiry is made. No common uniform test can be prescribed. Hence we must indicate, not what is insanity absolutely, but what constitutes it relatively to the purpose of inquiry. And the attempt to do this is subject to the observation that the spirit and tendency of the decisions is adverse to establishing fixed and uniform tests, even with reference to a particular object of inquiry; and favorable to allowing each case to be decided upon its own circumstances, and according to the judgment of the tribunal exercised in comparing the degree of mental power possessed by the individual with the requirements of the act the performance of which is questioned.

1. When the question of insanity is presented in a proceeding, such as the

writ *de lunatico inquirendo*, instituted to bring the individual or his property under legal restraint or care as to his future acts, evidently the general fitness of the subject to act and deal freely among his fellow-men is what is in question; and the appropriate standard or test, accordingly, is inability to manage one's affairs. Early English decisions in cases *de lunatico* required a finding that the individual either was from birth an idiot, or had become lunatic, and was in consequence incapable of governing himself and managing his affairs. But the necessity of according legal protection to persons who, though neither idiots nor lunatics, in the strong sense in which those words were used in the common law, nevertheless showed serious derangement, led to the introduction of the term unsound mind; and the modern practice, unless a different standard is prescribed by the statute of the jurisdiction, requires a finding that the party is of unsound mind and incapable of managing his affairs. The courts appear to have declined to accept any lighter imputations of disability than this as sufficient to warrant appointing a committee; nor do the cases afford any specific tests of what is a proper degree of aberration to warrant a finding. The responsibility is placed upon the jury. If, upon all the evidence before them relative to the mental condition of the subject of inquiry, they will return that they consider him of unsound mind and incapable of managing his affairs, the appointment may be made; otherwise not. See *Ray, Med. Jur. Ins.* § 5. Dr. Ray criticises this rule, derived from English cases, as too strict for the necessities of the insane at the present day, without noticing Stat. 11 Geo. IV. & 1 Wm. IV. ch. 60, which appears to give power to issue a commission of lunacy in all cases where an individual is incapable of managing his affairs, although he may not be an idiot, a lunatic, or a person of unsound mind, in the strict sense of those words. But this statute, passed in 1830, does not modify for the United States the stricter rule derivable from the earlier decisions.

In this country, the decisions have been to the effect that a finding which merely declares the party "to be incapable of managing his affairs," is insufficient. Armstrong *v.* Short, 1 *Hawks*, 11. So is a finding that the party is incapable of managing his affairs, or of governing himself, in consequence of mental imbecility and weakness. Matter of Morgan, 7 *Paige*, 236. So is a return that the party, by reason of old age and sickness, is so deprived of reason as to be unable to manage his estate. Beaumont's Case, 1 *Whart.* 52. But a finding that he is *non compos mentis* is not affected by the addition of the words "lunatic and idiotic:" those may be rejected as surplusage. Bethea *v.* M'Lennon, 1 *Ired. L.* 523. All the characteristics of *dementia*, mentioned by medical writers, need not be manifested by an individual to warrant a finding of *non compos*. If the jury are satisfied that the party is affected by such unsoundness of mind, caused by *dementia* or other mental alienation, as renders him incapable of managing his affairs, they may find him a lunatic and of unsound mind. But failure of memory, or feebleness of intellect from old age, are not of themselves evidence of that unsoundness of mind which warrants a finding; to warrant it, they must be such as to import total deprivation or suspension of the ordinary mental powers. Matter of Vanauken, 10 *N. J. Eq.* 186. Where, however, a person from old age, as well as from any other cause, becomes mentally incapacitated from managing his affairs, a commission of lunacy may, upon clear evidence and a full and prudent inquiry, be sustained. Matter of Barker, 2 *Johns. Ch.* 232. That a person makes improvident bargains, and is generally unthrifty in his business or unsuccessful in his enterprises, does not necessarily prove him to be *non compos mentis*, though it may tend to prove it. Re Carmichael, 36 *Ala.* 514. The test question is, whether the mind is deranged to such an extent as to disqualify the person from conducting himself with safety to himself and others, and from managing and disposing his affairs and discharging his relative duties, M'Elroy's Case, 6 *Watts & S.* 451; whether the prosecution have shown (they have the burden of proof) that the defendant has become

deprived of reason, so far as practically to have lost the power to govern his mind, body, and estate; but it is not necessary to show a derangement or loss of all the faculties, and, on the other hand, perfect mental action is not necessary to entitle the defendant to prevail. Commonwealth *v.* Haskell, 2 *Brews.* 491; Commonwealth *v.* Schneider, 59 *Pa. St.* 328.

2. The question, what measure of mental disease or incapacity gives exemption from criminal responsibility, has been most elaborately and earnestly contested in a long series of cases, and without, as yet, coming to any complete agreement. We consider that, taking the more recent and advanced or progressive decisions as the guide, and bearing in mind that the rules of law on this subject show a steady amelioration in the light of advancing medical knowledge, the test may well be stated thus: Was the person, at the time of committing the act, disabled from knowing that it was criminal, or from governing his conduct by his knowledge? This statement rests on the idea that "sanity," with reference to the criminal law, implies the twofold power of the mind to understand that a design is unlawful or morally wrong, and to control the conduct in the light of such knowledge. "Insanity," then, is the privation of either power; if from mental disease or non-development the individual either could not know that his act was wrong, or could not control his conduct by such knowledge, he is insane with reference to criminal responsibility.

The influence of insane delusions, the fixed belief of facts which have no existence, is an important form of insanity, and is often mentioned as a distinct test. It does not seem to require, however, a separate statement in the definition; for a delusion must operate either upon the knowledge, deceiving the person as to the wrongfulness of his act, or upon the moral power, impelling him uncontrollably to do the act, notwithstanding its unlawfulness. The two branches of the test above stated include the insanity which consists in delusions.

Both branches of the test have not, indeed, the support of all the decisions. The earlier cases do not present the power to govern self-conduct by the knowledge of right and wrong as an independent element. They are silent as to this, simply making the defence of insanity depend upon incapacity to comprehend the wrongfulness of the act; and the definitions they give do not seem to recognize a perversion of the nature disabling a person from choosing that which he understands to be right, or impelling him to a course notwithstanding he knows it to be wrong, as constituting any exemption. This perversion of the power of choice, sometimes called *moral* insanity, has been but recently urged as a ground of exemption. Of the cases in which it has been presented, some repudiate it, others accept it. It is not everywhere established. The law of the jurisdiction must be examined. The leading authorities previous to about 1870, upon this whole subject of the defence of insanity, will be found well presented and reviewed in the note to Commonwealth *v.* Rogers, 1 *Benn. & H. Lead. Cr. Cas.* 94, 100. Subsequent cases are McFarland's Case, 8 *Abb. Pr.* N. S. 57, 89; Bradley *v.* State, 31 *Ind.* 492; Roberts *v.* People, 19 *Mich.* 401; State *v.* Jones, 50 *N. H.* 369; State *v.* Johnson, 40 *Conn.* 136; Blackburn *v.* State, 23 *Ohio St.* 146, which seem to recognize and sustain the defence of moral insanity, or the second branch of the test given above; and Lloyd *v.* State, 45 *Ga.* 57; Flanagan *v.* State, 52 *N. Y.* 467; People *v.* Montgomery, 13 *Abb. Pr.* N. S. 207; Wagner *v.* People, 4 *Abb. App. Dec.* 509; State *v.* Stickley, 41 *Iowa*, 232; Wright *v.* People, 4 *Neb.* 407; Brown *v.* Commonwealth, 78 *Pa. St.* 122, 128, which appear to be adverse to that doctrine, and to adhere to the older view, that incapacity to know the wrongfulness of the act must be shown.

In the application of the test, an important consideration is that it calls for want of power to know, not want of knowledge. Ignorance, or erroneous judgment as to the criminality of an act, does not sustain the defence. Many of the cases have used the expression, that, if the accused did not know the wrongfulness of his act, he is exempt. But

"want of knowledge" is a very inadequate statement of the disability intended by the rule. The idea is, not that the accused did not know his act to be unlawful, but that he had not capacity to comprehend its unlawfulness. If he had that capacity, he should have exercised it. Another important consideration is, that the want of capacity must relate to the act for which the prisoner is upon trial; if he had capacity to understand the nature of that act, and to refrain from doing it because unlawful, he may be charged; and his delusions or derangements upon other subjects are not material. Another important consideration is, that the test is to be applied to mental condition at the time of the act in question. Sane or insane when committing the act, is the question. Sanity before or after is not material to the responsibility. In a striking case in New York (Cole's Case, 7 *Abb. Pr.* N. S. 321), the jury reported to the court that they believed the prisoner sane before and after the commission of the homicide, but doubted his sanity at the instant of the act; upon which the judge instructed them that they must give the prisoner the benefit of that doubt; and a verdict of not guilty was rendered and received.

3. An inquiry into sanity for ascertaining the ability of the individual to prosecute or defend a judicial proceeding, arises in either of two ways. Sometimes, upon the threshold of a proceeding, the suggestion is made that insanity of a party incapacitates him from suing or defending in person, and requires the appointment of a guardian *ad litem*. These cases do not seem to come into the reports in a way to disclose formal adjudications upon what is the test of insanity in them. It is settled law that a person in a state of insanity cannot sue or be sued, without appointment by the court of some one to represent him, and cannot be tried for an offence; but the suggestion of insanity and application for an appointment is usually disposed of without any review such as would give rise to a decision liable to be reported upon the proper test of insanity.

Sometimes, again, when the defence of the statute of limitations is interposed to an action, it is met by the replication that at the time when the cause of action accrued the plaintiff was insane, and therefore within an exception in the statute, and not barred by it. This class of cases seems to call for precisely the same test of insanity as the class just above mentioned. The disability which, under the statute, excuses the failure to sue when the cause of action arose ought to be the same in nature and degree as would at that time have prevented his suing, and called for the appointment of a representative. Such a case is that of Burnham *v.* Mitchell, 34 *Wis.* 117. In that case, the plaintiff sued as administrator of a deceased lunatic. The defendant set up a settlement made with the lunatic in his lifetime, and also the statute of limitations; and the plaintiff relied upon the insanity of the decedent, both to avoid the settlement and relieve the bar from lapse of time. The case, therefore, called for consideration of the question what is the test of insanity with reference to either question. Upon the trial, the defendant insisted, and requested the court to charge, that an imbecile person, or a person of weak understanding, was not an insane person, within the exception in the statute of limitations; but the latter term implied not weakness, but deprivation of reason, or a person wholly without understanding. The court below refused to restrict the term insane person in this manner, and charged that the degree of deprivation of mind which would be sufficient to avoid an act done, or give or continue a right on the ground of insanity, need not be a total deprivation of mind, but must have relation to the nature of the act done or to be understood; that different kinds of business require different degrees of mental ability to enable a person to do them understandingly; that, so long as a person acts rationally, the law makes no distinction between weak and strong minds; that mere weakness of mind short of imbecility is not sufficient ground in itself to invalidate a person's acts, but, when the mind becomes enfeebled and disordered by

disease, so that the person does not act rationally, nor recognize the obvious and ordinary relations of things, but acts without such understanding or from delusion or insane impulse, his acts are invalid; and that, when the capacity to do a certain act is in issue, the question is, whether or not the alleged insane person had sufficient mental ability to know what he was doing, and the nature of the act to be done. And, in regard to the settlement, the jury were told to consider whether the decedent understood that the relation of creditor and debtor existed between himself and the defendant, and that the defendant was his debtor; whether he understood the amount he was receiving in satisfaction of that indebtedness; whether he had a rational idea of the bearing of defendant's statement as to his ability to pay, and of the propriety, under the circumstances, of accepting a less amount in settlement of his claim; that it was not essential he should have been able to reason wisely in regard to the business, or that his conclusion should be prudent; but it was sufficient if he acted rationally, so that it could not be said his acts were those of an insane man. The jury found the decedent insane. The supreme court confirmed the instructions above stated, and held that the word insane in the exception in the statute of limitations should not be construed as importing an entire loss of understanding; that, if a person has not sufficient mental ability to know what he is doing, and the nature of the act to be done, he may well be deemed insane within such exception.

This case seems to warrant the view that, where sanity is impeached for the purpose of showing a disability to sue or defend, the question should be, whether the person understands the nature and importance of his rights involved in the litigation, and the necessity and adaptation of the proper legal remedy, so that he is competent, not, indeed, to give the wisest possible directions as to the conduct of proceeding, but to exert an intelligent will, in selecting and instructing attorneys and counsel, according to the ordinary course of a judicial proceeding.

4. The cases involving the question of power to contract, of the validity of any business act or transaction which has been already performed, are partly covered by the quotation from Burnham *v.* Mitchell, *supra*. The test question here is: Had the person sufficient mental capacity for the act or transaction alleged? The inquiry is twofold: First, what degree of mental capacity is essential to the proper execution of the act; and, second, whether such capacity was at the time possessed by the party. Very different degrees of capacity are requisite for different dealings. If the person appears to have had sufficient for the act under review, it is to be sustained, although he may not have been capable of some more complicated acts; if not, it is to be set aside, notwithstanding for lesser dealings he may be competent. Hall *v.* Unger, 2 *Abb. U. S.* 507; and see 15 *Wall.* 9.

One who seeks to set aside a contract on the ground of insanity must prove that it is the offspring of mental disease, Wray *v.* Wray, 32 *Ind.* 126; mere feebleness of mind does not incapacitate from making a contract, Cain *v.* Warford, 33 *Md.* 23; Mulloy *v.* Ingalls, 4 *Neb.* 115; and the hallucination or delusion must have existed at the time of making the contract, and have affected the capacity for making it, Staples *v.* Wellington, 58 *Me.* 453. The test is, whether the person had the ability to comprehend, in a reasonable manner, the nature of the particular transaction: proof of delusions upon independent subjects is not enough. Lozear *v.* Shields, 23 *N. J. Eq.* 509. Monomania upon a subject nowise connected with the contract will not avoid it. Boyce *v.* Smith, 9 *Gratt.* 704.

To avoid a deed on account of insanity of the grantor, proof must be made that he had not the right use of his reason, so that he could not comprehend the nature and consequences of his act. Hale *v.* Hills, 8 *Conn.* 39. When this appears, the deed may be set aside: Dicken *v.* Johnson, 7 *Ga.* 484. The question is, whether, at the time of the conveyance, he was in possession of mental capacity sufficient to transact the business with intelligence, understanding

rationally what he was doing. Darby *v.* Hayford, 56 *Me.* 246.

The test here propounded is offered for those cases only in which the sole ground of impeaching a contract or deed is mental incapacity. Where there is ground to impute fraud or undue influence in procuring a contract or deed, a slight degree of mental weakness may be taken into consideration. And compare, for a stricter rule than the current of recent cases seems to sustain, viz., that the insanity which will avoid a deed or contract must be such as will sustain a commission of lunacy, Siemon *v.* Wilson, 3 *Edw. Ch.* 36; Smith *v.* Beatty, 2 *Ired. Eq.* 456.

In Hall *v.* Unger, *supra*, the act in question was the execution of a power of attorney to sell land; and the court held that this was an act so nearly analogous to the making a will, that the ordinary test as to testamentary capacity might be applied. He must know the character and location of the property, and the object and effect of the power of attorney; in other words, must recollect that he was owner of the property, that it was situated in F, and that the instrument conferred an authority to sell it.

But, in general, the authorities tend to the rule that it requires less intelligence and reason to make a will than to execute a contract; except in Louisiana. Aubert *v.* Aubert, 6 *La. Ann.* 104. The capacity to make a contract is that which appears called for by the nature of the transaction proposed, and may well be higher than testamentary capacity. Thus it has been held that where the chancellor becomes satisfied that a person who has been found upon inquisition to be a lunatic has so far recovered his reason as to be capable of disposing of his estate by will, with sense and judgment, the chancellor may suspend the operation of the commission and inquisition, so far as to allow such person to make a will, under the superintendence of an officer of the court, in order to guard against improper influence, and without discharging the proceedings entirely, or restoring him to full control of his property. Matter of Burr, 2 *Barb. Ch.* 208.

5. Cases where the object of inquiry is the validity of a will, are, lastly, to be mentioned. In very many of these, allegations of undue influence, or of other grounds of contestation, are combined with the dispute of sanity. Such cases cannot aid in elucidating the test of testamentary incapacity. Confining our view to those decisions which have been rendered upon the simple question of mental capacity, we believe they will be found, upon the whole, to require that the proof of insanity to impeach a will should show that the testator was without the mental ability to recollect his property, and the persons among whom it might naturally be bestowed, with sufficient clearness to make intelligent dispositions of it. Testamentary capacity does not require as high a degree of mental power, according to the current of authorities, as the capacity to carry on business; a person found lunatic upon a commission, although presumably, is not necessarily incapacitated from making a will; but it requires that the testator should have an intelligent recollection of his property, and of the persons who might naturally be, or whom he intends to make, the objects of his bounty, and be able to comprehend the dispositions which the will contains. If this measure of mental power did not exist at the time of execution of the will, it is void, independent of attempts to influence the testator. For the very numerous authorities on the subject see *U. S. Dig.* tit. Wills, I. and IV.; also 1 *Redf. on Wills*, 30.

INSIMUL COMPUTASSENT. They accounted together. These were the emphatic words, in the Latin form, of the count upon an account stated, literally translated in the English form, and adopted as the name of the count.

Insimul tenuit. One species of the writ of *formedon* brought against a stranger by a coparcener on the possession of the ancestor, &c. *Jacob.*

INSOLVENCY. The pecuniary condition of a person who has not means to pay his debts as they fall due, according to the usual course of business. Insolvent, *n.*: a person who has not means to pay his debts as they fall due, according to the usual course of business. Insolvent, *adj.*: without means to pay

one's debts; also, about or concerning persons without means to pay their debts, as in the phrase, an insolvent law.

Under bankruptcy (*q. v.*) we have discussed the distinction between bankruptcy and insolvency.

In England, prior to 1861, the statutes distinguished between bankruptcy and insolvency; an insolvent debtor being a person not a trader who was unable to meet his liabilities. And the term insolvency was frequently applied to the means of getting rid of pecuniary engagements, afforded by acts of parliament passed for the relief of insolvent debtors. The principal one of modern enactments of this class (for a sketch of earlier ones see Jacob) was Stat. 1 & 2 Vict. ch. 110, passed in 1838, which enabled any person imprisoned for debt, &c., to apply, by petition to the court for the relief of insolvent debtors, for his discharge from custody. Then, by Stat. 10 & 11 Vict. ch. 102, § 36, passed in 1847, any creditor at whose suit the prisoner was committed might petition the court to have the real and personal estate and effects of the prisoner vested in the provisional assignee, for the benefit of his creditors. The insolvent was required to make a schedule of his property and debts, and to execute a warrant of attorney, authorizing the entering up of a judgment against him in the name of the assignee or assignees for the amount of his unsatisfied debts, for the satisfaction of which his subsequent property was liable, and thereupon might, except in cases of misconduct, &c., receive a discharge.

In 1861, the acts relating to insolvent debtors were repealed, and the insolvent debtors' court abolished, by the bankrupt act, 2 Stat. 24 & 25 Vict. ch. 134; repealed in 1869 by a substitute, Stat. 32 & 33 Vict. ch. 71. The bankrupt law does not make a distinction between bankruptcy and insolvency, though for certain purposes a trader stands on a different footing from a non-trader. *Mozley & W.*

The following are decisions involving the meaning of the latter word in various connections:

Insolvency is the inability to pay one's debts from one's own means. Other definitions collected. Herrick *v.* Borst, 4 *Hill*, 650.

That one could pay if time were given him does not preclude insolvency. Webb *v.* Sachs, 15 *Bankr. Reg.* 168.

The fact that a debtor is under protest and does not pay his debts, does not establish his insolvency. It must be shown that he has not the means of paying his debts, by showing that all his property and credits are not equal in amount to the debts due by him. Rock *v.* Bringier, 19 *La. Ann.* 183; Lea *v.* Bringier, *Id.* 197.

A party whose assets are forty per cent above his liabilities is not to be considered insolvent. Hunt *v.* Creditors, 9 *Cal.* 45.

A trader is not necessarily insolvent, although his assets may not, at a given date, satisfy all the demands against him, due or to become due. Bell *v.* Ellis, 33 *Cal.* 620.

Failure to pay a single debt when due is not sufficient to establish insolvency. Driggs *v.* Moore, 1 *Abb. U. S.* 440.

Difficulty in paying particular demands is not insolvency. Walkenshaw *v.* Perzel, 4 *Robt.* 426.

Insolvency does not mean an absolute inability of the debtor to pay his debts at some future time, upon a settlement and winding up of all his affairs, but a present inability to pay in the ordinary course of business. Thompson *v.* Thompson, 4 *Cush.* 127; Lee *v.* Kilburn, 3 *Gray*, 594.

That the mere non-payment of debts does not constitute insolvency; insolvency is not a convertible term for a mere refusal to pay, although the latter may be evidence of it, see People *v.* Kerr, 37 *Barb.* 357; compare Hoyt *v.* Shelden, 3 *Bosw.* 267; *Re* Larne, &c. Railway Co., 14 *Jur.* 996; *Re* Birmingham Benefit Society, 3 *Sim.* 421.

Insolvency is a term of no definite uniform meaning. It is, perhaps, more often than otherwise, understood to signify inability to pay all of one's debts. The insolvency of the maker of a note, which excuses the assignee from bringing suit against the assignor, means inability, from want of property liable to execution, to pay any part of the given debt. Herald *v.* Scott, 2 *Ind.* 55.

By insolvency, as used in the act of congress requiring that in all cases of insolvency any indebtedness of the insolvent to the United States, for duties, &c., shall have preference, is meant some overt and notorious act which the laws of the state recognize as insolvency. Bartlet *v.* Prince, 9 *Mass.* 431.

It is not every case of actual insolvency which operates to avoid an assignment of a debtor's property as against a debt due to the United States. Traders may be really insolvent, yet it may be unknown to them. The act gives the United States a preference only after some notorious act of insolvency, such as a general assignment, absconding, followed by an attachment of property, &c. An assignment of property to a particular creditor, to secure a prece-

dent debt to him, does not constitute an act of insolvency within the act. United States *v.* King, *Wall. C. Ct.* 12.

By insolvency, as used in the bankrupt act, when applied to traders and merchants, is meant inability of a party to pay his debts as they become due in the ordinary course of business. Toof *v.* Martin, 13 *Wall.* 40; 1 *Dill.* 203; Buchanan *v.* Smith, 16 *Id.* 277; S. P. Wager *v.* Hall, *Id.* 584.

A debtor is insolvent, within the meaning of the bankrupt act, when he is unable to pay his debts and meet his engagements in the ordinary course of business, as persons in trade usually do. Matter of Louis, 3 *Ben.* 153; Graham *v.* Stark, *Id.* 520; Driggs *v.* Moore, 1 *Abb. U. S.* 440; Rison *v.* Knapp, 1 *Dill.* 186.

A debtor does not cease to be insolvent because his creditors have agreed to extend the time of payment on account of his present inability to pay. Rison *v.* Knapp, 1 *Dill.* 186.

Insolvency, in the bankrupt act, as it has been interpreted by all the judges of the courts of the United States who have passed upon it, means, when applied to traders, simply an inability to pay debts as they mature and become due and payable in the ordinary course of business, as persons carrying on trade usually do, in that which is made, by the laws of the United States, lawful money and a legal tender to be used in payment of debts; irrespective of a possibility or probability, or even certainty, that at a future time, on the settlement and winding up of all the debtor's affairs, his debts will be paid in full out of his property. Property is not a lawful tender in payment of debts, and a debtor has no right to pay a debt with property of any kind. Therefore the amount of the trader's property is of no consequence, if an inability exists to pay matured debts in such lawful money. *Re* Bininger, 7 *Blatchf.* 262; and see *Re* Lewis, 2 *Am. L. T. Bankr.* 75.

The word means a present inability to pay as debts mature, although this inability be not so great as to compel an absolute suspension. Rison *v.* Knapp, 1 *Dill.* 186; 4 *Bankr. Reg.* 114.

Contemplation of insolvency is not a "contemplation of bankruptcy," within the meaning of the act of 1841. Lonergan *v.* Fenlon, 2 *Pittsb.* 115.

A corporation, like an individual, is insolvent when it is not able to pay its debts. Insolvency means a general inability to answer in the course of business the liabilities existing and capable of being enforced. Brouwer *v.* Harbeck, 9 *N. Y.* 589.

Insolvency, in the abstract, has the same signification, whether applied to corporations or associations, and means a general inability to pay one's debts; an inability to fulfil one's obligations, according to his undertaking; a general inability to answer, in the course of business, the liabilities existing and capable of being enforced, — not an absolute inability to pay one's debt at some future time, upon a settlement and winding up of all a trader's concerns; but, not being in a condition to pay one's debts in the ordinary course, as persons carrying on trade usually do. Ferry *v.* Bank of Central New York, 15 *How. Pr.* 445.

That the same definition of insolvency which applies to ordinary traders is applicable also to a corporation engaged in the manufacture and sale of pianos, see Hazelton *v.* Allen, 3 *Allen*, 114.

Insolvency, in respect to a banking association, means an insufficiency of the property and assets of the company to pay all its debts. Curtis *v.* Leavitt, 15 *N. Y.* 9, 199; see also Oakley *v.* Paterson Bank, 2 *N. J. Eq.* 173; Coryell *v.* New Hope, &c. Bridge Co., 9 *N. J. Eq.* 457.

That the refusal by a bank to redeem its bills is *prima facie* insolvency, see Townsends *v.* Bank of Racine, 7 *Wis.* 185.

In a time of general suspension of specie payments by banks, the mere fact of suspension by a bank of circulation is not proof of insolvency. A bank may be regarded as solvent, under such circumstances, which has property enough to satisfy all its liabilities. Livingston *v.* Bank of New York, 26 *Barb.* 304; 5 *Abb. Pr.* 338.

Insolvency, as applied to banks in the United States currency act (Rev. Stat. § 5242), has the same meaning as is given to it in the bankrupt act, as applied to traders, — an inability to pay debts in the ordinary course of business. Case *v.* Citizens' Bank, 2 *Woods*, 22; and see Jackson *v.* McCulloch, 13 *Bankr. Reg.* 283.

An insurance company cannot be said to be insolvent, or to act in contemplation of insolvency, merely because the amount of risks against which it has insured greatly exceeds its capital, especially if its assets are more than sufficient to meet all losses of which it has any notice or suspicion. It is essential to the success of such a company that its risk should exceed its capital. Holbrook *v.* Basset, 5 *Bosw.* 147.

The word insolvency, in Va. Stat. March 29, 1837, § 20, in relation to limited partnerships, signifies that the partnership has not sufficient property or effects to pay all its debts. M'Arthur *v.* Chase, 13 *Gratt.* 683.

Insolvency fund. A fund, consisting of moneys and securities, which, at the time of the passing of the bankruptcy act, 1861, stood, in the Bank of England, to the credit of the commissioners of the insolvent debtors' court, and was, by the 26th section of that act, directed to be carried by the bank to the account of the accountant in bankruptcy. Provision has now been made for its transfer to the commissioners for the reduction of the national debt. *Robson Bkcy.*

Insolvent law. A term applied to a law regulating the settlement of insolvent estates, and according a certain measure of relief to insolvent debtors. The leading features of insolvent laws,

as the term is generally understood in the United States, are, that they are appropriate measures of state legislation, as opposed to a bankrupt law, which is within the sphere of congress; that they are suspended whenever a national bankrupt law is in operation, but may revive on its repeal; that they are not confined to merchants and traders, but afford their relief to all classes; and that they provide for a sale and distribution of all available assets of the debtor among his creditors, and for a discharge of the debtor's person from arrest and imprisonment, but leave the contract or indebtedness existing, and liable to be satisfied out of the debtor's future acquisitions, except that as between parties residing within the state, or as respects contracts made in the state, a state insolvent law may afford a complete discharge.

INSPECTION. Looking into; actual examination; observation of the corpus of a subject.

Primarily, the term imports an examination in which the sense of sight is the chief element; but it is not used as excluding other aids.

The term is frequently used of an official examination of merchandise, particularly provisions, to determine whether they are fit for market. It may be used of persons, as in laws authorizing an examination to detect disease. Also, the exercise by an individual of the right or privilege of reading public documents and papers on record, or the books or papers of an adverse party to litigation by way of preparing one's own case, is called inspection.

Inspection law. Laws authorizing and regulating the appointment of inspectors, and the official examination by them of produce or merchandise about to be offered for sale, have long been familiar in the statute books. The enactment of such laws is the exercise of a power recognized and sanctioned by unquestioned usage, and is included within the general legislative power of a state. The constitution of the United States recognizes such legislation by the states in the provision of art. 1, § 10, cl. 2, that no state shall lay duties on imports except what may be necessary "for executing its inspection laws." The primary and proper object of such laws is understood to be the protection of the public health and welfare against unwholesome or unmarketable merchandise or provisions, which otherwise might be imposed upon ignorant or unwary purchasers.

Inspection of documents. This expression is sometimes used with reference to the right of a person to inspect and take copies of documents of a public nature in which he is interested. More frequently it is used in connection with the right of a party in an action or suit to inspect and take copies of documents material to his case, which may be in the possession of the opposite party.

In English practice, this may be done by a plaintiff in a chancery suit; also by a defendant, when he has sufficiently answered the plaintiff's interrogatories. For this purpose, the party desiring to inspect documents in his adversary's possession takes out a summons requiring his opponent to state what documents he has in his possession, and to make an affidavit in a prescribed form for that purpose. *Hunt Eq.* Pt. II. ch. 2, § 2. Leave to inspect documents will also, in certain cases, be given by a judge at chambers in an action at common law. See Stat. 14 & 15 Vict. ch. 99, § 6. And provisions are made for the inspection of documents under the judicature act, 1875, by order xxxi., rules 11–22, in the first schedule to that act.

In American practice, the power of courts to afford an inspection of books and papers was, in former years, recognized and exercised, upon the principles of equity jurisprudence; but has, in recent times, by the codes of reformed procedure and by special statutes, been much enlarged and facilitated.

Deed of inspectorship. The name of an instrument authorized by the former insolvent laws of England, to be entered into between an insolvent debtor and his creditors, upon a composition of the debts, appointing one or more person or persons to inspect and oversee the winding up of such insolvent's affairs on behalf of the creditors. *Wharton.*

Trial by inspection was a mode of trial formerly in use in England, by

which the judges of a court decided a point in dispute, upon the testimony of their own sense, without the intervention of a jury. It was allowed in cases where the fact upon which issue was taken must, from its nature, be evident to the court from ocular demonstration or other irrefragable proof, and was adopted for the greater expedition of a cause. Thus questions whether a party were an infant or an idiot or not, whether an injury was a mayhem or not, and the like, might be determined on an inspection by the judges.

This, as a distinct method of trial, has been long disused. But a practice of allowing a subject-matter involved in a trial to be submitted to the jury for inspection, as an aid to their determination, exists, though under stringent limitations. A strong theoretic objection to it is that there is no way by which the impressions thus made upon the minds of the jury can be made matter of record, and brought before a court of error, for purposes of review. In an action for breach of warranty of a horse, if the plaintiff is allowed to bring the horse into court, and submit him for inspection, the verdict is almost necessarily final; the defeated party cannot make the horse an exhibit, or in any manner have a review, in a court of appellate jurisdiction, of the inspection thus allowed. Hence the theory of jury trials requires that the cause should be tried upon the testimony of witnesses.

Documents, indeed, can be incorporated into the record; hence original papers are freely submitted to the jury for inspection. As to other matters, the theory of trial and review sustains a general rule that the jury are to hear the testimony of persons who have seen the subject-matter of dispute, and describe it, stating the relevant facts. This testimony is preferred to a direct inspection, not only because it is usually more convenient, but also because it is more capable of judicial control and review. But practical necessities have established departures from or exceptions to the rule. There is a well-settled practice, in causes involving the location and description of real property, of allowing the jury to go and *view* the premises. Things to which testimony relates, such as the limb of plaintiff which has been injured by the tort for which he sues, the weapon with which the defendant is alleged to have committed the homicide with which he stands charged, are often brought into court and submitted to the jury. The proper rule may perhaps be stated thus: the subject-matter may be, in the discretion of the court, submitted to inspection by the jury, for the purpose of enabling them to understand the testimony, but not to enable them to decide without testimony. In other words, the verdict on the issue must be founded on testimony of witnesses or documentary evidence, as to the constitutive facts; but if it appears expedient that the jury, in order to understand the statements in evidence, should see the persons, places, or things to which they refer, the court, giving proper instructions, may allow an inspection.

INSPEXIMUS. We have inspected; we have examined. The emphatic word of the Latin form of exemplification of letters-patent; often applied as the name of such an exemplification.

INSTALLATION. The ceremony of putting a dignitary or officer in full possession of his dignity or office. It is more commonly used of ecclesiastical dignitaries, but is not inapplicable to high civil officers. In the church of England, it is used for the induction (*q. v.*) of a dean, prebendary, &c., into possession of his stall or other seat of office, in the cathedral to which he has been appointed. In its more general sense, it seems to import some measure of public formality, like inauguration, *q. v.* A simple qualification of a functionary, by taking the oath of office, though it would operate to invest him with authority, would not be called installation.

INSTALMENT. 1. When a debt is divided into portions which are made payable at different times, these portions are called instalments.

2. The older books use instalment in the sense of installation, *q. v.*

In dignities, possession is given by instalment; in rectories and vicarages, by induction, — without which no temporal rights

accrue to the minister, though every ecclesiastical power is vested in him by institution. 2 *Bl. Com.* 312.

INSTANCE COURT. One of the two divisions of admiralty courts. An "instance court" takes cognizance of contracts made and injuries committed on the high seas; a "prize court" has jurisdiction of prizes, &c. Percival *v.* Hickey, 18 *Johns.* 257. See ADMIRALTY.

INSTANTER. Instantly; forthwith; immediately; without delay. This word does not, in practice, import entire absence of delay or allowance of time. It is usually said to mean within twenty-four hours. Compare FORTHWITH.

INSTITOR. A term in the civil law for an agent; a person placed in charge of the property or business interests of another.

INSTITUTES. Text-books, comprising the established principles of jurisprudence, written out in a methodical or comprehensive manner, have been sometimes styled Institutes; examples are Justinian's Institutes of the civil law, Coke's Institutes of English law, Bouvier's Institutes of the municipal law in the United States. The term does not import any thing characteristically or definitely different from "Commentaries" or "Treatise."

Institutes of Gaius, or Caius. This is believed to be the earliest systematic treatise on the Roman law, and to be the source and model of the much better known Institutes of Justinian. It was wholly lost in ancient times, and was unknown to jurists of the middle ages; but in 1816 a copy was discovered which has been the foundation of several published editions.

Institutes of Justinian. Elements of the Roman law, in four books, compiled by the lawyers Tribonian, Theophilus, and Drotheus, by order of the emperor Justinian. The work was promulgated in the year 533, and in modern times has been regarded as a leading compilation of the ancient civil law. See CORPUS JURIS CIVILIS. Since the discovery, however, of a copy of the Institutes of Gaius, it has appeared that the Institutes of Justinian are little more than a new edition of that work, omitting what had become obsolete, and including the new constitutions of Justinian as far as they had then been issued. 1 *Mackeld. Civ. Law*, 56.

The Institutes of Justinian are divided into four books, each book into several titles, and every title into several parts. The first is called *principium*, which is the beginning of the title; and those which follow, paragraphs. The first book of the Institutes has twenty-six titles, the second twenty-five, the third thirty, and the fourth eighteen; in all there are ninety-one titles. The division of subjects is triple, — into persons, things, and actions, under which heads the subject-matter of the four books is comprised. The first book, after two titles devoted to preliminary explanations of justice, law, and right, treats of the rights of persons; the second, third, and five first titles of the fourth, treat of things; and actions are the subjects treated of from the sixth title of the fourth book to the end. *Wharton.*

INSTITUTION. 1. In a general sense, commencement, establishment; as the institution of a suit, the institution of a ceremony or rule.

2. The rules and customs of a community; the peculiar methods and usages of the conduct of government are called the institutions of that people.

3. An organization or establishment for execution of some purpose of public concern, as an asylum or a college, is called an institution. By institution, in this sense, is understood a permanent establishment, as contradistinguished from an enterprise of a temporary character. City of Indianapolis *v.* Sturdevant, 24 *Ind.* 391.

4. In ecclesiastical law, institution is an investiture of the spiritual authority and duties attached to a benefice, as induction (*q. v.*) is of the temporalities. It is the act of conferring upon a minister the spiritual charge of a church or parish, by a service adapted to the occasion. In English ecclesiastical law, induction and institution are kept quite distinct; in the usages of American Episcopalians, they are blended in one service. *Staunton.*

5. In the civil law, institution signifies the designation by an individual of another to be his heir.

Institution, in ecclesiastical usage, is putting a clerk into possession of a spiritual benefice, previous to which the oaths against simony and of allegiance and supremacy are to be taken. It is a conveyance or commitment of the cure of souls from the bishop

to the incumbent, whereby the benefice becomes filled. It is thus performed: the clerk kneels before the ordinary, or commissary having a deputation for that purpose, whilst he reads the words of the institution out of a written instrument, drawn for this purpose, with the episcopal seal appended, which the clerk holds in his hand during the ceremony. The act of presentation only gives the clerk a right *ad rem*, but institution gives him a right *in re*, when he becomes parson as to the spirituality to celebrate divine service; and may enter on the parsonage house and glebe, and take the profits of the benefice, though he cannot grant, or let, or claim a freehold in them, or bring an action for them till induction. *Wharton.*

INSTRUMENT. 1. This word is most frequently used to denote something reduced to writing, as a means of evidence; or by elision for written instrument. It is *nomen generalissimum* for bills, bonds, conveyances, leases, mortgages, promissory notes, wills, and the like; but scarcely includes accounts, letters in ordinary correspondence, memoranda, and similar writings, where the creation of evidence to bind the party, or the establishment of an obligation or title, is not the primary motive.

2. It has also the more general sense of a means of accomplishing something; a thing useful in the execution of a purpose. Thus the expression instruments of evidence might be shown by the connection to include all means of proof, witnesses as well as documents.

Instrument of sasine. An instrument in Scotland by which the delivery of "sasine" (*i.e.* seisin, or the feudal possession of land) is attested. The form of this instrument is given in schedule B to Stat. 8 & 9 Vict. ch. 35, passed in 1845. It is subscribed by a notary in the presence of witnesses, and is executed in pursuance of a "precept of sasine," whereby the "granter of the deed" desires "any notary public to whom these presents may be presented" to give sasine to the intended grantee or grantees. It must be entered and recorded in the registers of sasines. *Mozley & W.*

INSURE. To engage to indemnify a person against pecuniary loss from specified perils. Insurance: a contract to pay money to another, upon the occurrence of a specified event, by way of indemnity for his loss thereby. Insurer: one who engages to pay an indemnity, on a destruction or loss of property, to a person damaged thereby. Insured, *n.*: a person who has obtained the engagement of another that the latter will pay an indemnity for any loss the former may sustain by injury or destruction of property in which he is interested. Insured, *adj.*: applies to property which is the subject of such an engagement.

Various classes or kinds of insurance are in use. *Marine* insurance applies to vessels, cargoes, and property exposed to maritime risks. *Fire* insurance covers buildings, merchandise, and other property on land exposed to injury by fire. *Life* insurance means the engagement to pay a stipulated sum upon the death of the insured, or of a third person in whose life the insured has an interest, either whenever it occurs, or in case it occurs within a prescribed term. *Accident* and *health* insurance include insurances of persons against injury from accident, or expense and loss of time from disease. Many other forms might exist, and several others have been to a limited extent introduced in recent times; such as insurance of valuables against theft, insurance of the lives and good condition of domestic animals, insurance of valuable plate-glass windows against breakage.

Insurances are usually divided, according to the degree of risk contemplated, into common insurances, hazardous, and double or extra hazardous. See HAZARDOUS.

Insurance or assurance is a contract by which one party, in consideration of a premium, engages to indemnify another against a contingent loss. The party who pays the premium, and is to have the advantage of the security, is called the insured or assured; the party giving the security is termed the underwriter or insurer; and the instrument is called a policy of insurance.

Insurances are mainly of three kinds:

1. Marine insurances, which are insurances of ship, goods, and freight, against the perils of the sea, and other dangers therein mentioned.

2. Fire insurances, which are insurances of a house or other property against loss by fire.

3. Life insurances, which are engagements to pay to the representatives of the assured, within a limited period from the date of his death, a specified sum of money, or to pay any such sum to the assured or his representatives, within a limited period of the death of some other person specified in the policy of assurance. In the former case, the assured is said to insure his own life; in the latter case, he is said to insure the life of the person specified in the policy of assurance, who must be a person in

whose life the assured has an interest. It may be added, that, by section 10 of the married women's property act, 1870 (33 & 34 Vict. ch. 93), a wife may effect a policy of insurance on her own or her husband's life, for her separate use. *Mozley & W.*

There is this difference between life insurance policies and all other kinds, that the latter are contracts of indemnity merely, and the moneys secured thereby cease to be payable if no damage arises; but the former, if duly kept up until the death of the party assured, are payable at all events. Dalby *v.* India, &c. Life Assurance Co., 15 *Com. B.* 365.

Insurable interest. Such a concern, right, or title in or to specific property as will sustain a contract to indemnify for its loss. An engagement to insure one who has no interest in the subject insured amounts merely to a wager upon its continued existence, and is, in general, void.

The expression insurable interest does not involve title; an insurable interest in property may exist without either legal or equitable title to the property, Buck *v.* Chesapeake Ins. Co., 1 *Pet.* 151; Carter *v.* Humboldt, &c. Ins. Co., 12 *Iowa*, 287; as in the case of insurances upon the right of a master to primage on freight, Pedrick *v.* Fisher, 1 *Sprague*, 565; upon the expectancy of payment to a mechanic for work already done upon a house, under a contract which postpones payment until completion, Protection Ins. Co. *v.* Hall, 15 *B. Mon.* 411; Franklin, &c. Ins. Co. *v.* Coates, 14 *Md.* 285. Many examples of insurances sustained upon an interest in property less than a title might be given. See *U. S. Dig.* tit. Insurance. And, in the case of life insurance, the idea of title is out of the question. Yet, to sustain an insurance taken out by one person upon the life of another, the insurer must have some pecuniary interest in the life: it may be slight, but must be real; such as the interest which a husband and wife have in each other's lives; that which a creditor has in his debtor's life.

In general, to constitute an insurable interest, there need not be a legal or equitable title to the property insured. If there is a right in or against the property, which some court will enforce upon the property, a right so closely connected with it, and so much dependent for value upon the continued existence of it alone, as that a loss of the property will cause pecuniary damage to the holder of the right against it, he has an insurable interest. Rohrback *v.* Germania Fire Ins. Co., 62 *N. Y.* 47, 54.

Insurance agent. Companies engaged in the business of insurance conduct its details largely by aid of agents. These are known as *general* agents, or as *local* or *sub* agents, according as they have a general oversight of the companies' business in a state or region of territory, or one employed in particular localities only, to receive applications and collect premiums.

Insurance agent, in the internal revenue laws, is one who acts as agent of any fire, marine, life, mutual, or other insurance company or companies, or who negotiates or procures insurance for which he receives any compensation. Act of July 13, 1866, § 9, 14 *Stat. at L.* 119.

Insurance company. An association or company making it their business to enter into contracts of insurance. Two distinct kinds of companies have long been known. Mutual companies: in these the persons insured form the company, that is, each member contributes or engages to pay, whenever losses shall require, a sum to a general fund, and losses sustained by any member are paid out of this fund. Stock companies: in these, members contribute a capital which is liable for losses of the insured, and the insured pay premiums which form the basis of dividends. Some companies combine the two methods.

Until 1824, in England, firms and companies, with the exception of two chartered companies, were prohibited from taking marine insurances. The prohibition was at that date removed, and the business of marine insurance placed on the same footing as other business, and many other companies have been formed. Besides individual indemnities and companies, there are associations formed by ship-owners, who agree, each entering his ships for a certain amount, to divide the losses between them. Such associations have long been known, but appear to be on the decline since 1824. They appear to correspond with mutual insurance companies in America. *Wharton.*

That friendly societies are not insurance companies within a covenant to effect a policy with "some respectable insurance company," see Courtenay *v.* Courtenay, 3 *J. & L.* 519.

Insurance policy. The document or

form of writing by which contracts of insurance are ordinarily evidenced.

The weight of authority is that a writing is not necessary, except, indeed, where the statute creating a corporation with power to make insurances confines them to written policies; but here the reason is in the charter restriction, not in any principle forbidding parol contracts of insurance. As far as the nature of the contract, or the general rules of insurance law, or the ordinary provisions of the statute of frauds, are concerned, the contract need not be written. If reduced to writing, however, as it usually is, the document has a well-settled character and features, and is called a policy.

What are called gaming or wager policies are policies attempted to be effected without the insured having an insurable interest in the subject-matter. These are void.

Double insurance. This is where the insured effects a second insurance with another company or insurer, upon property already covered by insurance.

General insurance. General insurance is where the perils insured against are such as the law would imply from the nature of the contract of marine insurance considered in itself, and supposing none to be expressed in the policy. Special insurance is where, in addition to the implied perils, further perils are expressed in the policy; and they may either be specified, or the insurance may be against all perils. Vandenheuvel *v.* United Ins. Co., 2 *Johns. Cas.* 127, 150.

Re-insurance. This is where an insurer or company, having made insurance upon property, obtains a third party to insure his or their risk. It is to be carefully distinguished from double insurance, being an insurance of an insurer's risk. Upon the winding up of an insurance company, it is common for the managers or receiver to effect an insurance of all the risks of the company in some other company continuing business. The new company takes the place of the old one, in responsibility to the policy-holders, and the old one is practically released. This is re-insurance.

INSURGENT. One who is concerned in an insurrection; one who rises in resistance to the government.

INSURRECTION. A rising of subjects in resistance to their government. It does not seem to differ from rebellion, so much in having a distinct legal character, as in that it presents the idea of a movement on a smaller scale, less extensive territorially, or of briefer duration. It is a milder term than rebellion for a disturbance of the same general character and guilt.

Title lxix. of the United States revised statutes regulates the steps to be taken by the president, when the use of the military power becomes necessary for the suppression of insurrection.

INTEMPERANCE. Does not necessarily imply drunkenness. Thus an instruction "that a person who is in the habit of drinking intoxicating liquors intemperately is a person who is in the habit of getting intoxicated, within the meaning of the statute," is erroneous. Mullinix *v.* People, 76 *Ill.* 211.

INTEND. 1. To design, resolve, purpose. In this sense, the word denotes a state of the mind beyond desire or wish, and this side of attempt or endeavor. One intends to do an act when he not only chooses or prefers it, but also means to attempt it, without, however, having yet done any act or made any movement towards it.

2. To apply a rule of law in the nature of presumption; to discern and follow the probabilities of like cases.

Intended: designed, purposed; also presumed, imputed. Intending: designing, resolving; also presuming, imputing.

The words "intended to be recorded," used in a deed, in reference to a power of attorney, under which the deed purports to have been made, imply a covenant on the part of the grantor to procure the power to be recorded within a reasonable time. Penn *v.* Preston, 2 *Rawle*, 14.

Intendment. Certain rules of judicial action which are founded on considerations of public policy, general convenience, or the probabilities in like cases, without resting upon the circumstances of the particular controversy, are called intendments. Thus it is said that, on an appeal, the intendments are in favor of the judgment under review; that, after verdict, intendments may be made in support of the judgment. So it is said to be an intendment of law

that a man is innocent until proved guilty; that the courts will intend marriage rather than an illicit cohabitation. The term is very nearly equivalent to presumption.

Intendment of law, is found, in old English law-books, used in the sense of the general policy or true meaning of law.

INTENT; INTENTION. A design, resolve, purpose. Intentional, intentionally: done with design or on purpose.

In criminal law, an evil intent is, upon familiar principles, an essential element in offences, with, perhaps, some exceptions of criminal carelessness. For example, a child who is too young to entertain a criminal intent, a lunatic who is disabled from forming one, or a person acting under an honest misapprehension of facts, as they have no criminal intent, are not punishable. This intent, however, is not necessarily a purpose to violate the law; that idea involves knowledge of the law, which is not necessary to criminality. What is to be inquired for is an intelligent purpose to do the act which violated the law.

Intent, as used in the statute 13th of Elizabeth, declaring void conveyances made with intent to hinder creditors, refers to the tendency and natural effect of the deed, rather than to the grantor's actual motive. Whedbee *v.* Stewart, 40 *Md.* 414.

"With intention," in an indictment, held equivalent to "with intent." State *v.* Tom, 2 *Jones L.* 414.

"With an intent" and "for a purpose," are expressions almost absolutely identical in meaning. Commonwealth *v.* Raymond, 97 *Mass.* 567.

Intention, when used with reference to the construction of wills and other documents, means the sense and meaning of it, as gathered from the words used therein. Parol evidence is not ordinarily admissible to explain this. When used with reference to civil and criminal responsibility, a person who contemplates any result as not unlikely to follow from a deliberate act of his own, he may be said to intend that result, whether he desire it or not. Thus, if a man should, for a wager, discharge a gun among a multitude of people, and any should be killed, he would be deemed guilty of intending the death of such person; for every man is presumed to intend the natural consequence of his own actions. Intention is often confounded with motive, as when we speak of a man's "good intentions." *Mozley & W.*

INTER. Among; between. A Latin preposition used in many phrases, among which are the following:

Inter alia. Among other things.

Inter alios. Between other persons; between those who are strangers to a matter in question. A transaction between such persons is termed *res inter alios acta*, q. v. Thus it is common to say that a judicial proceeding cannot affect a party before the court, because it was *res inter alios acta*.

INTERCOMMONING. When the commons of two adjacent manors join, and the inhabitants of both have immemorially fed their cattle promiscuously on each other's common, this is called intercommoning. *Termes de la Ley; Cowel; Jacob; Brown.*

INTERCOMMUNING. Letters of intercommuning were letters from the Scotch privy council passing (on their act) in the king's name, charging the lieges not to reset, supply, or intercommune with the persons thereby denounced; or to furnish them with meat, drink, house, harbour, or any other thing useful or comfortable; or to have any intercourse with them whatever, under pain of being repute art and part in their crimes, and dealt with accordingly; and desiring all sheriffs, bailies, &c., to apprehend and commit such rebels to prison. *Bell.*

Inter conjuges. Inter virum et uxorem. Between husband and wife.

Inter conjunctas personas. Between conjunct persons. By the act 1621, cap. 18, all conveyances or alienations between conjunct persons, unless granted for onerous causes, are declared, as in a question with creditors, to be null and of no avail. Conjunct persons are those standing in a certain degree of relationship to each other, such, for example, as brothers, sisters, sons, uncles, &c. These were formerly excluded as witnesses, on account of their relationship; but this, as a ground of exclusion, has been abolished. *Trayn. Max.*

Inter partes. Instruments in which two persons unite, each making conveyance to, or engagement with, the other, are called papers *inter partes* — between parties — in distinction from those in which one party only does the act, makes the conveyance, &c., set forth, as in a deed poll, a will, a bill of sale, a promissory note.

Inter regalia. Among the things belonging to the sovereign. Among these are rights of salmon fishing, mines of gold and silver, forests, forfeitures, casualties of superiority, &c., which are called *regalia minora*, and may be conveyed to a subject. The *regalia majora* include the several branches of the royal prerogative, which

are inseparable from the person of the sovereign. *Trayn. Max.*

Inter rusticos. Among the illiterate.

Inter se, or inter sese. Between themselves.

Inter vivos. Between the living; between living persons. This phrase is chiefly applied to gifts, to distinguish an ordinary gift from a gift made in contemplation of death, termed *donatio mortis causa*, q. v. The expression also distinguishes transfers of real estate by conveyance from devises.

INTERDICT. 1. In the Roman law interdict was the name of a species of remedy, often said, somewhat loosely, to correspond to the modern injunction. *Jacob; Brown.* In its principal form or use it did resemble injunction; but the uses and scope of it varied at different periods. In early times, it seems to have been a simple prohibition, by the *prætor*, ancillary to an action involving rights of possession, forbidding that either party should do any thing to affect the possession until the right had been determined. In the time of Gaius, it had been developed into an extraordinary action, by which a summary decision of the right of possession might be obtained. It was employed in three forms, known as the prohibitory, the exhibitory, and the restitutory interdict. The first seems to have corresponded more nearly to the original form of the remedy; it prohibited interference with the subject-matter in controversy, and operated much like the equitable remedy of injunction. The second called for an exhibition of accounts, like a modern decree for an accounting. The third was in the nature of a decree that a possession lost by force should be restored to the party. See *Hunter's Rom. Law*, 835.

2. In Scotch law, it is an order of the court of session or of an inferior court, pronounced, on cause shown, for stopping any act or proceedings complained of as illegal or wrongful. It may be resorted to as a remedy against any encroachment either on property or possession, and is a protection against any unlawful proceeding. *Bell.*

3. In ecclesiastical law, a censure prohibiting the administration of religious ordinances and divine service, either to particular persons or within designated territorial limits.

INTERDICTION. In French law, a person over twenty-one years of age, if he is in a habitual state of imbecility or insanity, may be excluded the management of his goods, upon the application of any of the relatives, or, they failing, on the application of the *procureur du roi*, to the court of first instance, who will thereupon direct an inquiry before the *conseil de famille*. The interdiction may be either absolute or limited: in the case of a limited interdiction, the party is able to act, with the approval of a *conseil judiciaire*.

INTERESSE. Interest. The interest of money; also, an interest in lands. The word, in the latter sense, includes all estates, rights, and titles that one may have of, in, to, or out of lands.

Interesse termini. An interest in a term. A right to the possession of a term at a future time, as distinguished from a term of which the lessee is in actual possession. It is that species of property or interest which a lessee for years acquires in the lands demised to him, before he has actually become possessed of those lands; as distinguished from that property or interest vested in him by the demise, and also reduced into possession by an actual entry upon the lands and the assumption of ownership therein, and which is then termed an estate for years. Thus, where an estate for years in lands is granted to commence at a future period, the grantee, of course, cannot enter until that period has arrived; but still he has acquired a kind of estate, or at least interest, in the lands; and the estate or interest so acquired, and which he will continue to have until the period at which the term is to commence shall arrive, and he shall have entered upon the possession of the lands, is simply an *interesse termini*.

INTEREST. 1. A claim to advantage or benefit from a thing; any right in the nature of property, but less than title; a partial or undivided right; a title to a share.

In this sense, the word is used in a great variety of ways, and with many different shades of meaning. Its chief use seems to designate some right attaching to property which either cannot or need not be defined with precision;

hence it occurs in many connections where its meaning is vague, not from any peculiarity in the word, but because there was no certain, definite meaning to be expressed. In some connections, it seems to be used as including title, but as broader, and chosen because more comprehensive, as in the rules that actions shall be brought in the name of the real party in interest, that contracts for sale of any interest in real property must be in writing. Sometimes it seems to mean advantages less than title, as in the expression that a lessee, before entry, has no estate in the land, but only an interest in the term. Sometimes it is added to words of more definite meaning, apparently only by way of precaution that no conceivable claim shall be omitted, as in conveying all one's right, title, and interest. Sometimes it signifies an undefined share, as in saying that one has an interest in a business, that a master was promised an interest in the freights.

Interest, in one legal signification, means the estate or property which a man possesses either in land or chattels, the quantum of which, of course, depends upon the title under which he holds, and which, therefore, varies in exact proportion to the different titles under which property can be held. Thus, in land, a man may be possessed of a freehold interest, or of an interest less than freehold; which main classification may again be divided into his interest in fee-simple, fee-tail, or for life, or his interest for a term of years, or at will. So, also, with regard to the interest or property in goods and chattels, it may be either joint or several: joint, if shared with others (as with the part owners of a ship); several, if possessed by one person exclusively, or by more than one, their interests, however, not being in common. *Brown.*

Interest, in a provision peculiarly worded, in a deed of settlement giving a wife power of appointment over the interest, rents, and profits conveyed by the deed, was held to mean estate, on the grounds that "rents and profits" sufficiently covered the idea of income; that interest might as well mean estate or property as annual revenue; and that, unless it were so construed in this deed, no provision was made for final disposal of the inheritance or fee. Ladd *v.* Ladd, 8 *How.* 10, 29.

2. A bias or inclination of mind, actual or presumable, founded upon a claim to advantage or liability to loss; some such relation to a matter in controversy as will give rise to a pecuniary gain or loss, from the event.

There is a familiar use of the word to signify a favorable mental inclination, as in the expressions, a wife may be expected to take an interest in her husband's business; brokers are paid by commissions, to increase their interest in effecting sales. This, however, is a purely vernacular use of the term, and beyond the scope of this work. The technical sense now under consideration is a modification, perhaps, of this vernacular one, but involves the element, important to be recognized, of prospect of gain or loss, as the reason of the mental inclination designated. When a witness is called incompetent from interest, or a judge or juror is pronounced disqualified because interested, the meaning does not include all kinds of bias, but a bias resting upon some pecuniary grounds, — some inclination which the law imputes to the individual on account of a probability of gain or loss, and because such probability might in ordinary cases divert the action of the mind in testifying or deciding.

Interest, in a statute that no witness shall be excluded by interest in the event of the suit, means concern, advantage, good, share, portion, part, or participation. Fitch *v.* Bates, 11 *Barb.* 471.

The fees which the law gives for the performance of official duties in relation to civil or criminal proceedings do not constitute an interest in the proceedings. They are regarded simply as an equivalent for the service performed. A magistrate is not disqualified by interest to render a judicial decision because it will call for further official action, in which he will receive official fees. Commonwealth *v.* Keenan, 97 *Mass.* 589.

3. A compensation, usually reckoned by percentage, for the loan, use, or forbearance of money.

The sum lent is called the *principal*, the sum agreed on as interest is called the *rate per cent*, and the principal and interest, added together, is called the *amount*.

Interest is distinguished into simple and compound. *Simple* interest is that which is paid for the principal or sum lent, at a certain rate or allowance, made by law or agreement of parties. *Compound* interest is when the arrears of interest of one year are added to the principal, and the interest for the following year is calculated on that accu-

mulation; in other words, interest upon interest.

The amount of interest which may be taken is in most jurisdictions limited by law. This limitation does not, however, enter into the meaning of the word; that is, the word interest does not necessarily import a lawful charge for use of money, a compensation within the rate allowed. It may extend to a charge beyond what is allowed. Such a charge is called excessive or unlawful interest, or usury, *q. v.*

When a loan made to facilitate a mercantile adventure at sea is put at risk upon the event of the voyage, the lender is not restricted to the rate allowed upon loans made to be repaid absolutely, but, in view of his risk, is permitted to contract for a higher rate. See FŒNUS NAUTICUM; MARINE INTEREST.

Interest on money is a certain profit for the use of a loan. Dry Dock Bank *v.* American Life Ins. & Trust Co., 3 *N. Y.* 344, 355.

Interest is the premium allowed by law for the use of money. Gaar *v.* Louisville B. Co., 11 *Bush*, 180.

In a bond to pay the "interest" of a fund for one's lifetime support, this word was construed in its usual sense of a compensation for the forbearance of money, and not otherwise to create a trust. Granger *v.* Pierce, 112 *Mass.* 244.

Interest is an accessory or incident to principal. The principal is a fixed sum, the accessory is a constantly accruing one. The former is the basis on which the latter rests. Interest cannot, by mere implication of law, sustain the double character of accessory and principal. After interest has accrued, the parties may, by their contract or acts, change its character to that of principal, and then interest upon it may commence to run. But it does not become principal so as to draw interest merely because it has become due. In other words, interest is not compounded, except by agreement of parties. Doe *v.* Warren, 7 *Me.* 48.

A promissory note for a certain sum with "annual interest" requires the payment of the interest annually. The expression describes not merely the mode of computing the interest, but also the time of payment. Catlin *v.* Lyman, 16 *Vt.* 44.

Two kinds of interest are known (to the laws of Spain): judicial or legal, and conventional or customary. Judicial interest is a certain rate of interest established and declared by a general law of the country, to be computed from the time of a judicial demand, in all cases in which no express stipulation is made. Conventional interest is a certain rate of interest agreed upon by the parties, which may be more or less than the rate established by the general law of the country, according to the usage of the particular place, and regulated by the relative value of the sum loaned and the profits arising from the use. Miner *v.* Bank of Louisiana, 1 *Mart.* (*La.*) 20; Fowler *v.* Smith, 2 *Cal.* 568.

INTEREST REIPUBLICÆ. It benefits or concerns the republic; it is for the advantage of the government or of the state. These words are the commencement of several maxims. Ordinarily, they do not relate particularly to republics in the technical sense, of a form of government distinguished from a monarchy or a democracy, but refer to the public interest, the general welfare, the state or commonwealth in the sense of the body politic and irrespective of distinctions as to form of government. The meaning is not, "it is for the interest of a republic" as distinguished from other kinds of government that such and such things shall be done, but "it is for the general interest as represented by the government," whatever the form may be, and as distinguished from individual or private interests, that they shall be done.

Interest reipublicæ ut pax in regno conservetur, et quæcunque paci adversentur provide declinentur. It benefits the state that peace be preserved in the kingdom, and that whatever things are adverse to peace be prudently declined.

Interest reipublicæ ne maleficia remaneant impunita. It concerns the state that crimes should not remain unpunished.

Interest reipublicæ quod hominea conaerventur. It concerns the state that men be preserved.

Interest reipublicæ res judicatas non rescindi. It concerns the state that things adjudicated be not rescinded.

Interest reipublicæ suprema hominum testamenta rata haberi. It concerns the state that men's last wills be confirmed.

Interest reipublicæ ut carceres aint in tuto. It concerns the state that prisons be in security.

Interest reipublicæ ut quilibet re sua bene utatur. It concerns the state that every one uses his property properly.

Interest reipublicæ ut sit finis litium. It concerns the state that there be an end of lawsuits. This maxim is often quoted, and has a wide application. To this doctrine may be referred the principle of the limitation of actions, the statutes of set-off, which were enacted to prevent the necessity of cross-actions, and the rule which forbids circuity in legal proceedings; in accordance with which a court of law will endeavor to prevent circuity and multiplicity of suits, where the circumstances of the litigant parties are such that, on changing their relative positions of plaintiff and defendant, the recovery by each would be equal in amount. Carr *v.* Stephens, 9 *Barn. & C.* 758; Penny *v.* Innes, 1 *Cromp. M. & R.* 439; Simpson *v.* Swan, 3 *Camp.* 291.

INTERFERENCE. This word is used in patent law in a technical sense, under the provision of Rev. Stat. § 4904, prescribing proceedings whenever an application is made for a patent which, in the opinion of the commissioner, would interfere with any pending application, or with any unexpired patent. It is held that two patents interfere only when they claim, wholly or partially, the same invention. That is what constitutes an interference. Gold, &c. Separating Co. *v.* United States Disintegrating Ore Co., 6 *Blatchf.* 307; 3 *Fish. Pat. Cas.* 489.

When an examination of an application for a patent discloses reason to believe an interference is involved, the commissioner directs an investigation to be made, for the purpose of determining which of the claimants was the first to make the invention, or that portion of it from which the interference results. If the interference is between two applications, a patent will be finally granted to him who is shown to be the first inventor, and will be denied, so far as the point thus controverted is concerned, to the other applicant. But if the interference is between an application and a previous patent, all that can be done is to grant or withhold from the applicant the patent he asks. There is no power in the patent office to cancel the existing patent. If the patent is granted, the two patentees will stand upon a footing of equality, and must settle their rights by a resort to the courts.

In interference cases, each party is allowed to take the testimony of witnesses, in accordance with established rules.

INTERIM. Meanwhile; in the mean time.

Interim curator. A person appointed by justices of the peace to take care of the property of a felon convict, until the appointment by the crown of an administrator or administrators for the same purpose. (*Stat.* 33 & 34 *Vict.* ch. 23, §§ 21–26; 4 *Steph. Com.* 462; *Cox & Saunders' Cr. Law,* 442–445.) *Mozley & W.*

Interim order. An order to take effect provisionally, or until further directions. The expression is used especially with reference to orders given pending an appeal. *Mozley & W.*

INTERLINEATION. The act of writing between the lines of an instrument; also, sometimes, whatever is written between lines.

The word interlineation does not include an erasure. Didier *v.* Warner, 1 *Code R.* 42.

INTERLOCUTORY. Done between the commencement of a suit and its final determination; incident to and during the progress of an action; that which decides, not the cause, but only some intervening matter relating to the cause. Mora *v.* Sun Mutual Ins. Co., 13 *Abb. Pr.* 304. See FINAL. The principal use of the term is in distinguishing determinations which are not reviewable in a higher court, on appeal or error, from those which, being final, may be carried up for review; and numerous cases upon what decisions are interlocutory are collected, *U. S. Dig.* tit. APPEAL; ERROR.

Interlocutory costs. Costs accruing upon proceedings in the intermediate stages of a cause, as distinguished from final costs, such as the costs of motions.

Interlocutory decree. A decree that is not final, and does not conclude the suit. It seldom happens in equity suits that the first decree can be final; for, if any matter of fact is strongly controverted, the court usually directs an inquiry in chambers to be made, after which the matter is to come on again for further consideration, and the final decree is therefore suspended until the result of such inquiry is made known.

Such decree, contemplating and requiring further judicial action, is called interlocutory. Examples are:

A decree intended to preserve the property in dispute, and to keep it within the control of the court until all the rights of the parties concerned can be passed upon, is interlocutory only. Forgay *v.* Conrad, 6 *How.* 201; McKim *v.* Thompson, 1 *Bland*, 150.

A decree which declares the rights of the parties, and directs a reference, preliminary to ascertaining the amount for which the defendants will finally be held responsible, Kane *v.* Whittick, 8 *Wend.* 219; decrees directing foreclosure, a partition, a sale, or a resale, but involving a necessity for a confirmation, or decree of distribution, &c., in the future, McMurtry *v.* Glasscock, 20 *Mo.* 432; Cork *v.* Knickerbocker, 11 *Ind.* 230; Hunter *v.* Miller, *Id.* 356; Carr *v.* Hoxie, 13 *Pet.* 460; Clifton *v.* Livor, 24 *Ga.* 91; Demaray *v.* Little, 17 *Mich.* 386; Gudgell *v.* Mead, 8 *Mo.* 53; Allen *v.* Belches, 2 *Hen. & M.* 595.

Interlocutory judgment. In practice according to the course of the common law, or in civil actions brought in the states which have adopted codes of reformed procedure, "interlocutory" is applied to a judgment that is not final, but which is given upon some plea, proceeding, or default occurring in the course of the action, and which does not terminate the suit. In common-law practice, the term includes judgments on demurrer, or on verdict for the defendant on certain dilatory pleas called pleas in abatement, those which are given when, although the right of the plaintiff in the action is established, yet the amount of damages he has sustained is not ascertained, which cannot be done without the intervention of the jury. This happens when the defendant in an action suffers judgment by default, or confession, or upon a demurrer, in any of which cases, if the demand sued for be damages, and not a specific sum, then a jury must be called to assess them; therefore, the judgment given by the court previous to such assessment by the jury is interlocutory and not final, because the court knows not what damages the plaintiff has sustained. In practice under the codes, as the jurisdiction exercised by judgment includes both equitable and legal suits, the phrase interlocutory judgment is substantially coextensive with its sense in both law and equity practice, strictly so called.

Interlocutory order. An interlocutory order is an order made during the progress of a suit upon some incidental matter which arises out of the proceedings; an order made upon a point whereby some right or principle is established in the cause on which a final decree depends, or which determines or directs some matter or thing which is necessary to the making of the final order or decree. The term is applied in all branches of practice, common law, equity, and admiralty, and under the state codes.

INTERMEDDLE. An injunction order, forbidding the defendant to intermeddle with property, means to meddle with it improperly; to do something to or with it that may affect injuriously the plaintiff's rights in the action. It does not mean that the defendant shall not take care of or protect such property. McQueen *v.* Babcock, 41 *Barb.* 337.

INTERN. Has been recently used, as a transitive verb, in the sense of to restrict or shut up a person, as a political prisoner, within a limited territory. Thus to intern within a city corresponds with to imprison in a building.

INTERNATIONAL LAW. The law of nations; that system of rules recognized by common consent among civilized peoples, by which subjects of common concern, such as the effect to be given by one to the laws of another; the conflict of laws of different sovereignties; the rights of commerce upon the high seas; the rights of emigration and asylum, and the return of fugitives; the conservation of peace; the obligations of neutrality; the conduct of war; and effect of captures and conquests, — are adjudicated.

The different states of Christendom are combined by religious faith, by civilization, by science and art, by conventions, and by usages or ideas of right having the moral force of law, into a community of nations, each politically sovereign and independent of the other, but all admitting much interchange of legal rights or duties. In their mutual

intercourse, the nations recognize, and more or less obey, certain rules of right, partly natural and partly conventional, which oblige their consciences and control their actions, in war as well as in peace, and which constitute the law of nations. This law of nations is subdivided into two great parts: one, which treats of the reciprocal duties and rights of nations personified, and in their public relation as nations; and another, which treats of the duties and rights of each nation in its relation to individuals of another nation. As respects the United States, this law of nations, although not specially adopted by the constitution, or any municipal act, is deemed essentially a part of the law of the land. 1 *Op. Att.-Gen.* 27; 7 *Id.* 18; *Id.* 229.

International law is divided into two branches: public international law, which comprises the rights and duties of sovereign states towards each other; and private international law, which comprises the rights and duties of the subjects of different states towards each other, and is mainly conversant with questions as to the particular law governing doubtful cases. *Mozley & W.; Field's Draft Code*, § 8. Of the questions between a sovereign state and citizens of another state, some are generally reckoned as belonging to one of these branches and some to the other. Thus the question of capturing contraband goods would be deemed to belong to public international law, but the question how far legacy duty is payable by a foreigner would be deemed to belong to private international law. The place of many of such questions is difficult of assignment.

INTERPLEADER. The name of a remedy allowed where the right to some subject-matter is in controversy between two claimants, while the thing itself is in the possession of a third person who makes no claim to it, and has no other interest in it than to deliver it to the true owner, and be protected against the claims of the competitor.

The older books speak of interpleader as if it were incidental and peculiar to the action of detinue. But it has long been extensively used as an equitable remedy, and is best known in that aspect. By statute in England it has been extended in courts of law.

A bill of interpleader lies where two or more persons severally claim the same thing under different titles or in separate interests from one another, who, not claiming any title or interest therein himself, and not knowing to which of the claimants he ought of right to render the debt or duty claimed, or to deliver the property in his custody, is either molested by an action or actions brought against him, or fears that he may suffer injury from the conflicting claims of the parties. Under these circumstances, he may apply to a court of equity to be protected, not only from being compelled to pay or deliver the fund or thing claimed to both the claimants, but also from the vexation attending upon the suits which may be instituted against him. Gibson *v.* Goldthwaite, 7 *Ala.* 281; 2 *Story Eq.* 112; 1 *Smith Eq. Pr.* 468.

The appropriate allegations in a bill of interpleader are, that two or more persons have preferred a claim against complainant; that they claim the same thing; that the complainant has no beneficial interest in the thing claimed; that he cannot determine, without hazard to himself, to which of the defendants the thing of right belongs. Atkinson *v.* Monks, 1 *Cow.* 691.

INTERPRET. To ascertain the meaning of language; to translate orally from one tongue to another. Interpretation: the art or act of ascertaining the meaning of language, or of expressing its meaning in another tongue. Interpreter: one who restates the testimony of a witness testifying in a foreign tongue, to the court and jury, in their language.

The words "interpretation" and "construction" are used interchangeably by many law writers, but some authorities warrant a distinction.

Dr. Lieber (*Leg. & Pol. Hermen.*) defines interpretation as the art of finding out the true sense of any form of words; that is, the sense which their author intended. Professor Parsons (2 *Contr.* 491, note *a*) says that interpretation properly precedes construction, but it does not go beyond the written text.

Rutherforth (2 *Inst.* 314) defines interpretation as consisting in finding out or collecting the intention of a writer, either from his words or from other conjectures, or from both. And he divides it into three sorts: *literal*, which is where we collect the intention from the words used only; *rational*, where the words do not express his intention perfectly, but

either exceed it or fall short of it, so that we are to collect it from probable or rational conjectures only; and *mixed*, where the words, although they do express his intention when they are rightly understood, yet are in themselves of doubtful meaning, and we are forced to have recourse to conjectures to find out in what sense they are used. This doctrine seems to use "rational interpretation" in substantially the same sense as the "construction" of Dr. Lieber's definition.

The rules of interpretation or construction, whichever term is employed to designate the process of determining the effect of language in a written instrument, vary materially with the nature of the document.

Simple agreements. When these are to be interpreted, the lawful, honest intent in which the parties probably united is the leading guide; and to ascertain this, the courts enquire for and consider all the attendant circumstances, the known desires of the parties in making the contract, the usages of the business in which they were dealing, and the legal conditions; but discard any testimony of the oral negotiations; these are deemed merged in the writing, and any declaration by either party (or of the draughtsman) as to what he individually meant. But the intent sought for is not the actual design of the author of the writing, unqualifiedly.

Specialties. Many of the sealed instruments, and particularly conveyances of land are subject to technical rules governing the interpretation of particular words, which the courts will not relax, merely because the parties may have intended something different from the technical signification. A deed is not treated as subject to the rule of giving effect to the intent, in the same degree as a simple contract.

Negotiable instruments. As these are framed in established forms, for the express purpose of being sold from hand to hand in commerce, they are liable to be enforced, in favor of remote purchasers, according to the commercial meaning of the words, rather than the maker's intention.

Wills. In the elucidation of these, the doctrine of giving effect to the actual intent is carried very far. Interpretation is little else than ascertaining what the testator in fact designed.

Judgments, and *statutes.* In the interpretation of these there must be much qualification of the doctrine.

The foregoing remarks are made with sole reference to explaining words by means of others in the same tongue. Interpret and interpretation are also used in law proceedings in the vernacular sense of translate and translation, meaning, to set forth the sense of words of a foreign tongue in equivalents of our own; and interpreter is almost always used in this signification.

INTERREGNUM. A vacancy in the government, or in the highest official position or supreme head of a government; the period during which such a vacancy exists.

INTERROGATORIES. Formal inquiries or questions, exhibited in writing, for the judicial examination of a party or witness.

Direct or original interrogatories are those which are put on behalf of the party calling a witness. *Cross* interrogatories are those which are interposed by the adverse party.

Interrogatories are customarily employed in several judicial proceedings. A bill in equity looking towards a discovery is accompanied by interrogatories which the defendant must answer under oath. In proceedings for a contempt, one of the first and fundamental steps is to propound interrogatories to the person accused, to elicit precisely what acts supposed to be in contempt he has really done, and what were the attending circumstances, and his actual motive; and his answers to these may relieve him of the charge. The examination of a witness taken out of court upon a commission is conducted by means of interrogatories, prepared by the parties, settled by the court, and annexed to the commission as a guide to the officer taking the examination.

INTERSECTION. The point of intersection of two roads is the point where their middle lines intersect. Springfield Road, 73 *Pa. St.* 127; compare Pittsburg *v.* Cluley, 74 *Id.* 259; Falls *v.* Reis, *Id.* 439.

INTERVENE. To put forward a defence, in a suit to which one has not been made a party, of one's interest in the subject-matter. Intervener or intervenor: one who, not being made a party in a suit in which he is interested, appiles to be heard in it, as to his interest. Intervening or intervention: the act or practice of applying to come in and defend a suit in which the applicant is not a party.

INTESTATE. Without a will. The word is used both as an adjective and as a noun. Thus a person is said to die intestate when he dies without making a will, or dies without leaving any thing to testify what his wishes were with respect to the disposal of his property after his death; also the person himself who has died without a will is meant. Thus, in speaking of the property of a person who has thus died, it is common to say the intestate's property; *i.e.*, the property of the person dying in an intestate condition. Hence intestate is both the opposite to testator, the latter word signifying a man who dies having made a will; and to testate, which means having made a will.

INTOXICATE. Generally relates to the use of strong drink. Intoxicated, used without words of qualification, signifies a condition produced by drinking intoxicating spirituous liquor, and is equivalent to drunk. No additional word is needed to convey this idea. It is sometimes said that a person is intoxicated with opium, or with ether, or with laughing-gas; but this is an unusual or forced use of the word. A complaint under a statute authorizing proceedings against persons found intoxicated, which avers that defendant was found intoxicated, is in this respect sufficient, and need not allege upon what he became so. State *v.* Kelley, 47 *Vt.* 294.

INTOXICATING LIQUORS. Those the use of which is ordinarily or commonly attended with entire or partial intoxication. People *v.* Zeiger, 6 *Park. Cr.* 355.

The terms intoxicating liquor and spirituous liquor are not synonymous. All spirituous liquor is intoxicating, but all intoxicating liquor is not spirituous. Fermented liquor, though intoxicating, is not spirituous, because not distilled. Commonwealth *v.* Grey, 2 *Gray*, 501; Commonwealth *v.* Livermore, 4 *Id.* 18.

A statute amending a previous statute prohibiting the sale of spiritous liquors, by striking out the word "spiritous" wherever it occurs, and substituting "intoxicating," does not operate (with respect to pending prosecutions) as an implied repeal of the earlier law. The later act is not repugnant to the former; but the two may well stand together For the term intoxicating liquors includes a larger class than "spiritous liquors." The two expressions bear the relation to each other of genus and species; all spiritous liquors are intoxicating, but all intoxicating liquors are not spiritous. Hence although "spiritous" is stricken out of the statute, yet if "intoxicating" is simultaneously substituted, there is no moment of time when selling spiritous liquors is not prohibited. Commonwealth *v.* Herrick, 6 *Cush.* 465.

INTRA. Within; in; near.

Several phrases which in classical Latin are introduced by this preposition, by the usage of modern law writers begin with the preposition *infra;* as to which phrases see that word.

INTRUSION. Is used in a technical sense to denote the wrong of taking possession of real property by one who has no color of title, to the prejudice of the tenant next in remainder or reversion. Intruder: the person who thus takes possession.

Blackstone (3 *Com.* 169) ranks intrusion as a species of injury by ouster, or amotion of possession from the freehold, and states it to be the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion. It happens, he says, where a tenant for a term of life dies seised of lands and tenements, and a stranger enters thereon, after such death of the tenant, and before any entry of him in remainder or reversion. The difference between intrusion and abatement he states to be that an abatement is always to the prejudice of the heir or immediate devisee; an intrusion is always to the prejudice of him in remainder or reversion: so that an intrusion is always immediately consequent upon the determination of a particular estate; an abatement is always consequent upon the descent or devise of an estate in fee-simple.

According to *Termes de la Ley*, the word is also applied to copyholds, when a stranger enters or intrudes before the reversioner or remainder-man, after the determination of the particular copyhold estate.

In England, former laws allowed a writ of intrusion as a special remedy to

restore possession to the rightful owner; but this writ has been abolished by Stat. 3 & 4 Wm. IV. ch. 57.

Stephens says (3 *Com.* 669) that intrusion is also used to designate trespass committed on the lands of the crown; as by entering thereon without title, holding over after a lease is at an end, &c. For this the remedy is by an information of intrusion in the court of exchequer.

A defendant in possession of land under a deed claiming legal right to the possession of the premises in good faith cannot be ejected therefrom as an intruder. Russel *v.* Chambers, 43 *Ga.* 478.

INVALID. Not of binding force or legal efficacy; lacking in authority or obligation. See VALID.

INVASION. The entry of a country by a public enemy, making war.

INVENT. To contrive, devise, or plan, by original thought and experiment, and independent of any pre-existent example, some machine, composition, design, improvement, or other article or thing. Invented: applies to a thing thus devised by an original mental process, and independent of any previous example of the same kind. Invention: the process of thought and experiment by which some new machine, composition, or design, &c., is brought into existence. Also, the thing thus originated anew is called an invention. Inventor: a person who, by original thought and experiment, contrives or devises some new article or thing.

To constitute a person an inventor under the patent laws, the mental operation of devising the thing to be patented must be substantially that of his own mind; but he may have collateral and subordinate aid from the minds of others in evolving and completing what he has himself conceived. He must himself have conceived the idea; but this does not exclude all right to make use of the knowledge, or even the suggestions, of other persons. Inquiries made, or information or advice received from men of science, in the course of an inventor's researches, will not impair his right to the character of an inventor. It makes no difference whether an inventor derives his information from books, or from conversation with men skilled in science. Although he is aided by the suggestions of others in arriving at the useful result, yet if, after all the suggestions, there was something left for him to devise and work out by his own skill and ingenuity, he is still to be regarded as the first and original inventor. But if the suggestions and communications of others go to make up a complete and perfect machine, embodying all that is embraced in the patent subsequently issued to the party to whom the suggestions were made; or if one person suggests an idea as to an invention, which is indispensable to its operation, and which in reality constitutes its whole value, and another adopts such suggestion and takes out a patent therefor, — the patent is void, as not being for the invention of the patentee.

Again, the fact that a mechanic or workman employed by one who has devised the idea of a new invention, to make experiments, construct machinery or models, or otherwise to aid in reducing the idea to practice, has suggested improvements in the plan, will not deprive the inventor of the merit of the invention, nor affect the validity of the patent, if they are embraced within it. If an inventor furnishes the idea to produce the result, he is entitled to avail himself of the mechanical skill of others to carry out his contrivance in practice. Persons employed, as well as employers, are entitled to their own independent inventions; but where the employer has conceived the plan of an invention, and is engaged in experiments to perfect it, no suggestions from an employe, not amounting to a new method or arrangement which in itself is a complete invention, is sufficient to deprive the employer of the exclusive property in the perfected improvement. See the cases collected *U. S. Dig.* tit. Patents, or *Abb. Nat. Dig.* tit. Patents. As to what is an invention, see DISCOVERY.

INVENTORY. A list, schedule, or written enumeration of articles of property, in an orderly form, and particularizing the several articles.

Such lists are made for various purposes. The most important use of them is in connection with the administration

of the estates of deceased persons. The laws regulating this subject require the executor or administrator, at the outset, to make an inventory of the assets belonging to the estate. He is charged with the appraised value of the property shown by this inventory, which charge is reduced and extinguished by credits successively allowed him for payments made of debts, legacies, and distributive shares.

The practice of making these inventories is said to be derived from the directions of the Institutes of Justinian. According to the early Roman law, the heir was chargeable with all the debts of the ancestor. But, by the legislation of Justinian, an heir, exhibiting a true inventory of the deceased's goods coming to his hand, was chargeable no further than to the value of the inventory. This was called "benefit of inventory."

In common parlance, &c., the term inventory is applied on other occasions, involving a valuation of goods. Accounts of the goods sold are often called inventories; the accounts taken by sheriffs of goods levied and sold under execution, under distress of goods for rent, &c., are called inventories. The bankrupt laws of the United States require the debtor, at an early stage of the proceeding, to make and file a sworn inventory of his assets.

Inventory does not materially differ, in nature, from invoice; unless, perhaps, the latter implies that prices or valuations are stated more strongly than does the former. But invoice is a term between merchants, and denotes a list such as is used in commercial dealings, while inventory signifies a list prepared for some proceeding under judicial cognizance.

INVEST. 1. To give possession; to put into possession; to put one in possession of a fee, estate, or office newly acquired; to clothe with possession; to clothe possession with the solemnities of law.

2. To lay out money or capital in some permanent form so as to produce an income.

It is rather a forced use of the term invest to apply it to an active capital employed in banking; the word is usually applied to a more inactive and permanent disposition of funds. People *v.* Utica Ins. Co., 15 *Johns.* 358, 384.

The term invest is broad enough to cover the loaning of money, but does not restrict to that mode of investment. Shoemaker *v.* Smith, 37 *Ind.* 122.

A power to an insurance company, to invest the money paid in upon subscriptions to the stock, does not involve banking powers. Scott *v.* Depeyster, 1 *Edw.* 513.

That a power to invest in public stocks or other securities includes power to discount commercial paper by way of loan, but a power to invest in stocks only does not, see Duncan *v.* Maryland Savings Inst., 10 *Gill & J.* 299; N. Y. Fire Ins. Co. *v.* Ely, 2 *Cow.* 678.

A sum is invested within a statute that non-residents shall be taxed on all sums invested in any manner in business within the state, whenever its amount is represented by any thing but money. People *v.* Commissioners of Taxes, 23 *N. Y.* 242, 244.

A wife's separate property being sold, a part of the proceeds was loaned by her husband, who took the borrower's note, payable to the wife; and the wife made a general deposit in bank of another part. It was held that both sums were "secured" and "invested" in her name, within a statute protecting the wife's title to proceeds of her separate estate, if secured or invested in her name. Promissory notes are securities. A general deposit of money in bank is a loan to the bank; and money loaned is invested in a debt against the borrower, whether or not written evidence of the debt is taken. Jennings *v.* Davis, 31 *Conn.* 134.

INVESTIGATION. Denotes inquiry either by observation, experiment, or discussion. Wright *v.* Chicago, 48 *Ill.* 285.

INVESTITURE. A ceremony which accompanied the grant of lands in the feudal ages, and consisted in the open and notorious delivery of possession in the presence of the other vassals, which perpetuated among them the *æra* of their new acquisition at the time when the art of writing was very little known; and thus the evidence of the property was reposed in the memory of the neighborhood, who, in case of disputed title, were afterwards called upon to decide upon it. *Brown.*

Invito domino. The owner being unwilling; against the will of the owner; without the owner's consent. This phrase is frequently used, in criminal law, in discussions of the law of larceny, to constitute which crime the property must be taken *invito domino.*

INVOICE. An account, list, or written statement of goods or merchandise, indicating nature, quality, quantity, and prices of the several articles, such as is usually furnished between mer-

chants, on a sale or consignment of goods.

Invoice does not carry any necessary implication of ownership. An invoice usually accompanies goods that are consigned to a factor for sale, as well as in the case of a purchaser. Rolker *v.* Great Western Ins. Co., 4 *Abb. App. Dec.* 76.

Invoice price, of goods, means the prime cost. Le Roy *v.* United Ins. Co., 7 *Johns.* 343.

IPSE. Inflexions of this Latin pronoun are used in one or two law phrases to intensify the expression or identify strongly the thing spoken of.

Ipsissimis verbis. In the very same words; in the identical words.

Ipso facto. By the fact itself; by the mere fact. By the mere effect of an act or a fact, without any other act or proceeding.

The expression is used where a transfer or forfeiture of property by mere operation of law is declared; and the meaning is, that it shall not be necessary to declare such transfer of forfeiture in a court of law, but that, by the very occurrence of the fact designated or doing of the act prohibited, the change shall be thereby instantly and completely operative. Thus, where the same person obtains two or more church preferments with cure, not qualified by dispensation, &c., the first living is void *ipso facto*, viz., without any declaratory sentence. An estate or lease may be *ipso facto* void by condition, &c. Estates and property have been vested in trustees, &c., by act of parliament, *ipso facto*, without conveyance. Thus it is said that the property of the suitors in the court of chancery, standing in the name of the accountant-general, vests in his successor, *ipso facto*, by the very act of his appointment, without any conveyance from the preceding accountant-general or his representatives.

Ipso jure. By the law itself; by operation of law merely.

IRREGULAR. Not according to rule; improper or insufficient, by reason of departure from the prescribed course. Irregularity: a departing from the lawful course of proceedings; also, a step taken or thing done contrary to rule.

The words import objection or fault: they are not applied to departures from rule which are wholly immaterial, but to those which carry ill consequences in rendering the proceeding defective, voidable, &c. But they do not impute crime or moral wrong. Matters *mala in se* are not properly to be styled irregular; neither is an unwise exercise of discretion, or an injudicious step in matters not governed by a rule. Their chief application is to steps taken in the course of judicial proceedings or in the administration of business, which should be conducted according to an established routine.

Irregular deposit. A strict name for that kind of deposit where the thing deposited need not be returned. See DEPOSIT.

Irregular process. Sometimes the term irregular process has been defined to mean process absolutely void, and not merely erroneous and voidable; but usually it has been applied to all process not issued in strict conformity with the law, whether the defect appears upon the face of the process, or by reference to extrinsic facts, and whether such defects render the process absolutely void or only voidable. Cooper *v.* Harter, 2 *Ind.* 252.

Irregularity is the technical term for every defect in practical proceedings, or the mode of conducting an action or defence, as distinguishable from defects in pleadings. 3 *Chitt. Gen. Pr.* 509.

Irregularity, in the sense of a departure from rule or neglect of legal formalities, is most frequently, though not exclusively, applied to such departure, neglect, or informality as does not affect the validity of the act done. Thus an irregular distress is not now vitiated, so as to make the distrainor a trespasser *ab initio*, and so to render all his proceedings illegal from the first; but, if distress is made for rent justly due, any subsequent irregularity will do no more than give an action for damages to the party grieved, and not even that, if tender of amends is made before action brought. Stat. 11 Geo. II. ch. 19, § 19. *Mozley & W.*

In the canon law, irregularity is used for an impediment to the taking holy orders; as where a man is base-born, notoriously defamed of any crime, maimed, or much deformed in body, &c. *Tomlins.*

IRRELEVANT. Not material to an issue. Irrelevancy: the want of any adaptation to assist in the determination of an issue.

Irrelevancy, in an answer, consists in statements which are not material to the decision of the case; such as do not form or tender any material issue. People *v.* McCumber, 18 *N. Y.* 315, 321.

Irrelevant designates matter in a plead-

ing which has no substantial relation to the controversy in suit. Fabbricotti *v.* Launitz, 3 *Sandf.* 743; Seward *v.* Miller, 6 *How. Pr.* 312.

It is equivalent to impertinent, and includes "scandalous" matter in a pleading. Carpenter *v.* West, 5 *How. Pr.* 53.

A denial of material matter, though insufficient in form, cannot be deemed an irrelevant or sham answer or plea. Seward *v.* Miller, 6 *How. Pr.* 312; Morton *v.* Jackson, 2 *Minn.* 219.

IRREPARABLE INJURY. Does not mean such injury as is beyond the possibility of repair, or beyond possible compensation in damages, or necessarily great damage, but includes an injury, whether great or small, which ought not to be submitted to on the one hand, or inflicted on the other; and which, because it is so large or so small, or is of such constant and frequent occurrence, cannot receive reasonable redress in a court of law. Wahle *v.* Reinbach, 76 *Ill.* 322.

Irreparable injury includes wrongs of a repeated and continuing character, or which occasion damages that are estimated only by conjecture, and not by any accurate standard. Johnson *v.* Kier, 3 *Pittsb.* 204.

IRRESISTIBLE FORCE. This term is used to denote an interposition of human agency, which, from its nature and power is absolutely uncontrollable, such as inroads of a hostile army, piracy, or robbery by force, &c. *Story Bailm.* §§ 25, 26.

This may excuse non-delivery by a carrier or other bailee. Compare ACT OF GOD; INEVITABLE ACCIDENT.

IRREVOCABLE. Not subject to be recalled; not open to change at the will of the party.

Thus a power of attorney is held to be irrevocable by the principal when it is coupled with an interest or granted for a consideration. A will is, in general, revocable; but one made in pursuance of a valid contract or settlement requiring the party to make it may be irrevocable.

ISSUABLE. That which permits an issue to be framed.

Issuable plea. A plea such that the adverse party can join issue upon it and go to trial; a plea to the merits. A demurrable plea is not issuable.

A party is sometimes ordered by the court to plead issuably; which means, to interpose an issuable plea.

Issuable terms. Hilary and Trinity terms were called, under former English practice, the issuable terms, because in them issues were made up for the assizes. The distinction is obsolete since the judicature acts. 3 *Bl. Com.* 353; *Wharton.*

ISSUE, *n.* 1. Offspring; lineal descendants; all persons descended from a common ancestor. In this sense, the word includes not only a child or children, but all other descendants in whatever degree; and it is so construed generally in deeds. But, when used in wills, it is, of course, subject to the rule of construction that the intention of the testator, as ascertained from the will, is to have effect, rather than the technical meaning of the language used by him; and hence issue may, in such a connection, be restricted to children, or to descendants living at the death of the testator, where such an intention clearly appears. Under the same rule, the word, when occurring in a devise, is construed either as a word of purchase or of limitation, as may best answer the intention of the testator; but in a deed it is always taken as a word of purchase; and, when used as a word of purchase, in either a deed or will, it is synonymous and coextensive with the term descendants, and includes all persons who answer that description. 2 *Washb. Real Prop.* 604. The distinction between the employment of the term as a word of purchase and as a word of limitation is important chiefly with reference to the application of the principle known as the rule in Shelley's case. Where an estate is given to one person for life, and by the same act or instrument the remainder is limited to his issue, the term issue is technically construed as a word of purchase, not a mere word of limitation, and the rule in Shelley's case does not apply; but if, as it may be in a devise, the term be construed as merely a word of limitation, like heirs, the rule applies, and the entire estate becomes vested in the first taker. See SHELLEY'S CASE; and compare CHILD; HEIR.

Another occasion for the construction of the word arises in cases of executory devises, limited over upon a person's "dying without issue," or "dying without having issue," or upon a "failure of

issue," of such person, &c. In such a connection, the word was formerly taken in its largest sense as including all descendants, however indefinite or remote, unless explanatory words were added defining the time to which the contingency should apply. As the contingency of a general failure of issue might not occur for many generations, such a devise was deemed too remote to be valid within the rule prohibiting perpetuities. But, under later statutes and decisions, the word issue in such devises is restricted to mean issue at the death of the first taker; and the phrases above mentioned are not now usually deemed to import a general or indefinite failure of issue. Compare DYING WITHOUT CHILDREN; FAILURE OF ISSUE.

Issue, in its usual sense, comprehends all issue to the latest time. Maxwell *v.* Call, &c., 2 *Brock.* 119.

Issue includes all offspring or descendants. Henderson *v.* Womack, 6 *Ired. Eq.* 437.

Issue is more comprehensive than children, and embraces all one's lineal descendants indefinitely. Holland *v.* Adams, 3 *Gray*, 188.

If not qualified or explained, issue may be construed to include grandchildren as well as children. Adams *v.* Law, 17 *How.* 417, 421.

Standing uncontrolled by the context, the word issue is synonymous with descendants. Weehawken Ferry Co. *v.* Sisson, 17 *N. J. Eq.* 475.

In a statute regulating descent, in event of death leaving issue, the word issue is not restricted to "children," but extends to all lineal descendants however remote. Den Rodman *v.* Smith, 2 *N. J. L.* 7.

Issue, used in a will as descriptive of devisees, &c., includes those only who are of the blood of testator, and not those who are connected by marriage. Barnes *v.* Greenzebach, 1 *Edw.* 41.

In a deed, the term issue is universally a word of purchase, and synonymous with "descendants." But the term may be, and often is, in wills, construed as meaning children, where such appears to be the intention of the testator. Such intention must, however, be gathered from the instrument itself. Price *v.* Sisson, 13 *N. J. Eq.* 168, 178.

In a will, the word issue is not a technical expression, implying *prima facie* words of limitation, but will yield to the intention of the testator, to be collected from the words of the will. In a deed or grant it is otherwise. McPherson *v.* Snowden, 19 *Md.* 197.

Issue, in wills and deeds of settlement, may be construed to include grandchildren. Ingraham *v.* Meade, 3 *Wall. Jr.* 32.

The term issue, in a will, means, *prima facie*, the same as "heirs of the body," and, in general, is to be construed as a word of limitation; but this construction will give way if there be on the face of the instrument sufficient to show that the words were intended to have a less extended meaning, and to be applied only to children or to descendants of a particular class. Taylor *v.* Taylor, 63 *Pa. St.* 481; Kleppner *v.* Laverty, 70 *Pa. St.* 70.

Issue, used in a will, *prima facie* means heirs of the body, and, in the absence of explanatory words showing it was used in a restricted sense, is a word of limitation. Robins *v.* Quinliven, 79 *Pa. St.* 333.

Where the word issue is used in a will in relation to the interests of a son and three daughters of the testator, and as to the daughters it is clear, from other provisions of the same will, that children living at their deaths are meant, the same meaning must be given to it in regard to the son. Gibson *v.* Gibson, 4 *Jones L.* 425.

In a marriage settlement, where the purpose is to provide a jointure, and not to make a settlement on the issue of the marriage, in a limitation to the children of the marriage, contingent upon the event that the wife depart this life in the lifetime of the husband, leaving issue of the said marriage, one or more children then living, the word issue, as explained by the subsequent words, does not include grandchildren. Adams *v.* Law, 17 *How.* 417.

The rule in Shelley's case only applies to a limitation of a remainder to the heirs, or heirs of the body, of the first taker; and not to an estate for life, with remainder to the issue of the devisee who may be living at the time of her death. The term issue, in such a devise, is a word of purchase, not of limitation. Cushney *v.* Henry, 4 *Paige*, 345.

Used without modifying words in a devise, by which the ancestor takes a freehold, issue is a word of limitation. Kingsland *v.* Rapelye, 3 *Edw.* 1.

The words, dying without issue, used in a devise, in reference to freehold estates, are to be construed as meaning an indefinite failure of issue, unless there is something in the context which manifestly confines the sense to a definite period. Willis *v.* Bucher, 3 *Wash. C. Ct.* 369.

The words, without issue, in a will, when applied to dispositions of real estate, *ex vi termini* mean an indefinite failure of issue, if there be nothing in the will restricting it to a failure at the time of the death of the first devisee, or to some other time or event. Newton *v.* Griffith, 1 *Har. & G.* 111.

To have no issue, to die having no issue, and to die without issue, are technically and judicially convertible terms. *Ib.*

Where a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without

issue, the word "heirs" or "issue" shall be construed to mean heirs or issue living at the death of the person named as ancestor. 1 *N. Y. Rev. Stat.* 724, § 22.

When in a devise will be deemed used as a word of purchase and not of limitation. See Timanus *v.* Durgan, 46 *Md.* 402.

When it will be construed as meaning "heirs." See Thomas *v.* Higgins, 47 *Md.* 439.

2. In pleading, an issue or the issue is a meeting of the parties, in their pleadings, upon a distinct matter to be judicially determined; a point or question in dispute between the parties to an action, eliminated by their pleadings, in proper form for trial. An issue arises upon the pleadings when an allegation of fact or a conclusion of law is maintained by one party and controverted by the other.

An issue of *fact* is one which arises upon a denial of an averment of matter of fact, and presents a question of fact for determination upon evidence; an issue of *law* arises upon a demurrer, and involves the question of law as to the sufficiency of the pleading demurred to.

As to FEIGNED ISSUE and GENERAL ISSUE, — see those titles.

Issue has different significations in law; it means the progeny begotten between a man and his wife; the profits arising from amerciaments and fines; or the profits of lands and tenements; but it most generally signifies the question of law or fact arising out of the allegations and pleas of the pursuer and defender in a cause.

When, in the course of pleading, one party makes an averment which his opponent denies, the parties are said to be at issue. *Jacob; Bell.*

The word issue is often used as a *nomen collectivum*, and the phrase issue joined may embrace various distinct grounds of defence. Pointer *v.* Rust, 7 *Humph.* 532.

The phrase, issues of fact, in N. C. Const. art. 11, § 18, providing for a waiver of jury trial in all issues of fact joined, includes not only such issues as are made by the pleadings, but also those arising in a compulsory reference, and similar ancillary proceedings. State *v.* Brown, 70 *N. C.* 27; Keener *v.* Finger, *Id.* 35.

Issue is the disputed point or question to which the parties in an action have narrowed their several allegations, and upon which they are desirous of obtaining the decision of the proper tribunal. When the plaintiff and defendant have arrived at some specific point or matter affirmed on the one side and denied on the other, they are said to be at issue (*ad exitum, i. e.*, at the end or result of their pleadings); the question so set apart is called the issue, and is designated, according to its nature, as an issue in fact, or an issue in law. If it is an issue in fact, it is almost universally tried by a jury of twelve men; if an issue in law, by the judges of the land constituting the court in which the action has been brought. (*Steph. Plead.* 25.) *Holthouse; Brown.*

3. The act of emitting, sending out, or causing to go forth; the giving a thing its inception; the first delivery; as the issue of an order from a commanding officer of or from a court; the issue of money.

Issue, as used in reference to bank-notes, relates exclusively to the moneyed currency of the country. Curtis *v.* Leavitt, 17 *Barb.* 309, 341.

4. The whole quantity of instruments or securities put forth at one time; a class or series; as in the expression, all the bonds of that issue were payable in coin.

5. Issues (*plu.*) is used for the rents and profits of real property, especially in the phrase rents, issues, and profits.

Issue frequently signifies fines or amerciaments levied upon a person who has been guilty of some default. Thus the fines to the king levied out of the issues and profits of sheriff's lands, by reason of their having been guilty of some negligence or default, are so termed. So the goods of a defendant which have been distrained under a writ of *distringas*, in order to compel his appearance to the action, are termed "issue." (Graves *v.* Stokes, 1 *Taunt.* 415; 2 *Lil. Abr.* 89.) *Holthouse.*

ISSUE, *v.* To send out; deliver by authority; emit; put in circulation; as to issue orders from an officer, money from the treasury, notes from a bank, or process from a court.

In questions as to the power of making certain alterations on the terms of a bill or note, it is of importance to determine whether or not it has been issued. A bill or note is issued as soon as it is in the hands of a person entitled to enforce payment, whether it has been given in exchange for a cross-acceptance, or for any other value, and whether the payee and holder is the drawer or a third party. But it is not issued unless it is in the hands of the payee or other holder, when drawn in favor of a third party, or if it is made payable to the drawer, unless it has been accepted or indorsed by the drawer. In England, an accommodation bill, which, though both accepted and indorsed, was deposited in the

hands of an agent for behoof of all parties, was held not to be fully issued till it had been given to a third party. *Bell.*

A process may be said to be "issued," when it is made out and placed in the hands of a person authorized to serve it, and with a *bona fide* intent to have it served. Mills *v.* Corbett, 8 *How. Pr.* 500.

For the distinction between "paying out" notes, and "issuing" them as money, — see United States *v.* Ray, 2 *Cranch C. Ct.* 141; People *v.* Wells, 8 *Mich.* 104.

ITA. So; thus.

This word commences several Latin phrases, among which are the following:

Ita est. So it is. In countries where the civil law prevails, after the decease of a notary, the officer who is authorized to make official copies of his notarial acts from his register adds to such a copy, instead of the notary's signature, which is required during his life, the words *ita est.*

Ita lex scripta est. So the law is written. An expression sometimes used to imply that the law must be obeyed, notwithstanding the hardship which may result from its operation.

Ita quod. So that; so as. These words were formerly used in deeds in Latin to introduce a condition; they are still occasionally employed as a name for a conditional provision. The condition in a submission to arbitration ("so as the award be made of and upon the premises" is an ordinary form) is likewise termed the *ita quod.*

Ita te Deus adjuvet. So help you God. The form, in Latin, of administering an oath.

ITEM. Also; likewise; again. This word was formerly much used in written instruments, particularly in wills, to mark the beginning of a new paragraph or division after the first; the first being usually introduced by the word *imprimis*, q. v.

From this use of the word is derived the common application of it to denote a separate or distinct particular of an account or bill.

Item is a usual word in a will to introduce new, distinct matter. The word "also," when used in a will to point out the beginning of a new devise or a new bequest, imports no more than "*item.*" In such a connection it is of the same signification as "moreover." It cannot be construed to mean "in like manner," with reference to a preceding clause, or as implying any dependence upon such preceding clause of what follows. Hopewell *v.* Ackland, 1 *Salk.* 239.

J.

JACTITATION. Assertions repeated to the prejudice of another's right; false boasting.

The term designates a wrong which, in certain aspects, is cognizable under the canon law, in the ecclesiastical courts.

The wrong known in the common law as slander of title is in its nature a species of jactitation, and the Louisiana code allowed an action of jactitation to protect the ownership of lands from disturbance by slander of title.

Jactitation of marriage, is the boasting or giving out by a party that he or she is married to some other, whereby a common reputation of a marriage between them may ensue. To defeat that result, the person may be put to a proof of the actual marriage, failing which proof, she or he is put to silence about it.

Jactitation of a right to a church sitting, appears to be the boasting by a man that he has a right or title to a pew or sitting in a church to which he has legally no title.

Jactitation of tithes, is the boasting by a man that he is entitled to certain tithes to which he has legally no title.

JACTUS. Throwing.

Jactus lapilli. The throwing down of a stone. One of the modes, under the civil law, of interrupting prescription. Where one person was building on another's ground, and in this way acquiring a right by *usucapio*, the true owner challenged the intru-

sion and interrupted the prescriptive right by throwing down one of the stones of the building before witnesses called for the purposes. *Trayn. Max.*

Jactus mercium navis levandæ causa. The throwing of goods into the sea for the purpose of lightening the ship; jettison. Where a ship, either through perils of the sea, or other cause, has been disabled from performing her voyage in safety, and goods are thrown overboard to insure the safety of the ship and remainder of the cargo, the loss thus sustained has to be borne by the owners of the ship and cargo, *pro rata. Trayn. Max.*

JAIL. A species of prison; a building designated by law, or regularly used by the sheriff, for the confinement of persons held in lawful custody. Jailer: the keeper of a jail.

The old spelling of this word was gaol, and the law dictionaries give a preference to this form; but in late years the orthography "jail" is more common.

Gaol is a strong place or house for keeping of debtors, &c., and wherein a man is restrained of his liberty to answer an offence done against the laws. Every county hath two gaols; one for debtors, which may be any house where the sheriff pleases; the other for the peace and matters of the crown, which is the county gaol. *Jacob.*

Jail delivery. In this connection "jail" is used in its earlier or stricter sense of a place of provisional confinement, or for keeping one in custody for purposes of some judicial inquiry. Anciently, a special writ of jail delivery was issued for each prisoner; but afterwards a general commission, embracing all prisoners collectively, was substituted as more convenient. The commission, by force of the word general, purports to require a disposition to be made of all persons imprisoned; but the requirement is complied with either by an acquittal resulting in the discharge of the prisoner, or in a conviction resulting in a sentence to permanent imprisonment in punishment. Either of these takes him out of "jail;" that is, out of provisional confinement. The phrase does not import that all persons in confinement shall be set at liberty.

It was in reference to this authority that the full and formal name of the higher criminal courts was made "courts of oyer and terminer and general jail delivery."

The administration of justice being originally in the crown, in former times our kings in person rode through the realm once in seven years, to judge of and determine crimes and offences; afterwards, justices in eyre were appointed; and since, justices of assise and gaol delivery, &c. A commission of a gaol delivery is a patent in nature of a letter from the king to certain persons, appointing them his justices, or two or three of them, and authorizing them to deliver his gaol, at such a place, of the prisoners in it; for which purpose, it commands them to meet at such a place at the time they themselves shall appoint; and informs them that for the same purpose the king hath commanded his sheriff of the same county to bring all the prisoners of the gaol, and their attachments, before them at the day appointed. *Jacob.*

Jail liberties, or limits. One of the instigations of imprisonment for debt consisted in designating a convenient space or region around the jail within which an imprisoned debtor who would give bond that he would not escape beyond was allowed to go at large. This limited region of liberty for prisoners is called the jail limits, or jail liberties. "Prison bounds" and "rules of the prison" are equivalent expressions.

JEOFAIL. An error, mistake, or oversight.

The word is a corruption of *j'ai faillé*, I have failed (*Jacob*), and was the old law French formula for a pleader's acknowledgment of an error, on applying for leave to amend. The earlier statutes giving liberty of correcting errors in pleadings were called statutes of jeofails; and this term at length became a general one for statutes allowing amendments.

Jeofaile is, when the parties to any suit in pleading have proceeded so far that they have joined issue, which shall be tried or is tried by a jury or inquest; and this pleading or issue is so badly pleaded or joined, that it will be error if they proceed; then some of the said parties may, by their counsel, show it to the court, as well after verdict given and before judgment, as before the jury is charged. And the counsel shall say "this inquest ye ought not to take;" and if it be after verdict, then he may say "to judgment you ought not to go." And because such niceties occasioned many delays in suits, divers statutes are made to redress them *Termes de la Ley.*

In our practice, however, the privilege of amending has been greatly en-

larged by provisions incorporated in the general acts and codes regulating procedure, and these have superseded the special acts of this nature formerly important.

JEOPARDY. Danger; peril.

The act of congress of March 3, 1825, § 22, Rev. Stat. 5472, prescribed additional punishment for any person who, in robbing the mail, shall put the life of the carrier in jeopardy by the use of dangerous weapons. It has been held that this includes exhibiting weapons calculated to take life, and obtaining possession of the mail by threatening the carrier with them. Putting the carrier in fear, and his life in peril or danger, is putting his life in jeopardy. Jeopardy means the same as peril or danger. The offer or threat to use dangerous weapons, then exhibited, thereby putting the carrier in a well-grounded fear for his life, is enough to constitute jeopardy: it is not necessary that a wound should be given of a character to endanger life. If the carrier's life was in danger, or if he really believed it to be so, the robbery was committed by putting his life in jeopardy. United States *v.* Wilson, *Baldw.* 78, 93.

The constitution of the United States provides that no person shall be subject for the same offence to be twice put in jeopardy of life or limb; and most of the state constitutions or statutes contain provisions to like effect. See citations, Sedgw. Constr. (2d ed.) 572, note. They have led to many decisions as to when a second trial is forbidden or may be allowed; and among these are several which turn upon the meaning of the term jeopardy.

A person once placed upon his trial before a competent court and jury, charged with his case upon a valid indictment, is in jeopardy, in the sense of the constitution, unless such jury be discharged without rendering a verdict, from a legal necessity, or from cause beyond the control of the court, such as death, sickness, or insanity of some one of the jury, the prisoner, or the court, or by consent of the prisoner. People *v.* Webb, 38 *Cal.* 467.

When a person is placed on trial upon a valid indictment, before a competent court and a jury, he is put in jeopardy; and the discharge of the jury without verdict, unless by consent of the defendant, or from some unavoidable accident or necessity, is equivalent to an acquittal. Among these unavoidable necessities are the inability of the jury to agree after a reasonable time for deliberation; also the close of the term of the court. *Exp.* McLaughlin, 41 *Cal.* 211; People *v.* Cage, 48 *Ib.* 324.

If a person is indicted for manslaughter, and, on his trial, the court, without the consent of the defendant, discharges the jury upon the ground that the evidence shows that the defendant is guilty of murder, the defendant has been put in jeopardy. He cannot be again indicted for murder for the same killing, but is entitled to an acquittal. People *v.* Hunckeler, 48 *Cal.* 331.

Whenever a person has been given in charge, on a legal indictment, to a regular jury, and that jury is unnecessarily discharged, he has been once put in jeopardy, and the discharge is equivalent to a verdict of acquittal. Wright *v.* State, 5 *Ind.* 290; McCorkle *v.* State, 14 *Id.* 39; s. p. Heikes *v.* Commonwealth, 26 *Pa. St.* 513; United States *v.* Shoemaker, 2 *McLean*, 114.

Where a valid indictment has been returned by a competent grand jury to a court having jurisdiction, the defendant has been arraigned and pleaded, a jury been impanelled, sworn, and charged with the case, and all the preliminary things of record are ready for the trial, the jeopardy has attached, and, unless the defendant waives his constitutional right, or unforeseen circumstances withdraw from him the benefit of the privilege, any subsequent lapse or error in the proceedings of the court will entitle him to be discharged from custody. Morgan *v.* State, 13 *Ind.* 215.

A person is in jeopardy when put upon trial under an indictment not defective; and the discharge of the jury without absolute necessity will sustain a plea of *autrefois acquit*. O'Brian *v.* Commonwealth, 9 *Bush*, 333.

A man is not put in jeopardy by the impanelling and swearing of a jury by inadvertence, when it was dismissed before he is arraigned or answers to the indictment. United States *v.* Riley, 5 *Blatchf.* 204.

Where, after a trial is commenced, the judge withdraws, and the trial is completed by another judge, and the judgment is reversed for that cause, the prisoner cannot be said to have been in jeopardy, and he may be tried again. State *v.* Abram, 4 *Ala.* 272.

A person tried before a judge sitting at an unauthorized special term of his court cannot be said to be put in jeopardy, as the proceedings are *coram non judice*, and void. Dunn *v.* State, 2 *Ark.* 229.

One who has not been put on his trial on the merits in a court of competent jurisdiction has not legally been put in jeopardy. State *v.* Cheek, 25 *Ark.* 206.

An indictment under which the accused could not be convicted, whether by reason of a variance between the proof and the indictment, or of some defect in the latter,

does not put him in jeopardy; and the discharge of such an indictment on motion of the prosecutor, or even a verdict of acquittal, will not be a bar to another indictment and trial for the same offence. People *v.* McNealy, 17 *Cal.* 332; State *v.* Stebbens, 29 *Conn.* 463; Mount *v.* Commonwealth, 2 *Duv.* 93; Commonwealth *v.* Curtis, *Thach. Cr. Cas.* 202; People *v.* Barrett, 1 *Johns.* 66.

The jeopardy contemplated by the constitutional provision that no person shall be put in jeopardy twice for the same offence, does not begin until a petit jury has been sworn and charged. If the jury is discharged on account of the illness or death of a juror, or of the judge, or because the term of the court has expired, the prisoner has not been in jeopardy, and may again be put upon trial. State *v.* Nelson, 26 *Ind.* 366.

The accused is not put in jeopardy by an indictment dismissed by the prosecuting attorney with the presumed consent of the court, even after a jury has been sworn to try the case. Wilson *v.* Commonwealth, 3 *Bush*, 105; s. p. Walton *v.* State, 3 *Sneed*, 687.

A defendant in a criminal case is not put in jeopardy until a verdict has been rendered. Hence, while the discharge of a juror, against the objection of the prisoner, after the jury is sworn, operates as a discharge of the entire jury, it does not operate as an acquittal, or bar another trial. O'Brian *v.* Commonwealth, 6 *Bush*, 563.

After a quashal for misnomer, a reindictment for the same offence does not put in second jeopardy. Commonwealth *v.* Farrell, 105 *Mass.* 189.

JETSAM. See FLOTSAM.

JEWEL. By "jewels" are meant ornaments of the person, such as ear-rings, pearls, diamonds, &c., which are prepared to be worn. Cavendish *v.* Cavendish, *Brown Ch.* 467.

A watch and chain are not a jewel or ornament, for the loss of which, under the New York statute, an innkeeper is not liable. Bernstein *v.* Sweeney, 33 *N. Y. Superior Ct.* 271.

A watch is neither a jewel nor an ornament, as these words are used and understood, either in common parlance or by lexicographers. It is not used or carried as a jewel or ornament, but as an article of ordinary wear by most travellers, and of daily and hourly use by all. Ramaley *v.* Leland, 43 *N. Y.* 539.

Jewelry, in Mass. St. 1820, ch. 45, prohibiting peddling jewelry without a license, is employed as a generic term of the largest import; it includes personal ornaments of plain gold, although not containing gems. Commonwealth *v.* Stephens, 14 *Pick.* 370.

JOHN DOE. The name generally given to the fictitious plaintiff in an action of ejectment, brought according to strict forms of the old practice.

JOINDER. Coupling; uniting. It occurs in several technical phrases.

Joinder of actions, or causes of actions. This expression signifies the uniting of two or more demands or rights in action in one action; the statement of more than one cause of action in a declaration.

Joinder of counties. There can be no joinder of counties for the finding of an indictment; though, in appeal of death, where a wound was given in one county, and the party died in another, the jury were to be returned jointly from each county, before the Stat. 2 & 3 Edw. VI. ch. 24; but by that statute the law is altered, for now the whole may be tried either on indictment or appeal, in the county wherein the death is. *Jacob.*

Joinder in demurrer. When a defendant in an action demurs to the declaration, this tenders an issue of law, and the plaintiff, if he means to maintain his action, must accept this issue; and this acceptance of the defendant's tender, signified to the plaintiff in a set form of words, is called joinder in demurrer.

Joinder of issue. In common law pleading, when the pleadings in an action reach such a stage that either party traverses or denies the facts pleaded by his antagonist, and the latter, instead of seeking to avoid their effect, or pleading any new matter to rebut them, simply accepts the issue thus tendered, this is called joinder of issue, or joining issue.

Joinder of offences. In criminal practice, more offences than one may sometimes be embraced in and prosecuted under one indictment, which is called joinder of the offences.

Joinder of parties, *i.e.* of plaintiffs or defendants. The uniting of two or more persons as co-plaintiffs or as co-defendants in one suit. This subject is of more importance in equity practice; but the expression is also somewhat used in reference to actions at law.

JOINT. Combined; united; done by or against, or shared between, two or more persons in union. Jointly: combinedly; unitedly. Joint occurs in several technical phrases. 5 Can P R 346

Joint and several. The obligations founded upon contract are either joint, in which all the joint parties, upon the one side or the other, are together

bound, but not separately, and neither one can be held to a liability without the other; or they are several, in which each individual is liable, independent of and separately from his associates; or they are joint and several, in which the creditor party may, at his option, proceed against one or all of the debtors. Thus a joint and several bond may be put in suit either against all the obligors, or against either one separately, at the option of the obligee.

The words jointly and severally, in a bond, must be construed distributively, so as to apply as well to the obligors as to their heirs. "We bind ourselves," makes them joint obligators; "we bind our heirs, executors, and administrators," binds them jointly; and "we bind each and every of them," binds them severally. *Mitchell* v. *Darricott*, 3 Brev. 145.

Joint action, or suit. An action or suit brought by two or more persons.

Joint administrators, executors, or trustees. Two or more persons, who are associated in the administration of an estate, the execution of a will, or the performance of a trust.

Joint bond. A bond given by two or more obligors, and binding them jointly, not severally.

Joint committee, in legislative practice, is composed of members selected by each branch or house of a legislative body, to meet and act together; as a committee formed of senators and representatives in congress, or of lords and commoners in parliament.

Joint contract. One in which the contractors are together bound to perform the promise or obligation therein contained, or are together entitled to receive the benefit of such promise or obligation.

Joint creditors. Persons united in interest in a demand; owning a debt together.

Joint debtors. Persons united in an indebtedness or obligation; who owe a debt together.

Joint fine. If a whole vill is to be fined, a joint fine may be laid, and it will be good for the necessity of it; but, in other cases, fines for offences are to be severally imposed on each particular offender, and not jointly upon all of them. (1 *Roll. Rep.* 33; 11 *Rep.* 42; *Dyer*, 211.) *Jacob.*

Joint indictment. One indictment brought against two or more offenders, charging them as having been together guilty of the offence alleged.

Joint lives. This expression, which is met with more frequently in English books, applies when a right is granted to two or more persons, to be enjoyed while both live. Annuity to two for their joint lives is payable until one dies.

Joint-stock association, or company. A name applied to a union of persons owning together a capital stock which they have devoted to a common purpose, under an organization analogous to that of a corporation; or to a body upon which some of the privileges or powers of corporations have been conferred by statute, but which is not in a full sense a corporation.

Exceptionally, the term is used in the sense of joint-stock corporation; thus insurance companies are called mutual or joint-stock companies, but without intending to imply that they are not incorporated.

The term is in more common and definite use in England than in this country. Many of the states, however, have statutes regulating joint-stock companies.

There is, however, some difficulty in harmonizing the English nomenclature with that in use in this country. In both countries there has been a great extension of the principle of allowing men to combine for a large enterprise, without assuming the full liability of partners; and in both countries a danger has been seen in giving to members of such combinations the entire immunity from liability possessed by members of corporations formed under the old common-law forms of incorporation. In England, the policy has been to confine incorporation to its original meaning, and grant it only in rare cases; while laws have been passed which allow partnerships under such names as joint-stock companies, public companies, &c., to assimilate themselves to corporations, and enjoy, to a considerable extent, corporate powers, and exemption from personal liability, but which do not affect to recognize such bodies as "corporations" in the full sense of that term. In this country, upon the other hand, it has been thought convenient to create

corporations, under that name, for almost any purpose for which simple partnership forms were inadequate, and to secure creditors by imposing an individual liability upon members or officers of the corporation. Hence much of the law of English joint-stock companies applies directly to what in this country are termed "corporations."

In England, a joint-stock company has been defined to be a qualified or *quasi* corporation, constituted neither by charter, act of parliament, nor letters-patent, but by the act of the members themselves, the interest of every member whereof is freely transferable without the consent of the rest. 3 *Steph. Com.* 19. Such a company, if established before the passing of what are known as the joint-stock companies acts, and if it has not adopted their provisions, is simply a partnership. It may consist of a large number of members; but their rights and liabilities are precisely the same as those of any other sort of partners, subject only to the peculiar regulations contained in an instrument of organization called a deed of settlement. The capital is divided into equal parts called shares; each member of the company has a certain number of these, and is entitled to participate in profits according to his number of shares. The management of the business is confided to some few shareholders, called directors, and the general body of the shareholders have, unless on extraordinary occasions, no power to interfere in the concerns of the company.

But it early became usual for such companies to obtain a private act of parliament in aid of their deed of settlement; and at length certain general acts were passed for the regulation of such companies.

These acts correspond in general nature and utility to the general acts of incorporation which have become so common throughout the United States.

Brown gives a summary of these joint-stock companies acts of parliament, as they were in force down to 1874, from which it appears that joint-stock banking companies form one important and quite distinct class, subject to enactments appropriate to them. All joint-stock banking companies, if formed under Stat. 7 Geo. IV. ch. 46, and not registered since, are governed by that act and their deed of settlement; if formed and registered under the act of 1857 (20 & 21 Vict. ch. 49), they are governed by their deed of settlement, and so much of the companies act of 1862 as applies to companies registered but not formed under it; if formed under the 20 & 21 Vict. ch. 14, and 21 & 22 Vict. ch. 91, they are governed by their rules and articles of association, and the companies act of 1862; or, if formed under the companies act of 1862 (25 & 26 Vict. ch. 89), they are governed exclusively by the provisions of that act.

Joint-stock companies other than banks he divides into two classes, according as they have been by subsequent legislation or have not been excepted from the operation of Stat. 7 & 8 Vict. ch. 110. That act defined the voluntary societies with transferable shares which were subject to its operation, to embrace every partnership whereof the capital is divided into shares transferable without the express consent of all the purchasers; and also specified associations for the insurance of lives or property, or for granting annuities on lives; and also friendly societies making assurances on lives to the extent specified; and also every partnership which, at its formation, or by subsequent admission (except any admission subsequent on devolution or any act in law), shall consist of more than twenty-five members; and required their registration. That statute was, however, superseded by the joint-stock companies act 1856 (19 & 20 Vict. ch. 47), which has since been repealed by the companies act 1862 (25 & 26 Vict. ch. 89); and this latter statute is now (says Brown, 1874) in force. It consolidates the laws relating to joint-stock companies, and includes in its operation all companies formed and registered under the act of 1856 (19 & 20 Vict. ch. 47), or under the act 18 & 19 Vict. ch. 133, together with certain companies not formed under the abovementioned acts, nor registered.

The companies excepted from the operation of Stat. 7 & 8 Vict. were com-

panies incorporated by statute or charter, and companies for executing any bridge, road, railway, or other like public object, not capable of being carried out unless with the authority of parliament. Formerly, each of such companies was governed by the provisions of its own charter or special act of parliament; but, latterly, general provisions were made for the regulation thereof by the companies clauses consolidation act 1845, the lands clauses consolidation act 1845, and, as to railways only, the railways clauses consolidation act 1845 (being respectively the acts 8 & 9 Vict. ch. 16, 18, and 20); and these three general acts apply also to all companies established by act of parliament after May 8, 1845, for the execution of undertakings of a public nature.

Under the companies act of 1862, with the exception of companies and partnerships formed under some other act, or under letters-patent, or engaged in working mines within the jurisdiction of the stannaries, every banking company or partnership consisting of more than ten persons, and every other company or partnership having for its object the acquisition of gain, and consisting of more than twenty persons, established since November 1, 1862, *must*, and any company consisting of seven or more persons associated for any lawful purpose *may*, be formed and registered under the statute. And mining companies in the stannaries may register under it, and then become subject to its provisions, and a peculiar jurisdiction of the stannaries court, conferred by the statute. Every other company, too (except a railway company), whether previously existing, or formed afterwards in pursuance of an act of parliament or letters-patent, or otherwise duly constituted by law, and every unregistered company consisting of more than seven members, may, with the assent of the shareholders, be registered as a limited or unlimited company under its provisions. If not thus registered, the law of companies established under private acts of parliament, charters, or letters-patent is that laid down by their acts, charters, or letters-patent.

Companies thus constituted certainly differ very materially from ordinary firms; but, so far as their acts, charters, or letters-patent have not provided, they are governed by the ordinary law of partnership.

Joint-stock corporation. This term must be understood as quite different in meaning from "joint-stock company." It designates a corporation (*i.e.* a legally incorporated body), but one owning and managing a stock capital; it distinguishes business corporations, founded upon a stock subscribed, from benevolent and religious societies, and the like.

JOINT TENANCY. That estate which arises when two or more persons acquire property by purchase, at the same time, in the same title, and without any thing to create a difference in their respective interests or possession. Joint tenants: persons who hold property which they acquired by purchase at the same time, in virtue of the same title, interest, and possession.

The important feature or result of joint tenancy is the principle of survivorship; according to which, on the death of one tenant, his share, being undistinguishably connected with that of his fellow, vests in the survivor or survivors, instead of descending to heirs. The estate was of feudal origin, and appears to have been founded upon the same policy with the law of primogeniture; viz., the desire to perpetuate estates in the hands of a few, and to discourage their division among many persons. By joint tenancy, the death of a tenant worked no division of the property. This being its character, it has diminished in importance and frequency of occurrence, under modern views of permitting the free division of lands and other property.

Much difficulty has been experienced by writers on real-property law in framing a definition of this estate. Mr. Freeman gives a discriminating review of several leading definitions, substantially as follows: Both Littleton and Blackstone content themselves with giving an instance or illustration of this estate; neither attempts any precise or formal definition. The former says: "Joyntenants are, as if a man be seized of certaine lands or tenements, &c., and

enfeoffeth two, three, or four or more, to have and to hold to them for terme of there lives, or for terme of another's life, by force of which feoffment or lease they are seized, these are joyntenants." According to Blackstone, an estate in joint tenancy is where lands or tenements are granted to two or more persons to hold in fee-simple, fee-tail, for life, for years, or at will. Each of these illustrations shows rather how a joint tenancy may be created, than what its peculiar incidents are after its creation. The definition ascribed to Littleton is more objectionable than Blackstone's, because it involves the idea that joint tenancies cannot be of estates in fee, but are confined to estates for life. Both illustrations are alike faulty in implying that a joint tenancy must necessarily be created by feoffment or grant, and that it does not include personal property. They are also liable to the further objection of assuming that a grant to two or more is the chief feature of joint tenancy, whereas a tenancy by entirety was also created by a grant to two (they being husband and wife); and a tenancy in common arose from a grant to two or more, when the grantor inserted words indicating an intent to create a several, instead of a joint, estate. Mr. Cruise, in treating of joint tenancy, avoids this last objection when he states that "where lands are *granted to two or more persons*, to hold to them and their heirs, or for term of their lives, or for term of another's life, *without any restrictive, exclusive, or explanatory words*, all the persons named in such instrument to whom the lands are so given take a *joint estate*, and are called joint tenants."

Joint tenants, according to the definition of Chancellor Kent, are "persons who own lands by a joint title, created expressly by one and the same deed or will. They hold uniformly by purchase." This definition has the vice of implying that joint tenancy does not apply to chattels, and that it could not exist in title by prescription. A better definition than either of those heretofore alluded to is that of Mr. Preston, viz., "Joint tenancy is when several persons have any subject of property jointly between them, in equal shares, by purchase." This definition, as well as that of Chancellor Kent, is too broad in this, that it embraces tenancy by entireties as well as joint tenancy. It is doubtful, too, whether joint tenants necessarily hold in equal shares. Thus, if A, B, and C be joint tenants, and C alienate one-half of his moiety to D, A, B, and C remain joint tenants, though the interest of C is no longer equal to that of A or B. Perhaps, however, after such alienation the estate would be held as follows: one-half by A, B, and C as joint tenants; one-third by A and B as joint tenants; and one-sixth by D as tenant in common. Viewed in this light, the alienation would create two joint tenancies, in one of which the interests of the co-tenants A and B would be equal, and in the other the interests of the co-tenants A, B, and C would also be equal; and thus the correctness of Mr. Preston's definition would be established. If this definition were modified so as to exclude tenancies by entireties, and by inserting "two or more" in the place of "several," it would seem correct. It would then stand: Joint tenancy is when two or more persons, not being husband and wife at the date of its acquisition, have any subject of property jointly between them in equal shares, by purchase. *Freeman Coten. & Part.* §§ 9, 10.

Professor Washburn gives the definition above quoted from Preston, apparently adopting it, and adds particulars in description of the estate. Each of the joint tenants has the whole and every part, with the benefit of survivorship, unless the tenancy be severed. In the quaint language of the law, they hold each *per my et per tout*, the effect of which, technically considered, is that, for purposes of tenure and survivorship, each is the holder of the whole; but, for purposes of alienation, each has only his own share. And the shares are presumed to be equal. If the grant of one parcel of land defines the share and interest which each is to take, it creates an estate in common, and not a joint tenancy. Moreover, while joint tenants constitute but one person in respect to the estate, as towards the rest of the world, each, as between themselves, is entitled to his

share of the rents and profits while he lives, but subject to the right of the survivor or survivors to take the entire estate upon his death. There may be a joint tenancy whether the estate be in fee, for life, for years, or at will, and also of estates in remainder. So there may be a joint tenancy in an estate for life, though the reversion or remainder be in only one of the tenants, and if he who has the reversion in fee die first, his heir will be postponed as to his enjoyment of the estate, until after the decease of the other joint tenant. But a joint tenancy can only be created by purchase or act of the parties, and not by descent or act of the law. It must, moreover, be created by one and the same act, deed, or devise, and joint disseisors may be joint tenants. A joint tenancy at common law must have a fourfold unity, as it is called, viz., of interest, of title, of time, and of possession; the interest being acquired by all, and by the same act or conveyance, commencing at the same time and held by the same undivided possession. But under the law of uses as well as by will, the unity of time may be so far dispensed with as to allow two or more joint tenants to take their shares at different times. 1 *Washb. Real P.* 642.

We have hesitated to accept Mr. Preston's definition, for the verbal reason that it employs "jointly," which is an element in the term in question. "Joint tenancy is having property jointly." But what is having property jointly? That is part of the thing to be defined. Therefore the definition at the head of this article is proffered in addition. The case of a conveyance to husband and wife is not excluded, because, conceding that it was not at common law a species of joint tenancy, the enabling married women's acts, so extensively passed of late years, seem to obliterate the distinction wherever they prevail. On this point, the local law must be consulted.

Joint trespassers. Persons who unite in the commission of a trespass.

JOINTURE. A species of estate in lands which is a substitute for dower. Jointress or jointuress: a woman who has an estate settled upon her for life, in lieu of dower.

On account of rights of dower, under the early law on that subject, being inconvenient restrictions upon alienation, parliament, by the statute of uses, Stat. 27 Hen. VIII. ch. 10, provided jointure in lieu of dower. Originally, the word meant a joint estate limited to both husband and wife, but by later rules may be an estate limited to the wife only, expectant upon a life-estate in the husband; and has been defined as "a competent livelihood of freehold for the wife, of lands or tenements, &c., to take effect presently in possession or profit, after the decease of her husband, for the life of the wife at least."

Some confusion observable in the use of the word may be cleared up by reflecting that this species of provision for the wife, might operate as an absolute bar of dower, or might only put her to her election between her dower and her jointure. Often a provision is called a jointure or not a jointure, when the meaning is that it is or is not an absolute bar.

To a strict legal jointure, six things are said to be requisite:

The provision for the wife must take effect in possession or profit immediately after her husband's death.

It must be for her own life at least, and not *pour autre vie*, or for any terms of years, or for any smaller estate. But the widow will be bound by the acceptance of a precarious interest, if she were adult at the time she agreed to the jointure.

It must be made to herself, and no other in trust for her.

It must be made in satisfaction of the whole of her dower, and not of part only.

It must be either expressed or averred to be in satisfaction of dower.

It must be made before marriage; if made after marriage, the widow may in general waive it, and claim her dower.

A jointure is a settlement of land and tenements made to a woman in consideration of marriage; or it is a covenant, whereby the husband, or some friends of his, assureth to the wife lands or tenements, for term of her life. It is so called, either because it is granted *ratione junctura in matrimonio*, or

for that land in frank-marriage was given jointly to husband and wife, and after to the heirs of their bodies, whereby the husband and wife were made as it were joint tenants during the coverture. *Tomlins.*

The term jointure is used in Ky. Rev. Stat. to denote any species of estate, in real or personal property, created by conveyance or devise, intended to be in lieu or satisfaction of dower. Whether a provision for a wife, by deed or will, should be regarded as a jointure, in the sense of the statute, is a question of intention, to be determined upon the general face of the instrument. No express statement of such intention is necessary. Tevis *v.* McCreary, 3 *Metc.* (*Ky.*) 151.

In Me. Stat. 1821, ch. 40, concerning dower, the word jointure is used in its well-known and established legal sense, and must be a freehold estate in lands or tenements secured to the wife, to take effect on the decease of the husband, and to continue during her life, at the least, unless she be herself the cause of its determination. But no jointure can prevent the widow from having her dower, unless made before marriage and with her consent. And a legal jointure cannot be composed partly of a freehold and partly of an annuity not secured on real estate. Vance *v.* Vance, 21 *Me.* 364.

A marriage contract, by which is reserved only the right to dispose of the individual property at death, is not a jointure, and is no bar to the widow's claim for dower; and, if there is no disposition made of the property by the parties, it is subject to the course prescribed by law. Whitehead *v.* Middleton, 3 *Miss.* 692.

Under the Missouri dower law of 1845, a settlement, whether antenuptial or postnuptial, does not operate as a jointure, unless expressed to be in bar of dower. Perry *v.* Perryman, 19 *Mo.* 469.

It is not essential to the validity of a jointure that it should be exempt from any incumbrance, the widow, if evicted of her jointure, having still a right to claim her dower. Ambler *v.* Norton, 4 *Hen. & M.* 23.

That jointure is abolished in New York by the revised statutes, see McCartee *v.* Teller, 2 *Paige*, 511.

JOURNAL. 1. Any book kept as a record of what is done day by day, or of proceedings in the order of their occurrence.

2. In book-keeping, the journal is a book of account used in double entry, the chief object of which is to contain a monthly abstract of the day-book, &c., so that the entries may be posted in a brief form into the ledger.

3. In legislative parlance, the journal of either house is the daily record of its proceedings kept by the clerk, in which the various motions, votes, resolutions, &c., are entered as they occur.

JOURNEY. As used in Tenn. act of 1870, prohibiting the carrying of deadly weapons, except on a journey, &c., does not include mere travel in the neighborhood of one's house, though in another county. Smith *v.* State, 3 *Heisk.* 511.

JOURNEYS ACCOUNTS. A term in ancient English practice, under the rules of which, if a suit became abated without the default of the plaintiff or demandant, the plaintiff might purchase a new writ within as little time as he possibly could after the abatement of the first writ; and, if he did so, then the second writ was treated as a continuance of the first.

While chancery was movable, one who purchased a new writ was required to apply as hastily as distance of the place would allow, accounting twenty miles for every day's journey; and his second writ must show he had purchased it as hastily as he could, accounting the days' journeys. Hence the name journées accounts, by journeys reckoned. Kinsey *v.* Heyward, 1 *Ld. Raym.* 432.

JUDEX. A judge; an officer who administers justice and declares the law.

1. In the Roman law. A private person who, under appointment of the magistrate for the particular cause, tried and decided a case; in general, one, but sometimes a greater number, were appointed in each cause. The action proceeded before the prætor until issue was joined, and was until then said to be *in jure;* afterwards it proceeded before a *judex* or *judices*, and was then said to be *in judicio.* The functions of *judices*, in hearing and determining the issues in a cause, to a great extent coincided with those of jurors in the common-law system. They decided questions of fact, and perhaps, also, questions of law, but were furnished in each case with instructions from the prætor as to the legal principles involved, as well as with the *formula* or record in the action. See ACTIO.

2. In the civil law. The practice of appointing *judices* for particular causes was disused in the Roman law even before the time of Justinian, and the term *judex* was thenceforward applied to the magistrate who conducted the proceedings in the cause from its beginning to its end, and finally decided it. The word is used in this sense in the civil law.

3. In old English law. A judge; particularly an ecclesiastical judge, as distinguished from the justices of the common-law courts, termed in Latin *justitiarius*.

Judex æquitatem semper spectare debet. A judge ought always to regard equity.

Judex ante oculos æquitatem semper habere debet. A judge ought always to have equity before his eyes.

Judex bonus nihil ex arbitrio suo faciat, nec propositione domesticæ voluntatis; sed juxta leges et jura pronunciet. A good judge may do nothing from his own judgment, or from a dictate of private will; but let him pronounce according to law and justice.

Judex damnatur cum nocens absolvitur. The judge is condemned when a guilty person escapes punishment.

Judex est lex loquens. A judge is the law, speaking.

Judex habere debet duos sales: salem sapientiæ, ne sit insipidus; et salem conscientiæ, ne sit diabolus. A judge should have two salts: the salt of wisdom, lest he be insipid; and the salt of conscience, lest he be devilish.

Judex non potest esse testis in propria causa. A judge cannot be a witness in his own cause.

Judex non potest injuriam sibi datam punire. A judge cannot punish an injury done to himself.

Judex non reddit plus quam quod petens ipse requirit. A judge restores not more than that which the plaintiff himself requires.

Judex ad quem. Judge to whom. Spoken of a superior judge; one to whom an appeal is addressed.

Judex a quo. Judge from whom. Spoken of an inferior judge; one from whom an appeal has been taken. This phrase, in English form, is in frequent use; "judge *a quo*" or "court *a qua*" recurs often in Louisiana reports as the designation of the judicial officer, or of the tribunal whose decision is under review.

JUDGE. A public officer, empowered to administer justice in a court; the chief member of a court, and charged with the control of proceedings and the decision of questions of law or discretion; a magistrate of high dignity in the law, charged with conducting the trial of causes, and often with determining the punishment of offenders.

Judge and justice (*q. v.*) are often used in substantially the same sense.

In Great Britain, the king is considered as the fountain of justice, and general conservator of the peace of the kingdom. The original power of judicature, by the fundamental principles of society, is lodged in the society at large; but as it would be impracticable to render complete justice to every individual by the people in their collective capacity, therefore every nation has committed that power to certain select magistrates, who, with more ease and expedition, can hear and determine complaints; and in this kingdom, this authority has immemorially been exercised by the king or his substitutes. He, therefore, has alone the right of erecting courts of judicature; for, though the constitution of the kingdom hath intrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust; it is consequently necessary that courts should be erected, to assist him in executing this power, and equally necessary, that, if erected, they should be erected by his authority. And hence it is that all jurisdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers. It is probable, and almost certain, that in very early times, before our constitution arrived at its full perfection, our kings, in person, often heard and determined causes between party and party. But, at present, by the long and uniform usage of many ages, our kings have delegated their whole judicial power to the judges of their several courts; which are the grand depositaries of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the crown itself cannot alter, but by act of parliament. In this distinct existence of judicial power in a peculiar body of men, nominated, indeed, but not removable, at pleasure by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be, in some degree, separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges

are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative. For which reason, by Stat. 16 Car. I. ch. 10, which abolished the court of star chamber, effectual care is taken to remove all judicial power out of the hands of the king's privy council. *Jacob.*

The term judge is used especially of the judges of the superior courts of law and equity in England and Ireland, and of the court of session in Scotland, and of the supreme court in any colony or dependency. But the presiding officers of local and inferior courts are frequently so called. Thus we speak of "county court judges," &c. In its widest sense, the title signifies any one invested with authority to decide questions in dispute between parties, and to award the proper punishment to offenders. *Mozley & W.*

Judge is a judicial administrator who presides in a court duly constituted, declares the law in all matters that are tried before him, and pronounces sentence or judgment according to the law. Some judges are called recorders, but the name does not alter the nature of the office. When the judges are simply spoken of, the fifteen judges of the superior courts of common law are meant, namely, of the courts of queen's bench, common pleas, and the exchequer. There are besides five judges of equity. *Cab. Lawyer*, 703.

The general duties of a judge in the process of forming his judgment in a cause are: to gather the materials, as facts, law, and authorities, of which to form his judgment; to set on authorities their just value, and to take them as guides in the formation of his judgment; to hear the arguments of counsel; to contend with difficulties presented by the subject of the suit or by authorities, and, aided by his own knowledge and arguments, and the arguments of counsel, with a single and unbiased mind to deliberate his judgment; and in so doing to heed the nature of the case, as a case that is new, or that falls within some rule, or is concluded by precedent, or is distinguishable from precedent, or is a case fit to be adjudged on its own particular circumstances only; and, in most instances, to look forward to the consequences of the judgment contemplated. *Ram Leg. Judg.* 4.

A judge of probate is not within a constitutional provision which prohibits the election of "judges" within thirty days of a general election. The official title "judge of probate" is the mere designation of an officer whose functions do not distinctively make him a judge within the meaning of the constitution. State *v.* French, 1 *Chand.* 130.

By the words "any judge of a court of record," in N. Y. Laws of 1848, 66, § 2, — providing that a certain application may be made to any judge of a court of record in any county in which the judgment on which the complaint is grounded is docketed, and in which the defendant resides, — the legislature meant any judge of a court of record commonly called judge, and known and spoken of as a judge of the court of record. Neither the recorder of the city of New York nor the city judge is such judge of a court of record. People *v.* Goodwin, 50 *Barb.* 562.

Section 4 of Ind. Rev. Stat. 1852, 6, authorizes the clerk, auditor, and sheriff to appoint a person to preside at a term of the circuit court, only in case the circuit judge is temporarily absent; and not when the office is vacant. Case *v.* State, 5 *Ind.* 1.

A judge who begins to hear a case, and is appointed judge of a new court which supersedes the old, may continue the hearing without a resubmission of the case. Seale *v.* Ford, 29 *Cal.* 104.

Where a party was indicted for a crime, tried, convicted, and sentenced, at a term of a circuit court held by a person who exercised the office of judge of said court under an appointment of the governor made without authority of law (there being another person entitled to exercise said office), the sentence was nevertheless held valid and binding. State *v.* Bloom, 17 *Wis.* 521.

The territorial judges, holding over under the constitution of Iowa, could not act as judges of the supreme court, and also of the district courts, as the two offices in the same person are incompatible. Allen *v.* Dunham, 1 *Greene* (*Iowa*), 89.

The absence of a judge from the state is not such a vacancy as can be supplied by the executive under legislative authority, and the act of the legislature, authorizing the governor to appoint a judge of the supreme court during the absence of one of the judges from the state, is unconstitutional. People *v.* Wells, 2 *Cal.* 610.

The provision of Ill. Const., art. 5, § 11, that no person shall be eligible to the office of judge of any court in the state, who is not a citizen of the United States, and who shall not have resided in that state five years next preceding his election, and who shall not for two years next preceding his election have resided in the division, circuit or county in which he shall be elected, applies only to judges of courts established or recognized by the constitution, and which are required to be elected by the voters of divisions, circuits, and counties. People *v.* Wilson, 15 *Ill.* 388.

The provision of N. Y. Laws 1847, 319, ch. 280, § 81, — that "no judge of any court shall have a voice in the decision of any cause in which he has been counsel, attorney or solicitor, or in the subject-matter of which he is interested," — applies to justices of the peace. Carrington *v.* Andrews, 12 *Abb.* (*N. Y.*) *Pr.* 348.

For the judge of the court of common pleas to sit for the judge of the circuit court, in a particular case in which the latter is incompetent, does not amount to holding two offices. Dukes *v.* State, 11 *Ind.* 557.

A judge cannot delegate his power to another, nor can a person be authorized to act as judge by agreement of the parties to a suit. Wright *v.* Boon, 2 *Greene (Iowa)*, 458.

The judge of the superior court, sitting to hear appeals from sewer assessments, in compliance with a clause in the charter of the city of Hartford, does not constitute a court within the meaning of that clause of the Connecticut constitution which provides that the judges of inferior courts shall be appointed annually. Clapp *v.* Hartford, 35 *Conn.* 220.

A judicial officer may be required by law to discharge other than judicial duties. He may, by authority of law, perform ministerial acts; but when performed they do not become judicial acts because they were performed by a judicial officer. People *v.* Bush, 40 *Cal.* 344.

Every special tribunal is subject to the maxim, that no person can sit as a judge in any cause in which he is a party, or in which he is interested. Stockwell *v.* White Lake, 22 *Mich.* 341.

A provision of Ark. Const. 1868, art. 7, § 5, that the general assembly shall not interfere with the term of office of any judge, does not preclude them from abolishing a court. Van Buren *v.* Mattox, 30 *Ark.* 566.

When a judge of a district court is required, by the proper authority, to hold a term of a court, either regular or special, for some county outside of his proper district, the authority of such judge is special. The jurisdiction of the judge of the district is superseded by that of the substituted judge, in that county, during the specified term, but not elsewhere, nor longer. The substituted judge has, in the specified county, all the powers of the judge of the district. Bear *v.* Cohen, 65 *N. C.* 511.

Judge a quo. The judge from whose decision an appeal is taken.

Judge ad quem. The judge to whom an appeal is carried for decision.

Judge-advocate. The title of the prosecuting officer in military law or before courts-martial. There are a judge-advocate appointed by commission under the sign manual, a judge-advocate acting by deputation, either special or general, from the judge-advocate-general, and called deputy-judge-advocate, and a person appointed by general officers commanding forces abroad, to act as judge-advocate. *Simm. Courts-Mar.*

Judge-advocate-general. A superior officer, in English military law, appointed to advise the crown in refereuce to courts-martial and military causes.

Judge-ordinary. In England, the judge of the court of probate, sitting as judge of the court of divorce, is so called, as being the ordinary judge of the divorce court. 2 *Steph. Com.* 239.

In Scotland, the title judge-ordinary is applied to all those judges, whether supreme or inferior, who, by the nature of their office, have a fixed and determinate jurisdiction in all actions of the same general nature, as contradistinguished from the old Scotch privy council, or from those judges to whom some special matter is committed; such as commissioners for taking proofs, and messengers-at-arms. *Bell.*

Judge's certificate. A written statement by the judge who tried a cause, assuming the existence of some fact which is required to be thus proved, to warrant further proceedings. Thus, a certificate of probable cause for bringing the action must, in some cases, be procured, to protect an officer plaintiff, if unsuccessful, from costs.

Judge's minutes, or notes. Memoranda usually taken by a judge, while a trial is proceeding, of the testimony of witnesses, of documents offered or admitted in evidence, of offers of evidence, and whether it has been received or rejected, and the like matters. They are very often referred to in settling a case which is to present the evidence to an appellate court; and they may be the basis of a motion before the judge for a new trial.

Judge's order. An order made on summons by a judge at chambers.

JUDGMENT. The authenticated decision of the court, obtained in a suit, upon the relative claims of the parties therein submitted; the sentence of the law pronounced by the court upon the matters presented by the record of proceedings in a suit. 2 Can App R 53

The definition given by the New York code of procedure, which has been widely approved, is, the final determination of the rights of the parties in the action. *Code*, § 245.

Freeman says that judgment, except where the signification of the word has been changed by statute, is defined as the decision or sentence of the law pronounced by a court or other competent tribunal upon the matter contained in the record; or as the conclusion of the law upon facts found by the court or jury, or admitted by the parties. The reasons announced to sustain the decision, and the award of execution, constitute no part of the judgment.

Freeman recommends a classification founded upon the state of the pleadings at the time when the court makes its final decision. As stated by him, it appears intended to include judgments in common-law actions of a civil nature only; the classes being as follows:

1. Judgments rendered where the pleadings present no other issue than an issue of law. These are:

The judgment given for the plaintiff when an issue of law formed by a demurrer to any of the pleadings in chief is determined in his favor. It is final, and is called a judgment *quod recuperet.*

The judgment given for defendant when a like issue is found in his favor.

Judgment of *respondeat ouster*, a species of interlocutory judgment for the plaintiff on demurrer to a plea in abatement, when it appears that the defendant has mistaken the law on a point not affecting the merits of the case. By this judgment he is allowed to plead such further defence as he may have.

The judgment given for the defendant on a demurrer to a plea in abatement, which is, that the writ be quashed.

2. Judgments rendered upon the decision of a court or a jury upon the issue or issues of fact made by the pleadings. These are:

The judgment for plaintiff upon an issue of fact found in his favor.

The judgment of *nil capiat per breve* or *per billam*, when rendered, although the issue of fact has been found in plaintiff's favor.

Judgment *quod partes replacitent.* This is given if an issue is formed, and a verdict returned on so immaterial a point that the court cannot know for whom to give judgment. The parties must then reconstruct their pleadings, beginning at the first fault which occasioned the immaterial issue.

3. Judgments given where no issue has been made by the party required to plead. These are:

Judgment *nil dicit*, rendered whenever the defendant fails to plead to the plaintiff's declaration in the time allowed for him to do so. This judgment is proper, although the defendant who fails to plead in time may have appeared by attorney.

Judgment *non sum informatus*, rendered when the defendant enters upon the record that he is not informed of any defence to the action.

Judgment by confession *relicta verificatione*, entered when the defendant either confesses the action in the first instance, or when, after pleading, he before trial abandons his plea.

Judgment *non obstante veredicto*, rendered when, after the verdict of the jury has been returned and before the judgment thereon is entered, it appears by the record that the matters pleaded or replied to, although found true, constitute neither a defence nor a bar to the action. This judgment can only be entered on application of the plaintiff.

4. Judgments entered where, before or after the joining of an issue of law or of fact, the plaintiff abandons or withdraws his prosecution. These are:

Judgment of *non pros.*, entered against the plaintiff, before any issue is joined for not declaring, replying, or surrejoining, or for not entering the issue agreeably to the rules of the court.

Judgment of *nolle prosequi*, which is entered when plaintiff declares that he will not further prosecute his suit, or entry of a *stet processus*, by which plaintiff agrees that all further proceedings shall be stayed.

Judgment of *retraxit.* This is given when the plaintiff voluntarily goes into court and enters on the record that he withdraws his suit. It differs from a nonsuit in that it is positive. Nonsuit is a mere neglect of plaintiff; therefore he may sue again, upon payment of costs; but a *retraxit* is an open, voluntary renunciation of his claim in court, and by it he for ever loses his action.

Judgment of nonsuit, which is of two kinds, voluntary and involuntary. When plaintiff abandons his case, and consents that judgment go against him for costs, it is voluntary. But when he, being called, neglects to appear, or when he has given no evidence on which a jury could find a verdict, it is involuntary. *Freem. Judg.* § 6.

Judgment is the sentence or order of the court in a civil or criminal proceeding. *Mozley & W.*

Judgment, though pronounced or awarded by the judges, is not their determination

or sentence, but the determination and sentence of the law. It is the conclusion that naturally and regularly follows from the premises of law and fact, which stand thus: against him who hath rode over my corn, I may recover damages by law; now A hath rode over my corn; therefore, I shall recover damages against A. If the major proposition be denied, this is a demurrer in law; if the minor, it is then an issue of fact; but if both be confessed (or determined) to be right, the conclusion or judgment of the court cannot but follow. Which judgment or conclusion depends not therefore on the arbitrary caprice of the judge, but on the settled and invariable principles of justice. The judgment, in short, is the remedy prescribed by law for the redress of injuries; and the suit or action is the vehicle or means of administering it. What that remedy may be, is indeed the result of deliberation and study to point out; and, therefore, the style of the judgment is, not that it is decreed or resolved by the court, for then the judgment might appear to be their own; but, "it is considered," *consideratum est per curiam*, that the plaintiff do recover his damages, his debt, his possession, and the like; which implies that the judgment is none of their own, but the act of law, pronounced and declared by the court after due deliberation and inquiry. (1 *Co. Inst.* 39.) *Jacob.*

The following are the several species of judgments most usually occurring in practice:

Judgment on plea in *abatement.* If it be for the plaintiff upon verdict, it is peremptory, *quod recuperet*, and, therefore, in actions for damages, if the jury do not assess them, a trial *de novo* must be awarded. But if it be on demurrer, or on replication of *nul tiel record*, it is not final, but merely a *respondeat ouster.* Judgment for the defendant is, that the writ be quashed, unless the matter pleaded in abatement is some temporary disability, such as infancy, &c., in which case the judgment is, that the plaintiff must remain without day, until, &c. (*Tidd*, 642.)

Judgment in *ejectment.*

Judgment on a *cognovit.* If the *cognovit* be made unconditionally, the plaintiff may, of course, sign judgment and sue out execution as soon as he pleases. If there be conditions inserted in it, judgment must be in strict pursuance thereto.

Judgment in *default* of appearance or for want of a plea.

Judgment in *demurrer.* It is either interlocutory or final, in the same manner as judgment by default. If a defendant plead several matters to the same or several counts of a declaration, and the plaintiff demur to some of the pleas, and take issue upon others; if the defendant succeed upon any of the pleas demurred to, and that plea be an answer to the whole action, the plaintiff shall not have judgment upon the issues in fact, should they be found for him; but the only judgment that shall be entered is *nil capiat per breve.* (1 *Saund.* 80, n. 1.)

Judgment *de melioribus damnis.*

Judgment in *error.*

Judgment against *executors* or *administrators.* In an action against an executor or administrator, suggesting a *devastavit*, the judgment against the defendant shall be *de bonis propriis*, and so, if he plead a plea which he knows to be false, and also if he be made liable and charged as assignee; but otherwise, the judgment would be *de bonis testatoris.* (2 *Chit. Arch. Prac. by Pren.* 1177.)

Judgment against *heirs* or *devisees.* If an heir have aliened the lands previously to the suing out of the writ, he is expressly rendered liable for the specialty debts of his ancestor, to the amount of the lands aliened, by Stat. 11 Geo. IV. and 1 Wm. IV. ch. 47, § 6; and an action is maintainable against a devisee, rendering wills in fraud of creditors void; and Stat. 3 & 4 Wm. IV. ch. 104, renders the lands liable to every kind of debt.

Judgment against *prisoners.* The plaintiff shall proceed to trial or final judgment against a prisoner in the term next after issue is joined, or at the sittings or assizes next after such term, unless the court or a judge shall otherwise order, and shall cause the defendant to be charged in execution within the term next after such trial or judgment. Otherwise, the prisoner may be discharged or superseded. (*R.* 124, *H. T.* 1853.)

Judgment *quando acciderint.* If, on the plea of *plene administravit* in an action against an executor or administrator, or on the plea of *riens per descent* in an action against an heir, the plaintiff, instead of taking issue on the plea, take judgment of assets *quando acciderint*, in this case, if assets afterwards come to the hands of the executor or heir, the plaintiff must first sue out a *scire facias*, before he can have execution. If, upon this *scire facias*, assets be found for part, the plaintiff may have judgment to recover so much immediately, and the residue of the assets *in futuro.* (1 *Sid.* 448.)

Judgment *non obstante veredicto.* Where the defence put upon the record is not a legal defence to the action in point of substance, and the defendant obtain a verdict, the court, upon motion, will give the plaintiff leave to sign judgment notwithstanding the verdict, provided the merits of the case be very clear. But where the plea contains no confession of the cause of action, the proper course is toward a repleader, and not to give judgment *non obstante veredicto.* A defendant cannot obtain this judgment in any case; he must arrest the judgment. It must be moved for within four days from the time of trial, if there are so many days in term; it cannot in any case be moved for after the expiration of the term, provided the jury precept be returnable in the same term. The judgment is interlocutory; after

which a writ of inquiry must be executed, and final judgment signed as in ordinary cases. If the defendant have succeeded on any of his pleas, he will be entitled to retain his verdict on them: and there must be a trial *de novo;* the successful party is entitled to the costs of the material issues. (*Com. Law Proc. Act,* 1852, § 145; 2 *Chit. Arch. Prac. by Pren.* 1483.)

Judgment of *non pros.* It is a final judgment for costs, signed by a defendant only, whenever a plaintiff, in any stage of the cause, neglects to prosecute his action, or part of it, within the times limited by the rules of the court. (2 *Chit. Arch. Prac. by Pren.* 1409.)

Judgment as in case of a *nonsuit.*

Judgment upon *nul tiel record.* The judgment for the plaintiff is interlocutory or final, just as it is upon demurrer or default; but the defendant's judgment would be final. A rule for judgment is not now necessary.

By rule 10 of H. T. 1853, where a defendant shall plead a plea of judgment recovered, he shall, in the margin of such plea, state the date of such judgment, and if such judgment shall be in a court of record, the number of the roll on which such proceedings are entered, if any; and, in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and, in case the same be falsely stated by the defendant, the plaintiff on producing a certificate from the proper officer, or person having the custody of the records or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea.

Judgment in *replevin.*

Judgment in *scire facias.* The judgment is the same as in ordinary cases.

Judgment on *warrant of attorney.* Judgment may be entered upon a warrant of attorney, at the time therein specified for that purpose; and if the warrant were given to secure the payment of money, it is not necessary that the plaintiff should delay the signing of the judgment until default be made in the payment, unless that be expressly stipulated for in the defeasance. If the warrant specify any particular time at which the judgment is to be signed, it cannot be entered up at any other time. Within a year and a day from the date of a warrant, judgment may be entered up as of course; but leave to enter up judgment on a warrant of attorney above one, and under ten years old, must be obtained by order of a judge made *ex parte;* and, if ten years old or more, upon a summons to show cause. The application for such leave is founded upon an affidavit, stating the consideration for the warrant of attorney, its execution, the amount remaining due to the plaintiff, and alleging positively that the defendant was alive at a certain time therein mentioned. (*H. T.* 1853, r. 26.)

In *criminal* cases, judgment, unless any matter be offered in arrest thereof, follows upon conviction, being the pronouncing of that punishment which is expressly ordained by law. *Wharton.*

Judgment is given either for the plaintiff or the defendant; when for the plaintiff, it is either a judgment by *confession,* or by *default;* when given for the defendant, it is either a judgment of *nonsuit, non pros., retraxit, nolle prosequi, discontinuance,* or *stet processus;* and judgment may be given for either party upon *demurrer, issue of nul tiel record,* or *verdict.* A judgment by confession or default is such a judgment as is signed against the defendant when the justice of the plaintiff's claim is admitted by him, either in express terms, as by giving a *cognovit,* or by conduct, as by failing to take proper steps in the suit. A judgment upon nonsuit is a judgment given to the defendant whenever it clearly appears that the plaintiff has failed to make out his case by evidence. A judgment of *non pros.* is a judgment which the defendant is entitled to have against the plaintiff when he does not follow up (*non prosequitur*) his suit as he ought to do, as by delaying to take any of those steps which he ought to take beyond the time appointed by the practice of the courts for that purpose. A *retraxit,* or *nolle prosequi,* is when the plaintiff, of his own accord, declines to follow up his action; the difference between them is, that a *retraxit* is a bar to any future action brought for the same cause, whereas a *nolle prosequi* is not, unless made after judgment.

A judgment on a discontinuance is when the plaintiff finds that he has misconceived his action and obtains leave from the court to discontinue it, on which judgment is given against him, and he has to pay the expenses. A judgment on a *stet processus* is entered when it is agreed, by leave of the court, that all further proceedings shall be stayed; though in form this is a judgment for the defendant, yet it is generally like a discontinuance, being, in point of fact, for the benefit of the plaintiff, and entered on his application; as, for instance, when the defendant has become insolvent, &c. Judgment on demurrer is such a judgment as is pronounced by the court upon a question of law submitted to them, as opposed to a question of fact, which is submitted to a jury. A judgment upon an issue of *nul tiel record* is when a matter of record is pleaded in any action, — as a fine, a judgment, or the like, — and the opposite party pleads *nul tiel record, i.e.* that there is no such matter of record existing; upon this issue is joined and tendered in the following form: "And this he prays may be inquired of by the record, and the other doth the like;" and thereupon the party pleading the record has a day given him to bring it in, and proclamation is made in court for him to "bring forth the record by him in pleading alleged, or else he shall be condemned;" and on his failure to do so his antagonist

shall have judgment to recover. A judgment upon a verdict is the judgment of the court pronounced after the jury have given their verdict. *Brown.*

Judgments are the judicial sentences of courts, rendered in causes within their jurisdiction, and coming legally before them. Peirce *v.* City of Boston, 3 *Metc.* (*Mass.*) 520.

The term judgment is sometimes applied to the final determination of the issues in the case, or to the final ascertainment of the guilt of the accused, at *nisi prius.* It is also used in a larger sense, involving the order for execution or sentence. Commonwealth *v.* Gloucester, 110 *Mass.* 491.

A decision on a demurrer is a judgment, and must be perfected like one before it is appealable. Cummings *v.* Heard, 2 *Minn.* 34.

An order of the county court dismissing an appeal from the judgment of a justice, on the ground that it was not brought in time, is a judgment within the definition given in N. Y. Code, § 245; the final determination of the rights of the parties in the action. Pearson *v.* Lovejoy, 53 *Barb.* 407.

The word judgment includes an order of filiation. Cloud *v.* State, 2 *Harr.* (*Del.*) 361.

A decree rendered by consent is not, legally speaking, a judgment. A judgment is the decision of a controversy given by a court of justice, between parties who do not agree. Consent decrees decide nothing. They merely authenticate private agreements, and render them executory between the parties. Union Bank *v.* Marin, 3 *La. Ann.* 34.

Judgment, in N. C. Rev. Code, ch. 51, § 2, — declaring void all contracts, judgments, conveyances, &c., for money lost at play, — means only judgments confessed or allowed by consent, and does not include judgments recovered adversely. Teague *v.* Perry, 64 *N. C.* 39.

Judgment creditor. A creditor who claims to be such by virtue of a judgment; that is, a party entitled to enforce execution under a judgment.

Judgment debt. A sum due by a final decision of a court; an indebtedness shown by judgment.

Judgments are very generally liens upon real property of the judgment debtor; and, upon familiar principles of equitable jurisprudence, a creditor may have equitable aid to enforce payment of a judgment debt out of assets that may have been assigned, &c., when for a simple contract debt he could not. The American practice in cases of this class is indicated under creditor's suit, *q. v.* Mr. Brown gives, in substance, the following account of the English practice having the same general purpose:

Judgment debts are debts, whether on simple contract or by specialty, for the recovery of which judgment has been entered up, either upon a *cognovit*, or as the result of a successful action. The old law of judgments was in many respects different from the present law. Thus, under the old law, which rested substantially upon the acts 13 Edw. I. ch. 18, 29 Car. II. ch. 3, and 4 & 5 Wm. & M. ch. 20, the lands affected by a judgment were the entirety of terms for years only, and one moiety of freehold lands, tithes, reversions, and trust estates whereof the trustee was seised for the debtor at the time of execution sued. Estates tail were liable to the extent of one moiety thereof, but only during the life of the tenant in tail; and joint tenancies were in the same position. Moreover, trust terms for years, joint trust estates, and equities of redemption, were altogether exempt; as were also copyholds, glebe, and advowsons in gross. Moreover, purchasers (including mortgagees) were not bound by a judgment which was either undocketed or misdocketed (Tunstall *v.* Trappes, 3 *Sim.* 286; Brandling *v.* Plummer, 8 *De Gex, M. & G.* 747); unless they had notice thereof, in which case they were bound (Davis *v.* Earl of Strathmore, 16 *Ves.* 419). However, equity assisted the judgment creditor towards enforcing his execution in respect of those equitable interests before enumerated which were not statutorily liable on an *elegit*; thus, in the case of an equitable freehold estate, the judgment creditor, after suing out an *elegit*, might file his bill in equity for relief (Neate *v.* Marlborough, 3 *Myl. & C.* 407); and, in the case of an equitable leasehold or term of years, the judgment creditor, after suing out a *fi. fa.*, might in like manner file his bill in equity for relief (Gore *v.* Bowser, 1 *Jur.* N. S. 392); and this seems to be still the law (Padwick *v.* Duke of Newcastle, *L. R.* 8 *Eq.* 700).

On the other hand, under the present law, which depends substantially upon the statutes 1 & 2 Vict. ch. 110; 2 & 3 Vict. ch. 11; 3 & 4 Vict. ch. 82; 23 & 24 Vict. ch. 38; and 27 & 28 Vict. ch. 112, the lands affected by a judgment are the entirety of lands, tenements, and hereditaments whether freehold, copyhold, or leasehold, and whether legal or equitable, and whether possessed at the time of entering up judgment or afterwards, and whether joint or sole, and whether the interest of the debtor therein amount to an estate in, or only to a general power over, them. Advowsons are no longer exempt from liability; but with reference to rectories and tithes, only lay and not ecclesiastical ones are intended (Hawkins *v.* Gathercole, 6 *De Gex, M. & G.* 1). The judgment prevails against the *jus accrescendi* in the case of joint tenants (1 *Dart Vend. & P.* 431), and also against the issue of tenant in tail, and against remainder-men in tail (Lewis *v.* Duncombe, 20 *Beav.* 398).

The before-mentioned Victorian statutes also made provision for the registration and re-registration of judgments and executions thereon, the short result of which may be stated as follows: From Aug. 16, 1838, to July 23, 1860, every judgment that was entered up against the owner of lands required to be registered in the owner's name (*i.e.* in the name of the debtor), and to be re-registered every five years, in order to become a charge upon the land; from July 23, 1860, to July 29, 1864, every like judgment required to be registered in the name of the debtor, and to be re-registered every five years, and execution thereon required also to be sued out, and also registered in the name of the creditor, and also within three months from the date of such registration to have been executed, in order to become a charge upon the land; but since July 29, 1864, no such judgment requires to be registered at all, but execution is to be sued out thereon, and to be also registered in the name of the debtor, although even then it is not a charge upon the land until such land has been actually taken upon the execution by summary process.

The date of the registration, and not that of entering up the judgment, or of the registration, and not that of suing out the execution, is the point of time which regulates the priorities or rights of adverse successive claimants; thus judgment creditors, as between themselves, take rank according to the order of the dates of their several registrations, and notice of an unregistered judgment entered up at a prior date does not affect them (Benham *v.* Keane, 1 *Johns. & H.* 685); as neither does such notice affect a subsequent purchaser or mortgagee, this being the construction of Stats. 3 & 4 Vict. ch. 82, § 2, and 18 & 19 Vict. ch. 15, § 5. But notice of an unregistered judgment does affect a subsequent *cestui que trust* (Benham *v.* Keane, *supra*). And notice of a judgment which has been re-registered within five years prior to the date of the purchase or mortgage does affect a purchaser or mortgagee having notice thereof, notwithstanding an interval of more than five years may have elapsed between such re-registration and the next preceding registration (Simpson *v.* Morley, 2 *Kay & J.* 71); but a purchaser or mortgagee who has no notice of a judgment, although the same has been registered, and, *a fortiori*, as already mentioned, if it is either unregistered or not duly re-registered, is not bound thereby, this being the construction of the Stat. 2 & 3 Vict. ch. 11, § 5; for it has been held that registration is not notice (Robinson *v.* Woodward, 4 *De Gex & S.* 562), unless, indeed, it can be proved that the party has made an actual search over the period covering the judgment (Proctor *v.* Cooper, 2 *Drew.* 1); and no such search is compulsory either upon a purchaser or upon a mortgagee (Lane *v.* Jackson, 20 *Beav.* 535), although it is not, therefore, wise to avoid a search (Freer *v.* Hesse, 4 *De Gex, M. & G.* 495). And in case the property is situate in a register county, the registration and re-registration must be made both in the local and in the general registries. (Johnson *v.* Houldsworth, 1 *Sim.* N. S. 106.)

In the case of a judgment which is entered up between a contract for sale and the conveyance of the land, where the judgment is duly perfected as required by the acts, the judgment creditor could not, by the old law, proceed against the land in the hands of the purchaser (Lodge *v.* Lyseley, 4 *Sim.* 70), but would have been restrained by injunction from so doing (Brunton *v.* Neale, 14 *L. J. Ch.* 8); the judgment creditor might, however, have come against the unpaid purchase-money (Forth *v.* Norfolk, 4 *Madd.* 505); and the present law is to the same effect (Brown *v.* Perrott, 4 *Beav.* 585). And by the present law, upon any sale by a mortgagee, the surplus proceeds of sale are charged by any judgments entered up against the mortgagor between the dates of the mortgage and the sale (Robinson *v.* Hedger, 13 *Jur.* 846). But under the old law and under the present law, a judgment entered up subsequently to a voluntary conveyance, and duly perfected, does not upset the prior voluntary conveyance (Beavan *v.* Earl of Oxford, 6 *De Gex, M. & G.* 507), a judgment creditor not being a purchaser within the meaning of Stat. 27 Eliz. ch. 4.

A judgment entered up against an annuitant has been held to be a charge on the land out of which the annuity issues (Younghusband *v.* Gisborne, 1 *De Gex & S.* 209); and the like decision was given regarding a judgment entered up against one entitled to a gross sum of money charged on land (Russell *v.* M'Culloch, 1 *Kay & J.* 313); but now, by Stat. 18 & 19 Vict. ch. 15, § 11, where a mortgage is paid off prior to the completion of the purchase, any judgment against the mortgagee ceases to be a charge on the lands purchased (Greaves *v.* Wilson, 25 *Beav.* 434).

The extent of the judgment creditor's remedy at law depends on section 11 of Stat. 1 & 2 Vict. ch. 110, and the extent of his remedy in equity on the 13th section of that act. And accordingly, at law, the judgment creditor may proceed against all legal estates of his debtor, and also against all estates held simply in trust for him, but not against any equity of redemption of his debtor; and in equity he may proceed against all and every the lands of his debtor, having first taken out an *elegit* (Smith *v.* Hurst, 10 *Hare*, 30), and obtained actual possession of the lands, if possible, or the nearest equivalent to actual possession (Guest *v.* Cowbridge Ry. Co., *L. R.* 6 *Eq.* 619), and he should pray a sale of the lands, as distinguished from a foreclosure (Tuckley *v.* Thompson, 1 *Johns. & H.* 126), an order for which he may obtain upon petition in a summary way under the 27 & 28 Vict. ch. 112 (*Re* Isle of Wight Ferry, 11

Jur. N. S. 279). Sometimes both a bill and a petition, may, however, be necessary. (*Re* Cowbridge Ry. Co., *L. R.* 5 *Eq.* 413.) If neither an *elegit* nor a *fi. fa.* can be sued out, there is no remedy. (Padwick *v.* Newcastle, *L. R.* 8 *Eq.* 700.) *Brown.*

Judgment debtor. A person against whom judgment has been recovered, for the payment of which he is still liable; one who owes the amount of a judgment.

He may be either the defendant in the action when the plaintiff has recovered judgment for his demand, or the plaintiff when the defendant prevailed and recovered costs.

Judgment in personam, or in rem. Judgments and decrees are either *in personam* or *in rem.* They are *in personam* when the proceedings are against the person; provided the adjudication be of such a nature as to be binding only upon the parties to the suit and their privies in blood or estate. Judgments and decrees *in rem* are not, as the term implies, confined to proceedings where property is proceeded against as a party to the action; but include, in addition to adjudications against the thing, all these decisions or sentences, which, by the policy of the law, are binding upon all other persons as well as upon the parties to the suit. The proceedings prior to the judgment or decree may be *in personam,* no notice may be given except to the defendant, yet, if the judgment affect the status of any person or of any subject-matter, as in a suit for divorce, it is conclusive upon the whole world, and is therefore classed as being *in rem. Freem. Judgm.* § 13.

A judgment *in rem* is an adjudication upon the status of some particular subject-matter by a tribunal competent for the purpose. Lord *v.* Chadbourne, 42 *Me.* 429.

Judgment nisi. To afford opportunity for full consideration of questions of law arising at circuit, it has long been customary, in English practice, to direct judgment to be entered, to become absolute "unless" the court shall within the first four days of the next term order otherwise; giving the defeated party four days to move against the judgment.

Judgment note. A promissory note, containing, in addition to the usual contents of a note, a power of attorney authorizing entry of judgment by confession, against the maker, upon default of payment.

Judgment record, or roll. A formal systematic transcript of the proceedings leading to the judgment in an action, and of the judgment, the authentic official collection of the papers, proceedings, and judgment in their order.

The judgment roll is a parchment roll upon which all proceedings in the cause up to the issue, and the award of *venire* inclusive, together with the judgment which the court has awarded in the cause, are entered. This roll, when thus made up, is deposited in the treasury of the court, in order that it may be kept with safety and integrity. In practice, the making up and depositing the judgment roll is generally neglected, unless in cases where it becomes absolutely necessary to do so; as when, for instance, it is required to give the proceedings in the cause in evidence in some other action; for in such case the judgment roll, or an examined copy thereof, is the only evidence of them that will be admitted. *Smith's Act. at Law,* 184.

The duty of preparing the judgment roll has been, in English practice, until lately, left to the successful party or his solicitor. 3 *Steph. Com.* 566. Now, by the judicature act 1875, sched. 1, order xli., rule 1, every judgment is to be entered by the proper officer in a book to be kept for the purpose. *Mozley & W.*

Judgment summons. A summons issued under the debtors' act 1869, and the rules framed in pursuance thereof, on the application of a plaintiff who has obtained a judgment or order in a county court for the payment of any sum or sums of money, but has not succeeded in obtaining payment from the defendant of the sum or sums so ordered to be paid. The judgment summons cites the defendant to appear personally in court, and be examined on oath touching the means he has, or has had since the date of the judgment, to pay the sum in question, and also to show cause why he should not be committed to prison for his default. *Robson Bkcy.*

JUDICATURE ACTS. Important English statutes, which have made an extensive change in the judicial organization and the fundamental principles of procedure.

They are Stat. 36 & 37 Vict. ch. 66, 1873, and the 38 & 39 Vict. ch. 77, 1875. The first of these enacted the changes intended at the date of its passage, but postponed the time when its provisions should take effect. Several amendments in the system proposed were matured in the interim, and were enacted by the second act mentioned. The changes, as set forth in the two acts taken together, went into operation Nov. 1, 1875. A third act (37 & 38 Vict. ch. 83) is of slight importance, as it only extended the time allowed before the first act should take effect.

The acts abrogate the organization of the former superior courts, and create one supreme court of judicature in England, consisting of two permanent divisions, one of which, her majesty's high court of justice, has chiefly original jurisdiction; while the other, under the name of her majesty's court of appeal, is clothed chiefly with appellate jurisdiction. The details of this change in the organization of courts are quite fully explained under the heads of the different English courts affected. See COURTS, subd. Courts of England; CHANCERY; COUNTY COURT; COURT OF APPEAL; COURT OF COMMON PLEAS; COURT FOR DIVORCE AND MATRIMONIAL CAUSES; COURT OF EXCHEQUER; COURT OF EXCHEQUER CHAMBER; COURT OF KING'S BENCH; COURT OF PROBATE; HIGH COURT OF ADMIRALTY; HIGH COURT OF CHANCERY; HIGH COURT OF JUSTICE; SUPREME COURT OF JUDICATURE.

With respect to procedure, the acts effect a fusion of legal and equitable remedies, very analogous to that which has been accomplished in many of the states by the codes of reformed procedure. It is prescribed that, in every civil cause commenced in the high court of justice, law and equity shall be administered according to seven rules, in substance: 1. If a plaintiff or petitioner claims an equitable estate or right or relief on equitable grounds, the new courts shall give him the same relief as ought to have been given by the former court of chancery; 2. Equitable defences may be set up, and shall have the same effect as in the court of chancery; 3. Equitable relief may be granted to defendant as against the plaintiff, or as against third persons; such persons, if not originally parties, to be brought in by notice; 4. Equitable estates, rights, duties, and liabilities, appearing incidentally in a cause, are to be noticed the same as they were in chancery; 5. Proceedings in the new courts must not be restrained (except by stay of proceedings ordered by the court); but any ground, under former practice for injunction or prohibition upon proceedings at law, may be set up as a defence to an action in the new courts; 6. Subject to the above rules, and some other provisions of the acts, the new courts must recognize and give effect to all legal demands, estates, rights, duties, liabilities, &c., existing by the common law, custom, or statute, in the same manner as before the new acts; 7. The new courts shall grant absolutely, or upon terms, all such remedies as parties may appear to be entitled to, so that all matters of controversy shall be completely and finally determined and multiplicity of proceedings avoided.

Eleven new principles of jurisprudence are established, the general nature of which may be indicated as follows: 1. In the administration, in the new courts, of insolvent decedent estates, and winding up of insolvent corporations, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future or contingent liabilities, respectively, as may be in force for the time being under the bankrupt laws. 2. No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any statute of limitations. 3. An estate for life without impeachment of waste shall not confer upon the tenant for life any legal right to commit "equitable waste," unless an intent to confer such right expressly appears by the instrument creating such estate. 4. Merger by operation of law only, of any estate, the beneficial interest in which would not be deemed merged in equity, is abolished. 5. A mortgagor entitled for the time being to possession or rents and profits of any land as to which no notice of intention to take possession, &c., has been given by the mortgagee, may sue for such possession, or for such rents and profits, or to prevent or recover damages in respect of any wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with another person. 6. An absolute assignment of a debt or chose in action notified to the debtor shall be effectual to pass the legal right to it from the date of such notice, and all remedies for it, and the

power to give a good discharge. But if the debtor, &c., has notice of any claims conflicting with those of the assignee, he may call upon the claimants to interplead. 7. Stipulations as to time, &c., which would not be deemed of the essence of the contract, in equity, shall have the same effect in all courts as they would have in equity. 8. A *mandamus* or injunction may be granted, or a receiver appointed by interlocutory order; and this may be done either unconditionally or upon terms; and if an injunction is asked ancillary to a suit to prevent an apprehended waste or trespass, the injunction may be granted, whether defendant is in possession, or claims a right to do the act sought to be restrained under color of title or not, and whether the estates claimed are legal or equitable. 9. The rules of admiralty relative to damages for collision shall prevail in the new courts. 10. In questions relating to the custody and education of infants, the rules of equity shall prevail. 11. In general, where there is any conflict between the rules of equity and those of the common law, the rules of equity shall prevail.

The acts abolish the division of the legal year into terms, so far as relates to the administration of justice; but the terms may continue to be referred to as a measure of time. Subject to rules of court, the judges and commissioners may sit and act at any time and place for the transaction of business. And numerous regulations are prescribed for the division and assignment of business among the several branches of the court, and for the conduct of trials and the course of procedure.

JUDICIA. Judgments. The plural of *judicium*, q. v.

JUDICIAL. Pertaining to the administration of justice in courts.

Whatever emanates from a judge as such, or proceeds from a court of justice, is judicial. A power which, when exercised by officers not connected with the judiciary, would be regarded as purely administrative, becomes at once judicial when exercised by a court of justice. And where any power is conferred upon a court of justice, to be exercised by it as a court, in the manner and with the formalities used in its ordinary proceedings, the action of such court is to be regarded as judicial, irrespective of the original nature of the power. Matter of Cooper, 22 *N. Y.* 67, 82, 84.

The seizure of books or apparatus of a manufacturer, for violation of the internal revenue laws, done by internal revenue officers, is not a judicial proceeding. United States *v.* A Distillery, 1 *Hugh.* 533.

Acts of the secretary of state of a state, in issuing and revoking licenses to foreign insurance companies, under the statute, are not judicial. State *v.* Doyle, 40 *Wis.* 175.

Judicial action. The taxation of costs is not "judicial action" in the proper sense of the term, but ministerial. It may, therefore, be made by the clerk, and cannot be reviewed on error. Abbott *v.* Mathews, 26 *Mich.* 176.

The duty of draining the streets, &c., of a city, although not a judicial one, is of a judicial nature, requiring the exercise of qualities of deliberation and judgment. Mills *v.* Brooklyn, 32 *N. Y.* 489.

Judicial admissions, or confessions. Admissions or confessions publicly made and noted in court, which appear by the record of proceedings in court.

Judicial authority. The power appropriate to a judge; jurisdiction; the official right to hear and determine questions in controversy.

There is a wide distinction between a special authority to act under particular circumstances, and a judicial authority to act in particular cases. So long, in either case, as the party acts within the limits of his authority, he is, of course, justified in what he does, and in either case, if he plainly exceed the limits of his authority, he is without justification; the material difference is this, that in the former case, *i.e.* where he has a mere authority to execute, it is open to inquiry whether facts existed which warranted his act; in the latter, where he acts judicially in a matter within his jurisdiction, his adjudication is usually conclusive upon the question, whether the particular facts warranted that judgment, and to protect him from an action of trespass. 3 *Stark. Evid.* 1150 *q.*

Judicial committee of the privy council. A tribunal in England, composed of members of the privy council, which advises her majesty upon any matters referred to it; and formerly had extensive appellate jurisdiction; but this seems mostly abrogated by the judicature acts.

The judicial committee of the privy council, as constituted by Stat. 3 & 4 Wm. IV. ch. 41, passed in 1833, and 14 & 15 Vict. ch. 83, § 15, passed in 1851, consists of the lord

president of the council, the lord chancellor, the lords justices of appeal, and such other members of the privy council as shall hold, or have held, certain judicial or other offices enumerated in the acts, or shall be specially appointed by the crown to serve on the committee. Moreover, by Stat. 34 & 35 Vict. ch. 91, passed in the year 1871, her majesty was enabled to appoint, by warrant under her sign manual, four paid additional judges to act as members of the judicial committee, and to hold office during good behavior. (2 *Steph. Com.* 461.)

To the judicial committee have been referred all appeals to the crown from admiralty and ecclesiastical courts; from courts in her majesty's colonies and dependencies, and petitions for the prolongation of patents. But by the judicature acts (*q. v.*), provision has been made for the transfer of the appellate jurisdiction of the judicial committee to the new supreme court of judicature. *Mozley & W.*

Judicial decision. The determination of a court or judge, in a cause.

A contract to repay money if an instrument is held void by judicial decision, does not contemplate a postponement of payment till a decision of the court of last resort is had. Wadsworth *v.* Green, 1 *Sandf.* 78.

Judicial discretion. That limited power understood to be confided to a judge to decide, upon his own judgment, various collateral or minor matters. It is not an arbitrary authority to make orders as he pleases; but, within narrow limits, questions are confided, to be decided as he thinks right, without review.

Judicial discretion means a discretion, to be exercised in discerning the course prescribed by law. Tripp *v.* Cook, 26 *Wend.* 143.

Judicial documents. Written instruments relating to litigation. They are such as judgments, decrees, and verdicts; depositions, examinations, and inquisitions taken in the course of a legal process; writs, warrants, pleadings, bills, and answers, &c., incident to judicial proceedings.

Judicial officer. A person in whom is vested authority to decide causes or exercise powers appropriate to a court.

The term includes judges and all officers of like authority, functions, and powers.

A sheriff is not a judicial officer, and the offices of sheriff and of tax-collector, although distinct under the constitution, may still be united in the same hands. Attorney-General *v.* Squires, 14 *Cal.* 12.

Judicial power. That branch of the powers of government which relates to the deciding of controversies and administration of justice, as distinguished from executive power (*q. v.*) and legislative power (*q. v.*).

Judicial proceedings. A general term for proceedings in courts; for the course authorized to be taken in various cases to secure the determination of a controversy; to obtain the enforcement of a right or the redress or prevention of a wrong.

A statute authorizing amendment of misnomers in writs, petitions, bills, or other judicial proceedings, includes misnomer in making out an appeal. Chappel *v.* Smith, 17 *Ga.* 68.

Judicial sale. A sale which takes place under the order and auspices of a court, and the result of proceedings taken to enforce a right of sale, as distinguished from a sale by an owner in virtue of his right of property.

A judicial sale is one made under the process of a court having competent authority to order it, by an officer duly appointed and commissioned to sell. Williamson *v.* Berry, 8 *How.* 495.

Judicial sale includes a foreclosure by notice and sale. Sturdevant *v.* Norris, 30 *Iowa*, 65.

Judicial separation. A separation of man and wife by decree of court, less complete than an absolute divorce; otherwise called a limited divorce. By English law, it has the effect, so long as it lasts, of making the wife a single woman for all legal purposes, except that she cannot marry again; and similarly the husband, though separated from his wife, is not by a judicial separation empowered to marry again. It thus corresponds somewhat to a divorce *a mensa et thoro* under the old law, but is more complete in its effects. The law of New York is substantially the same. These limited divorces are there granted for causes less grave than adultery, — for cruelty, desertion, &c.

Judicial statistics. Statistics, published by authority, of the civil and criminal business of the United Kingdom, and matters appertaining thereto. Annual reports are published separately for England and Wales, for Ireland, and for Scotland. The statistics for England and Wales contain statements of the police establishments and expenses, and the number of offences committed and offenders apprehended; statements of the number of inquests held by coroners; of the number of persons com-

mitted for trial at assises and sessions, with the result of the proceedings; of the state of prisons, with returns of reformatory and industrial schools, and of criminal lunatics; of the causes in the superior courts of common law and equity, &c., and the county courts; also of the appeals to the privy council, and the judicial proceeding of the house of lords. The same matters, though with some difference in the arrangement, form the bulk of the report for Ireland. Kindred matters are dealt with in the report for Scotland, though here there is a wider divergence, rendered necessary by the variation between the laws of Scotland and England. *Mozley & W.*

Judicial writ. In English practice, the *capias* and all other writs subsequent to the original writ not issuing out of chancery, but from the court to which the original was returnable. Being grounded on what has passed in that court in consequence of the sheriff's return, they are called judicial writs, in contradistinction to the writs issued out of chancery, which were called original writs. 3 *Bl. Com.* 282.

Judicial writs are such writs as issue under the private seal of the courts, and not under the great seal of England, and are tested or witnessed not in the king's name, but in the name of the chief judge of the court out of which they issue. In this phrase the word judicial is used in contradistinction to original; original writs signifying such as issue out of chancery under the great seal, and are witnessed in the king's name. Since the uniformity of process act (2 Wm. IV. ch. 39, § 31), the distinction has become almost useless.

JUDICIARY. The body of officers charged with the administration of justice; the judges taken collectively.

JUDICIUM. This Latin word is used in several senses in old English law; for judicial authority or jurisdiction, in the abstract; for a court or tribunal; for a judicial hearing, investigation, or other proceeding; and sometimes in the sense of verdict or judgment.

Judicium Dei. The judgment of God. The decision in a trial by ordeal; so named because the deity was believed to decide in favor of the innocent.

Judicium a non suo judice datum nullius est momenti. A judgment given by an improper judge is of no moment.

Judicium est quasi juris dictum. Judgment is, as it were, a dictum of law.

Judicium non debet esse illusorium; suum affectum habere debet. A judgment ought not to be illusory; it ought to have its consequence.

Judicium parium. The judgment of one's peers, particularly trial by jury.

Judicium redditur in invitum, in præsumptione legis. Judgment, in presumption of law, is given against an unwilling party.

Judicium semper pro veritate accipitur. Judgment is always taken for truth.

Judicia in curia regis non annihilentur, sed stent in robore suo quousque per errorem aut attinctum adnullentur. Judgments in the king's court are not annihilated, but remain in force until annulled by error or attaint.

Judicia in deliberationibus crebro maturescunt, in accelerato processu nunquam. Judgments become frequently matured by deliberations, never by hurried process.

Judicia posteriora sunt in lege fortiora. The latter decisions are the stronger in law.

Judicia sunt tanquam juris dicta, et pro veritate accipiuntur. Judgments are, as it were, the dicta of the law, and are received as truth.

Judiciis posterioribus fides est adhibenda. Credit is to be given to the latter decisions.

JUGE. In French law, a judge.

Juges d'instruction, are officers subject to the *procureur-impérial*, who receive, in cases of criminal offences, the complaints of the parties injured, and who summon and examine witnesses upon oath, and, after communication with the *procureur-imperial*, draw up the forms of accusation. They have also the right, subject to the approval of the same superior officer, to admit the accused to bail. They are appointed for three years, but are re-eligible for a further period of office. They are usually chosen from among the regular judges. *Brown.*

Juge de paix. An inferior judicial functionary, appointed to decide summarily controversies of minor importance, especially such as turn mainly on questions of fact. He has also the functions of a police magistrate. *Ferrière.*

JURA. Rights; the plural of *jus*, q. v.

Jura ecclesiastica limitata sunt infra limites separatos. Ecclesiastical laws are limited within separate bounds.

Jura eodem modo destruuntur quo constituuntur. Laws are abrogated by the same means by which they were made.

Jura naturæ sunt immutabilia. The laws of nature are unchangeable.

Jura personarum. The rights of persons.

Jura publica anteferenda privatis. Public rights are to be preferred to private.

Jura publica ex privato promiscue decidi non debent. Public rights ought not to be promiscuously decided out of a private transaction.

Jura regalia. Royal rights, or rights in the nature of royal rights; especially civil and criminal jurisdiction.

Jura regis specialia non concedunter per generalia verba. The special rights of the king are not affected by general words.

Jura rerum. The rights which a person may acquire in things.

Jura sanguinis nullo jure civili dirimi possunt. The rights of blood can be taken away by no civil law.

Jura summa imperii. The supreme rights of dominion.

JURAMENTUM. An oath.

Juramentum calumniæ. The oath of calumny. An oath required, in the civil and canon law, of the parties to a suit, their attorneys and proctors, that they are not influenced by malice, but believe their cause to be just. See ANTE JURAMENTUM.

JURAT. An abbreviation of the Latin *juratum*, signifying sworn, the emphatic word in the Latin form of the memorandum or clause in an affidavit by which the officer certifies that it was "sworn" before him; from which such a clause or a like clause in any affidavit or deposition is called the *jurat*.

JURATA, was formerly the conclusion of every *nisi prius* record, which stated in effect that the proceedings were respited till some day therein named, unless the judge who was to try the cause should before that day come (as he always did) to the place appointed for the trial; now abolished. *Smith. Act. Law*, ch. 4.

JURATS. 1. Twelve officers in the island of Jersey, members of the royal court, and also members of the states or legislative assembly of the island; elected for life by the whole of the ratepayers throughout the island. *Cowel;* 1 *Bl. Com.* 107; 1 *Steph. Com.* 101.

2. Also, officers in the nature of aldermen, in certain towns of Kent and Sussex. *Cowel.*

Juris et de jure. Of right and by law. This term is applied to presumptions which are conclusive, and cannot be rebutted by evidence; as distinguished from presumptions *juris*, which may be rebutted.

JURISCONSULT. A jurist; a person skilled in the science of law, particularly of international or public law.

JURISDICTION. 1. The authority of government; the sway of a sovereign power.

2. The authority of a court as distinguished from the other departments; judicial power considered with reference to its scope and extent as respects the questions and persons subject to it; power given by law to hear and decide controversies.

The separation of the legislative, judicial and executive powers of government is essential to a republican form of government, and cannot be violated even by a constitutional convention, and therefore the ordinance of April 29, 1868, by the Mississippi constitutional convention of that year, granting new trials upon certain classes of final judgments and decrees referred to, and on certain conditions therein named, not being a legislative, but a judicial act, is unconstitutional and void. Lawson *v.* Jeffries, 47 *Miss.* 686.

The determination of the result of an election is not a matter pertaining to the ordinary jurisdiction of the law in courts of justice; it is in the nature of a political question, to be regulated under the constitution by the political authority of the state; not by the judicial. Rogers *v.* Johns, 42 *Tex.* 339.

Courts have no power to promulgate laws or to authorize others to do so. If violation or remissness of official duty has occurred among those who are by the constitution authorized to enact and promulgate laws, the correction is to be sought within the powers of the legislative and executive departments, and not within those of the judicial. State *v.* Deslonde, 27 *La. Ann.* 71.

Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to the suit; to adjudicate or exercise any judicial power over them. Rhode Island *v.* Massachusetts, 12 *Pet* 657, 717.

The power to hear and determine a cause is jurisdiction. United States *v.* Arredondo, 6 *Pet.* 691; Hickman *v.* O'Neal, 10 *Cal.* 292.

Jurisdiction is the power to hear and determine a cause; the authority by which judicial officers take cognizance of and decide causes. Brownsville *v.* Basse, 43 *Tex.* 440.

Jurisdiction includes the power to hear without determining, or to determine without hearing. *Exp.* Bennett, 44 *Cal.* 84.

The word jurisdiction (*jus dicere*) is a

term of large and comprehensive import, and embraces every kind of judicial action upon the subject-matter, from finding the indictment to pronouncing the sentence. When the jurisdiction of the offence, with its penalties fixed by law, is transferred from one tribunal to another, it carries with it the power to inflict such punishment, to the same extent to which it was held by the court from which it was transferred. To have jurisdiction is to have power to inquire into the fact, to apply the law, and to declare the punishment, in a regular course of judicial proceeding. Hopkins *v.* Commonwealth, 3 *Metc.* (*Mass.*) 460.

The term jurisdiction, in the extradition treaties between the United States and foreign countries, has a broader meaning than that of mere physical territorial jurisdiction, or even of *quasi* territorial jurisdiction, or treaty jurisdiction. It has an enlarged meaning, equivalent to the words "authority, cognizance, or power of the courts." *Re* Vogt, 18 *Int. Rev. Rec.* 18.

JUROR. 1. One member of a jury.

2. Sometimes one who takes an oath, as in the term non-juror, — a person who refuses certain oaths

JURY. A body of men summoned and sworn to decide the facts of a controversy on trial; that branch of a court which is charged with the determination of the facts.

The terms "jury" and "trial by jury" as used in the constitution, mean twelve competent men, disinterested and impartial, not of kin, nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor of or against either party, duly impanelled and sworn to render a true verdict according to the law and the evidence. State *v.* McClear, 11 *Nev.* 39.

Juries are either *special* or *common*. Special juries were introduced for causes of too great nicety for the discussion of ordinary freeholders. The officer is to take indifferently forty-eight of the principal freeholders in the presence of the attorneys of both sides, each of whom is to strike off twelve, and the remaining twenty-four are returned. A common jury is formed by the first chosen twelve of a panel. 3 *Bl. Com.* 357.

The words trial by jury, in the state constitutions, mean a jury of twelve men. People *v.* Kennedy, 2 *Park. Cr.* 312; May *v.* Milwaukee, &c. R. R. Co., 3 *Wis.* 219.

The word jury, in the provision of the constitution of Minnesota securing the right to trial by jury, imports a body of twelve men, and a trial by a less number in a criminal prosecution, against the objection of the accused, and notwithstanding he has the right, upon entering into a recognizance with surety, to appeal to another court, is a deprivation of and a violation of his constitutional rights. State *v.* Everett, 14 *Minn.* 439.

Jury, as used in N. Y. Const. of 1846, art. 1, § 7, means a body of men having the usual characteristics, and acting through the accustomed forms by which the powers of a jury are exercised. Clark *v.* City of Utica, 18 *Barb.* 451.

It imports a body of twelve men, whose verdict is to be unanimous. Cruger *v.* Hudson River R. R. Co., 12 *N. Y.* 190; People *v.* Kennedy, 2 *Park. Cr.* 312.

The word jury, as used in the New York constitution, does not mean a jury of twelve men exclusively. A jury of six men in a justice's court is as much a jury, in the eye of the law, as a jury of twelve men in a court of record; and is the jury which had been "heretofore used" in that tribunal at the adoption of the constitution. Knight *v.* Campbell, 62 *Barb.* 16.

Jury, in the constitution, means a tribunal of twelve men presided over by a court, and hearing the allegations, evidence, and arguments of the parties. Lamb *v.* Lane, 4 *Ohio St.* 167.

Twelve men are necessary to constitute a jury. Jackson *v.* State, 6 *Blackf.* 461; Brown *v.* State, 8 *Id.* 561; Durham *v.* Hudson, 4 *Ind.* 501; Brown *v.* State, 16 *Id.* 496.

A jury must be composed of twelve men, according to the meaning of the term in the common law. United States *v.* Insurgents of Pennsylvania, 2 *Dall.* 335; Bonaparte *v.* Camden & Amboy R. R. Co., *Baldw.* 205; Wynehamer *v.* People, 13 *N. Y.* 378, 427, 458, 484; Baxter *v.* Putney, 37 *How. Pr.* 140.

Jury means a panel of twelve men, unless a different number is designated in the statute. Bibel *v.* People, 67 *Ill.* 172.

The term jury does not necessarily imply twelve men. There are statutes, as in the case of coroners' inquests, and some others, which provide for a jury to consist of less than twelve persons. Fitchburg R. R. Co. *v.* Boston & Maine R. R., 3 *Cush.* 58.

A jury is a certain number of men (usually twelve) to whose decision the matter in dispute between a plaintiff and defendant is submitted, and who are bound upon their oaths to decide (or give their verdict) according to the evidence which is laid before them on the trial of the cause. Such men, individually, are called jurors. A jury is either a common jury or a special jury. A common jury consists of persons between the ages of twenty-one and sixty, who shall have £10 a year, beyond reprises, in lands and tenements of freehold, copyhold, or customary tenure, or held in ancient demesne, or in rents issuing out of such tenements in fee-simple, fee-tail, or for life, or £20 a year in leaseholds held for twenty-one years or any longer term, or any term determinable on a life or lives; or, being a householder, shall be rated to the poor-rate, or, in Middlesex, to the house duty, in a value of not less than £30; or who shall occupy a house containing not less than

fifteen windows. These qualifications, however, do not extend to jurors of any liberties, franchises, cities, or boroughs who possess civil or criminal jurisdiction. It is called a common jury, because the matter to be tried by it is only of a common or ordinary nature. A special jury consists of persons of the degree of squire or upwards, or of the quality of banker, or merchant, &c. It is called special, because the matter to be tried by it is usually of a special and important nature, and is supposed to require men of education and intelligence to understand it. See also jury act 1870, 33 & 34 Vict. ch. 77. *Brown.*

Jury signifies twenty-four or twelve men sworn to inquire of a matter of fact, and to declare the truth upon such evidence as shall be delivered them. Juries are of two kinds: grand juries, to inquire whether there is a *prima facie* ground for a criminal accusation; and petty juries, for determining disputed matters of fact in civil and criminal cases. *Mozley & W.*

Jury process. The process by which a jury is summoned in a cause, and by which their attendance is enforced.

JURYMAN. One member of a jury; a juror.

JUS. Right; justice; law. An abstract right. In the civil law, *jus* generally means law, as distinguished from *lex*, a statute. By modern writers the word has been used to designate a right which may be enforced by the law; usually with some qualifying word or phrase annexed, describing the particular right or class of rights intended.

Jus accrescendi. The right of survivorship. The right of the survivor or survivors of two or more joint tenants to the tenancy or estate, upon the death of one or more of the joint tenants, the last survivor taking an estate of inheritance. This is an incident of estates held jointly, but does not extend to partnership property.

Jus accrescendi inter mercatores, pro beneficio commercii, locum non habet. For the benefit of commerce, the right of survivorship has no place among merchants. There is no right of survivorship among merchants in mercantile transactions. Particularly among the members of a mercantile partnership, the right of survivorship is not allowed; although they hold jointly the property of the firm, the share of each partner goes, upon his decease, to his personal representatives, like any other part of his estate. This maxim extends to real as well as personal property; so that all property, of whatever nature, purchased with partnership capital for the purposes of the partnership, continues to be partnership capital, and is not subject to the *jus accrescendi*. The right of action or legal interest in the debts and other choses in action of the partnership, however, survives to a surviving partner, but only for the joint benefit of himself and the representatives of his deceased partner; he has no power to dispose of the partnership effects as against such representatives except for the purpose of paying partnership debts and liabilities. *Whart. Leg. Max.* 90.

Jus accrescendi præfertur oneribus. The right of survivorship is preferred to burdens. One joint proprietor cannot incumber the joint estate so as in any way to affect the right of another joint proprietor who survives him. Thus if one joint tenant grants a right of way over or makes any charge upon the joint estate, although it may be good as against himself, it does not, if he dies before the other joint tenant, affect the latter's right of survivorship. Within the principle of this maxim, also, is the rule that no dower or curtesy can be claimed out of a joint estate. A similar principle is sometimes expressed in the words *jus accrescendi præfertur ultimæ voluntati*, — the right of survivorship is preferred to a last will; which rule applies to an attempt by a joint tenant to effect by a testamentary provision what the maxim first mentioned prohibits his effecting by act or deed during his lifetime. Hence a devise by a joint tenant of his share of the joint estate is without effect; the right of the survivor, which accrued at the original creation of the estate, is prior to and has preference over the devise, which only takes effect after the death of the testator.

Jus ad rem. A right to a thing. A term of the civil law, signifying a right to a thing arising out of an obligation incurred by a particular person, and which may be enforced against or through him, as distinguished from a right in some particular article or piece of property, having effect against every person, which is termed *jus in re*. A

right of property consisting in action or obligation may be *jus ad rem;* property in possession or dominion is *jus in re.* A right of action, when considered with regard to the person from whom it is due, is called obligation; when considered with regard to the person to whom it is due, it is called *jus ad rem.* The *jus ad rem* belongs to a person only mediately and from relation to some particular individual; the *jus in re* belongs to a person immediately and absolutely, and is the same right as against all others. Various distinctions between the two classes of rights have been drawn, based upon the title to, or the possession or right of possession of, the thing in question; but these seem not to be essential points of distinction.

Jus ad rem is employed by modern writers to denote a right to a thing, without the possession, or which is an imperfect or incomplete right in any respect. *Jus in re* is used, in like manner, of a complete right as distinguished from an imperfect right; it includes both right and possession. Thus a lien accompanied with possession is *jus in re;* a lien resting wholly in contract is *jus ad rem.*

Jus civile. Civil law. The body of law peculiar to one state or people. Particularly, in Roman law, the civil law of the Roman people, as distinguished from the *jus gentium.* The term is also applied to the body of law called emphatically the civil law.

The *jus civile* and the *jus gentium* are distinguished in this way. All people ruled by statutes and customs use a law partly peculiar to themselves, partly common to all men. The law each people has settled for itself is peculiar to the state itself, and is called *jus civile,* as being peculiar to that very state. The law, again, that natural reason has settled among all men, the law that is guarded among all peoples quite alike, is called the *jus gentium,* and all nations use it as if law. The Roman people, therefore, use a law that is partly peculiar to itself, partly common to all men. *Hunter, Roman Law,* xxxviii.

But this is not the only, or even the general, use of the words. What the Roman jurists had chiefly in view, when they spoke of *jus civile,* was not local as opposed to cosmopolitan law, but the old law of the city as contrasted with the newer law introduced by the prætor (*jus prætorium, jus honorarium*). Largely, no doubt, the *jus gentium* corresponds with the *jus prætorium;* but the correspondence is not perfect. *Id.* xxxix.

Jus commune. Common right. Natural justice.

Jus dare. To give the law; to make law. This is the province of the legislature, as distinguished from that of the judge, which is to declare the law, —*jus dicere.*

Jus dicere. To declare the law. Distinguished from *jus dare,* q. v.

Jus disponendi. The right of disposing of a thing. One of the qualities of ownership. Thus, the surviving member of a partnership has no *jus disponendi* of the partnership property as against the personal representatives of a deceased partner, except for the purpose of discharging partnership liabilities.

Jus ex injuria non oritur. A right does not arise out of, or from, a wrong. A person cannot recover for an injury occasioned to, or damages suffered by, him, owing to his own wrongful act.

Jus et fraus nunquam cohabitant. Right and fraud never dwell together. This maxim is applicable to those cases where a wrong or forgery is attempted to be committed under color of right.

Jus gentium. The law of nations; universal law. In Roman law, this term included not only the law governing the relations of nations with each other, sometimes termed international law, but also the law generally observed by all nations, and which is established by natural reason among all men.

Jus honorarium. The honorary law. The name of a body of law compiled from the edicts of the Roman prætors and ædiles, of an equitable and remedial nature. See JUS PRÆTORIUM.

Jus in re. A right in a thing. A term of the civil law, signifying a right in respect to a thing inherent in the person's relation to the thing, without reference to any other particular person, and which is the same as against all others. As to the distinction between *jus in re* and *jus ad rem,* see the latter term.

Jus legitimum. A legal right. In the civil law, a right which might be enforced in the ordinary course of law.

Jus mariti. The right of a husband. Particularly the right to the movable

property of his wife which a husband acquires by virtue of the marriage.

Jus naturale. Natural law; the law of nature. This name was given by the Romans to the rules or principles which they regarded as taught by nature, to all men; and not peculiar to men, but applying to all living things. But the *jus gentium* — the general or universal element of law — was also identified with the *jus naturale*.

Jus personarum. Rights of persons. In the civil law, those rights which belong to persons as such, or in their different characters and relations; as parents and children, masters and servants, &c.

Jus possessionis. The right of possession.

Jus postliminii. The right to reclaim property after recapture. The right of postliminy, *q. v.*

Jus prætorium. The prætorian law. In the civil law, this term denotes that system of equitable and remedial law introduced by the prætors, within their discretion; termed also *jus honorarium*.

Jus precarium. A precarious right. See PRECARIUM.

Jus privatum. Private law. In Roman law, the law regulating the affairs of individuals was termed *jus privatum;* and was distinguished from the *jus publicum*, which term denoted the law regulating the affairs of the state. The *jus privatum* was gathered from and included the precepts of the *jus naturale*, the *jus gentium*, and the *jus civile*, q. v.

Jus proprietatis. The right of property. Proprietorship as distinguished from the *jus possessionis*.

Jus publicum. Public law. In Roman law, the law regarding the state.

The *jus publicum* is what looks to the standing of the affairs of Rome; *jus privatum*, to the advantage of individuals. *Jus publicum* is also said to be the law relating to sacred rites, to priests and magistrates. The distinction that seems to be intended may be expressed with more precision from a different stand-point. Two kinds of cases come before legal tribunals. In one, private individuals seek redress from private individuals for evils affecting themselves; in the other, persons sue or are sued, not in their own behalf, but as representing the state or sovereign. Causes are thus either, 1, between private individuals; or, 2, between the sovereign and private individuals. Public law, therefore, embraces ecclesiastical law, constitutional law (including the administration), and criminal law. *Hunter, Roman Law,* xxxvii.

Jus relictæ. Right of a widow. The right of a widow to a certain share of her deceased husband's estate.

Jus rerum. The law of things. The law regulating the rights and powers of persons over things; how property is acquired, enjoyed, and transferred.

Jus respicit æquitatem. The law has regard to equity. In the broadest sense of the terms, law is founded upon equity, and regard is had to equity in all legal decisions. But as to the two systems of jurisprudence, distinguished by the terms "law" and "equity," the general relation between them is expressed by the maxim *æquitas sequitur legem*, q. v. When the law is clear, it must be applied, although the result may appear to be inequitable in a particular case; law does not give place to equity, or what may seem to be so. Nevertheless, the courts of law regard the established principles acted upon in courts of equity. Thus, where a rule of property is settled in a court of equity, and is not repugnant to any legal principle, rule, or determination, it may properly be adopted at law. And courts of law will inquire of decisions in courts of equity, not upon questions merely equitable, but for legal judgments proceeding upon legal grounds. Smith *v.* Doe, 7 *Price*, 379; *Broom Max.* 151.

Jus scriptum. Written law.

1. In the Roman law, all law actually committed to writing, without regard to its origin or mode of enactment or promulgation.

The Roman *jus scripta* includes statute (*lex*), decree of the commons (*plebiscitum*), decree of the senate (*senatus consultum*), the decisions of the emperors (*principum placita*), the edicts of magistrates having the right to issue edicts, and the answers of learned men (*responsa prudentium*). *Hunter, Roman Law,* xl.

2. In English law, statute law, as distinguished from the common law; more generally designated as *lex scripta*.

Jus tertii. This phrase, which signifies literally the right of some third person, is commonly applied in the following manner: a tenant, it is true, cannot dispute the title of his landlord, but he may plead that such title has determined by conveyance or other-

wise; and so also a bailee, when sued to redeliver the goods bailed to him, cannot, as a rule, deny the right of the bailor (who delivered them to him) to recover the goods; nevertheless, he may show that, by transfer, assignment, or otherwise, the bailor's right to have the goods redelivered to him has determined; *e. g.*, a pawnbroker will regard only the holder of the duplicate, and, to an action brought by the pawnor, will set up the defence of *jus tertii*. *Brown.*

JUSTICE. 1. That attribute, science, or virtue which is exercised in voluntarily rendering, or in lawfully compelling others to render, to every one whatever is due to him.

2. The title of a judicial officer; a judge. Judge and justice are often used interchangeably.

Justice of assise, or nisi prius. The judges of the superior courts at Westminster, who go circuit into the various counties of England and Wales twice a year, for the purpose of disposing of such causes as are ready for trial at the assises, are termed justices of assise.

Justice in eyre. From the old French word *eire*, *i.e.* a journey. Those justices who in ancient times were sent by commission into various counties, to hear more especially such causes as were termed pleas of the crown, were called justices in eyre; they differed from justices in oyer and terminer, inasmuch as the latter were sent to one place, and for the purpose of trying only a limited number of special causes; whereas the justices in eyre were sent through the various counties, with a more indefinite and general commission. In some respects they resembled our present justices of assise, although their authority and manner of proceeding differed much from them.

Justice of the forest. Officers who had jurisdiction over offences committed within the forest were called, in old English law, justices of the forest. The court wherein these justices sat and determined such causes was called the justice seat of the forest. They were also sometimes called the justices in eyre of the forest.

Justice of jail delivery. Those justices who are sent with commission to hear and determine all causes appertaining to such persons who for any offence have been cast into jail, were called, in England, justices of jail delivery. See JAIL. Part of their authority was to punish those who let to mainprise those prisoners who were not bailable by the law, nor by the statute *de finibus*, and they seem formerly to have been sent into the country upon this exclusive occasion; but afterwards justices of assise had the same authority given them.

Justice of oyer and terminer. In England, the justices of oyer and terminer are certain persons appointed by the king's commission, among whom are usually two judges of the courts at Westminster, and who go twice in every year into every county of the kingdom (except London and Middlesex), and, at what is usually called the assises, hear and determine all treasons, felonies, and misdemeanors. They are usually those who have before been described under the titles of justices of assise and justices of jail delivery.

Justice of the peace. A judicial officer of inferior grade and limited jurisdiction, having jurisdiction to try and determine minor controversies of such kinds as are specified by statute, and to entertain criminal complaints, and commit offenders.

Justice's court. A court held by a justice of the peace.

In England, justices of the peace are certain justices appointed by the king's special commission under the great seal, jointly and separately, to keep the peace of the county where they dwell. Any two or more of them are empowered by this commission to inquire of and determine felonies and other misdemeanors, in which number some particular justices, or one of them, are directed to be always included, and no business to be done without their presence, the words of the commission running thus: "*quorum aliquem vestrum*," A, B, C, D, &c., "*unum esse volumus;*" whence the persons so named are usually called justices of the quorum. The origin of these magistrates is to be found in the reign of Edward I., who by the Stat. 3 Edw. I. (statute of Westminster the First), ch. 9, and by the statute of coroners (4 Edw. I. stat. 2), but chiefly by the statute of Winton, otherwise Winchester (13 Edw.

I.), directed that upon any robbery or felony being committed in any town, hue-and-cry should be raised upon the felon, and they that kept the town were to follow him with hue-and-cry from town to town, with all the town and the towns near; and, failing capture, the hundred was made liable for the damage. In the reign of Edward III., conservators of the peace were appointed, whose duty it was to assist the sheriff, coroner, and constable, and they were empowered to imprison and punish rioters and offenders. These conservators were afterwards designated justices of the peace. By a more recent statute, 27 Eliz. ch. 13, the sheriff or constable was required to make the pursuit both with horse and foot; and to the present day hue-and-cry in that manner may still be made under that and the previous statutes, but is seldom if ever in fact made, owing to the equally effective, if not so speedy, remedy which is provided in the ordinary police and criminal processes for the apprehension and punishment of offenders.

JUSTICIAR, or JUSTICIARY. The title of the higher judges, in old English times, before the division of *aula regia* into separate courts.

JUSTICIARY COURT. The chief criminal court of Scotland, consisting of five lords of session, added to the justice general and justice clerk; of whom the justice general, and, in his absence, the justice clerk, is president. This court has a jurisdiction over all crimes, and over the whole of Scotland. *Bell.*

JUSTICIES. An old English writ, directed to the sheriff in some special cases, by virtue of which he may hold plea of debt in his county court for a large sum; whereas, otherwise, by his ordinary power, he was limited as to the amount of which he might take jurisdiction. It was called *justicies*, because it is a commission to the sheriff to do a man justice and right, beginning with the word *justicies*, &c. In effect it empowered the sheriff, for the sake of despatch, to do the same justice in his county court as might otherwise be had at Westminster.

JUSTIFIABLE. That which is rightful; that which can be shown to be sustained by law, as justifiable homicide. See HOMICIDE.

Justifiable cause. In a statute of the United States, declaring it to be a crime for a master to force a seaman on shore in a foreign port without justifiable cause, these words do not mean such a cause as in the mere maritime law might authorize a discharge, but such a cause as the known policy of the American laws on the subject contemplates as a case of moral necessity for the safety of the ship and crew, and the due performance of the voyage. United States *v.* Coffin, 1 *Sumn.* 394.

Justifiable motive. Malice includes those motives which are more wicked, but does not include all; there are many unlawful motives which have never been classified as malicious. *Nye* v. *People*, 35 Mich. 16.

JUSTIFICATION, or JUSTIFYING. 1. In pleading, is a setting forth of some cause or reason why defendant might lawfully do the act for which he is called upon by the action to answer.

2. In practice, also, the oath of bail or sureties to the ownership of property sufficient to qualify them.

Just and reasonable terms. This phrase, in the Illinois practice act, refers to terms which would be just and reasonable by the common-law practice. Empire Fire Ins. Co. *v.* Real Estate Trust Co., 1 *Ill. App.* 391.

K.

KALENDS. See CALENDS.

KEELAGE. The right to demand money for the privilege of anchoring a vessel in a harbor; also, sometimes, the money so paid.

KEEP, *n.* A strong tower or hold in the middle of any castle or fortification, wherein the besieged made their last efforts of defence, was formerly, in England, called a keep; and the inner pile within the castle of Dover, erected by King Henry II. about the year 1153, was termed the king's keep; so at Windsor, &c. It seems to be something of the nature of that which is called abroad a citadel. *Jacob.*

KEEP, *v.* The words "keep" and "kept" have several meanings. Their precise signification depends on the context of which they form a part, or the circumstances under which they are used.

When it is said, in reference to a woman, that a certain man keeps her, the ordinary and popular interpretation of the expression is, that the relation between the parties is one which involves illicit intercourse. Downing *v.* Wilson, 36 *Ala.* 717.

The word keeping, in an act prohibiting "the keeping of gaming-tables," implies duration. It is not applicable to temporary use, because a thing kept is not, in its nature, temporary. Neither a single act of play, at a sweat-cloth at the races, or even a single day's use of it on the race-field, is a "keeping" of a common gaming-table within such an act. United States *v.* Smith, 4 *Cranch C. Ct.* 659.

Keeper, in a statute prohibiting gaming, includes one who assists in the superintendence of a gaming-house, though not a proprietor or lessee. Stevens *v.* People, 67 *Ill.* 587.

Under a statute which renders the keeper as well as the owner of a dog liable to any person injured by him, a person who harbors a dog upon his premises is responsible for him, irrespective of the ownership of the animal. Where the evidence showed that the dog was harbored about the stables of a horse-railroad company, by the man in charge of the stables, and with knowledge and assent of the general superintendent, this was held sufficient to charge the company as keepers of the dog. Barrett *v.* Malden, &c. R. R. Co., 3 *Allen*, 101; compare Cummings *v.* Riley, 52 *N. H.* 368.

Keeping house. The English bankrupt laws use the phrase keeping house to denote an act of bankruptcy. It is committed when a trader absents himself from his place of business and retires to his private residence, to evade the importunity of creditors. The usual evidence of "keeping house" is refusal to see a creditor who has called on the debtor at his house for money. *Robson Bkcy.*

A trader who secludes himself in his house to avoid the fair opportunity of his creditors, who are thus deprived of the means of communicating with him, he begins "to keep house" within the meaning of the English bankruptcy act, and commits an act of bankruptcy. Cumming *v.* Baily, 6 *Bing.* 363.

Keeping open. To allow general access to one's shop, for purposes of traffic, is a violation of a statute forbidding him to "keep open" his shop on the Lord's day, although the outer entrances are closed. Commonwealth *v.* Harrison, 11 *Gray*, 308.

To "keep open," in the sense of such a law, implies a readiness to carry on the usual business in the store, shop, saloon, &c. Lynch *v.* People, 16 *Mich.* 472.

Keeping the peace. Avoiding a breach of the peace; dissuading or preventing others from breaking the peace.

Security for keeping the peace consists in being bound, with one or more securities, in a recognizance or obligation, whereby the party acknowledges himself to be indebted in a given sum, with condition that it shall be void if he shall keep the peace; either generally towards all persons, or particularly towards some individual who has been threatened, and has applied for the security, or both. *Mozley & W.*

KEEPER OF THE GREAT SEAL. A high officer of state, through whose hands pass all charters, grants, and commissions of the king under the great seal. He is styled lord keeper of the great seal, and this office and that of lord chancellor are united under one person; for the authority of the lord keeper and that of the lord chancellor were, by Stat. 5 Eliz. ch. 18, declared to be exactly the same; and, like the lord chancellor, the lord keeper with us at the present day is created by the mere delivery of the king's great seal into his custody. *Brown.*

KEEPER OF THE PRIVY SEAL. An officer through whose hands pass all charters signed by the king before they come to the great seal. He is a privy councillor, and was anciently called clerk of the privy seal, but is now generally called the lord privy seal. *Brown.*

KIDNAPPING. The offence of taking a person by force or fear and against his will, with intent to carry him to another place.

By earlier writers the term is used of the offence of taking children only; and this seems its etymological meaning. See *Phillips' World of Words; Webst. Dict.; Johns. Dict.* Many accurate authorities employ it without reference to the age of the subject, but confine it to an abduction committed with intent to export the person injured out from his own home, state, or country, to another, excluding a taking for the purpose of keeping in secret confinement only. See *Bell's Dict.; Bouvier; Jacob;* 4 *Bl. Com.* 219.

Bishop says that, according to what is believed to be the better view, kidnapping is false imprisonment, aggravated by the intent to carry the person away to another place, but not necessarily to another country.

Several of the statutes on the subject appear to have used the term somewhat more broadly, and so as to include taking a person for the purpose of keeping him in secret confinement. But we think

this is not the general acceptation. In Hadden *v.* People, 25 *N. Y.* 372, it was held that procuring intoxication of a seaman, with the design of thereby getting him on board ship without his consent, and then taking him on board in that condition, was kidnapping, under the New York revised statutes.

No clear, uniform distinction can be suggested between the meanings of "abduction" and "kidnapping." It seems probable that abduction was at first employed, because kidnapping was used of children only, and that more recently kidnapping has been used in a broader sense in this respect, so that the two are now equivalents.

It is not necessary, to constitute the crime of kidnapping, that physical force or violence should be used on the person kidnapped. Falsely exciting fears by threats, fraud, &c., amounting substantially to a coercion of the will, is sufficient. Moody *v.* People, 20 *Ill.* 315.

In order to constitute kidnapping a child under ten years of age, it is not necessary that actual force and violence should be used; nor is a transportation to a foreign country necessary to the completion of the offence. State *v.* Rollins, 8 *N. H*, 550.

KILL, *v.* To deprive of life.

It is appropriate to express privation of life of any and all beings; if taking human life, distinctively, is intended, homicide (*q. v.*) is the appropriate technical word.

KILL, *n.* 1. A Dutch word, signifying a channel or bed of the river, and hence the river or stream itself. It is found used in this sense in descriptions of land in old conveyances. French *v.* Carhart, 1 *N. Y.* 96.

2. An Irish word, signifying a church or cemetery, which is used as a prefix to the names of many places in Ireland. *Encyc. Lond.*

KIN; KINDRED. Relationship of persons; and, generally, lawful relationship by blood. Also, persons related to any individual; blood relatives. See CONSANGUINITY; NEXT OF KIN; RELATIVE.

Whenever a legislature in this country uses a term, without defining it, which is well known in the English law, it must be understood in the sense of the English law. Thus, terms of kindred, when used in a statute, include only legitimate kin, unless a different intention is clearly manifested. McCool *v.* Smith, 1 *Black*, 459.

The word kindred, in Me. Laws 1821, ch. 38, § 19, means lawful kindred. Hughes *v.* Decker, 38 *Me.* 153.

KING. The male sovereign of a country or nation under a monarchical form of government; a monarch or potentate, who rules singly and sovereignly over a people, or has the highest power and rule in the land.

In England, the king (or queen) is the person in whom the supreme executive power is vested. The statutes of parliament, so often quoted in American jurisprudence, are generally cited by the name and year of the sovereign in whose reign they were passed. See a table of the dates of accessions and deaths, under REGNAL YEARS.

For some compounds in which "king" is by usage changed to "queen" during a woman's reign, such as king's counsel, king's evidence, &c., see QUEEN.

KINGDOM. A country or territorial jurisdiction subject to a monarchical government.

KLEPTOMANIA. A form of insanity, consisting in an irresistible impulse to steal.

KNIGHT. A degree or title in English law, being the next personal dignity below the nobility. *Bouvier.* A commoner of rank, originally one that bore arms, who, for his martial powers, was raised above the ordinary rank of gentleman. *Mozley & W.* Knighthood: the character, degree, or dignity of knights. *Wharton.*

The following different classes or kinds of knights are mentioned:

A knight of the order of St. George, or of the garter. This order is believed to have been instituted by Edward III. in 1344.

A knight-banneret: who ranks after privy councillors and judges; and, unless created by the king in person in the field, under royal banners, in time of open war, he ranks after baronets.

A knight of the order of the bath: an order instituted by King Henry IV. They are so called from the ceremony formerly observed of bathing the night before their creation.

A knight-bachelor: the most ancient, though the lowest, order of knighthood.

A knight of the order of St. Michael

and St. George: an order instituted the 27th of April, 1818, for the United States of the Ionian Islands, and for the ancient sovereignty of Malta and its dependencies. This order is often conferred on persons who have distinguished themselves in the colonies and dependencies of the British Empire.

A knight of the thistle: an order instituted by King Achias, of Scotland, and re-established by Queen Anne on the 31st of December, 1703.

A knight-marshal: an officer in the king's house, formerly having jurisdiction and cognizance of transgressions within the king's house and verge, and of contracts made there.

A knight of the shire: a gentleman of worth chosen by the freeholders of a shire, otherwise called knight of parliament. Two knights or gentlemen of property are elected by the freeholders of a county to represent them in parliament. In times of old, they were required to be real knights, girt with the sword; but now notable esquires may be chosen. They were required to possess, as a qualification to be chosen, not less than £600 per annum of freehold estate; but, at the present day, all property qualifications in members of parliament have been removed.

Knight-service. A species of feudal tenure, which differed very slightly from a pure and perfect feud, being entirely of a military nature; and it was the first, most universal, and most honorable of the feudal tenures. To make a tenure by knight-service, a determinate quantity of land was necessary, which was called a knight's fee (*feodum militare*), the measure of which was estimated at twelve plough-lands. (*Spelm.* 219; 2 *Co. Inst.* 596.) *Brown.*

KNOWINGLY. Knowingly, in a statute imposing a penalty upon any one who shall "knowingly sell, supply," &c., means actual personal knowledge. Verona, &c. Cheese Factory *v.* Murtaugh, 4 *Lans.* 17.

That the term knowingly, applied in criminal law to the intent with which an act is done or omitted, imports only a knowledge that the facts exist which bring the act or omission within the prohibition of the law, and does not require any knowledge of the prohibition, see *Rep. N. Y. Penal Code*, § 767.

The fine imposed by the U. S. postal law on any person who shall knowingly and wilfully obstruct or retard the passage of the mail, is incurred by one who serves a warrant in a civil suit against a mail carrier, notwithstanding he may have acted in ignorance of the law of congress. United States *v.* Barney, 3 *Am. Law J.* 128.

The word knowingly, in section 3169 of the U. S. revised statutes, which provides that "every officer or agent appointed and acting under the authority of any revenue law of the United States . . . who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, . . . shall be punished, &c., — means something more than what is implied in the legal presumption that every person must know the law. A person, to be convicted under this statute, must have violated the law knowingly; the fact that he demanded or received an excess of money prescribed by law is not of itself sufficient to warrant a conviction. United States *v.* Highleyman, 22 *Int. Rev. Rec.* 138.

The words "knowingly and wilfully," in section 96 of the internal revenue act of 1868, relating to the construction of a distillery, do not imply a criminal intent; and one who fails therein to prevent the abstraction of spirits passing from the worm to the cistern is liable to the penalty, though not intending to defraud the revenue. United States *v.* McKinn, 3 *Pittsb.* 155.

KNOWN. A statute prescribing that a claimant of a lien shall state, in his notice of his claim, the name of the owner of the property, "if known," is not limited to cases of absolute knowledge. If the lienor has information and belief, he should state the fact accordingly. Story *v.* Buffum, 8 *Allen*, 35.

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