A

LAW DICTIONARY,

ADAPTED TO THE

CONSTITUTION AND LAWS

OF THE

UNITED STATES OF AMERICA,

AND OF THE

SEVERAL STATES OF THE AMERICAN UNION;

WITH

REFERENCES TO THE CIVIL AND OTHER SYSTEMS
OF FOREIGN LAW.

By JOHN BOUVIER.

SECOND EDITION.

VOL. I.

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in the Clerk's Office of the District Court for the Eastern District of Pennsylvania.

TO THE HONOURABLE

JOSEPH STORY, L.L.D.,

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

THIS WORK

IS,

WITH HIS PERMISSION,

MOST RESPECTFULLY DEDICATED,

AS A TOKEN

OF THE GREAT REGARD ENTERTAINED FOR HIS TALENTS,
LEARNING AND CHARACTER,

BY

THE AUTHOR.

ADVERTISEMENT

TO THE SECOND EDITION.

To merit, in some degree, the approbation which has been bestowed upon this work, the author has devoted much time and taken much pains to render it as perfect as possible. One thousand new subjects have been added, and many, perhaps one half, of the original articles have been revised and improved.

Among the new, will be found the article *Bankrupt*, which has been put in, although the act of the 19th of August, 1841, has been repealed. This part of the work was printed before the repeal, and it was then properly introduced, but, as it is still in force in relation to pending cases, and those which have been decided, the article will be found useful.

The examples under the article *Abbreviation* have been nearly doubled, and several hundreds have been added to the article *Construction*.

The longest articles have been numbered, and at the end of each, an index has been added, to enable the student to find, at a glance, the object of his search.

To insure correctness with regard to local matters, the author opened a correspondence with one gentleman of the bar in each state, and received from them all, with but one exception, that assistance and information which he desired; bestowed with that courteous liberality, so prominent with the American bar, and with gentlemen of education. He here takes the opportunity to offer them his sincere thanks. The information thus obtained has been incorporated in his work, and it will, he hopes, greatly aid to procure to it the title of an American Law Dictionary.

As a new edition of Bacon's Abridgment is in the course of publication, different in paging from other editions, the references to that work have been changed from the volume and page, as they were in the first edition of this work, to the title. The latter mode of reference will suit all editions.

Philadelphia, June, 1843.

PREFACE.

To the difficulties which the author experienced on his admission to the bar, the present publication is to be attributed. His endeavours to get forward in his profession were constantly obstructed, and his efforts for a long time frustrated, for want of that knowledge which his elder brethren of the bar seemed to possess. To find among the reports and the various treatises on the law the object of his inquiry, was a difficult task; he was in a labyrinth without a guide; and much of the time which was spent in finding his way out, might, with the friendly assistance of one who was acquainted with the construction of the edifice, have been saved, and more profitably employed. He applied to law dictionaries and digests within his reach, in the hope of being directed to the source whence they derived their learning, but he was too often disappointed; they seldom pointed out the authorities where the object of his inquiry might be found. It is true such works contain a great mass of information, but from the manner in which they have been compiled, they sometimes embarrassed him more than if he had not consulted them. They were written for another country possessing laws different from our own, and it became a question how far they were or were not applicable here. Besides, most of the matter in the English law dictionaries will be found to have been written while the feudal law was in its full vigour, and not fitted to the present times, or calculated for present use, even in England. And there is a great portion which, though useful to an English lawyer, is almost useless to the American student. What, for example, have we to do with those laws of Great Britain which relate to the person of their king, their nobility, their clergy, their navy, their army; with their game laws; their local statutes, such as regulate their banks, their canals, their exchequer, their marriages, their births, their burials, their beer and ale houses, and a variety of similar subjects?

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

The English law dictionaries would be very unsatisfactory guides, even in pointing out where the laws relating to the acquisition and transfer of real estate, or the laws of descent in the United States, are to be found. And the student who seeks to find in the Dictionaries of Cowell, Manley, Jacobs, Tomlins, Cunningham, Burn, Montefiore, Pott, Whishaw, Williams, the Termes de Ley, or any similar compilation, any satisfactory account in relation to international law, to trade and commerce, to maritime law, to medical jurisprudence, or to natural law, will probably not be fully gratified. He cannot, of course, expect to find in them any thing in relation to our government, our constitutions, or our political or civil institutions.

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

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

source. And he here takes the opportunity to acknowledge the benefits which he has derived from the learned labours of these gentlemen, and of those of Judge Sergeant, Judge Swift, Judge Gould, Mr. Rawle, and other writers on American law and jurisprudence.

In the execution of his plan, the author has, in the first place, defined and explained the various words and phrases, by giving their most enlarged meaning, and then all the shades of signification of which they are susceptible; secondly, he has divided the subject in the manner which to him appeared the most natural, and laid down such principles and rules as belong to it; in these cases he has generally been careful to give an illustration, by citing a case whenever the subject seemed to require it, and referring to others supporting the same point; thirdly, whenever the article admitted of it, he has compared it with the laws of other countries within his reach, and pointed out their concord or disagreement; and, fourthly, he has referred to the authorities, the abridgments, digests, and the ancient and modern treatises, where the subject is to be found, in order to facilitate the researches of the student. He desires not to be understood as professing to cite cases always exactly in point; on the contrary, in many instances the authorities will probably be found to be but distantly connected with the subject under examination, but still connected with it, and they have been added in order to lead the student to matter of which he may possibly be in pursuit.

At the suggestion of a judicious friend, in order to make this work as complete as possible, and useful to the inquiring practitioner, as well as to the student, an appendix has been added, containing Kelham's Norman Law Dictionary.

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

Philadelphia, September, 1839.

A

LAW DICTIONARY.

A, The first letter of the English and most other alphabets, is frequently used as an abbreviation, (q. v.) and also in the marks of schedules or papers, as schedule A, B, C, &c.

A MENSA ET THORO, from bed and board. A divorce *a mensa et thoro*, is rather a separation of the parties by act of law, than a dissolution of the marriage. It may be granted for causes of extreme cruelty or desertion of the wife by the husband. 2 Eccl. Rep. 208. This kind of divorce does not affect the legitimacy of children, nor authorize a second marriage. V. *A vinculo matrimonii*, *Cruelty*, *Divorce*.

A PRENDRE, French, to take, to sieze, *in contracts*, as profits a prendre. Ham. N. P. 184.

A RENDRE, French, to render, to yield, *in contracts*. *Profits a rendre;* under this term are comprehended rents and services. Ham. N. P. 192.

A VINCULO MATRIMONII, from the bonds of marriage. A marriage may be dissolved *a vinculo*, in many states, as in Pennsylvania, on the ground of canonical disabilities before marriage, as that one of the parties was legally married to a person who was then living; impotence, (q. v.), and the like; adultery; cruelty; and malicious desertion for two years or more. In New York a sentence of imprisonment for life is also a ground for a divorce *a vinculo*. When the marriage is dissolved *a vinculo*, the parties may marry again; but when the cause is adultery, the guilty party cannot marry his or her paramour.

AB INITIO, from the beginning. 1. Where a man makes a lawful entry, and subsequently abuses an authority *in law* to enter, as to distrain or the like, he becomes a trespasser *ab initio*. Bac. Ab. Trespass, B.; 8 Coke, 146; 2 Bl. Rep. 1218; Clayt. 44. And if an officer neglect to remove goods attached within a reasonable time and continue in possession, his entry becomes a trespass *ab initio*. 2 Bl. Rep. 1218. See also as to other cases, 2 Stra. 717; 1 H. Bl. 13; 11 East, 395; 2 Camp. 115; 2 Johns. 191; 10 Johns. 253; Ibid. 369.—2. But in case of an authority *in fact*, to enter, an abuse of such authority will not, in general, subject the party to an action of trespass, Lane, 90; Bac. Ab. Trespass, B.; 2 T. R. 166. See generally 1 Chit. Pl. 146, 169, 180.

AB IRATO, *civil law.* A latin phrase which signifies *by a man in anger.* It is applied to bequests or gifts, which a man makes adverse to the interest of his heir, in consequence of anger or hatred against him. Thus a devise made under these circumstances is called a testament *ab irato.* And the suit which the heirs institute to annul this will is called an *action ab irato.* Merlin, Répert, mots, *Ab irato.*

ABANDONMENT, *contracts.* In the French law the act by which a debtor surrenders his property for the benéfit of his creditors. Merl. Rép. mot Abandonment.

ABANDONMENT, *contracts.*— In insurances the act by which the insured relinquishes to the assurer all the property to the thing insured. No particular form is required for an abandonment, nor need it be in writing; but it must be explicit and absolute, and must set forth the reasons upon which it is founded. It must also be made in reasonable time after the loss. It is not in every case of loss that the insured can abandon. In the following cases an abandonment may be made; when there is a total loss; when the voyage is lost or not worth pursuing, by reason of a peril insured against; or if the cargo be so damaged as to be of little or no value; or where the salvage is very high, and further expense be necessary, and the insurer will not engage to bear it; or if what is saved is of less value than the freight; or where the damage exceeds one-half of the value of the goods insured; or where the property is captured, or even detained by an indefinite embargo; and in cases of a like nature. The abandonment, when legally made, transfers from the insured to the insurer the property in the thing insured, and obliges him to pay to the insured what he promised him by the contract of insurance. 3 Kent, Com. 265; 2 Marsh. Ins. 559; Pard. Dr. Com. n. 836 et seq. Boulay Paty, Dr. Com. Maritime, tit. 11, tom. 4, p. 215.

ABANDONMENT. *In maritime contracts in the civil law,* principals are generally held indefinitely responsible for the obligations which their agents have contracted relative to the concern of their commission; but with regard to ship owners there is a remarkable peculiarity; they are bound by the contract of the master only to the amount of their interest in the ship, and can be discharged from their responsibility by abandoning the ship and freight. Poth. Chartes part. s. 2, art. 3, § 51; Ord. de la Mar. des proprietaires, art. 2; Code de Com. l. 2, t. 3, art. 216.

ABANDONMENT, *rights.* The relinquishment of a right; the giving up of something to which we are entitled. Legal rights when once vested must be divested according to law, but equitable rights may be abandoned. 2 Wash. R. 106. See 1 H. & M. 429; a mill site, once occupied, may be abandoned. 17 Mass. 297; an application for land, which is an inception of title, 5 S. & R. 215; 2 S. & R. 378; 1 Yeates, 193, 289; 2 Yeates, 81, 88, 318; an improvement, 1 Yeates, 515; 2 Yeates, 476; 5 Binn. 73; 3 S. & R. 319; and a trust fund, 3 Yerg. 258, may be abandoned.

ABANDONMENT *for torts,* a term used in civil law. By the Roman law, when the master was sued for the tort of his slave, or the owner for a trespass committed by his animal, he might abandon them to the person injured, and thereby save himself from further responsibility. Similar provisions have been adopted in Louisiana. It is enacted by the civil code that the master shall be answerable for all the dam-

ages occasioned by an offence or quasi offence committed by his slave. He may, however, discharge himself from such responsibility by abandoning the slave to the person injured; in which case such person shall sell such slave at public auction in the usual form, to obtain payment of the damages and costs; and the balance, if any, shall be returned to the master of the slave, who shall be completely discharged, although the price of the slave should not be sufficient to pay the whole amount of the damages and costs; provided that the master shall make abandonment within three days after the judgment awarding such damages shall have been rendered; provided also that it shall not be proved that the crime or offence was committed by his order; for in such cases the master shall be answerable for all damages resulting therefrom, whatever be the amount, without being admitted to the benefit of abandonment. Art. 180, 181.

The owner of an animal is answerable for the damages he has caused; but if the animal had been lost, or had strayed more than a day, he may discharge himself from this responsibility, by abandoning him to the person who has sustained the injury, except where the master has turned loose a dangerous or noxious animal, for then he must pay for all the harm he has done, without being allowed to make the abandonment. Ib. art. 2301.

ABANDONMENT, *malicious.*— The act of a husband or wife, who leaves his or her consort wilfully, and with an intention of causing a perpetual separation. Such abandonment, when it has continued a sufficient length of time, is sufficient cause for a divorce. Vide 1 Hoff. R. 47; *Divorce.*

ABATEMENT, *chancery practice*, is a suspension of all proceedings in a suit, from the want of proper parties capable of proceeding therein. It differs from an abatement at law in this, that in the latter the action is in general entirely dead, and cannot be revived, 3 Bl. Com. 168; but in the former, the right to proceed is merely suspended, and may be revived by a bill of revivor. Mitf. Eq. Pl. by Jeremy, 57; Story, Eq. Pl. § 354.

ABATEMENT, *contracts*, is a reduction made by the creditor, for the prompt payment of a debt due by the payor or debtor. Wesk. on Ins. 7.

ABATEMENT, *merc. law.* By this term is understood the deduction sometimes made at the custom-house from the duties chargeable upon goods when they are damaged. See Act of Congress, March 2, 1799, s. 52, 1 Story L. U. S. 617.

ABATEMENT, *pleading*, is the overthrow of an action in consequence of some error committed in bringing or conducting it, when the plaintiff is not forever barred from bringing another action. 1 Chit. Pl. 434; Pleas in abatement will be considered as relating, 1 to the jurisdiction of the court; 2, to the person of the plaintiff; 3, to that of the defendant; 4, to the writ; 5, to the qualities of such pleas; 6, to the form of such pleas; 7, to the affidavit of the truth of pleas in abatement.

[2] § 1. As to pleas relating to the jurisdiction of the court, see article Jurisdiction, and Arch. Civ. Pl. 290; 1 Chit. Pl. Index. tit. Jurisdiction.

[3] § 2. *Relating to the person of the plaintiff.* 1. The defendant may plead to the person of the plaintiff that there never was any such person in *rerum natura.* Bro. Brief, 25; 19 Johns. 308; Com. Dig. Abatement, E. 16. And if one of several plaintiffs be a fictitious person, it abates the writ. Com. Dig. Abatement, E. 16; 1 Chit. Pl. 435;

Arch. Civ. Pl. 304. But a nominal plaintiff in ejectment may sustain an action. 5 Verm. 93; 19 John. 308. As to the rule in Pennsylvania, see 5 Watts, 423.—2. The defendant may plead that the plaintiff is a feme covert. Co. Lit. 132, b.; or that she is his own wife. 1 Brown. Ent. 63; and see 3 T. R. 631; 6 T. R. 265; Com. Dig. Abatement, E. 6; 1 Chit. Pl. 437; Arch. Civ. Pl. 302. Coverture occurring after suit brought is a plea in abatement which cannot be pleaded after a plea in bar, unless the matter arose after the plea in bar, but in that case the defendant must not suffer a continuance to intervene between the happening of this new matter, or its coming to his knowledge and pleading it. 4 S. & R. 238; Bac. Abr. Abatement, G.; 4 Mass. 659; 4 S. & R. 238; 1 Bailey, 369; 4 Vern. 545; 2 Wheat. 111; 14 Mass. 295; 1 Blackf. 288; 2 Bailey, 349. See 10 S. & R. 208; 7 Verm. 508; 1 Yeates, 185; 2 Dall. 184; 3 Bibb, 246.—3. That the plaintiff, (unless he sue with others as executor) is an infant and has declared by attorney. 1 Chit. Pl. 436; Arch. Civ. Pl. 301; Arch. Pr. B. R. 143; 2 Saund. 212, a, n. 5; 1 Went. 58, 62; 7 John. R. 373; 3 N. H. Rep. 345; 8 Pick. 552; and see 7 Mass. 241; 4 Halst. 381; 2 N. H. Rep. 487.—4. A suit brought by a lunatic under guardianship, shall abate. Brayt. 18.—5. Death of plaintiff before the purchase of the original writ, may be pleaded in abatement. 1 Arch. Civ. Pl. 304, 5; Com. Dig. Abatement, E. 17. Death of plaintiff pending the writ might have been pleaded since the last continuance, Com. Dig. Abatement, H. 32; 4 Hen. & Munf. 410; 3 Mass. 296; Cam. & Nor. 72. 4 Hawks, 433; 2 Root, 57; 9 Mass. 422; 4 H. & M. 410; Gilmer, 145; 2 Rand. 454; 2 Greenl. 127. But in some states, as in Pennsylvania, the death of the plaintiff does not abate the writ; in such case the executor or administrator is substituted. —6. Alienage, or that the plaintiff is an alien enemy. Bac. Abr. h. t.; 6 Binn. 241; 10 Johns. 183; 9 Mass. 363; Id. 377; 11 Mass. 119; 12 Mass. 8; 3 M. & S. 533; 2 John. Ch. R. 508; 15 East, 260; Com. Dig. Abatement, E. 4; Id. Alien, C. 5; 1 S. & R. 310; 1 Ch. Pl. 435; Arch. Civ. Pl. 3. 301.—7. Misnomer of plaintiff may also be pleaded in abatement. Arch. Civ. Pl. 305; 1 Chitty's Pleading, Index, tit. Misnomer. Com. Dig. Abatement, E 19, E 20, E 21, E 22; 1 Mass. 76; Bac. Abr. h. t.—8. If one of several joint tenants, sue in action ex contractu, Co. Lit. 180, b; Bac. Abr. Joint-tenants, K; 1 B. & P. 73; one of several joint contractors, Arch. Civ. Pl. 48—51, 53; one of several partners, Gow on Part. 150; one of several joint executors who have proved the will, or even if they have not proved the will, 1 Chit. Pl. 12, 13; one of several joint administrators, Ibid. 13; the defendant may plead the non-joinder in abatement. Arch. Civ. Pl. 304; see Com. Dig. Abatement, E 9, E 12, E 13, E 14.—9. If persons join as plaintiffs in an action who should not, the defendant may plead the misjoinder in abatement. Arch. Civ. Pl. 304; Com. Dig. Abatement, E 15.—10. When the plaintiff is an alleged corporation, and it is intended to contest its existence, the defendant must plead in abatement. Wright, 12; 3 Pick. 236; 1 Mass. 485; 1 Pet. 450; 4 Pet. 501; 5 Pet. 231. To a suit brought in the name of the "judges of the county court," after such court has been abolished, the defendant may plead in abatement that there are no such judges. Judges, &c. v. Phillips, 2 Bay, 519.

[4] § 3. ***Relating to the person of the defendant.*** 1. In an action against

two or more, one may plead in abatement that there never was such a person in *rerum natura* as A, who is named as defendant with him. Arch. Civ. Pl. 312.—2. If the defendant be a married woman, she may in general plead her coverture in abatement, 8 T. R. 545; Com. Dig. Abatement, F. 2. The exceptions to this rule arise when the coverture is suspended. Com. Dig. Abatement, F 2, § 3; Co. Lit. 132, b; 2 Bl. R. 1197; Co. B. L. 43.—3. The death of the defendant abates the writ at common law, and in some cases it does still abate the action, see Com. Dig. Abatement, H 34; 1 Hayw. 500; 2 Binn. 1; 1 Gilm. 145; 1 Const. Rep. 83; 4 McCord, 160; 7 Wheat. 530; 1 Watts, 229; 4 Mass. 480; 8 Greenl. 128; in general where the cause of action dies with the person, the suit abates by the death of the defendant before judgment. Vide *Actio Personalis moritur cum personâ*.—4. The misnomer of the defendant may be pleaded in abatement, but one defendant cannot plead the misnomer of another. Com. Dig. Abatement, F 18; Lutw. 36; 1 Chit. Pl. 440; Arch. Civ. Pl. 312. See form of a plea in abatement for a misnomer of the defendant in 3 Saund. 209, b. and see further, 1 Show. 394; Carth. 307; Comb. 188; 1 Lutw. 10; 5 T. R. 487.—5. When one joint tenant, Com. Dig. Abatement, F 5, or one tenant in common in cases where they ought to be joined, Ibid. F 6, is sued alone, he may plead in abatement. And in actions upon contracts if the plaintiff do not sue all the contractors, the defendant may plead the non-joinder in abatement. Ibid. F 8, a; 1 Wash. 9; 18 Johns. 459; 2 Johns. Cas. 382; 3 Caines's Rep. 99; Arch. Civ. Pl. 309; 1 Chit. Pl. 441. When husband and wife should be sued jointly, and one is sued alone, the non-joinder may be pleaded in abatement. Arch. Civ. Pl. 309. The non-joinder of all the executors, who have proved the will; and the non-joinder of all the administrators of the deceased, may be pleaded in abatement. Com. Dig. Abatement, F 10.—6. In a real action if brought against several persons, they may plead several tenancy, that is that they hold in severalty and not jointly, Com. Dig. Abatement, F 12; or one of them may take the entire tenancy on himself, and pray judgment of the writ. Id. F 13. But mis-joinder of defendant in a personal action is not the subject of a plea in abatement. Arch. Civ. Pl. 68, 310.—7. In cases where the defendant may plead non-tenure, see Arch. Civ. Pl. 310; Cro. El. 559.—8. Where he may plead a disclaimer, see Arch. Civ. Pl. 311; Com. Dig. Abatement, F 15.—9. A defendant may plead his privilege of not being sued in abatement. Bac. Ab. Abridgment C; see this Dict. tit. *Privilege*.

[5] § 4. *Plea in abatement to the writ*. 1. Pleas in abatement to the writ or bill are so termed rather from their effect, than from their being strictly such pleas, for as oyer of the writ can no longer be craved, no objection can be taken to matter which is merely contained in the writ, 3 B. & P. 399; 1 B. & P. 645—648; but if a mistake in the writ be carried into the declaration, or rather if the declaration, which is presumed to correspond with the writ or bill, be incorrect in respect of some extrinsic matter, it is then open to the defendant to plead in abatement to the writ or bill, 1 B. & P. 648; 10 Mod. 210; and there is no plea to the declaration alone but in bar; 10 Mod. 210; 2 Saund. 209, d.—2. Pleas in abatement to the writ or bill and to the form or to the action. Com. Dig. Abatement, H 1, 17.—3. Those of the first description were formerly either matter apparent on the face of the writ, Com. Dig. Abatement, H

1, or matters dehors. Id. H 17.—4. Formerly very trifling errors were pleadable in abatement, 1 Lutw. 25; Lilly's Ent. 5; 2 Rich. C. P. 5, 8; 1 Stra. 556; Ld. Raym. 1541; 2 Inst. 668; 3 B. & P. 395. But as oyer of the writ can no longer be had, an omission in the defendant's declaration of the defendant's addition, which is not necessary to be stated in a declaration can in no case be pleaded in abatement. 1 Saund. 318, n. 3; 3 B. & P. 395; 7 East, 383.—5. Pleas in abatement to the form of the writ, are therefore now principally for matters dehors, Com. Dig. Abatement, H 17; Gilb. C. P. 51, existing at the time of suing out the writ, or arising afterwards, such as misnomer of the plaintiff or defendant in Christian or surname.—6. Pleas in abatement to the action of the writ, and that the action is misconceived, as it is in case where it ought to have been trespass, Com. Dig. Abatement, G 5; or that it was prematurely brought. Ibid. Abatement, G 6, and tit. Action, E; but as these matters are grounds of demurrer or nonsuit, it is now very unusual to plead them in abatement. It may also be pleaded that there is another action pending. See tit. *Autre action pendant.* Com. Dig. Abatement, H 24; Bac. Ab. Abatement, M; 1 Chitty's Pl. 443.

[6] § 5. *Qualities of pleas in abatement.* 1. A writ is divisible, and may be abated in part, and remain good for the residue; and the defendant may plead in abatement to part, and demur or plead in bar to the residue of the declaration. 1 Chit. Pl. 444; 2 Saund. 210, n.—2. As these pleas delay the trial of the merits of the action, the greatest accuracy and precision are required in framing them; they should be certain to every intent, and be pleaded without any repugnancy. 3 T. R. 186; Willes, 42; 2 Bl. R. 1096; 2 Saund. 298, b, n. 1; Com. Dig. I 11; Co. Lit. 393; Cro. Jac. 82; and must in general give the plaintiff a better writ. This is the true criterion to distinguish a plea in abatement from a plea in bar. 8 T. R. 515; Bromal. 139; 1 Saund. 274, n. 4; 284 n. 4; 2 B. & P. 125; 4 T. R. 227; 6 East, 600; Com. Dig. Abatement, J 1, 2; 1 Day, 28; 3 Mass. 24; 2 Mass. 362. 1 Hayw. 501; 2 Ld. Raym. 1178; 1 East, 634. Great accuracy is also necessary in the form of the plea as to the commencement and conclusion, which is said to make the plea. Latch. 178; 2 Saund. 209, c. d; 3 T. R. 186.

[7] § 6. *Form of pleas in abatement.* 1. As to the form of pleas in abatement, see 1 Chit. Pl. 447; Com. Dig. Abatement, I 19; 2 Saund. 1, n. 2.

[8] § 7. *Of the affidavit of truth.* 1. All pleas in abatement must be sworn to be true, 4 Ann, c. 16, s. 11. The affidavit may be made by the defendant or a third person, Barnes, 344, and must be positive as to the truth of every fact contained in the plea, and should leave nothing to be collected by inference; Sayer's Rep. 293; it should be stated that the plea is true in substance and fact, and not merely that the plea is a true plea. 2 Str. 705; Lill. Ent. 1; 2 Chit. Pl. 412, 417; 1 Browne's Rep. 77; see 2 Dall. 184; 1 Yeates, 185.

See further on the subject of abatement of actions, Vin. Ab. tit. Abatement; Bac. Abr. tit. Abatement; Nelson's Abr. tit. Abatement; American Dig. tit. Abatement; Story's Pl. 1 to 70; 1 Chit. Pl. 425 to 458; Whart. Dig. tit. Pleading, F. (b). Penna. Pract. Index, h. t.; Tidd's Pr. Index, h. t; Arch. Civ. Pl. Index, h. t.; Arch. Pract. Index, h. t. *Death; Parties to Actions; Plaintiff; Puis darrein continuance.*

TABLE.

Abatement defined, 1, and considered as relating to,
1. Pleas to the jurisdiction, 2.
2. Pleas to the person of the plaintiff, 3.
1. No such person in rerum natura, 3.
2. Coverture, 3.
3. Infancy, 3.
4. Lunacy, 3.
5. Death of plaintiff, 3.
6. Alienage, 3.
7. Misnomer, 3.
8. When one of several contractors sues alone, 3.
9. Misjoinder, 3.
10. Corporation.
3. Pleas to person of the defendant, 4.
1. No such person in rerum natura, 4.
2. Coverture, 4.
3. Death, 4.
4. Misnomer, 4.
5. Suing one when several ought to be joined, 4.
6. Misjoinder, 4.
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8. Disclaimer, 4.
9. Privilege, 4.
4. Pleas to the writ, 5.
1. Mistake, 5.
2. Form of the action, 5.
3. Matter on face of writ, 5.
4. Matter dehors the writ, 5.
5. Such matters as exist before or after suing out the writ, 5.
6. To the action of the writ, 5.
5. Qualities of pleas in abatement, 6.
1. Divisible, 6.
2. Certain, 6.
6. Form of pleas in abatement, 7.
7. Affidavit of pleas in abatement, 8.

ABATEMENT OF A FREEHOLD. The entry of a stranger after the death of the ancestor, and before the heir or devisee takes possession, by which the rightful possession of the heir or devisee is defeated. 3 Bl. Com. 167; Co. Lit. 277, a; Finch's Law, 195; Arch. Civ. Pl. 11.

ABATEMENT OF LEGACIES, is the reduction of legacies for the purpose of paying the testator's debts. When the estate is short of paying the debts and legacies, and there are general legacies and specific legacies, the rule is that the general legatees must abate proportionably in order to pay the debts; a specific legacy is not abated unless the general legacies cannot pay all the debts; in that case what remains to be paid must be paid by the specific legatees, who must, where there are several, abate their legacies proportionably. 2 Bl. Com. 513; 2 Ves. sen. 561 to 564; 1 P. Wms. 680; 2 P. Wms. 383. See 2 Bro. C. C. 19; Bac. Abr. Legacies, H; Rop. on Leg. 253, 284.

ABATEMENT OF NUISANCES is the prostration or removal of a nuisance. 3 Bl. Com. 5. 1. Who may abate a nuisance; 2, the manner of abating it.

§ 1. *Who may abate a nuisance.* 1. Any person may abate a public nuisance. 2 Salk. 458; 9 Co. 454.—2. The injured party may abate a private nuisance, which is created by an act of *commission*, without notice to the person who has committed it; but there is no case which sanctions the abatement by an individual of nuisances from *omission*, except that of cutting branches of trees which overhang a public road, or the private property of the person who cuts them.

§ 2. *The manner of abating it.* 1. A public nuisance may be abated without notice, 2 Salk. 458; and so may a private nuisance which arises by an act of commission. And, when the security of lives or property may require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy it, an individual would be justified in abating a nuisance from omission without notice. 2 Barn. & Cres. 311; 3 Dowl. & R. 556.—2. In the abatement of a public nuisance, the abator need not observe particular care in abating it, so as to prevent injury to the materials. And though a gate illegally fastened, might have been opened without cutting it down, yet the cutting would be lawful. However, it is a general rule that the abatement must be limited by its necessity, and

no wanton or unnecessary injury must be committed. 2 Salk. 458.—3. As to private nuisances, it has been held, that if a man in his own soil erect a thing which is a nuisance to another, as by stopping a rivulet, and so diminishing the water used by the latter for his cattle, the party injured may enter on the soil of the other, and abate the nuisance and justify the trespass; and this right of abatement is not confined merely to a house, mill or land. 2 Smith's Rep. 9; 2 Roll. Abr. 565; 2 Leon. 202; Com. Dig. Pleader, 3 M. 42; 3 Lev. 92; 1 Brownl. 212.—4. The abator of a private nuisance cannot remove the materials further than necessary, nor convert them to his own use. Dalt. c. 50. And so much only of the thing as causes the nuisance should be removed; as if a house be built too high, so much only as is too high should be pulled down. 9 Co. 53; God. 221; 2 Str. 686.—5. If the nuisance can be removed without destruction and delivered to a magistrate, it is advisable to do so; as in the case of a libellous print or paper affecting an individual, but still it may be destroyed. 5 Co. 125, b.; 2 Campb. 511. See, as to cutting down trees, Roll. Rep. 394; 3 Buls. 198; Vin. Ab. tit. Trees, E, and Nuisance, W.

ABATOR is, 1st, he who abates or prostrates a nuisance; 2, he who having no right of entry, gets possession of the freehold to the prejudice of an heir or devisee, after the time when the ancestor died, and before the heir or devisee enters. See article *Abatement*. As to the consequence of an abator dying in possession, see Adams's Eject. 43.

ABATUDA, *obsolete*. Any thing diminished; as, moneta abatuda, which is money clipped or diminished in value. Cowell, h. t.

ABAVUS, *civil law*, is the great grandfather, or fourth male ascendant. Abavia, is the great grandmother, or fourth female ascendant.

ABBREVIATION, *practice*.—The omission of some words or letters in writing; as when *fi. fa.* is written for fieri facias. In writing contracts it is the better practice to make no abbreviations; but in recognizances and many other contracts they are used; as John Doe tent to prosecute, &c. Richard Roe tent to appear, &c. When the recognizances are used, they are drawn out *in extenso*. See 4 Ca. & P. 51; S. C. 19 E. C. L. R. 268; 9 Co. 48. In the following list of abbreviations are given the titles of many books. This being thought the most convenient place to introduce such matter.

A, a, the first letter of the alphabet, is sometimes used in the ancient law books to denote that the paging is the first of that number in the book. As an abbreviation, A is used for anonymous.

A. & A. on Corp. Angell and Ames on Corporations. Sometimes cited *Ang. on Corp.*

A. B. Anonymous Reports, printed at the end of Bendloe's Reports.

A. D. Anno Domini; in the year of our Lord.

A. & E. Adolphus and Ellis's Reports.

A. & F. on Fixt. Amos and Ferard on Fixtures.

A. K. Marsh. A. K. Marshall's (Kty.) Reports.

Ab. or *Abr.* Abridgment.

Abr. Ca. Eq. Abridgment of Cases in Equity.

Ab. Sh. Abbott on Shipping.

Acc. Accord or agrees.

Act. Acton's Reports. Reports of Cases argued and adjudged before the Most Noble and right Honourable the Lords Commissioners of Appeals in Prize Causes; also on Appeals before the King's most excellent Majesty in council, from May, 1809, to July, 1810; with an Appendix containing Orders in Council, Instructions, &c. to 1810. 2 Vols. 8vo.

Act. Reg. Acta Regia.

Ad. Eject. Adams on Ejectment. A Treatise on the Law of Ejectment, &c. 1 vol. This is a very able work. 10 Serg. & Rawle, 221.

Ad. & Ell. Adolphus and Ellis's Reports.

Ad fin. Ad finem. At or near the end.
Ads. Ad sectum, vide *Ats.*
Addams's R. Addams's Ecclesiastical Reports. In E. Eccl. Rep.
Addis. R. Addison's Reports.
Admr. Administrator.
Ady. C. M. Adye on Courts Martial.
Aik. R. Aiken's Reports.
Al. Aleyn's Cases.
Al. Alinéa. *Al. et.* Et alii, and others.
Al. & N. Alcock and Napier's Reports.
Ala. R. Alabama Reports.
Alc. Reg. Cas. Alcock's Registration Cases.
Ald. & Van Hoes. Dig. A Digest of the laws of Mississippi, by T. J. Fox Alden and J. A. Van Hoesen.
Aldr. Hist. Aldridge's History of the Courts of Law.
Alis. Prin. Alison's Principles of the Criminal Law of Scotland.
All. & Mor. Tr. Allen and Morris's Trial.
Alley. L. D. of Mar. Alleyne's Legal Degrees of Marriage considered.
Alln. Part. Allnat on Partition.
Am. America, American, or Americana.
Amb. Ambler's Reports. Reports of cases argued and determined in the High Court of Chancery, with some few in other courts. By Charles Ambler. 1 vol. fol.
Am. & Fer. on Fixt. Amos and Ferard on Fixtures.
Amer. America, American or Americana.
Amer. Dig. American Digest.
Amer. Jur. American Jurist.
An. Anonymous.
And. Anderson's Reports. Reports in the Common Pleas, chiefly in the reign of Queen Elizabeth, 2 parts. By Sir Edm. Anderson.
Ander. Ch. War. Anderdon on Church Wardens.
Andr. Andrews's Reports. Reports of cases argued and adjudged in the Court of King's Bench in the 11th and 12th years of the reign of King George II. By George Andrews. 1 vol. 8vo.
Ang. on Adv. Enj. Angell's Inquiry into the rule of law which creates a right to an incorporeal hereditament, by an adverse enjoyment of twenty years.
Ang. on Ass. Angell's Practical Summary of the Law of Assignments in trust for creditors.
Ang. on B. T. Angell on Bank Tax.
Ang. on Corp. Angell on the Law of Private Corporations.
Ang. on Limit. Angell's Treatise on the Limitation of Actions at Law, and Suits in Equity.
Ang. on Tide Wat. Angell on the right of property in Tide Waters.
Ang. on Water Courses. Angell on the common law in relation to Water Courses.
Ann. Anne; as 1 Ann. c. 7.
Anna. Annaly's Reports. Cases during the time of Lord Hardwicke in the King's Bench, 7, 8, 9 and 10 K. George II. to which are added some determinations of the late Lord C. J. Lee; and also two equity cases by Lord Chancellor Hardwicke, 1 vol. This book is usually cited, Cas. Temp. Hardw.
Annesl. on Ins. Annesley on Insurance.
Anon. Anonymous.
Anstr. Anstruther's Reports. Reports of cases argued and determined in the Court of Exchequer, from Easter Term, 32 Geo. III. 1792, to Trinity Term, 37 Geo. III. 1797. 3 vols. 8vo. By George Anstruther.
Anth. N. P. C. Anthon's Nisi Prius Cases.
Anth. Shep. Anthon's edition of Sheppard's Touchstone.
Ap. Justin. Apud Justinianum, or Justinian's Institutes.
App. Apposition.
Appx. Appendix.
Arch. Archbold. *Arch. Civ. Pl.* Archbold's Civil Pleadings. *Arch. Cr. Pl.* Archbold's Criminal Pleadings. *Arch. Pr.* Archbold's Practice. *Arch. B. L.* Archbold's Bankrupt Law.
Arg. Argumento, by an argument drawn from such a law. It also signifies *arguendo.*
Arg. Inst. Institution au Droit Français, par M. Argou.
Ark. Rep. Arkansas Reports. See *Pike's Rep.*
Ark. Rev. Stat. Arkansas Revised Statutes.
Art. Article.
Ashmead's R. Ashmead's Reports.
Aso & Man. Inst. Aso and Manuel's Institutes of the Laws of Spain.
Ass. or *Lib. Ass.* Liber Assissarium, or Pleas of the Crown.
Ast. Ent. Aston's Entries.
Atherl. on Mar. Atherley on the Law of Marriage and other Family Settlements.
Atk. Atkyn's Reports.
Atk. P. T. Atkyn's Parliamentary Tracts.
Atk. on Con. Atkinson on Conveyancing.
Atk. on Tit. Atkinson on Marketable Titles.
Ats. in practice, is an abbreviation for the words *at suit of*, and is used when the defendant files any pleadings: for example: when the defendant enters a plea he puts his name before that of the plaintiff, reversing the order in which they are on the record. C. D. (the defendant), *ats.* A. B. (the plaintiff.)

Aust. on Jur. The Province of Jurisprudence determined, by John Austin.

Auth. Authentica, in the Authentic; that is the *Summary* of some of the Novels of the civil law inserted in the code under such a title.

Ayl. Ayliffe's Pandect. New Pandect of the Roman Civil Law, with many useful observations thereon, showing wherein that law differs from the municipal law of Great Britain and from the Canon law in general, &c. 1 vol. fol.

Ayl. Parerg. Ayliffe's Parergon juris canonici Anglicani.

Azun. Mar. Law. Azuni's Maritime Law of Europe.

B, b, is used to point out that a number used at the head of a page to denote the folio, is the second number of the same volume.

B. B. Bail Bond.

B. or *Bk.* Book.

B. & A. Barnwall and Alderson's Reports. Reports of Cases argued and determined in the Court of King's Bench. By R. V. Barnwall and E. H. Alderson. 4 vols. 8vo. These reports commence Michaelmas Term, 58 Geo. III. (1817) and end with Trinity Term, 2 Geo. IV. (1821.) In E. C. L. R.

B. & B. Ball and Beatty's Reports.

B. C. Brown's Chancery Reports.

B. Eccl. L. Burn's Ecclesiastical Law. 4 vols. 8vo.

B. Just. Burn's Justice. 4 vol. 8vo.

B. N. C. Brooke's New Cases. Vide *Bellew.* post.

B. P. C. or *Bro. Parl. Cas.* Brown's Parliamentary Cases.

B. & P. or *Bos. & Pull.* Bosanquet and Puller's Reports. Reports in the Courts of Common Pleas and Exchequer Chamber, and in the House of Lords, from Easter Term, 36 Geo. III. 1796, to Hilary Term, 44 Geo. III. 1804. By J. B. Bosanquet and Chr. Puller. 5 vols. 8vo. The last two volumes form a new series and come down to 1807, and are cited 1 and 2 New Reports, more frequently than 4 and 5 B. & P. These reports are continued by W. P. Taunton, Esq.

B. R. or *K. B.* King's Bench.

B. Tr. Bishop's Trial.

Bab. on Auct. Babington on the Law of Auctions.

Bab. Set off. Babington on Set off and mutual credit.

Bac. Abr. Bacon's Abridgment. A new Abridgment of the Law. By Matthew Bacon. With considerable additions by Henry Gwillim; and with the additions of the later English and the American decisions. This book is generally cited by the page and sometimes by the title. An edition of this work is in the press, with notes to American law and decisions, by the author of this work.

Bac. Comp. Arb. Bacon's (M.) Complete Arbitrator.

Bac. El. Bacon's Elements of the Common Law.

Bac. Gov. Bacon on Government.

Bac. Law Tr. Bacon's Law Tracts.

Bac. Leas. Bacon (M.) on Leases and Terms of Years.

Bac. Lib. Reg. Bacon's (John) Liber Regis, vel The saurus Rerum Ecclesiasticarum.

Bac. Uses. Bacon's Reading on the statute of Uses. This is printed in his Law Tracts.

Bach. Man. Bache's Manual of a Pennsylvania Justice of the Peace.

Bail. R. Bailey's Reports.

Bainb. on M. & M. Bainbridge on Mines and Minerals.

Baldw. R. Baldwin's Circuit Court Reports.

Ball & Beat. Ball and Beatty's Reports. Reports of Cases in the High Court of Chancery in Ireland during the time of Lord Manners, from 1807 to 1815. 1 vol. 8vo.

Ballan. Lim. Ballantine on Limitations.

Banc. Sup. Upper Bench.

Barb. Eq. Dig. Barbour's Equity Digest.

Barb. Cr. Pl. Barbour's Criminal Pleading.

Barb. Grot. Grotius on War and Peace, with notes by Barbeyrac.

Barb. Puff. Puffendorf's Law of Nature and Nations, with notes by M. Barbeyrac.

Barb. on Set off. Barbour on the law of Set-off, with an appendix of precedents.

Barn. C. Barnardiston's Chancery Reports. Reports of Cases in Chancery. By Thomas Barnardiston. 1 vol. Lord Mansfield absolutely forbid the citing of this book, for it would be only misleading students to put them upon reading it. 2 Burr. 1142, in margin.

Barn. Barnardiston's K. B. Reports. Reports of Cases in the King's Bench, from 12 George 1, to Trinity term 7 George 2, 2 vols. This book is said to be "not of much authority," Dougl. 333, n.; "of still less authority than 10 Mod." Doug. 689, n.; "a bad reporter." 1 East, 642, n.

Barn. & Ald. Barnewall & Alderson's Reports, vide B. & A. In E. C. L. R.

Barn. & Adolp. Barnwall & Adolphus's Reports. In E. C. L. R.

Barn. & Cress. Barnewall & Cresswell's Reports. In E. C. L. R.

Barn. Sher. Barnes's Sheriff.

Barnes. Barnes's Notes of Practice. Notes of Cases of Practice taken in Common Pleas, from Michaelmas, 1732, to Hilary, 1756, inclusive, to which is added a continuation of cases to the end of the reign of George II. 1 vol. 8vo.

Barr. Obs. Stat. Barrington's Observations on the more ancient statutes.

Barr. Ten. Barry's Tenures.

Bart. El. Conv. Barton's Elements of Conveyancing. *Bart. Prec. Conv.* Barton's Precedents of Conveyancing. *Bart. S. Eq.* Barton's Suit in Equity.

Batty's R. Batty's Reports of cases determined in the K. B. Ireland.

Bay's R. Bay's Reports.

Bayl. Bills. Bayley on Bills.

Bayl. Ch. Pr. Bayley's Chamber Practice.

Beam. Ne Exeat. Brief view of the writ of *Ne Exeat Regno*, as an equitable process, by J. Beames.

Beam. Eq. Beames on Equity Pleading.

Beam. Ord. Chan. Beames's General Orders of the High Court of Chancery, from 1600 to 1815.

Beat. R. Beatty's Reports determined in the High Court of Chancery in Ireland.

Beav. R. Beavan's Chancery Reports.

Beawes. Beawes's Lex Mercatoria.

Beck's Med. Jur. Beck's Medical Jurisprudence.

Bee's R. Bee's Reports.

Bell's Comm. Bell's Commentaries on the Laws of Scotland, and on the Principles of Mercantile Jurisprudence.

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

Bell's Dict. Dictionary of the Law of Scotland. By Robert Bell.

Bell's Med. Jur. Bell's Medical Jurisprudence, 2 vols.

Bellew. Bellewe's Cases in the time of K. Richard II. Bellewe's cases in the time of Henry VIII., Edw. VI., and Q. Mary, collected out of Brooke's Abridgment, and arranged under years, with a table, are cited Brooke's New Cases.

Bellingh. Tr. Bellingham's Trial.

Belt's Sup. Belt's Supplement. Supplement to the Reports in Chancery of Francis Vesey, Senior, Esq. during the time of Lord Ch. J. Hardwicke.

Belt's Ves. sen. Belt's edition of Vesey Senior's Reports.

Benl. Benloe & Dalison's Reports. Reports and Pleadings in Common Pleas, in the reigns of K. Henry VII. Henry VIII. Edward VI. and Queens Mary and Elizabeth. By William Benloe and William Dalison. See *New Benl.*

Ben. on Av. Benecke on Average.

Benn. Diss. Bennet's Short Dissertation on the nature and various proceedings in the Master's Office, in the Court of Chancery. Sometimes this book is cited *Benn. Pract.*

Benn. Pract. See *Benn. Diss.*

Benth. Ev. Bentham's Treatise on Judicial Evidence.

Bett's Adm. Pr. Bett's Admiralty Practice.

Bev. on Hom. Bevil on Homicide.

Bing. Bingham. *Bing. Inf.* Bingham on Infancy. *Bing. on Judg.* Bingham on Judgments and Executions. *Bing. L. & T.* Bingham on the Law of Landlord and Tenant. *Bing. R.* Bingham's Reports. In E. C. L. R. *Bing. N. C.* Bingham's New Cases.

Binn. Reports of Cases adjudged in the Supreme Court of Pennsylvania. By Horace Binney. 6 vols. 8 vo.

Bird on Conv. Bird on Conveyancing. *Bird L. & T.* Bird on the Laws respecting landlords, tenants, and lodgers. *Bird's Sol. Pr.* Bird's Solution of Precedents of Settlements.

Biret, De l'Abs. Traité de l'Absence et de ses effects, par M. Biret.

Biss. on Life Est. Bissett on the Law of Estates for Life.

Bl. Blount's Law Dictionary and Glossary.

Bl. Com. or *Comm.* Commentaries on the Laws of England, by Sir William Blackstone, 4 vols. Lord Redesdale said he was sorry to hear this book cited *as an authority;* the author would have been sorry to have heard the book so cited; Lord Redesdale did not consider it such. 1 Sch. & Lef. 327.

Bl. Rep. Sir Wm. Blackstone's Reports. Reports of cases determined in the several courts of Westminster Hall, from 1746 to 1779. By Sir William Blackstone. 2 vols. 8vo. These reports are said not to be very accurate. Per Ld. Mansfield, Doug. 92, n.

Bl. H. Henry Blackstone's Reports, sometimes cited *H. Bl.*

Black. L. T. Blackstone's Law Tracts.

Blackf. R. Blackford's Reports.

Blak. Ch. Pr. Blake's Practice of the Court of Chancery of the state of New York.

Blan. on Ann. Blaney on Life Annuities.

Bland's Ch. R. Bland's Chancery Reports.

Blansh. Lim. Blanshard on Limitations.

Bligh. R. Bligh's Reports of cases decided in the House of Lords. There are two series of these reports, the first contains three volumes, and the last, ten; and is still continued.

Blount. Blount's Law Dictionary and Glossary.

Bo. R. Act. Booth on Real Actions.

Boh. Dec. Bohun's Declarations. *Boh. Eng. L.* Bohun's English Lawyer. *Boh. Priv. Lon.* Bohun's Privilegia Londini.

Boote. Boote's Ch. Pr. Boote's Chancery Practice. *Boote's S. L.* Boote's Suit at Law.

Booth's R. A. Booth on Real Actions.

Bos. & Pull. Bosanquet and Puller's Reports. Vide *B. & P.*

Bosc. on Conv. Boscowen on Convictions.

Bott. Bott's Poor Laws. 3 vols. 8vo.

Bouch. Inst. Dr. Mar. Boucher, Institution au Droit Maritime.

Boulay Paty, Dr. Com. Cours de Droit Commercial Maritime, par P. S. Boulay Paty.

Bouv. L. D. Bouvier's Law Dictionary.

Bowl. on Lib. Bowles on Libels.

Br. or *Brownl.* Brownlow's Reports.

Br. or *Br. Ab.* Brooke's Abridgment.

Bra. Brady's History of the succession of the Crown of England, &c.

Brac. Bracton's Treatise on the Laws and Customs of England. Vide as to character of this book, Fortesc. 419; Jones on Bailm. 75; 1 Show. 121; Fitz. Ab. Gard. 71.

Brack. L. Misc. Brackenridge's Law Miscellany.

Bradb. Bradby on Distresses.

Bran. Prin. or *Bran. Max.* Branche's Principia legis æquitatis, being an alphabetical collection of maxims, &c.

Brayt. R. Brayton's Reports.

Breese's R. Breese's Reports.

Brev. Sel. Brevia Selecta, or Choice Writs.

Brid. Bridgman's Reports. Reports from 12 to 19 K. James. By Sir John Bridgman.

Brid. Dig. Ind. Bridgman's Digested Index.—*Brid. Leg. Bib.* Bridgman's Legal Bibliography.—*Brid. Conv.* Bridgman's Precedents of Conveyancing. *Brid. Refl.* Bridgman's Reflections onthe Study of the Law. *Brid. Synth.* Bridgman's Synthesis. *Brid. Thes. Jur.* Bridgman's Thesaurus Juridicus.

Bridg. O. Orlando Bridgman's Reports.

Britton. Treatise on the ancient pleas of the Crown.

Bro. or *Brownl.* Brownlow's Reports. Reports in the Common Pleas in the reigns of Queen Elizabeth and K. James 1, in two parts. By Richard Brownlow and John Goldesborough. Cited 1 Bro. 2 Bro.

Bro. Ab. Brooke's Abridgment.

Bro A. & C. L. Brown's Admiralty Civil Law. This book, though far too brief, deserves to be popular. Coop. Just. 670.

Bro. C. C. Brown's Chancery Cases. Reports in Chancery from 18 Geo. III. 1788, to 34 Geo. III. 1794. By William Brown. 4 vols. 8vo.

Bro. Off. Not. A Treatise on the office and practice of a Notary in England, as connected with Mercantile Instruments, &c. By Richard Brooke.

Bro. P. C. Brown's Parliamentary Cases. Reports of Cases upon Appeals and Writs of Error in the High Court of Parliament. By Josiah Brown. 8 vols. 8vo.

Bro. on Sales. Brown on Sales.

Bro. V. M. Brown's Vade Mecum.

Brock. R. Brockenbrough's Reports of Chief Justice Marshall's Decisions.

Brod. & Bing. Broderip & Bingham's Reports. In E. C. L. R.

Brownl. Rediv. or *Brownl. Ent.* Brownlow Redivivus.

Bruce M. L. Bruce's Military Law.

Buck's Ca. Buck's Cases. Cases in Bankruptcy in 1817, 1818. By J. W. Buck.

Bull. or *Bull. N. P.* Buller's Nisi Prius. When Buller wrote his N. P. he was a young man and intended his book to carry with him on the circuit, for his own use. 10 Serg. & R. 49.

Bulst. Bulstrode's Reports. Reports in K. B. in the reigns of King James I. and Charles I. in three parts. By Edward Bulstrode.

Bunb. Bunbury's Reports. Lord Mansfield says, "Mr. Bunbury never meant that those cases should be published; they are very loose notes." 5 Burr. 2658.

Burge Confl. of L. Burge on the Conflict of Laws.

Burge For. Law. Burge on Foreign Law.

Burlam. Burlamaqui's Natural and Political Law.

Burn's L. D. Burn's Law Dictionary. *Burn's Just.* Burn's Justice of the Peace.

Burn's Eccl. Law or *Burn's E. L.* Burn's Ecclesiastical Law.

Burn. Cr. L. Burnett's Treatise on the Criminal Law of Scotland.

Burr. Burrow's Reports.

Burr. Pract. Burril's Practice.

Burr. Sett. Cas. Burrow's Settlement Cases.

Burr's Tr. Burr's Trial.

Butl. Hor. Jur. Butler's Horæ Juridicæ Subsecivæ.

C. Codex, the Code of Justinian. *C.* Code. *C.* Chancellor.

C. & A. Cooke and Alcock's Reports.

C. B. Communi Banco, or Common Bench.

C. C. Circuit Court.

C. C. Cepi Corpus. *C. C.* and *B. B.* Cepi Corpus and Bail Bond.

C. C. or *Ch. Cas.* Cases in Chancery in three parts. Most of these cases, in 2 C. C. are grossly misreported, said per Lord Loughborough, 1 H. Bl. 332.

C. C. C. or *Cr. Cir. Com.* Crown Circuit Companion.

C. C. E. or *Cain. Cas.* Caines's Cases in Error.

C. D. or *Com. Dig.* Comyn's Digest. This book is cited in this manner. Com. Dig. Arbitrament, (A. 2,) which signifies Comyn's Digest, title Arbitrament, division (A. 2). Sometimes the volume and page are cited as follows; 2 Com. Dig. 100.

C. & D. C. C. Crawford and Dix's Criminal Cases.

C. & D. Ab. C. Crawford and Dix's Abridged Cases.

C. J. Chief Justice.

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

C. & F. Clark & Findley's Reports.

C. J. C. P. Chief Justice of the Common Pleas.

C. J. K. B. Chief Justice of the King's Bench.

C. J. Q. B. Chief Justice of the Queen's Bench.

C. J. U. B. Chief Justice of the Upper Bench. During the time of the commonwealth, the English Court of the King's Bench was called the Upper Bench.

C. & M. Crompton & Meeson's Reports.

C. & M. Carrington & Marsham's Reports.

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

C. N. P. C. Campbell's Nisi Prius Cases.

C. P. Common Pleas.

C. & P. or *Car. & Pain.* Carrington & Paine's Reports, in E. C. L. R.

C. & P. Craig & Phillips's Reports.

C. R. or *Ch. Rep.* Chancery Reports.

C. & R. Cockburn and Rowe's Reports.

C. Theod. Codice Theosiano, in the Theodosian code.

Ca. Case or placitum.

Ca. T. K. Select cases tempore King.

Ca. T. Talb. Cases Tempore Talbot.

Ca. sa. in practice, is the abbreviation *of capias ad satisfaciendum.*

Caines's R. Caines's Term Reports.

Caines's Cas. Caines's Cases, in error.

Caines's Pr. Caines's Practice.

Cald. R. Caldecott's Reports.

Cald. S. C. Caldecott's Settlement cases; sometimes cited *Cald. R.*

Caldw. Arbit. Caldwell on Arbitration.

Call. on Sew. Callis on the Law relating to Sewers.

Call's R. Call's Reports.

Calth. R. Calthorp's Reports of special cases touching several customs and liberties of the city of London.

Calv. on Part. Calvert on parties to suits in equity.

Cam. & Norw. Cameron and Norwood's Reports.

Campb. Campbell's Reports. Reports of cases argued and ruled at Nisi Prius in the courts of K. B. and C. P. from 1807 to 1816. By John Campbell. 4 vols. 8vo.

Can. Canon.

Cap. Capitulo, chapter.

Car. Carolus; as 13 Car. 2, st. 2, c. 1.

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

Carr. & Marsh. Carrington and Marshman's Reports.

Cart. Carter's Reports. Reports in C. P. in 16, 17, 18 and 19, Charles II.

Carta de For. Carta de Foresta.

Carth. Carthew's Reports. Reports in K. B. from 3 James II. 1688, to 12 Wm. III. 1700. By Thomas Carthew.—Carthew and Comberbach are said by Ld. Thurlow to be equally bad authority, 1 Bro. C. C. 97; but Ld. Kenyon says Carthew is, in general, a good reporter.

Cary. Cary's Reports. Reports in Chancery, whereunto is anexed the King's Order and Decree in Chancery for a rule to be observed in that Court.

Cary on Partn. Cary on the law of partnership.

Cas. of App. Cases of Appeals to the H. of L.

Cas. L. Eq. Cases and opinions in Law, Equity and Conveyancing. 2 vols. 8vo.

Cas. of Pr. Cases of Practice in the Court of the King's Bench, from the reign of Eliz. to the 14 Geo. 3.

Cas. of Sett. Cases of Settlement.

Cas. Temp. Hardw. Cases during the time of Lord Hardwicke.

Cas. Temp. Talb. Cases during the time of Lord Talbot.

Ch. Chancellor.

Ch. Cas. Cases in Chancery. The two parts or volumes of these reports are commonly cited 1 or 2 Ch. Cas. It is proper to observe that the work entitled "Reports of Cases in Chancery," is a distinct collection of cases. The three volumes are usually cited as 1, 2, or 3 Ch. Rep.

Ch. Pr. Precedents in Chancery.

Ch. R. Reports in Chancery.

Ch. Rep. Vide Ch. Cases.

Chamb. on Jur. of Chan. Chambers on the Jurisdiction of the High Court of Chancery, over the persons and property of infants.

Chamb. L. & T. Chambers on the law of Landlord and Tenant.

Charlt. Charlton. *T. U. P. Charl.* T. U. P. Charlton's Reports. *R. M. Charlt.* R. M. Charlton's Reports.

Chase's Tr. Chase's Trial.

Cher. Cas. Cherokee Case.

Chipm. R. Chipman's Reports. *D. Chipm.* D. Chipman's Reports.

Chipm. Contr. Essay on the Law of Contracts for the payment of Specific Articles. By Daniel Chipman.

Ch. Contr. A practical treatise on the Law of Contracts, not under seal, and upon the usual defences to actions thereon. By Joseph Chitty, Jr. 1 vol. 8vo. Cited Chit. on Contr.

Chit. on App. Chitty's Practical Treatise on the law relating to apprentices and journeymen.

Chit. on Bills. Chitty on Bills.

Chit. jr. on Bills. Chitty, junior, on Bills.

Chit. Com. L. Chitty's treatise on Commercial Law.

Chit. Cr. L. Chitty's Criminal Law.

Chit. on Des. Chitty on the Law of Descents.

Chit. F. Chitty's Forms and practical proceedings.

Chit. Med. Jur. Chitty on Medical Jurisprudence.

Chit. Rep. Chitty's Reports. In E. C. L. R.

Chit. Pl. A Practical Treatise on Pleading. "No person competent to appreciate the difficulty of the task performed in compiling this work, can ever peruse it, without high admiration of the learning, talent and industry of the author." Steph. on Pl. iv. Mr. Lawes in his valuable treatise on Pleading in Assumpsit bears the same testimony to the merits of the author. p. 55.

Chit. Pr. Chitty's General Practice. A most excellent and practical work.

Chris. B. L. Christian's Bankrupt Laws.

Civ. Civil.

Civ. Code Lo. Civil Code of Louisiana.

Cl. Ass. Clerk's Assistant.

Clan. H. & W. Clancy on the Rights, Duties and Liabilities of Husband and Wife.

Clark on Leas. Clark's Enquiry into the nature of Leases.

Clarke, R. Clarke's Reports.

Clark & Fin. Clark and Finelly's Reports.

Clark. Adm. Pr. Clarke's Practice in the Admiralty.

Clark. Prax. Clarke's Praxis, being the manner of proceeding in the ecclesiastical courts.

Clay. Clayton's Reports. Reports of Pleas of Assize at York, with some precedents useful for pleaders, in English. 1 vol. 12mo.

Cleir. Us et Cout. Cleirac, Us et Coustumes de la mer.

Clerke's Rud. Clerke's Rudiments of American Law and Practice.

Clift. Clift's Entries.

Co. A particle used before other words to imply that the person spoken of possesses the same character as other persons whose character is mentioned, as co-executors, an executor with others; co-heir, an heir with others; co-partner, a partner with others, &c.—*Co.* is also an abbrevation for company, as John Smith & Co. When so abbreviated it also represents county.

Co. Coke's Reports. Reports of Resolutions, &c. in the several courts, of cases never resolved or adjudged before; and the reasons and causes of the resolutions, &c. from 14 Q. Eliz. (1572,) to 13 K. James, (1616,) 13 parts, with references to all the books of the common law, the pleadings in English, and many additional notes and references by G. Wilson, Esq. Cited sometimes *Rep.* See 1 Bl. Com. 72.

Co. or *Co. Rep.* Coke's Reports.

Co. Ent. Coke's Entries.

Co. B. L. Cooke's Bankrupt Law, in 2 vols. 8vo.

Co. on Courts. Coke on Courts; 4th Institute. See *Inst.* below, and 1 Bl. Com. 73.

Co. Litt. Coke on Littleton. See *Inst.* As to the character of this book see 1 Bl. Com. 73.

Co. M. C. Coke's Magna Charta; 2d Institute. See *Inst.* and 1 Bl. Com. 73.

Co. P. C. Coke's Pleas of the Crown. See *Inst.* and 1 Bl. Com. 73.

Cock. & Rowe. Cockburn and Rowe's Reports.

Code Civ. Code Civil, or Civil Code of France. This work is usually cited by the article.

Code Nap. Code Napoleon. The same as Code Civil.

Code Com. Code de Commerce.

Code Pén. Code Pénal.

Code Pro. Code de Procédure.

Col. Column, in the first or second column of the book quoted.

Col. & Cai. Cas. Coleman and Caines's Cases.

Coll. on Pat. Collier on the law of patents.

Coll. on Idiots. Collinson on the law concerning idiots, &c.

Coll. Rep. Colle's Reports. Reports of Cases upon Appeals and writs of Error in the High Courts of Parliament from 1697 to 1709, being a supplementary volume to Brown's Cases in Parliament. By Richard Colle. 1 vol. 8vo.

Com. or *Com. Rep.* Comyn's Reports.

Com. Contr. Comyn on Contract.

Com. on Us. Comyn on Usury.

Com. Dig. Comyn's Digest. A Digest of the Laws of England, by the Right Honourable Sir John Comyn, Knight, with

additions by Anthony Hammond, Esq. and notes of American Decisions, by Thomas Day, Esq. in 8 vols. This is an excellent digest, 4 Dall. 327.

Com. L. & T. Comyn on the Law of Landlord and Tenant.

Com. Law. Commercial law.

Com. Law. Rep. Common Law Reports edited by Sergeant and Lowber. Vide E. C. L. Rep.

Comb. Comberbach's Reports. Reports in K. B. from 1 K. James II. (1685,) to 10 K. William III. (1698.) By Roger Comberbach.—Comberbach is said by Lord Thurlow to be bad authority. 1 Bro. C. C. 97.

Comm. Blackstone's Commentaries.

Cond. Condensed.

Cond. Ch. R. Condensed Chancery Reports.

Cond. Ex. R. Condensed Exchequer Reports.

Cong. Congress.

Conkl. Pr. Conkling's Practice of the courts of the United States.

Conn. R. Connecticut Reports.

Conr. Cust. R. Conroy's Custodiam Reports.

Cons. del Mar. Consolato del Mare.

Cons. Ct. R. Constitutional Court Reports.

Coop. Eq. R. Cooper's Equity Reports.

Coop. Cas. Cases in the High Court of Chancery during the time of Lord Chancellor Eldon, in Hilary, Easter, and Trinity Terms, 55 Geo. III. 1815, with a few cases of an earlier period. By George Cooper. 1 vol. 8vo. These reports are a continuation of those by Vesey and Beames, and are continued by Merivale.

Coop. on Lib. Cooper on the law of libels.

Coop. Eq. Pl. Cooper's Equity Pleading.

Coop. Just. Cooper's Justinian's Institutes.

Coop. Med. Jur. Cooper's Medical Jurisprudence.

Coop. t. Brough. Cooper's cases in the time of Brougham.

Coop. P. P. Cooper's Points of Practice.

Cont. Contra.

Coote Mortg. Coote on Mortgages.

Corb. & Dan. Corbet and Daniel's Election Cases.

Corn. on Uses. Cornish on Uses.

Corp. Jur. Civ. Corpus Juris Civilis.

Cot. Abr. Cotton's Abridgment of Records.

Cov. on Conv. Evi. Coventry on Conveyancer's Evidence.

Cow. Int. Cowel's Law Dictionary, or the Interpreter of words and terms, used either in the common or statute laws of Great Britain.

Cowp. Cowper's Reports. Reports in K. B. from Hilary Term 14 Geo. III. 1774, to Trinity Term 18 Geo. III. 1778, both inclusive. By Henry Cowper. 2 vols. 8vo.

Cow. R. Cowen's Reports, N. Y.

Cox's Cas. Cox's Cases. Cases determined in the Courts of Equity from 1783 to 1796 inclusive.

Coxe's R. Coxe's Reports.

Crabb's C. L. Crabb's Common Law. A History of the English Law; or an attempt to trace the rise, progress, and changes of the Common Law. By George Crabb.

Craig & Phil. Craig and Phillips's Reports.

Cranch R. Cranch's Reports.

Cresw. R. Creswell's Reports of cases decided in the Court for the relief of insolvent debtors.

Crim. Con. Criminal conversation; adultery.

Cro. Croke's Reports. *Cro. Eliz.* Croke's Reports, during the time of Queen Elizabeth, also cited as 1 Cro. *Cro Jac.* Croke's Reports, during the time of King James I., also cited as 2 Cro. *Cro. Car.* Croke's Reports, during the time of Charles I., also cited as 3 Cro.

Crompt. Ex Rep. Crompton's Exchequer Reports.

Crompt. J. C. Crompton's Jurisdiction of Courts.

Crompt. & Mees. Crompton and Meeson's Exchequer Reports.

Crompt. Mees. & Rosc. Crompton, Meeson and Roscoe's Exchequer Reports.

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

Cul. culpabilis, guilty; *non cul.* not guilty; a plea entered in actions of trespass. *Cul. prit*, commonly written culprit; cul., as above mentioned, means culpabilis, or culpable; and prit, which is a corruption of prêt, and signifies ready, 1 Chitty Cr. Law, 416.

Cull. Bankr. L. Cullen's Principles of the Bankrupt Law.

Cun. Cunningham's Reports. Reports in K. B. in 7, 8, 9 and 10 George II., to which is prefixed a proposal for rendering the laws of England clear and certain, humbly offered to the consideration of both Houses of Parliament. By Tim. Cunningham.

Cunn. Dict. Cunningham's Dictionary. A new and complete Law Dictionary, or General Abridgment of the Law, &c. By T. Cunningham, 2 vols. folio.

Cur. adv. vult. Curia advisere vult. Vide *Ampliation.*

Cur. Scacc. Cursus Scaccarii, the court of the Star Chamber.

Curs. Can. Cursus Cancellariæ.

Curt. R. Curteis's Ecclesiastical Reports.

Curt. Am. Sea. Curtis on American Seamen.

Cush. Trust. Pr. Cushing on Trustee Process, or Foreign Attachment, of the laws of Massachusetts and Maine.

D. dialogue; as, Dr. & Stud. d. 2, c. 24, or Doctor and Student, dialogue 2, chapter 24.

D. dictum; *D.* Digest of Justinian.

D. C. District Court; District of Columbia.

D. Chipm. R. D. Chipman's Reports.

D. S. B. Debit sans brève.

D. & C. Dow and Clark's Reports.

D. & C. Deacon and Chitty's Reports.

D. & E. Durnford and East's Reports. This book is also cited as Term Reports, abbreviated T. R.

D. & L. Danson and Lloyd's Mercantile Cases.

D. & R. Dowling and Ryland's Reports of cases decided in the Court of the King's Bench. In E. C. L. R.

D. & R. N. P. C. Dowling and Ryland's Reports of cases decided at Nisi Prius. In E. C. L. R.

D. & S. Doctor and Student.

D. & W. Drury and Walsh's Reports.

D'Aguesseau, Œuvres. Œuvres complètes du Chancellier D'Agueseau, 15 vols.

Dag. Cr. L. Dagge's Criminal Law.

Dal. Dalison's Reports. See *Benl.*

Dall. Dallas's Reports.

Dall L. Dallas's Laws of Pennsylvania.

Dalloz, Dict. Dictionaire Général et raisonné de Legislation, de Doctrine, et de Jurisprudence, en matiere civile, commerciale, criminelle, administrative, et de Droit Public. Par Armand Dalloz, jeune.

Dalr. Feud. Pr. Dalrymple's Essay, or History of Feudal Property in Great Britain. Sometimes cited *Dalr. F. L.*

Dalr. on Ent. Dalrymple on the Polity of Entails.

Dalr. F. L. Dalrymple's Feudal Law.

Dalt. Just. Dalton's Justice.

Dalt. Sh. Dalton's Sheriff.

D'Anv. D'Anvers's Abridgment.

Dan. Ord. Danish Ordinances.

Dan. Rep. Daniell's Reports. Reports on the Equity side of the Exchequer, before the Lord Chief Baron, commencing in the sittings before Trinity Term, 57 Geo. III., 1817, to the end of Hilary Term, 58 Geo. III., 1818.

Dan. & Ll. Danson & Lloyd's Reports.

Dana's R. Dana's Reports.

Dane's Ab. Dane's Abridgment of American Law.

Dav. Davy's Reports. Reports of cases in the King's Courts in Ireland, 2 to 9 James, (1604 to 1611,) with a learned preface dedicated to Lord Chancellor Ellesmere, &c., translated into English. By Sir John Davys.

Dav. on Pat. Davies's collection of cases respecting Patents.

Daw. Land. Pr. Dawes's Epitome of the law of Landed Property.

Daw. Real Pr. Dawes's Introduction to the knowledge of the law on Real Estates.

Daw. on Arr. Dawes's Commentaries on the law of Arrest in civil cases.

Daws. Or. Leg. Dawson's Origo Legum.

Deac. R. Deacon's Reports.

Deac. & Chit. Deacon and Chitty's Reports.

Deb. on Jud. Debates on the Judiciary.

Deft. Defendant.

Desaus. R. Desaussure's Chancery Reports.

Dev. R. Devereux's Reports.

Dev. Ch. R. Devereux's Chancery Reports.

Dev. & Bat. Devereux and Battle's Reports.

Di. Dyer's Reports.

Dial. de Scac. Dialogus de Scaccario.

Dick. Just. Dickinson's Justice.

Dick. Pr. Dickinson's Practice of the Quarter and other Sessions.

Dick. Dicken's Reports. Reports of Cases in the High Court of Chancery. By John Dicken. Revised by John Wyatt, Esq. 2 vols. 8vo.—"Mr. Dicken was a very attentive and diligent register; but his notes being rather loose, were not to be considered as of very high authority." Per Lord Redesdale, 1 Sch. & Lef. 240. Vide also, Sug. Vend. 146.

Dict. Dictionary.

Dict. de Jur. Dictionnaire de Jurisprudence.

Dig. Digest of writs. *Dig.* The Pandects or Digest of the civil law, cited Dig. 1, 2, 5, 6, for Digest, book 1, tit. 2, law 5, section 6.

Disn. on Gam. Disney's Law of Gaming.

Doct. & Stud. Doctor and Student.

Doct. Pl. Doctrina Placitendi.

Doder. Eng. Law. Doderidge's English Lawyer.

Dods. R. Dodson's Reports.

Dom. Domat, Lois Civilles.

Dom. Proc. House of Lords.

Domat. Lois Civilles dans leur ordre naturel. Par M. Domat.

Dougl. Douglas's Reports. vols 3 and 4 In E. C. L. R.

Doug. El. Cas. Douglas's Election Cases.

Dow. or *Dow. P. C.* Dow's Parliamentary Cases.

Dow & Clarke. Dow and Clarke's Reports of Cases in the House of Lords.

Dowl. P. C. Dowling's Practical Cases.

Dow. & R. N. P. Dowling and Ryan's Nisi Prius Cases.

Dow. & Ry. M. C. Dowling and Ryan's Cases for Magistrates.

Dowl. & Ry. Dowling and Ryland's Reports of cases decided in the Court of the King's Bench. In E. C. L. R.

Dr. & St. Doctor and Student.

Drew. on Inj. Drewry on Injunctions.

Dru. & Wal. Drury and Walsh's Reports.

Dub. Dubitatur.

Dug. S. or *Dugd. Sum.* Dugdale's Summons.

Dugd. Orig. Dugdale's Origines.

Dug. Sum. Dugdale's Summonses.

Duke or *Duke's Ch. Uses.* Duke's Law of Charitable Uses.

Dunl. Pr. Dunlap's Practice.

Dunl. Adm. Pr. Dunlap's Admiralty Practice.

Duponc. on Jur. Duponceau on Jurisdictions.

Duponc. Const. Duponceau on the Constitution.

Dur. Dr. Fr. Duranton, Droit Français.

Durnf. & East. Durnford and East's Reports, also cited D. & E. or T. R.

Duv. Dr. Civ. Fr. Duvergier, Droit Civil Français. This is a continuation of Toullier's Droit Civil Français. The *first* volume of Duvergier is the *sixteenth* volume of the continuation. The work is sometimes cited 16 Toull. or 16 Toullier, instead of being cited 1 Duv. or 1 Duvergier, &c.

Dwar. on Stat. Dwarris on Statutes.

Dy. Dyer's Reports.

E. Easter Term.

E. Edward; as 9 E. 3, c. 9.

E. of Cov. Earl of Coventry's Case.

E. C. L. R. English Common Law Reports, sometimes cited Eng. Com Law Rep. (q. v.)

E. P. C. or *East, P. C.* East's Pleas of the Crown.

East, P. C. East's Pleas of the Crown.

Eccl. Ecclesiastical.

Eccl. Law. Ecclesiastical Law.

Eccl. Rep. Ecclesiastical Reports. Vide *Eng. Eccl. Rep.*

Ed. or *Edit.* Edition.

Ed. Edward; as, 3 Ed. 1, c. 9.

Ed. Inj. Eden on Injunction.

Ed. Eq. Reps. Eden's Equity Reports.

Ed. Prin. Pen. Law. Eden's Principles of Penal Law.

Edm. Exch. Pr. Edmund's Exchequer Practice.

Edw. Ad. Rep. Edwards's Admiralty Reports.

Edw. Lead. Dec. Edwards's Leading Decisions.

Edw. on Part. Edwards on Parties to Bills in Chancery.

Edw. on Rec. Edwards on Receivers in Chancery.

Eliz. Elizabeth; as, 13 Eliz. c. 15.

Ellis on D. and Cr. Ellis on the Law relating to Debtor and Creditor.

Elm. on Dil. Elmes on Ecclesiastical and Civil Dilapidations.

Encycl. Encyclopædia, or Encyclopédie.

Eng. English.

Eng. Ch. R. English Chancery Reports. Vide *Cond. Ch. R.* (See App. A.)

Eng. Com. Law Rep. English Common Law Reports. This is the most extensive collection of Reports published in a series of volumes. It is a reprint of the *regular* and *authoritative* series of Reports in the English Courts of Common Law, from the year 1813 to the present time; and is regularly continued. 33 vols. are now published. (See App. B, at the end of the work.)

Eng. Ecc. R. English Ecclesiastical Reports. This is a reprint of Ecclesiastical Reports. For the sake of convenient reference, a list of those published will be given, Five volumes of this work are published furnishing a series of decisions in the Ecclesiastical Courts of England and Scotland from 1790 to 1832. (See App. C at the end the work.)

Eng. Plead. English Pleader.

Eod. Eodem, under the same title.

Eq. Ca. Ab. Equity Cases Abridged.

Eq. Draft. Equity Draftsman.

Ersk. Inst. Erskine's Institute of the Law of Scotland. *Ersk. Prin. of Laws of Scotl.* Erskine's Principles of the Laws of Scotland.

Esp. N. P. Espinasse's Nisi Prius.

Esp. N. P. R. Espinasse's Nisi Prius Reports.

Esp. on Ev. Espinasse on Evidence.

Esp. on Pen. Ev. Espinasse on Penal Evidence.

Esq. Esquire.

Eunom. Eunomus, or Doctor and Student.

Ev. Col. Stat. Evans's Collection of Statutes.

Ev. on Pl. Evans on Pleading.

Ev. Tr. Evans's Trial.

Ex. or *Exor.* Executor. *Execx.* Executrix.

Exch. Rep. Exchequer Reports. Vide Cond. Exch. Rep.

Exec. Execution.

Exp. Expired.

Exton's Mar. Dicæo. Exton's Maritime Dicæologie.

F. Finalis, the last or latter part.

F. Fitzherbert's Abridgment.
F. & F. Falconer & Fitzherbert's Reports.
F. & S. Fox & Smith's Reports.
F. N. B. Fitzherbert's Natura Brevium.
Fairf. R. Fairfield's Reports.
Fac. Coll. Faculty Collection; the name of a set of Scotch Reports.
Falc. & Fitzh. Falconer & Fitzherbert's Election Cases.
Farr. Farresly, (7 Mod. Rep.) is sometimes so cited.
Farr's Med. Jur. Farr's Elements of Medical Jurisprudence.
Fearn. on Rem. Fearne on Remainders.
Fell on Mer. Guar. Fell on Mercantile Guaranties.
Ferg. on M. & D. Fergusson on Marriage and Divorce.
Ferg. Rep. Div. Fergusson's Reports in actions of Divorce.
Ferg. R. Fergusson's Reports of the Consistorial Court of Scotland.
Ff. or *ff.* Pandects of Justinian, this is a careless way of writing the Greek π.
Ferr. Hist. Civ. L. Ferriere's History of the Civil Law.
Fess. on Pat. Fessenden on Patents.
Fi. fa. Fieri Facias.
Field's Com. Law. Field on the Common Law of England.
Field on Pen. Laws. Fielding on Penal Laws.
Finch. Finch's Law; or a Discourse thereof in five books. *Finch's Pr.* Finch's Precedents in Chancery.
Fish. Copyh. Fish on Copyholds.
Fitz-G. Fitzgibbon's cases in the Courts of the K. B., Chancery, C. P., and Exch. vide 3 Atk. 306.
Fitzh. Fitzherbert's Abridgment. *Fitzh. Nat. Bre.* Fitzherbert's Natura Brevium.
Fl. or *Fleta.* A commentary on the English Law written by an anonymous author, in the time of Edward I., while a prisoner in the Fleet.
Fletch. on Trusts. Fletcher on the Estates of Trustees.
Floy. Proct. Pr. Floyer's Proctor's Practice.
Fol. Foley's Poor Laws.
Fol. Folio.
Fonb. Fonblanque on Equity. *Fonb. Med. Jur.* Fonblanque on Medical Jurisprudence.
Forr. Forrester's Cases during the time of Lord Talbot, commonly cited Cas. Temp. Talb.
For. Pla. Brown's Formulæ Placitorum.
Forb. on Bills. Forbes on Bills of Exchange.
Forb. Inst. Forbes's Institute of the Law of Scotland.
Forr. Exch. Rep. Forrest's Exchequer Reports.
Fortesc. Fortescue, de Laudibus Legum Angliæ. *Fortesc. R.* Fortescue's Reports, temp. Wm. III. and Anne.
Fost. or *Fost. C. L.* Foster's Crown Law.
Fox & Sm. Fox and Smith's Reports.
Fra. or *Fra. Max.* Francis's Maxims.
Fr. Ord. French Ordinance. Sometimes cited *Ord. de la Mar.*
Fras. Elect. Cas. Fraser's Election Cases.
Fred. Co. Frederician Code.
Freem. Freeman's Reports. *Freem. C. C.* Freeman's Cases in Chancery.
G. George; as, 13 G. 1, c. 29.
G. & J. Glyn & Jameson's Reports.
G. & J. Gill and Johnson's Reports.
Gale & Dav. Gale and Davison's Reports.
Gales's Stat. Gales's Statutes of Illinois.
Gall. or *Gall. Rep.* Gallison's Reports.
Geo. George; as, 13 Geo. 1, c. 29.
Geo. Lib. George on the offence of Libel.
Gibs. Codex. Gibson's Codex Juris Civilis.
Gilb. R. Gilbert's Reports. *Gilb. Ev.* Gilbert's Evidence, by Lofft. *Gilb. U. & T.* Gilbert on Uses and Trusts. *Gilb. Ten.* Gilbert on Tenures. *Gilb. on Rents.* Gilbert on Rents. *Gilb. on Rep.* Gilbert on Replevin. *Gilb. Ex.* Gilbert on Executions. *Gilb. Exch.* Gilbert's Exchequer. *Gilb. K. B.* Gilbert's King's Bench. *Gilb. Rem.* Gilbert on Remainders. *Gilb. on Dev.* Gilbert on Devises.
Gill & John. Gill and Johnson's Reports.
Gilm. R. Gilmer's Reports.
Gilp. R. Gilpin's Circuit Court Reports.
Gl. Glossa, the Gloss.
Glanv. Glanville's treatise of the laws and customs of England. See 8 Co. Rep. Preface; Plowd. 368; 1 Show. 121; Madox's Exch. 123; 2 Reeve's Eng. Law, page v. and 283.
Glassf. Ev. Glassford on Evidence.
Glov. Mun. Corp. Glover on Municipal Corporations.
Glyn & Jam. Glyn & Jameson's Reports of Cases in Bankruptcy.
Godb. Godbolt's Reports.
Godolph. Ad. Jur. Godolphin's View of the Admiralty Jurisdiction.
Godolp. Rep. Can. Godolphin's Repertorium Canonicum.
Godolph. Godolphin's Orphan's Legacy.
Gods. on Pat. Godson's Treatise on the Law of Patents.
Goldesb. Goldesborough's Reports. See *Bro. Brownl.*
Golds. Goldsborough's Reports.
Gord. Dig. Gordon's Digest of the Laws of the United States.

Gord. on Dec. Gordon on the Law of Decedents in Pennsylvania.

Gould on Pl. Gould on the Principles of Pleading in Civil Actions.

Gow. on Part. Gow on Partnership.

Grah. Pr. Graham's Practice. *Grah. N. T.* Graham on New Trials.

Grand Cout. Grand Coutumier de Normandie, (q. v.)

Grant on New Tr. Grant on New Trials.

Green's B. L. Green's Bankrupt Laws.

Green's R. Green's Reports.

Greenl. on Ev. Greenleaf's Treatise on the Law of Evidence.

Greenl. Ov. Cas. Greenleaf's Overruled Cases.

Greenl. R. Greenleaf's Reports.

Greenw. on Courts. Greenwood on Courts.

Gres. Eq. Ev. Gresley's Equity Evidence.

Griff. Reg. Griffith's Law Register.

Grimk. on Ex. Grimké on the duty of Executors and Administrators.

Grot. Grotius de Jure Bellum.

Gwill. Gwillim's Tithe Cases.

H. Henry; as, 19 H. 7, c. 15.

H. Hilary Term.

H. of L. House of Lords.

H. of R. House of Representatives.

H. & B. Hudson and Brooke's Reports.

H. & G. Harris & Gill's Reports.

H. & J. Harris and Johnson's Reports.

H. Bl. Henry Blackstone's Reports. Reports in Common Pleas and Exchequer from Easter 28 Geo. III. 1788, to Hilary 36 Geo. III. 1796. By Henry Blackstone. 2 vols. 8vo.

H. H. C. L. Hale's History of the Common Law.

H. & M. Henning & Munford's Reports.

H. & M. H. or *Harr. & M'Hen.* Harris and McHenry's Reports.

Hab. fa. seis. Habere facias seisinam.

H. P. C. Hale's Pleas of the Crown.

H. t. usually put in small letters, *h. t.* hoc titulo.

Hab. fa. pos. Habere facias possessionem.

Hag. Ad. R. Haggard's Admiralty Reports. *Hagg. Eccl. R.* Haggard's Ecclesiastical Reports. In E. E. R. *Hagg. C. R.* Haggard's Reports in the Consistory Court of London.

Hale, P. C. Hale's Pleas of the Crown.

Hale's Sum. Hale's Summary of Pleas.

Hale's Jur. H. L. Hale's Jurisdiction of the House of Lords.

Hale's Hist. C. L. Hale's History of the Common Law.

Halif. Civ. Law. Halifax's Analysis of the civil law.

Hall's R. Hall's Reports of Cases decided in the Superior Court of the city of New York.

Halk. Dig. Halkerton's Digest of the Law of Scotland relating to marriage.

Hall's Adm. Pr. Hall's Admiralty Practice.

Halst. R. Halstead's Reports.

Hamm. N. P. Hammond's Nisi Prius.

Ham. R. Hammond's (Ohio) Reports.

Hamm. on Part. Hammond on Parties to Actions.

Hamm. Pl. Hammond's Analysis of the principles of pleading.

Hamm. on F. I. Hammond on Fire Insurance.

Han. Hansard's Entries.

Hand's Ch. Pr. Hand's Chancery Practice.

Hand on Fines. Hand on Fines and Recoveries.

Hand's Cr. Pr. Hand's Crown Practice.

Hand on Pat. Hand on Patents.

Hans. Parl. Deb. Hansard's Parliamentary Debates.

Hard. Hardress's Reports.

Hardin's R. Hardin's Reports.

Hare R. Hare's Reports.

Hare on Disc. Hare on the discovery of evidence by bill and answer in equity.

Harg. Coll. Hargrave's Juridical Arguments and collection.

Harg. St. Tr. Hargrave's State Trials.

Harg. Exer. Hargrave's Exercitations.

Harg. Law Tr. Hargrave's Law Tracts.

Harp. L. R. Harper's Law Reports.

Harp. Eq. R. Harper's Equity Reports.

Harr. Ch. Harrison's Chancery Practice.

Harr. Dig. Harrison's Digest.

Harr. Ent. Harris's Entries.

Harr. & Gill. Harris and Gill's Reports.

Harr. & John. Harris and Johnson's Reports.

Harr. & M'H. Harris and M'Henry's Reports.

Harringt. R. Harrington's Reports.

Hasl. Med. Jur. Haslam's Medical Jurisprudence.

Hawk. P. C. Hawkins's Pleas of the Crown.

Hawk's R. Hawk's Reports.

Hay. on Est. An elementary view of the common law of uses, devises, and trusts, with reference to the creation and conveyance of estates. By William Hayes.

Hay. on Lim. Hayes on Limitations.

Hay. Exch. R. Hayes's Exchequer Reports.

Hays on R. P. Hays on Real Property.

Heath's Max. Heath's Maxims.

Hein. Elem. Juris Civ. Heineccii Ele-

menta juris Civilis, secundum ordinem Institutionem.

Hein. Elem. Juris Nat. Heinecii, Elementa juris Naturæ et gentium.

Hen. on For. Law. Henry on Foreign Law.

Hen. J. P. Henning's Virginia Justice of the Peace.

Hen. & Munf. Henning and Munford's Reports.

Herne's Ch. Uses. Herne's Law of Charitable Uses.

Herne's Plead. Herne's Pleader.

Het. Hetley's Reports.

Heyw. on El. Heywood on Elections.

Heyw. (N. C.) R. Heywood's North Carolina Reports.

Heyw. (Tenn.) R. Heywood's Tennessee Reports.

High. Highmore. *High. on Bail.* Highmore on Bail. *High. on Lun.* Highmore on Lunacy. *High. on Mortm.* Highmore on Mortmain.

Hill. Ab. Hilliard's Abridgment of the Law of Real Property.

Hill's R. Hill's Reports.

Hill's Ch. R. Hill's Chancery Reports.

Hind's Pr. Hind's Practice.

Hob. Hobart's Reports.

Hodg. R. Hodge's Reports.

Hoffm. Outl. Hoffman's Outlines of Legal Studies. *Hoffm. Leg. St.* Hoffman's Legal Studies. *Hoffm. Ch. Pr.* Hoffman's Chancery Practice. *Hoffm. Mas. Ch.* Hoffman's Master in Chancery.

Hog. R. Hogan's Reports.

Hog. St. Tr. Hogan's State Trials.

Holt on Lib. Holt on the law of Libels.

Holt on Nav. Holt on Navigation.

Holt, R. Holt's Reports.

Holt on Sh. Holt on the law of Shipping.

Hopk. R. Hopkins's Chancery Reports.

Hopk. Adm. Dec. Hopkinson's Admiralty Decisions.

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

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

Hough C. M. Hough on Courts Martial.

Hov. Fr. Hovenden on Frauds.

Hov. Supp. Hovenden's Supplement to Vesey Junior's Reports.

How. St. Tr. Howell's State Trials.

Howe's Pr. Howe's Practice in civil actions and proceedings at law, in Massachusetts.

Huds. & Bro. Hudson and Brooke's Reports.

Hugh. Entr. Hughes's Entries.

Hugh. on Wills. Hughes on Wills.

Hugh. R. Hughes's Reports.

Hugh. Or. Writs. Hughes's Comments upon Original Writs.

Hugh. Ins. Hughes on Insurance.

Hull. on Costs. Hullock on the law of costs.

Hult. on Conv. Hulton on Convictions.

Hume's Com. Hume's Commentaries on the criminal law of Scotland.

Hut. Hutton's Reports.

I., The Institutes of Justinian (q. v.) are sometimes cited, I. 1, 3, 4.

I. Infra, beneath or below.

Ib. Ibidem.

Id. Idem.

Il Cons. del Mar. Il Consolato del Mare. See *Consolato del Mare*, in the body of the work.

Imp. Pr. C. P. Impey's Practice in the Common Pleas. *Imp. Pr. K. B.* Impey's Practice in the King's Bench. *Imp. Pl.* Impey's Modern Pleader. *Imp. Sh.* Impey's office of Sheriff.

In f. In fine, at the end of the title, law, or paragraph quoted.

In pr. In principio, in the beginning and before the first paragraph of a law.

In princ. In principium. In the beginning, the preface.

In sum. In summa, in the summary.

Ind. Index.

Inf. Infra, beneath or below.

Ing. Dig. Ingersoll's Digest of the Laws of the United States.

Ing. Roc. Ingersoll's Roccus.

Ingr. on Insolv. Ingraham on Insolvency.

Inj. Injunction.

Ins. Insurance.

Inst. Coke on Littleton, is cited Co. Lit. or 1 Inst., for First Institute. Coke's Magna Charta, is cited Co. M. C. or 2d Inst., for Second Institute. Co. P. C. Coke's Pleas of the Crown is cited 3 Inst., for Third Institute. Co. on Courts. Coke on Courts is cited 4 Inst., for Fourth Institute. There is but little reason for calling these books institutes, as they have little of the institutional method to warrant such title. The first is a very extensive comment upon a little excellent treatise of tenures compiled by Judge Littleton, in the reign of Edward the Fourth. This comment is a rich store of common law learning, collected and heaped together from the ancient reports and year-books, but greatly defective in method. The second volume is a comment upon old acts of parliament, without any systematical order; the third, a more methodical treatise of the pleas of the crown; and the fourth, an account of the several species of courts. 1 Bl. Com. 73.

Inst. Institutes. When the Institutes of Justinian are cited, the citation is made

thus; Inst. 4, 2, 1; or Inst. lib. 4, tit. 2, l. 1; to signify Institutes, book 4, tit. 2, law 1. Coke's Institutes are cited, the first, either, Co. Lit., or 1 Inst. and the others 2 Inst., 3 Inst. and 4 Inst.

Inst. Cl. or *Inst. Cler.* Instructor Clericalis.

Introd. Introduction.

Ir. T. R. Irish Term Reports. Sometimes cited *Ridg. Irish T. R.* (q. v.)

J., Justice; as Story, J.

J. C. Juris consultus.

J. C. P. Justice of the Common Pleas.

J. Glo. Juncta Glossa, the Gloss joined to the text quoted.

J. J. Marsh. J. J. Marshall's (Kentucky) Reports.

J. K. B. Justice of the king's bench.

J. Q. B. Justice of the queen's bench.

J. U. B. Justice of the upper bench. During the commonwealth, the English court of the king's bench was called Upper Bench.

Jac. Jacobus, James; as, 4 Jac. 1, c. 1.

Jac. Introd. Jacob's Introduction to the Common, Civil, and Canon law.

Jac. L. D. Jacob's Law Dictionary.

Jac. L. G. Jacob's Law Grammar.

Jac. Lex Mer. Jacob's Lex Mercatoria, or the Merchant's Companion.

Jac. R. Jacob's Chancery Reports.

Jac. & Walk. Jacob and Walker's Chancery Reports.

Jack. Pl. Jackson on Pleading.

Jarm. Pow. Dev. Powell on Devises, with notes by Jarman.

Jebb's Ir. Cr. Cas. Jebb's Irish Criminal Cases.

Jeff. Man. Jefferson's Manual.

Jeff. R. Thomas Jefferson's Reports.

Jenk. Jenkins's Eight Centuries of Reports; or eight hundred cases solemnly adjodged in the Exchequer Chamber, or upon Writs of Error, from K. Henry III. to 21 K. James I.

Jer. Jeremy. *Jer. on Carr.* Jeremy's Law of Carriers. *Jer. Eq. Jur.* Jeremy on the Equity Jurisdiction of the High Court of Chancery.

John. Cas. Johnson's Cases.

John. R. Johnson's Reports.

John. Ch. R. Johnson's Chancery Reports.

John. Eccl. Law. Johnson's Ecclesiastical Law.

John. Civ. L. of Sp. Johnson's Civil Law of Spain.

Johns. on Bills. The Law of Bills of Exchange, Promissory notes, Checks, &c. By Cuthbert W. Johnson.

Jon. Sir Wm. Jones's Reports.

Jon. on Lib. Jones, De Libellis Famosis, or the law of Libels.

Jon. Inst. Hind. L. Jones Institute of Hindoo Laws.

Jon. (1) Sir W. Jones's Reports.

Jon. (2) Sir T. Jones's Reports.

Jon. T. Thomas Jones's Reports.

Jon. on Bailm. Jones's Law of Bailments.

Jones's Intr. Jones's Introduction to Legal Science.

Jud. Chr. Judicial Chronicle.

Judg. Judgments, as they were, upon solemn arguments, given in the Upper Bench and Common Pleas, upon the most difficult points, in all manner of actions.

Jur. Eccl. Jura Ecclesiastica, or a treatise of the Ecclesiastical Law and Courts, interspersed with various cases of law and equity.

Jur. Mar. Molloy's Jure Maritimo. Sometimes cited *Molloy.*

Jus Nav. Rhod. Jus Navale Rhodiorum.

Just. Inst. Justinian's Institutes.

K. B. King's Bench.

K. C. R. Reports in the time of Chancellor King.

K. & O. Knapp and Ombler's Election Cases.

Kames on Eq. Kames's Principles of Equity.

Kames's Ess. Kames's Essays.

Kames's Hist. L. T. Kames's Historical Law Tracts.

Keat. Fam. Settl. Keating on Family Settlements.

Keb. Keble's Reports.

Keb. Stat. Keble's English Statutes.

Keen's R. Keen's Reports.

Keil. or *Keilw.* Keilway's Reports.

Kel. Sir John Kelyng's Reports. *Kel.* 1, 2, or *W. Kel.* William Kelyng's Reports, two parts.

Kelh. Norm. L. D. Kelham's Norman French Law Dictionary. Vide Appendix at the end of second volume of this work.

Kent. Com. Kent's Commentaries on American Law.

Keny. Kenyon's Reports of the Court of King's Bench.

Kit. or *Kitch.* Kitchen on Courts.

Knа. & Omb. Knapp and Ombler's Election Cases.

Knapp's A. C. Knapp's Appeal Cases.

Knapp's R. Knapp's Privy Council Reports.

Kyd on Aw. Kyd on the Law of Awards.

Kyd on Bills. Kyd on the Law relating to Bills of Exchange.

Kyd on Corp. Kyd on the Law of Corporations.

L, in citation means *law*, as L. 1, 33. Furtum, ff de Furtis, i. e. law 1, section or paragraph beginning with the word Furtum, ff, signifies the Digest, and the words

de Furtis denote the title. L signifies also liber, book.

L. & G. Lloyd and Goold's Reports.

L. & W. Lloyd and Welsby's Mercantile Cases.

LL. Laws, as LL. Gul. 1, c. 42. Laws of William I., chapter 42; LL. of U. S., Laws of the United States.

L. S. Locus sigili.

L. R. Louisiana Reports.

La. Lane's Reports.

Lalaure, des Ser. Traité des Servitudes réelles, par M. Lalaure.

Lamb. Archai. Lambard's Archaionomia.

Lamb. Eiren. Lambard's Eirenarcha.

Lamb. on Dow. Lambert on Dower.

Lat. Latch's Reports.

Laus. on Eq. Lausat's Essay on Equity Practice in Pennsylvania.

Law. on Chart. Part. Lawes on the law of Charter Parties.

Law Lib. Law Library. (See App. D at the end of the work.)

Law Rep. Law Reporter.

Law's Eccl. Law. Law's Ecclesiastical Law.

Law Intel. Law Intelligencer.

Law Fr. & Latin Dict. Law French and Latin Dictionary.

Law. Pl. Lawes's Elementary Treatise on Pleading in Civil Actions.

Law. Pl. in Ass. Lawes's Treatise on Pleading in Assumpsit.

Lawy. Mag. Lawyer's Magazine.

Le. Ley's Reports.

Leach. Leach's Cases in Crown Law.

Leç. Elem. Leçon's Elémentaire du Droit Civil Romain.

Lee on Capt. Lee's Treatise of Captures in war.

Lee's Dict. Lee's Dictionary of Practice, 2 volumes.

Lee's Eccl. R. Lee's Ecclesiastical Reports.

Leg. Legibus.

Leg. Obs. Legal Observer.

Leg. Oler. The Laws of Oleron.

Leg. on Outl. Legge on Outlawry.

Leg. Rhod. The Laws of Rhodes.

Leg. Wisb. Laws of Wisbuy.

Leigh & Dal. on Conv. Leigh and Dalzell on Conversion of Property.

Leigh's R. Leigh's Reports.

Leigh's N. P. Leigh's Nisi Prius.

Leo. or *Leon.* Leonard's Reports.

Lev. Levinz's Reports.

Lev. Ent. Levinz's Entries.

Lew. C. C. Lewin's Crown Cases.

Lex Man. Lex Maneriorum.

Lex Mer. Lex Mercatoria. *Lex Mer. Am.* Lex Mercatoria Americana.

Lex Parl. Lex Parliamentaria.

Ley. Ley's Reports.

Lib. Liber, book.

Lib. Ass. Liber Assisarum.

Lib. Ent. Old Book of Entries.

Lib. Feud. Liber Feudorum.

Lib. Intr. Liber intrationum; or Old Book of Entries.

Lib. Nig. Liber Niger.

Lib. Pl. Liber Placitandi.

Lib. Reg. Register Books.

Lib. Rub. Liber Ruber.

Lib. Ten. Liberum tenementum.

Lid. Jud. Adv. Liddel's Detail of the duties of a deputy Judge Advocate.

Lill. Entr. Lilly's Entries. *Lill. Reg.* Lilly's Register.

Lill. Rep. Lilly's Reports.

Lill. Conv. Lilly's Conveyancer.

Lind. Lindewoode's Provinciale; or Provincial constitutions of England, with the legantine constitutions of Otho and Othobond.

Litt. s. Littleton, section.

Litt. R. Littell's Reports. *Litt. R.* Littleton's Reports.

Litt. Sel. Cas. Littell's Select Cases.

Litt. Ten. Littleton's Tenures.

Liv. Livre, book.

Liv. on Ag. Livermore on the law of Principal and Agent, 2 vols.

Liv. Syst. Livingston's System of Penal Law for the state of Louisiana. This work is sometimes cited Livingston's Report on the Plan of a Penal Code.

Liverm. Diss. Livermore's Dissertations on the Contrariety of Laws.

Llo. & Go. Lloyd and Goold's Reports.

Llo. & Welsb. Lloyd and Welsby's Reports of cases relating to Commerce, Manufactures, &c. determined in the Courts of Common Law.

Log. Comp. Compendium of the Law of England, Scotland, and Ancient Rome. By James Logan.

Lofft. Lofft's Reports.

Lois des Bâtim. Lois des Bâtimens. See 3 Kent. Com. 350, n. for the character of this work.

Lom. Dig. Lomax's Digest of the law of Real Property in the United States, &c.

Lom. Ex. Lomax on Executors.

Long Quint. Year book, part 10. Vide *Year Book.*

Louis. Code. Civil Code of Louisiana.

Louis. R. Louisiana Reports.

Lovel. on Wills. Lovelass on Wills.

Lown. Leg. Lowndes on the law of Legacies.

Lubé, Pl. Eq. An Analysis of the Principles of Equity Pleading. By D. G. Lubé.

Luder's Elec. Cas. Luder's Election Cases.

Luml. Ann. Lumley on Annuities.

Luml. Parl. Pr. Lumley's Parliamentary Practice.

Luml. on Settl. Lumley on Settlements and removal.

Lut. Ent. Lutwyche's Entries.

Lutw. Lutwyche's Reports.

M. Michaelmas Term.

M. Maxim, or Maxims.

M. Mary; as 4 M. st. 3, c. 1.

M. & A. Montagu and Ayrton's Reports of Cases of Bankruptcy.

M. & B. Montagu and Bligh's Cases in Bankruptcy.

M. & C. Mylne and Craig's Reports.

M. & C. Montagu and Chitty's Reports.

M. & G. Manning and Granger's Reports.

M. & G. Maddock and Geldart's Reports.

M. & K. Mylne and Keen's Chancery Reports.

M. & M or *Mo. & Malk. Rep.* Moody and Malkin's Nisi Prius Reports. In E. C. L. R.

M. P. Exch. Modern Practice Exchequer.

M. & P. Moore and Payne's Reports.

M. R. Master of the Rolls.

M. R. Martin's Reports of the Supreme Court of the State of Louisiana.

M. & R. Manning and Ryland's Reports. In E. C. L. R.

M. & S. Moore and Scott's Reports.

M. & S. Maule and Selwyn's Reports.

M. & Y. or *Mart. & Yerg.* Martin and Yerger's Reports.

M. & W. Meeson and Welsby's Reports.

M. D. & G. Montagu, Deacon and Gex's Reports of Cases in Bankruptcy.

M'Arth. C. M. M'Arthur on Courts Martial.

M'Cl. & Yo. M'Clelland and Younge's Exchequer Reports.

M'Kin. Phil. Ev. M'Kinnon's Philosophy of Evidence.

M'Lean, R. M'Lean's Reports.

M'Clel. E. R. M'Clleland's Exchequer Reports.

M'Cord's Ch. R. M'Cord's Chancery Reports.

M'Cord's R. M'Cord's Reports.

M'Naght. C. M. M'Naghton on Courts Martial.

Macnal. Ev. Macnally's Rules of Evidence on Pleas of the Crown.

Mad. Exch. Madox's History of the Exchequer.

Mad. Form. Madox's Formulare Anglicanum.

Madd. & Geld. Maddack and Geldart's Reports.

Madd. Madd. R. Maddock's Chancery Reports. *Madd. Pr.* or *Madd. Ch.* Maddock's Chancery Practice.

Mag. Ins. Magens on Insurance.

Mal. Malyne's Lex Mercatoria.

Man. Manuscript.

Man. & Gra. Manning and Granger's Reports.

Man. & Ry. Manning and Ryland's Reports. In E. C. L. R.

Manb. on Fines. Manby on Fines.

Mann. Comm. Manning's Commentaries of the Law of Nations.

Mans. on Dem. Mansel on Demurrers.

Manw. Manwood's Forest Laws.

Mar. Maritime.

Mar. N. C. March's New Cases. *Mar. R.* March's Reports.

Marg. Margin.

Marr. Adm. Dec. Marriott's Admiralty Decisions.

Marr. Form. Inst. Marriott's Formulare Instrumentorum; or a formulary of authentic instruments, writs, and standing orders used in the court of admiralty of Great Britain, of Prize and Instance.

Marsh. Marshall's Reports in the Court of Common Pleas. In E. C. L. R. *A. Marsh.* Marshall's (Kty.) Reports. *J. J. Marsh.* J. J. Marshall's Reports. *Marsh. Ins.* Marshall on the Law of Insurance.

Marsh. Decis. Brockenbrough's Reports of Chief Justice Marshall's Decisions.

Mart. Law Nat. Marten's Law of Nations.

Mart. (N. C.) R. Martin's North Carolina Reports.

Mart. (Lo.) R. Martin's Louisiana Reports.

Mart. & Yerg. Martin and Yerger's Reports.

Mason R. Mason's Circuit Court Reports.

Mass. R. Massachusetts Reports.

Math. on Pres. Mathew on the doctrine of Presumption and Presumptive Evidence.

Matth. on Port. Matthews on Portion.

Matth. on Ex. Matthews on Executors.

Maugh. Lit. Pr. Maughan on Literary Property.

Maule & Selw. Maule and Selwyn's Reports.

Max. Maxims.

Maxw. L. D. Maxwell's Dictionary of the Law of Bills of Exchange, &c.

Maxw. on Mar. L. Maxwell's Spirit of the Marine Laws.

Mayn. Maynard's Reports. See Year Books in the body of the work. The first part of the Y. B. is sometimes so cited.

Med. Jur. Medical Jurisprudence.
Mees. & Wels. Meeson and Welsby's Reports.
Meigs, R. Meigs's Tennessee Reports.
Mer. R. Merivale's Reports.
Merl. Quest. Merlin, Questions de Droit.
Merl. Répert. Merlin, Répertoire.
Merrif. Law of Att. Merrifield's Law of Attorneys.
Merrif. on Costs. Merrif. Law of Costs.
Metc. R. Metcalf's Reports.
Metc. & Perk. Dig. Digest of the Decisions of the Courts of Common Law and Admiralty in the United States. By Theron Metcalf and Jonathan C. Perkins.
Mich. Michaelmas.
Mich. Rev. St. Michigan Revised Statutes.
Miles's R. Miles's Reports.
Mill. Civ. Law. Miller's Civil Law.
Mill. Ins. Millar's Elements of the Law relating to Insurances. Sometimes this work is cited *Mill. El.*
Mill. on Eq. Mort. Miller on Equitable Mortgages.
Minor's Rep. Minor's Alabama Reports, sometimes cited *Ala. Rep.*
Mirch. on Adv. Mirehead on Advowsons.
Mirr. Mirror des Justices.
Misso. R. Missouri Reports.
Mitf. Pl. Mitford's Pleadings in Equity. Also cited *Redesd. Pl.* Redesdale's Pleadings.
Mo. Sir Francis Moore's Reports in the reign of K. Henry VIII., Q. Elizabeth, and K. James.
Mo. & Malk. Moody and Malkin's Reports. In E. C. L. R.
Mo. C. C. Moody's Crown Cases.
Mo. Cas. Moody's Nisi Prius and Crown Cases.
Mod. or *Mod. R.* Modern Reports.
Mod. Cas. Modern Cases.
Mod. C. L. & E. Modern cases in law and equity. The 8 & 9 Modern Reports are sometimes so cited; the 8th cited as the 1st, and the 9th as the 2d.
Mod Entr. Modern Entries.
Mod. Int. Modus Intrandi.
Mol. Molloy, De jure Maritimo.
Moll. R. Molloy's Chancery Reports.
Monr. R. Monroe's Reports.
Mont. & Ayrt. Montagu and Ayrton's Reports.
Mont. B. C. Montagu's Bankrupt Cases.
Mont. & Bligh. Montagu and Bligh's Cases in Bankruptcy.
Mont. & Chit. Montagu and Chitty's Reports.
Mont. on Comp. Montagu on the law of Composition. *Mont. B. L.* Montagu on the Bankrupt Laws. *Mont. on Set-off.* Montagu on Set-off.
Mont. Deac. & Gex. Montagu, Deacon and Gex's Reports of Cases in Bankruptcy, argued and determined in the Court of Review, and on appeals to the Lord Chancellor.
Mont. & Mac. Montagu and Macarthur's Reports.
Mont. Sp. of Laws. Montesquieu's Spirit of Laws.
Montesq. Montesquieu, Esprit des Lois.
Moo. & Malk. Moody and Malkin's Reports.
Moo. & Rob. Moody and Robinson's Reports.
Moore, R. J. B. Moore's Reports of Cases decided in the Court of Common Pleas. In E. C. L. R.
Moore's A. C. Moore's Appeal Cases.
Moore & Payne. Moore and Payne's Reports of Cases in C. P.
Moore & Scott. Moore and Scott's Reports of Cases in C. P.
Mos. Mosely's Reports.
Much. D. & S. Muchall's Doctor and Student.
Mun. Municipal.
Munf. R. Munford's Reports.
Murph. R. Murphey's Reports.
My. & Keen. Mylne and Keen's Chancery Reports.
Myl. & Cr. Mylne and Craig's Reports.
N. Number. *N.* or *Nov.* Novellæ: the novels.
N. A. Non allocatur.
N. B. Nulla bona.
N. Benl. New Benloe.
N. C. Cas. North Carolina Cases.
N. C. Law. Rep. North Carolina Law Repository.
N. Chipm. R. N. Chipman's Reports.
N. E. I. Non est inventus.
N. H. Rep. New Hampshire Reports.
N. L. Nelson's edition of Lutwyche's Reports.
N. L. Non liquet. Vide *Ampliation.*
N. & M. Neville and Manning's Reports.
N. & M'C. Nott and M'Cord's Reports.
N. P. Nisi Prius.
N. & P. Neville and Perry's Reports.
N. R. or *New R.* New Reports; the new series, or 4 & 5 Bos. & Pull. Reports are usually cited N. R.
N. S. New Series of the Reports of the Supreme Court of Louisiana.
N. Y. R. S. New York Revised Statutes.
Nar. Conv. Nares on Convictions.
Nels. Ab. Nelson's Abridgment.
Nels. Lex Maner. Nelson's Lex Maneriorum.

Nels. Ab. Nelson's Abridgment.
Nels. R. Nelson's Reports.
Nem. con. Nemine contradicente, (q. v.)
Nem. dis. Nemine dissentiente.
Nev. & Mann. Neville and Manning's Reports.
Nev. & Per. Neville and Perry's Reports.
New Benl. Benloe's Reports. Reports in the reign of Henry VIII., Edw. VI., Phil. and Mary, and Elizabeth, and other cases in the times of James and Charles. By William Benloe. See *Benl.*
New Rep. New Reports. A continuation of Bosanquet and Puller's Reports. See B. & P.
Newl. Contr. Newland's Treatise on Contracts.
Newl. Ch. Pr. Newland's Chancery Practice.
Newn. Conv. Newnam on Conveyancing.
Nich. Adult. Bast. Nicholas on Adulterine Bastardy.
Nient cul. Nient culpable, old French, not guilty.
Nol. P. L. Nolan's Poor Laws.
Nol. R. Nolan's Reports of cases relative to the duty and office of a justice of the peace.
Non cul. Non culpabilis, not guilty.
North. Northington's Reports.
Nott & M'Cord. Nott and M'Cord's Reports.
Nov. Novellæ, the Novels.
Nov. Rec. Novissima Recopilacion de las Leyes de España.
Noy's Max. Noy's Maxims. *Noy's R.* Noy's Reports.
O. Benl. Old Benloe.
O. Bridg. Orlando Bridgman's Reports.
O. C. Old Code; so is denominated the Civil Code of Louisiana of 1808.
O. N. B. Old Natura Brevium. Vide *Vet. N. B.*, in the abbreviations, and *Old Natura Brevium*, in the body of the work.
O. Ni. These letters, which are an abbreviation for *oneratur nisi habent sufficientem exonerationem*, are according to the practice of the English Exchequer, marked upon each head of a sheriff's account for issues, amerciaments and mean profits. 4 Inst. 116.
Oblig. Obligations.
Observ. Observations.
Off. Office. *Off. Br.* Officina Brevium. *Off. Ex.* Wentworth's Office of Executors.
Ohio R. Ohio Reports.
Oldn. Oldnall's Welsh Practice.
Onsl. N P. Onslow's Nisi Prius.
Ord. Amst. Ordinance of Amsterdam.
Ord. Antw. Ordinance of Antwerp.
Ord. Bilb. Ordinance of Bilboa.
Ord. Ch. Orders in Chancery.
Ord. Cla. Lord Clarendon's Orders.
Ord. Copenh. Ordinance of Copenhagen.
Ord. Flor. Ordinances of Florence.
Ord. Gen. Ordinance of Genoa.
Ord. Hamb. Ordinance of Hamburgh.
Ord. Konigs. Ordinance of Konigsburg.
Ord. Leg. Ordinances of Leghorn.
Ord. de la Mar. Ordonnance de la Marine, de Louis XIV.
Ord. Port. Ordinances of Portugal.
Ord. Prus. Ordinances of Prussia.
Ord. Rott. Ordinances of Rotterdam.
Ord. Swed. Ordinances of Sweden.
Ord on Us. Ord, on the law of Usury.
Orfil. Med. Jur. Orfila's Medical Jurisprudence.
Orig. Original.
Ought. Oughton's Ordo Judiciorum.
Overt. R. Overton's Reports.
Ow. Owen's Reports.
Owen, Bankr. Owen on Bankruptcy.
P. Page or part. *Pp.* Pages.
P. Paschalis, Easter term.
P. C. Pleas of the crown.
P. & D. Perry and Davison's Reports.
P. & K. Perry and Knapp's Election Cases.
P. & M. Philip and Mary; as, 1 & 2 P. & M. c. 4.
P. N. P. Peake's Nisi Prius.
Pa. R. Pennsylvania Reports.
P. R. or *P. R. C. P.* Practical Register in the Common Pleas.
P. Wms. Peere Williams's Reports.
Paige's R. Paige's Chancery Reports.
Paine's R. Paine's Reports.
Pal. Palmer's Reports.
Pal. Ag. Paley on the Law of Principal and Agent.
Pal. Conv. Paley on Convictions.
Pand. Pandects. Vide *Dig.*
Par. Paragraph; as, 29 Eliz. cap. 5, par. 21.
Par. & Fonb. M. J. Paris and Fonblanque on Medical Jurisprudence.
Pardess. Pardessus, Cours de Droit Commercial. In this work Pardessus is cited in several ways, namely; Pardes. Dr. Com. part 3, tit. 1, c. 2, s. 3, n. 286, or 2 Pardes. n. 286, which is the same reference.
Park on Dow. Park on Dower.
Park, Ins. Park on Insurance.
Park. R. Sir Thomas Parker's Reports of cases concerning the revenue, in the Exchequer.
Park. on Ship. Parker on Shipping and Insurance.
Park. Pr. in Ch. Parker's Practice in Chancery.
Parl. Hist. Parliamentary History.
Patch on Mortg. Patch's Treatise on the law of Mortgages.
Paul's Par. Off. Paul's Parish Officer.

Pay. Mun. Rights. Payne's Municipal Rights.

Peak. Add. Cas. Peake's Additional Cases.

Peak. C. N. P. Peake's cases determined at Nisi Prius, in the K. B.

Peake, Ev. Peake on the Law of Evidence.

Peck, R. Peck's Reports.

Peck's Tr. Peck's Trial.

Peckw. E. C. Peckwell's Election Cases.

Penn. Bl. Pennsylvania Blackstone, by John Read, Esq.

Penn. R. Pennington's Reports. The Pennsylvania Reports are sometimes cited *Penn. R.*, but more properly, for the sake of distinction, *Penna. R.*

Penna. Pr. Pennsylvania Practice; also cited Tro. & Hal. Pr. Troubat and Haly's Practice.

Penna. R. Pennsylvania Reports.

Pennsylv. Pennsylvania Reports.

Penult. The last but one.

Per. & Dav. Perry and Davison's Reports.

Per. & Knapp. Perry and Knapp's Election Cases.

Perk. Perkins on Conveyancing.

Perk. Prof. B. Perkin's Profitable Book.

Perpig. on Pat. Perpigna on Patents. The full title of this work is, "The French law and practice of patents for inventions, improvements, and importations. By A. Perpigna, A. M. L. B. Barrister in the Royal court of Paris, member of the Society for the encouragement of arts, etc." The work is well written in the English language. The author is a French lawyer, and has written another work on the same subject in French.

Pet. Ab. Petersdorff's Abridgment.

Pet. Adm. Dec. Peters's Admiralty Decisions.

Pet. on Bail, or *Petersd. on Bail.* Petersdorff on the law of Bail.

Pet. R. Peters's Supreme Court Reports.

Pet. C. C. R. Peters's Circuit Court Reports.

Phil. Ev. Phillips's Evidence.

Phil. Ins. Phillips on Insurance.

Phil. St. Tr. Phillips's State Trials.

Phillim. or *Phillim. E. R.* Phillimore's Ecclesiastical Reports. This forms a part of the Eng. Ecclesiastical Reports.

Pick. R. Pickering's Reports.

Pig. Pigot on Recoveries.

Pike's Rep. Reports of Cases argued and determined in the Supreme Court of Law and Equity of the State of Arkansas. By Albert Pike. These Reports are cited *Ark. Rep.*

Pl. Placitum or plea. *Pl.* or *Plow.* or *Pl. Com.* Plowden's Commentaries, or Reports.

Plff. Plaintiff.

Platt on Cov. Platt on the Law of Covenants.

Pol. Pollexfen's Reports.

Poph. Popham's Reports. The cases at the end of Popham's Reports are cited 2 Poph.

Port. R. Porter's Reports.

Poth. Pothier. The numerous works of Pothier are cited by abbreviating his name *Poth.* and then adding the name of the treatise, the figures generally refer to the number; as *Poth. Ob. n.* 100; which signifies Pothier's treatise on the law of Obligations, number 100. *Poth. du Mar.* Pothier du Mariage; *Poth. Vente*, Pothier Traité de Vente, &c. His Pandects in 24 vols. are cited *Poth. Pand.* with the book, title, law, &c.

Pott's L. D. Pott's Law Dictionary.

Pow. Powell. *Pow. Contr.* Powell on Contracts. *Pow. Dev.* Powell on Devises. *Pow. Mortg.* Powell on Mortgages. *Pow. Powers.* Powell on Powers.

Poyn. on M. & D. Poynter on the law of Marriage and Divorce.

Pr. Principium. *In pr.* In principium; in the beginning.

Pr. Ex. Rep. or *Price's E. R.* Price's Exchequer Reports.

Pr. Reg. Cha. Practical Register in Chancery.

Pr. St. Private Statute.

Pr. Stat. Private Statute.

Pract. Reg. C. P. Practical Register of the Common Pleas.

Pract. Reg. in Ch. Practical Register in Chancery.

Prat. on H. & W. Prater on the Law of Husband and Wife.

Pref. Preface.

Prel. Préliminaire.

Prest. Preston. *Prest. on Est.* Preston on Estates. *Prest. Abs. Tit.* Preston's Essay on Abstracts of Title. *Prest. on Conv.* Preston's Treatise on Conveyancing. Vide 4 Kent Com. 101, note.

Pri. Price's Reports.

Price's Ex. Rep. Price's Exchequer Reports.

Price's Gen. Pr. Price's General Practice.

Prin. Principium, the beginning of a title or law.

Prin. Dec. Printed Decisions.

Priv. Lond. Customs or Privileges of London.

Proct. Pr. Proctor's Practice.

Puff. Pudendorff's Law of Nature.

Q. Quæstione, in such a Quæstion.

Q. B. Queen's Bench.
Q. t. Qui tam.
Q. Van Weyt. Q. Van Weytsen on Average.
Q. Warr. Quo Warranto; (q. v.) The letters (q. v.) *quod vide*, which see, refer to the article mentioned immediately before them.
Qu. Quæstione, in such a Question.
Qu. claus. freg. Quare clausum fregit. (q. v.)
Quæst. Quæstione, in such a Question.
Quest. Questions.
Quinti Quinto. Year-book, 5 Henry V.
R. resolved, ruled, or repealed.
R. Richard; as, 2 R. 2, c. 1.
RC. Rescriptum.
R. & M. Russell and Mylne's Reports.
R. & M. C. C. Ryan and Moody's Crown Cases.
R. & M. N. P. Ryan and Moody's Nisi Prius Cases.
R. & R. Russell and Ryan's Crown Cases.
R. M. Charlt. R. M. Charlton's Reports.
RS. Responsum.
R. S. L. Reading on Statute Law.
Ram on Judgm. Ram on the Law relating to Legal Judgments.
Rand. Perp. Randall on the Law of Perpetuities.
Rand. R. Randolph's Reports.
Rast. Rastall's Entries.
Rawle's R. Rawle's Reports.
Rawle, Const. Rawle on the Constitution.
Ray's Med. Jur. Ray's Medical Jurisprudence of Insanity.
Raym. or, more usually, *Ld. Raym.* Lord Raymond's Reports. *T. Raym.* Sir Thomas Raymond's Reports.
Re. fa. lo. Recordari facias loquelam. Vide *Refalo* in the body of the work.
Rec. Recopilacion. *Rec.* Recorder; as, City Hall Rec.
Redd. on Mar. Com. Reddie's Historical View of the Law of Maritime Commerce.
Redesd. Pl. Redesdale's Equity Pleading. This work is also and most usually cited *Mitf. Pl.*
Reeves's H. E. L. Reeves's History of the English Law. *Reeves on Ship.* Reeves on the Law of Shipping and Navigation.
Reeves on Des. Reeves on Descents.
Reg. Regula, rule. *Reg.* Register.
Reg. Brev. Registrum Brevium, or Register of Writs.
Reg. Gen. Regulæ generalis.
Reg. Jud. Registrum Judiciale.
Reg. Mag. Regiam Magestatem.
Reg. Pl. Regula Placitandi.
Renouard, des Brev. d'Inv. Traité des Brevets d'Invention, de Perfectionement, et d'Importation, par Augustin Charles Renouard.
Rep. The Reports of Lord Coke are frequently cited 1 Rep., 2 Rep., &c. and sometimes they are cited *Co.*
Rép. Répertoire.
Rep. Eq. Gilbert's Reports in Equity.
Rep. Q. A. Reports of cases during the time of Queen Anne.
Rep. T. Finch. Reports tempore Finch.
Rep. T. Hard. Reports during the time of Lord Hardwicke.
Rep. t. Holt. Reports tempore Holt.
Rep. T. Talb. Reports of cases decided during the time of Lord Talbot.
Res. Resolution. The cases reported in Coke's Reports, are divided into resolutions on the different points of the case, and are cited 1 Res. &c.
Ret. Brev. Retorna Brevium.
Rev. St. or *Rev. Stat.* Revised Statutes.
Rey, des Inst. de l'Anglet. Des Institutions Judiciaries de l'Angleterre comparées avec celles de la France. Par Joseph Rey.
Reyn. Inst. Institutions du Droit des Gens, &c. par Gerard de Reyneval.
Ric. Richard; as, 12 Ric. 2, c. 15.
Rice's Rep. Reports of cases in Chancery argued and determined in the Court of Appeals and Court of Errors of South Carolina. By William Rice, State reporter.
Rich. Pr. C. P. Richardson's Practice in the Common Pleas.
Rich. Pr. K. B. Richardson's Practice in the King's Bench.
Rich. on Wills. Richardson on Wills.
Ridg. Irish T. R. Ridgeway, Lapp, and Schoales's Term Reports in the K. B., Dublin. Sometimes this is cited *Ridg. L. & S.*
Ridg. Rep. Ridgeway's Reports of Cases in K. B. and Chancery.
Ridg. St. Tr. Ridgeway's Reports of State Trials in Ireland.
Rob. Adm. Rep. Robinson's Admiralty Reports.
Rob. Cas. Robertson's cases in Parliament, from Scotland.
Rob. Dig. Roberts's Digest of the English Statutes in force in Pennsylvania.
Rob. Entr. Robinson's Entries.
Rob. on Fr. Roberts on Frauds.
Rob. on Fraud. Conv. Roberts on Fraudulent Conveyances.
Rob. Just. Robinson's Justice of the peace.
Rob. Pr. Robinson's Practice in suits at law, in Virginia.
Rob. on Wills. Roberts's Treatise on the Law of Wills and Codicils.
Roc. Ins. Roccus on Insurance. Vide *Ing. Roc.*
Rog. Rec. Rogers's City Hall Recorder.

Roll. Rolle's Abridgment. *Roll. R.* Rolle's Reports.

Rom. Cr. Law. Romilly's Observations on the Criminal law of England, as it relates to capital punishments.

Rop. on H. & W. A Treatise on the Law of Property, arising from the relation between Husband and Wife. By R. S. Donnison Roper. 2 vols. 8vo.

Rop. Leg. Roper on Legacies.

Rop. on Revoc. Roper on Revocations.

Rosc. Roscoe. *Rosc. on Act.* Roscoe on Actions relating to Real Property. *Rosc. Civ. Ev.* Roscoe's Digest of the Law of Evidence on the trial of actions at Nisi Prius. *Rosc. Cr. Ev.* Roscoe on Criminal Evidence. *Rosc. on Bills.* Roscoe's Treatise on the law relating to Bills of Exchange, Promissory Notes, Bankers' Checks, &c.

Rose's R. Rose's Reports of cases in Bankruptcy.

Ross on V. & P. Ross on the Law of Vendors and Purchasers.

Rot. Parl. Rotulæ Parliamentariæ.

Rowe's Sci. Jur. Rowe's Scintilla Juris.

Rub. or *Rubr.* Rubric, (q. v.)

Ruffh. Ruffhead's Statutes at large.

Ruffin's R. Ruffin's Reports.

Runn. Ej. Runnington on Ejectments.

Runn. Stat. Runnington's Statutes at large.

Rus. & Myl. Russell and Mylne's Chancery Reports.

Rush. Rushworth's Collections.

Russ. Cr. Russell on Crimes and Misdemeanors.

Russ. & Myl. Russell and Mylne's Reports of cases in Chancery.

Russ. R. Russell's Reports of cases in Chancery.

Russ. & Ry. Russell and Ryan's Crown Cases.

Rutherf. Inst. Rutherford's Institutes of Natural Law.

Ry. F. Rymer's Fœdera.

Ry. & Mo. Ryan and Moody's Nisi Prius Reports. In E. C. L. R. *Ry. & Mo. C. C.* Ryan and Moody's Crown Cases.

Ry. Med. Jur. Ryan on Medical Jurisprudence.

S. §, section.

S. B. Upper Bench.

S. & B. Smith and Batty's Reports.

S. C. Same Case.

S. C. C. Select cases in Chancery.

S. C. Rep. South Carolina Reports.

S. & L. Schoale and Lefroy's Reports.

S. & M. Shaw and Maclean's Reports.

S. P. Same Point.

S. & R. Sergeant and Rawle's Reports.

S. & S. Saussee and Scully's Reports.

S. & S. Simon and Stuart's Chancery Reports. In Con. C. R.

Sa. & Scul. Sausse and Scully's Reports.

Sadl. St. Pap. Sadler's State Papers.

Salk. Salkeld's Reports.

Sand. U. & T. Sanders on Uses and Trusts.

Sanf. on Ent. Sanford on Entails.

Sant. de Assec. Santerna, de Assecurationibus.

Saund. Saunders's Reports.

Saund. Pl. & Ev. Saunders's Treatise on the Law of Pleading and Evidence.

Sav. Saville's Reports.

Sav. Hist. Rom. Law. Savigny's History of the Roman Law during the Middle Ages. Translated from the German of Carl Von Savigny, by E. Cathcart.

Say. Sayer's Reports. *Say. Costs.* Sayer's law of Costs.

Scac. de Cam. Scaccia de Cambiis.

Scam. Rep. Scammon's Reports of Cases argued and determined in the Supreme Court of Illinois.

Sch. & Lef. Schoale and Lefroy's Reports.

Scheiff. Pr. Scheiffer's Practice.

Schul. Aq. R. Schultes on Aquatic Rights.

Sci. fa. Scire facias.

Sci. fa. ad dis. deb. Scire facias ad disprobandum debitum, (q. v.)

Scil. Scilicet, that is to say.

Sco. N. R. Scott's New Reports.

Scott's R. Scott's Reports.

Scriv. Copyh. Scriven's Copyholds.

Seat. F. Ch. Seaton's Forms in Chancery. By Henry Wilmot Seaton.

Sec. Section.

Sec. Leg. Secundum legem; according to law.

Sec. Reg. Secundum regulam; according to rule.

Sel. Ca. Chan. Select cases in Chancery. Vide S. C. C.

Seld. Mar. Cla. Seldon's Mare Clausum.

Self. Tr. Selfridge's Trial.

Sell. Pr. Sellon's Practice in K. B. and C. P.

Selw. N. P. Selwyn's Nisi Prius. *Selw. R.* Selwyn's Reports. These Reports are usually cited M. & S. Maule and Selwyn's Reports.

Sem. or *Semb.* Semble, it seems.

Sen. Senate.

Seq. Sequentia.

Serg. on Att. Sergeant on the law of Attachment.

Serg. Const. Law. Sergeant on Constitutional Law.

Serg. on Land L. Sergeant on the Land Laws of Pennsylvania.

Serg. & Lowb. Sergeant and Lowber's edition of the English Common Law Reports; more usually cited *Eng. Com. Law Rep.*

Serg. & Rawle. Reports of Cases adjudged in the Supreme Court of Pennsylvania. By Thomas Sergeant and William Rawle, Jun. 17 vols. 8vo.

Sess. Ca. Sessions Cases in K. B., chiefly touching settlements.

Shaw & Macl. Shaw and Maclean's Reports.

Shelf. Lun. Shelford on Lunacy.

Shelf. on Mort. Shelford on the Law of Mortmain.

Shelf. on R. Pr. Shelford on Real Property.

Shep. To. Sheppard's Touchstone.

Shepl. R. Shepley's Reports.

Show. P. C. Shower's Parliamentary Cases. *Show. R.* Shower's Reports in the Court of King's Bench.

Shub. Jur. Lit. Shuback de Jera Littoris.

Sid. Siderfin's Reports.

Sim. Simon's Chancery Reports. In Con. C. R.

Sim. & Stu. Simon and Stuart's Chancery Reports. In Con. C. R.

Skene, Verb. Sign. Skene de Verborum Significatione; an explanation of terms, difficult words, &c.

Skin. Skinner's Reports.

Skirr. Und. Sher. Skirrow's Complete Practical Under Sheriff.

Sm. Ch. Pr. Smith's Chancery Practice.

Sm. on Pat. Smith on the Law of Patents.

Smith & Batty. Smith and Batty's Reports.

Smith's For. Med. Smith's Forensic Medicine.

Smith's R. Smith's Reports in K. B., together with cases in the court of Chancery, from 44 to 46 Geo. III.

Sol. Solutio, the answer to an objection.

South Car. R. South Carolina Reports.

South. R. Southard's Reports.

Sp. of Laws. Spirit of Laws, by Montesquieu.

Spel. Gl. Spelman's Glossary.

Spelm. Feuds. Spelman on Feuds.

Ss. usually put in small letters, *ss.* Scilicet, that is to say.

St. or *Stat.* Statute.

St. Cas. Stillingfleet's Cases.

St. Tr. State Trials.

Stair's Inst. Stair's Institutions of the law of Scotland.

Stallm. on Elec. & Sat. Stallman on Election and Satisfaction.

Stark. Starkie's Ev. Starkie on the law of Evidence. *Stark. Cr. Pl.* Starkie's Criminal Pleadings. *Stark. R.* Starkie's Reports. In E. C. L. R. *Stark. on Sl.* Starkie on Slander and Libel.

Stat. Statutes.

Stat. Wes. Statute of Westminster.

Stath. Statham's Abridgment.

Staunf. or *Staunf. P. C.* Staunford's Pleas of the Crown.

Stearn. on R. A. Stearne on Real Actions.

Steph. Comm. Stephen's New Commentaries on the Law of England (partly founded on Blackstone.)

Steph. Cr. Law. Stephen on Criminal Law. *Steph. Pl.* Stephen on Pleading. *Steph. Proc.* Stephen on Procurations.

Stev. on Av. Stevens on Average.

Stev. & B. on Av. Stevens and Beneke on Average.

Stew. Adm. Rep. Stewart's Reports of Cases argued and determined in the Court of Vice Admiralty at Halifax.

Stew. R. Stewart's Reports.

Stew. & Port. Stewart and Porter's Reports.

Story on Bail. Story's Commentaries on the Law of Bailments.

Story on Const. Story on the Constitution of the United States.

Story on Eq. Story's Commentaries on Equity Jurisprudence.

Story's L. U. S. Story's edition of the Laws of the United States, in 3 vols. The 4th volume is a continuation of the same work by George Sharswood, Esq.

Story on Partn. Story on Partnership.

Story on Pl. Story on Pleading.

Story, R. Story's Reports.

Str. Strange's Reports.

Stracc. de Mer. Straccha de Mercatura, Navibus et Assecurationibus.

Strah. Dom. Straham's translation of Domat's Civil Law.

Stroud's Dig. Stroud's Digest of the Laws of Pennsylvania.

Stuart's (L. C.) R. Reports of cases in the court of King's Bench in the Provincial court of appeals of Lower Canada, and appeals from Lower Canada before the Lords of the Privy Council. By George O'Kill Stuart, Esq.

Sty. Styles's Reports.

Sugd. Sugd. Pow. Sugden on Powers. *Sugd. Vend.* Sugden on Vendors. *Sugd. Lett.* Sugden's Letters.

Sull. Lect. Sullivan's Lectures on the Feudal Law, and the Constitution and Laws of England.

Sull. on Land Tit. Sullivan's History of Land Titles in Massachusetts.

Sum. Summa, the Summary of a law.

Sumn. R. Sumner's Circuit Court Reports.

Supp. Supplement. *Supp. to Ves. Jr.* Supplement to Vesey Junior's Reports. This is an excellent collection of notes on the points decided in the Reports.

Swan on Eccl. Cts. Swan on the Jurisdiction of Ecclesiastical Courts.

Swanst. Swanston's Reports.

Swift's Ev. Swift's Evidence.

Swift's Sys. Swift's System of the Laws of Connecticut. *Swift's Dig.* Swift's Digest of the Laws of Connecticut.

Swinb. Swinburn on the Law of Wills and Testaments. This work is generally cited by reference to the part, book, chapter, &c.

Swinb. on Desc. Swinburn on the Law of Descents.

Swinb. on Mar. Swinburne on Marriage.

Swinb. on Spo. Swinburne on Spousals.

Syst. Plead. System of Pleading.

T. Title.

T. & G. Tyrwhitt and Granger's Reports.

T. Jo. Sir Thomas Jones's Reports.

T. L. Termes de la Ley, or Terms of the Law.

T. R. Term Reports. Ridgeway's Reports are sometimes cited *Irish T. R.*

T. R. Teste Rege.

T. & R. Turner and Russell's Chancery Reports.

T. R. E. or *T. E. R.* Tempore Regis Edwardi. This abbreviation is frequently used in Domesday Book, and in the more ancient law writers. See Tyrrel's Hist. Eng., Introd. viii. p. 49. See also Co. Inst. 86, a, where in a quotation from Domesday Book, this abbreviation is interpreted Terra Regis Edwardi; but in Cowell's Dict. verb. Reveland, it is said to be wrong.

T. Raym. Sir Thomas Raymond's Reports.

T. U. P. Charlt. T. U. P. Charlton's Reports.

Tait on Ev. Tait on Evidence.

Taml. R. Tamlyn's Reports of Cases decided in Chancery.

Taml. T. Y. Tamlyn on Terms for Years.

Tapia, Jur. Mer. Tratado de Jurisprudentia Mercantil.

Taunt. Taunton's Reports. In E. C. L. R.

Tayl. Civ. L. Taylor's Civil Law.

Tayl. Law Glo. Tayler's Law Glossary.

Tayl. R. Taylor's Reports.

Tech. Dict. Crabbe's Technological Dictionary.

Th. Br. Thesaurus Brevium.

Th. Dig. Thelwall's Digest.

Theo. Pres. Pro. Theory of Presumptive Proof, or an inquiry into the nature of circumstantial evidence.

Tho. Co. Litt. Coke upon Littleton; newly arranged on the plan of Sir Matthew Hale's Analysis. By J. H. Thomas, Esq.

Tidd's Pr. Tidd's Practice.

Tit. Title.

Toll. Ex. Toller's Executors.

Toml. L. D. Tomlin's Law Dictionary.

Toth. Tothill's Reports.

Touchs. Sheppard's Touchstone.

Toull. Le Droit Civil Français suivant l'ordre du Code; ouvrage dans lequel on a taché de réunir la théorie à la practique. Par M. C. B. M. Toullier. This work is sometimes cited Toull. Dr. Civ. Fr. liv. 3, t. 2, c. 1, n. 6; at other times, 3 Toull. n. 86, which latter signifies vol. 3 of Toullier's work, No. 86.

Tr. Eq. Treatise of Equity; the same as Fonblanque on Equity.

Traill, Med. Jur. Outlines of a course of Lectures on Medical Jurisprudence. By Thomas Stewart Traill, M. D.

Treb. Jur. de la Med. Jurisprudence de la Médecine, de la Chirurgie, et de la Pharmacie. Par Adolphe Trebuchets.

Trem. Tremaine's Pleas of the Crown.

Tri. per Pays. Trials per Pays.

Trin. Trinity term.

Tuck. Bl. Com. Blackstone's Commentaries, edited by Judge Tucker.

Turn. R. Turner's Reports of Cases determined in Chancery.

Turn. & Rus. Turner and Russell's Chancery Reports.

Tyl. R. Tyler's Reports.

Tyrw. Tyrwhitt's Exchequer Reports.

Tyrw. & Gra. Tyrwhitt and Granger's Reports.

Tyt. Mil. Law. Tytler's Essay on Military Law and the practice of Military Courts Martial.

U. S. United States of America.

U. S. Dig. United States's Digest. See *Metc. & Perk. Dig.*

Ult. Ultimo, ultima, the last, usually applied to the last title, paragraph or law.

Umfrev. Off. of Cor. Umfreville's Office of Coroner.

Under Sher. Under Sheriff, containing the office and duty of High Sheriffs, Under Sheriffs, and Bailiffs.

Ux. et. Et uxor, et uxorem, and wife.

V. Versus, against, as A B v. C D.

V. Versiculo, in such a verse.

V. vide, see.

V. or u. Voce; as Spelm. Gloss. v. Cancellarius.

V. & B. Vesey and Beames's Reports.

V. & S. Vernon and Scriven's Reports.

Val. Com. Valin's Commentaries.

Van Heyth. Mar. Es. Van Heythuysen's

Essay upon Marine Evidence, in courts of law and equity.

Vand. Jud. Pr. Vanderlinden's Judicial Practice.

Vatt. or *Vattel.* Vattel's Law of Nations.

Vaug. Vaughan's Reports.

Vend. Ex. Venditioni exponas.

Ventr. Ventris's Reports.

Verm. R. Vermont Judge's Reports.

Vern. Vernon's Reports.

Vern. & Scriv. Vernon and Scriven's Reports of Cases in the King's Courts, Dublin.

Verpl. Contr. Verplanck on Contracts.

Verpl. Ev. Verplanck on Evidence.

Ves. Vesey Senior's Reports.

Ves. Jr. Vesey Junior's Reports.

Ves. & Bea. Vesey and Beames's Reports.

Vet. N. B. Old Natura Brevium.

Vid. Vidian's Entries.

Vin. Ab. Viner's Abridgment.

Vin. Supp. Supplement to Viner's Abridgment.

Vinn. Vinnius.

Viz. Videlicit, that is to say.

Vs. Versus.

W. 1, W. 2. Statutes of Westminster, 1, and 2.

W. C. C. R. Washington's Circuit Court Reports.

W. & C. Wilson and Courtenay's Reports.

W. Jo. Sir William Jones's Reports.

W. Kel. William Kelynge's Reports.

W. & M. William and Mary.

W. & S. Wilson and Shaw's Reports of Cases decided in the H. of L.

Wagr. on Disc. Wagram on Discoveries.

Walf. on Part. Walford's Treatise on the law respecting Parties to actions.

Walk. Am. L. or *Walk. Introd.* Walker's Introduction to American Law.

Walk. R. Walker's Reports.

Wall. R. Wallace's Circuit Court Reports.

Ward on Leg. Ward on Legacies.

Ware's R. Reports of cases argued and determined in the District Court of the United States, for the District of Maine.

Warr. L. S. Warren's Law Studies.

Wash. C. C. Washington's Circuit Court Reports.

Wat. Cop. Watkin's Copyhold.

Watk. Conv. Watkins's Principles of Conveyancing.

Wats. on Arb. Watson on the Law of Arbitrations and Awards.

Wats. on Partn. Watson on the Law of Partnerships.

Wats. on Sher. Watson on the Law relating to the office and duty of Sheriff.

Watts's R. Watts's Reports.

Welf. on Eq. Plead. Welford on Equity Pleading.

Mellw. Ab. Wellwood's Abridgment of Sea Laws.

Wend. R. Wendell's Reports.

Wentw. Wentworth. *Wentw. Off. Ex.* Wentworth's Office of Executor. *Wentw. Pl.* Wentworth's System of Pleading, in 10 vols.

Wesk. Ins. Weskett on the Law of Insurance.

West's Rep. West's Reports of Lord Chancellor Hardwicke.

West's Symb. West's Symboliography, or a description of instruments and precedents, 2 parts.

Weyt. on Av. Quintin Van Weytsen on Average.

Whart. Dig. Wharton's Digest.

Whart. R. Wharton's Reports.

Wheat. Wheaton. *Wheat. R.* Wheaton's Reports. *Wheat. on Capt.* Wheaton's Digest of the Law of Maritime Captures and Prizes.

Wheel. Ab. Wheeler's Abridgments.

Wheel. Cr. Cas. Wheeler's Criminal Cases.

Wheel. on Slav. Wheeler on the law of Slavery.

Whish. L. D. Whishaw's Law Dictionary.

Whit. on Trans. Whitaker on Stoppage in Transitu.

White's New Coll. A new collection of the Laws, Charters, and Local ordinances of the governments of Great Britain, France, and Spain, &c.

Whit. on Liens. Whitaker on the law of Liens.

Whitm. B. L. Whitmarsh's Bankrupt Law.

Wicq. L'Ambassadeur et ses fonctions, par De Wicquefort.

Wightw. Wightwich's Reports in the Exchequer.

Wilc. on Mun. Cor. Wilcock on Municipal Corporations.

Wilc. R. Wilcox's Reports.

Wilk. Leg. Ang. Sax. Wilkin's Leges Anglo-Saxonicæ.

Wilk. on Lim. Wilkinson on Limitations.

Wilk. on Pub. Funds. Wilkinson on the law relating to the Public Funds, including the practice of Distringas, &c.

Wilk. on Repl. Wilkinson on the law of Replevin.

Will. Auct. Williams on the law of Auctions.

Will. on Eq. Pl. Willis's treatise on Equity Pleadings.

Will. on Inter. Willis on Interrogatories.

Will. L. D. Williams's Law Dictionary.
Will. (P.) Rep. Peere Williams's Reports.
Willc. Off. of Const. Willcock on the Office of Constable.
Willes's R. Willes's Reports.
Wills on Cir. Ev. Wills on Circumstantial Evidence.
Wilm. on Mortg. Wilmot on Mortgages.
Wilm. Judg. Wilmot's Notes of Opinions and Judgments.
Wils. on Arb. Wilson on Arbitrations.
Wils. Ch. R. Wilson's Chancery Reports
Wils. & Co. Wilson and Courtenay's Reports.
Wils. Ex. R. Wilson's Exchequer Reports.
Wils. & Sh. Wilson and Shaw's Reports decided by the House of Lords.
Wils. R. Wilson's Reports.
Win. Winch's Entries. *Win. R.* Winch's Reports.
Wing. Max. Wingate's Maxims.
Wms. Just. Williams's Justice.
Wms. R., more usually, *P. Wms.* Peere Williams's Reports.
Wood's Inst., or *Wood's Inst. Com. L.* Wood's Institutes of the Common Law of England. *Wood's Inst. Civ. Law.* Wood's Institutes of the Civil Law.
Woodes. Wooddeson. *Woodes. El. Jur.* Wooddesson's Elements of Jurisprudence. *Woodes. Lect.* Wooddesson's Vinerian Lectures.
Woodf. L. & T. Woodfall on the Law of Landlord and Tenant.
Wool. Com. L. Woolrych's Commercial Law.
Wool. L. W. Woolrych's Law of Waters.
Wool. on Ways. Woolyrch on Ways.
Worth. on Jur. Worthington's Inquiry into the Power of Juries to decide incidentally on questions of law.
Worth. Pre. Wills. Worthington's General Precedents for Wills, with practical notes.
Wright's R. Wright's Reports.
Wright, Fr. Soc. Wright on Friendly Societies.
Wright, Ten. Sir Martin Wright's Law of Tenures.
Wy. Pr. Reg. Wyatt's Practical Register.
X. The Decretals of Gregory the Ninth, are denoted by the letter X, thus, Ẋ.
Y. B. Year Books, (q. v.)
Y. & C. Younge and Collyer's Exchequer Reports.
Y. & C. N. C. Younge and Collyer's New Cases.
Y. & J. Younge and Jervis's Exchequer Reports.
Yeates, R. Yeates's Reports.
Yelv. Yelverton's Reports.
Yerg. R. Yerger's Reports.
Yo. & Col. Younge and Collyer's Exchequer Reports.
Yo. & Col. N. C. Younge and Collyer's New Cases.
Yo. Rep. Younge's Reports.
Yo. & Jer. Younge and Jervis's Reports.
Zouch's Adm. Zouch's Jurisdiction of the Admiralty of England, asserted.

ABBROCHMENT, *obsolete.* The forestalling of a market or fair.

ABDICATION, *government.* 1. A simple renunciation of an office, generally understood of a supreme office. James II. of England; Charles V. of Germany; and Christiana, queen of Sweden, are said to have abdicated.—2. When inferior magistrates decline their offices, they are said to make a resignation, (q. v.)

ABDUCTION, *crim. law*, the carrying away of any person by force or fraud. This is a misdemeanor punishable by indictment. 1 East, P. C. 458; 1 Russell, 569; the civil remedies are recaption, (q. v.) 3 Inst. 134; Hal. Anal. 46; 3 Bl. Com. 4; by writ of habeas corpus; and an action of trespass, Fitz. N. B. 89; 3 Bl. Com. 139, n. 27; Roscoe, Cr. Ev. 193.

ABEREMURDER, *obsolete.* An apparent, plain, or downright murder. It was used to distinguish a wilful murder, from chance-medley, or manslaughter.

TO ABET, *crim. law.* To encourage or set another on to commit a crime. This word is always taken in a bad sense. To abet another to commit a murder, is to command, procure, or counsel him to commit it. Old Nat. Brev. 21; Co. Litt. 475.

ABETTOR, *crim. law*, is one who encourages or incites, encourages or sets another on to commit a crime. Such a person is either a principal or

an accessory to the crime. When present aiding where a felony is committed, he is guilty as principal in the second degree; when absent, he is merely an accessory. 1 Russell, 21; 1 Leach, 66; Foster, 428.

ABEYANCE, *estates*, from the French *aboyer*, which in a figurative sense means *to expect, to look for, to desire*. When there is no person *in esse* in whom the freehold is vested, it is said to be in *abeyance*, that is, in expectation, remembrance and contemplation of law. The law requires, however, that the freehold should never, if possible, be in *abeyance*. Where there is a tenant of the freehold, the remainder or reversion in fee may exist for a time without any particular owner, in which case it is said to be in abeyance. Thus, if an estate be limited to A for life, remainder to the right heirs of B, the fee simple is in abeyance during the life of B, because it is a maxim of law, that *nemo est hæres viventis*. 2 Bl. Com. 107; 1 Cruise, 67—70; 1 Inst. 342; Merlin, Répertoire, mot Abayance; 1 Com. Dig. 175; 1 Vin. Abr. 104. Another example may be given in the case of a corporation. When a charter is given and the charter grants franchises or property to a corporation which is to be brought into existence by some future acts of the corporators, such franchises or property are in abeyance, until such acts shall be done, and when the corporation is thereby brought into life, the franchises instantaneously attach. 4 Wheat. 691. See, generally, 2 Mass. 500; 7 Mass. 445; 10 Mass. 93; 15 Mass. 464. 9 Cranch, 47, 293; 5 Mass. 555.

ABIDING BY PLEA, in the English law. A defendant who pleads a frivolous plea, or a plea merely for the purpose of delaying the suit; or who, for the same purpose, shall file a similar demurrer, may be compelled by rule in term time, or by a judge's order in vacation, either to abide by that plea, or by that demurrer, or to plead peremptorily on the morrow; or if near the end of the term, and in order to afford time for notice of trial, the motion may be made in court for rule to abide or plead instanter; that is within twenty-four hours after rule served, Imp. B. R. 340, provided that the regular time for pleading be expired. If the defendant when ruled, do not abide, he can only plead the general issue. 1 T. R. 693; but he may add notice of set-off. Ib. 694, n. See 1 Chit. Rep. 565, n.

ABJURATION. A renunciation of a country by oath. 1. The act of Congress of the 14th of April, 1802, 2 Story's Laws U. S. 850, requires that when an alien shall apply to be admitted a citizen of the United States, he shall declare on oath or affirmation before the court where the application shall be made, inter alia, that he doth absolutely and entirely renounce and *abjure* all allegiance and fidelity which he owes to any foreign prince, &c., and particularly, by name, the prince, &c., whereof he was before a citizen or subject. Rawle on the Const. 98.—2. In England *the oath of abjuration* is an oath by which an Englishman binds himself not to acknowledge any right in the pretender to the throne of England. —3. It signifies also according to 25 Car. II., an oath abjuring to certain doctrines of the church of Rome.—4. In the ancient English law it was a renunciation of one's country and taking an oath of perpetual banishment. A man who had committed a felony, and for the safety of his life flew to a sanctuary, might within forty days confess the fact and take the oath of abjuration and perpetual banishment; he was then transported. This was abolished by stat. 1 Jac. 1, c. 25. Ayl. Parerg. 14.

ABLEGATI, *diplomacy*. Papal

ambassadors of the second rank, who are sent with a less extensive commission, to a court where there are no nuncios. This title is equivalent to *envoy*, (q. v.)

ABNEPOS, in the civil law, is the grandson of the grandson or granddaughter, or fourth descendant.—Abneptis, is the grand-daughter of the grandson or grand-daughter.

ABOLITION, is the act by which a thing is extinguished, abrogated or annihilated. Merl. Répert. h. t., as the abolition of slavery is the destruction of slavery. In the civil and French law abolition is used nearly synonymously with pardon, remission, grace. Dig. 39, 4, 3, 3. There is, however, this difference; *grace* is the generic term; *pardon*, according to those laws, is the clemency which the prince extends to a man who has participated in a crime, without being the principal or accomplice; *remission* is made in cases of involuntary homicides, and self-defence. *Abolition* is different; it is applied when the crime exists which cannot be remitted. The prince then may by letters of abolition remit the punishment, but the infamy remains, unless letters of abolition have been obtained before sentence. Encycl. de d'Alembert, h. t. The term abolition is used in the German law in the sense it is used in the French law. Encycl. Amer. h. t. The term abolition is derived from the civil law, where it is sometimes used synonymously with absolution. Dig. 39, 4, 3, 3.

ABORTION, *med. jur.* and *criminal law*. The expulsion of the fœtus before the seventh month of utero-gestation, or before it is *viable*, (q. v.) The causes of this accident are referable either to the mother, and particularly to the uterus; or to the fœtus and its dependencies. The causes in the mother may be: extreme nervous susceptibility, great debility, plethora, faulty conformation, and the like; and it is frequently induced immediately by intense mental emotion, violent exercise, &c. The causes seated in the fœtus are its death, rupture of the membranes, &c. It most frequently occurs between the 8th and 12th weeks of gestation. When abortion is produced with a malicious design, it becomes a misdemeanor, at common law, 1 Russell, 553; and the party causing it may be indicted and punished. The criminal means resorted to for the purpose of destroying the fœtus, may be divided into general and local. To the first belong venesection, emetics, cathartics, diuretics, emmenagogues, &c. The second embraces all kinds of violence directly applied. When, in consequence of the means used to produce abortion, the death of the woman ensues, the crime is murder. By statute a distinction is made between a woman *quick with child*, (q. v.) and one who, though pregnant, is not so, 1 Bl. Com. 129. Physiologists, perhaps with reason, think that the child is a living being from the moment of conception. 1 Beck, Med. Jur. 291.—General references. 1 Beck, 288 to 331; and 429 to 435; where will be found an abstract of the laws of different countries, and of some of the states, punishing criminal abortion; Roscoe, Cr. Ev. 190; 1 Russ. 553; Vilanova y Mañes, Materia Criminal Forense, Obs. 11, c. 7, n. 15—18. See also 1 Briand, Méd Lég. 1ere partie, c. 4, where is considered the question, how far is abortion justifiable, and it can be considered neither a crime nor a misdemeanor? See Alis. Cr. L. of Scot. 628.

ABOVE. Uppermost. This word is applied in law to designate the superior court, or one which may revise proceedings of an inferior court on error, from such inferior jurisdiction. The court of error is called

the court above; the court whose proceedings are to be examined is called the court below. By bail above is understood bail to the action entered with the prothonotary or clerk, which is an appearance. See *Bail above*. The bail given to the sheriff, in civil cases, when the defendant is arrested on bailable process, is called bail below; q. v. vide *Below*.

TO ABRIDGE, *practice*, is to make shorter in words, so as to retain the sense or substance. In law it signifies particularly the making a declaration or count shorter, by taking or severing away some of the substance from it. Brook, tit. Abridgment; Com. Dig. Abridgment; 1 Vin. Ab. 109.

ABROGATION, *in the civil law, legislation*, is the destruction or annulling of a former law, by an act of the legislative power, or by usage. A law may be abrogated or only derogated from; it is abrogated when it is totally annulled; it is derogated from when only a part is abrogated: *derogatur legi, cum pars detrahitur; abrogatur legi, cùm prorsùs tollitur.* Dig. lib. 50, t. 17, l. 102. Abrogation is express or implied; it is express when it is literally pronounced by the new law, either in general terms, as when a final clause abrogates all laws contrary to the provisions of the new one, or in particular terms, as when it abrogates such and such preceding laws which are named. Abrogation is implied when the new law contains provisions which are positively contrary to the ancient laws, without expressly abrogating such laws: for it is a maxim, *posteriora derogant prioribus.* 3 N. S. 190; 10 M. R. 172, 560. It is also implied when the order of things for which the law had been made no longer exists, and hence the motives which had caused its enactment have ceased to operate: *ratione leges omnino cessante cessat lex.* Toullier, Droit Civil Français, tit. prel. § 11, n. 151. Merlin, mot Abrogation.

ABSENTEE. One who is away from his domicil, or usual place of residence. After an absence of seven years without being heard from, the presumption of death arises. 2 Campb. R. 113; Hardin's R. 479; 18 Johns. R. 141; 15 Mass. R. 305; Peake's Ev. c. 14, s. 1; 2 Stark. Ev. 457, 8; 4 Barn. & A. 433; 1 Stark. C. 121; Park on Ins. 433; 1 Bl. R. 404. In Louisiana when a person possessed of either moveable or immoveable property within the state, leaves it, without having appointed somebody to take care of his estate; or when the person thus appointed dies, or is either unable or unwilling to continue to administer that estate, then and in that case, the judge of the place where the estate is situated, shall appoint a curator to administer the same. Civ. Code of Lo. art. 50. In the appointment of this curator the judge shall prefer the wife of the absentee to his presumptive heirs, the presumptive heirs to other relations, the relations to strangers, and creditors to those who are not otherwise interested; provided, however, that such persons be possessed of the necessary qualifications. Ib. art. 51. For the French law on this subject, vide Biret, de l'Absence; Code Civil, liv. 1, tit. 4; Fouss. lib. 1, tit. 4, n. 379-487; Merl. Rép. h. t.; and see also Ayl. Pand. 269; Dig. 50, 16, 198; Ib. 50, 16, 173; Ib. 3, 3, 5; Code, 7, 33, 12.

ABSOLUTE, signifies without any condition or encumbrance, as an "absolute bond," *simplex obligatio*, in distinction from a conditional bond; an absolute estate, one that is free from all manner of condition or encumbrance. A rule is said to be absolute, when, on the hearing, it is confirmed. As to the effect of an absolute conveyance, see 1 Pow. Mortg. 125; in relation to absolute

rights, 1 Chitty, Pl. 364; 1 Chitty, Pr. 32.

ABSOLUTION, a definite sentence whereby a man accused of any crime is acquitted.

ABSQUE HOC, *pleading*, when the pleadings were in Latin, these words were employed in a traverse. *Without this, that* (q. v.) are now used for the same purpose.

ABSTENTION, *French law*. It is the tacit renunciation by an heir of a succession. Merl. Rép. h. t.

ABUSE, every thing which is contrary to good order established by usage. Merl. Rép. h. t. Among the civilians, abuse has another signification; which is the destruction of the substance of a thing in using it. For example, the borrower of wine or grain abuses the article lent by using it, because he cannot enjoy it without consuming it. Leç. El. Dr. Rom. § 414, 416.

ABUTTALS. The buttings and boundings of land, on the north or south, east or west, showing on what other lands, rivers, highways, or other places it does abut. More properly, it is said, the sides of land are *adjoining*, and the ends *abutting* to the thing contiguous. Vide *Boundaries*, and Cro. Jac. 184.

AC ETIAM, *Eng. law*. In order to give jurisdiction to a court, a cause of action over which the court has jurisdiction is alleged, *and also* (ac etiam) another cause of action over which, without being joined with the first, the court would have no jurisdiction; for example, to the usual complaint of breaking the plaintiff's close, over which the court has jurisdiction, a clause is added containing the real cause of action.

ACCEDAS AD CURIAM, that you go to court, *in practice in the English law*, is an original writ, issuing out of chancery, now of course, returnable in K. B. or C. P. for the removal of a replevin sued by plaint in court of any lord, other than the county before the sheriff. See F. N. B. 18; Dyer, 169.

ACCEDAS AD VICECOMITEM, *Engl. law*. The name of a writ directed to the coroner, commanding him to deliver a writ to the sheriff, who having a *pone* delivered to him, suppresses it.

ACCEPTANCE *of a bill of exchange*, is the act by which the drawee or other person evinces his consent and intention to comply with, and be bound by, the request contained in a bill of exchange to pay the same; or in other words, it is an engagement to pay the bill when due; 4 East, 72; this engagement is made by the drawee of the bill, or by some other person, supra protest, to the drawer or some of the other parties, either before the bill is drawn or afterwards, and it may be verbal or in writing; and is either absolute, partial or conditional, and when made after the drawing of the bill, is according to or varying from its tenor.

The acceptance ought to be made by the drawee himself, but it may be made by an agent, Chit. Bills, 30; Beawes, pl. 87, page 462; 1 Esp. Rep. 116; Ib. 269. On presentment of a foreign or inland bill for acceptance, the holder has a right to insist upon such an acceptance by the drawee as will subject him at all events to the payment of the bill according to the tenor of it; and consequently such drawee must have capacity to contract, and to bind himself to pay the amount of the bill, or it may be treated as dishonoured. Marius, 22.

The drawee must accept the bill within twenty-four hours after presentment, or it should be treated as dishonoured. Chit. Bills, 212, 213, in notes. On the refusal to accept, even within the twenty-four hours, the bill should be protested. Ib. By the laws of the state of New York

every person upon whom a bill of exchange is drawn, to whom the same is delivered for acceptance, who shall destroy such bill, or refuse within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted, shall be deemed to have accepted the same. An acceptance of a bill may be made *before* a bill is drawn, 3 Mass. 1; but in that case, it must be in *writing*. See 1 Gall. R. 630; 10 Johns. R. 207; 11 Mass. R. 54; 5 Mass. R. 11; 2 Gall. R. 233; 2 Wheat. R. 66; 15 Johns. R. 6; 1 Hall's Law Journ. 486; 1 East, 105; 4 Campb. R. 393; 1 Holt's C. N. P. 181; Burr. 1633; Cowp. 573; 2 W. C. C. R. 133; or, it may be made *after* the bill is drawn, and before it becomes due; or *after* the time appointed by the bill for payment, 1 H. Bl. 313; 2 Green. R. 339, and even after refusal to accept, so as to bind the acceptor.

As to the form of the acceptance, it is clearly established that it may be in writing on the bill itself, or on another paper, 4 East, 91; or it may be verbal, 4 East, 67; 10 Johns. R. 207; 3 Mass. R. 1.

An acceptance, in regard to its extent or effect, may be either absolute, conditional, or partial. An *absolute* acceptance is an engagement to pay the bill according to its tenor, and is usually made by writing on the bill "accepted," and subscribing the drawee's name; or by writing "accepted" only; or by merely writing the name either at the bottom or across the bill. Comb. 401; Vin. Abr. Bills of Exchange, L 4; Bayl. 77; Chit. Bills, 226 to 228. An acceptance which will subject the drawer to the payment of the money only on a contingency, is a *conditional* acceptance. Bayl. 83, 4, 5; Chit. Bills, 234. The holder is not *bound* to receive such an acceptance, but if he do receive it, he must observe its terms. 4 M. & Selw. 466; 1 Campb. 425; 2 Wash. C. C. R. 485. A *partial* acceptance varies from the tenor of the bill; as where it is made to pay part of the sum for which the bill is drawn, 1 Str. 214; 2 Wash. C. C. R. 485; or to pay at a different time, Molloy, B. 2, c. 10, s. 20; or place, 4 Ma. & Selw. 462.

ACCEPTANCE, *contracts*, an agreement to receive something which has been offered. To complete the contract, the acceptance must be absolute and past recall, 10 Pick. 326; 1 Pick. 278; and communicated to the party making the offer at the time and place appointed. 4 Wheat. R. 225; 6 Wend. 103. In many cases acceptance of a thing waives the right which the party receiving before had; as, for example, the acceptance of rent after notice to quit, in general waives the notice. See Co. Litt. 211, b; Id. 215, a; and *Notice to quit*. This subject is further considered under the articles *Assent* and *Offer*, (q. v.)

ACCEPTANCE, EXPRESS,—*contracts*. An agreement in direct and express terms to pay a bill of exchange by the party on whom it is drawn, or some other person, for the honour of some of the parties. It is usually in the words *accepted* or *accepts*, but other express words showing an engagement to pay the bill will be equally binding.

ACCEPTANCE, IMPLIED, *contracts*. An agreement to pay a bill, not by direct and express terms, but by such acts of the parties from which an express agreement may be inferred; for example, if the drawee write "seen," "presented," or any other thing upon it, (as the day on which it becomes due,) this, unless explained by other circumstances, will constitute an acceptance.

ACCEPTANCE, PARTIAL, *contracts*. An agreement to pay a bill

of exchange, according to the tenor of the acceptance; and this may vary from the bill with respect to *sum*, *time* and *place:* it may also vary from the tenor in which the acceptor undertakes to pay.

ACCEPTANCE, VERBAL, *contracts.* A verbal agreement by the drawee to pay a bill of exchange. This is equally binding with a written acceptance. Holt, 297; Burr. 1669.

ACCEPTANCE SUPRA PROTEST, is the acceptance of the bill, after protest for non-acceptance by the drawee, for the honour of the drawer, or of a particular endorser. When a bill has been accepted supra protest for the honour of one party to the bill, it may be accepted *supra protest* by another individual, for the honour of another. Beawes, tit. Bills of Exchange, pl. 42; 5 Campb. R. 447.

ACCEPTILATION, *contracts.* In the civil law, is a release made by a creditor to his debtor of his debt, without receiving any consideration. Ayl. Pand. tit. 26, p. 570; it is a species of donation, but not subject to the forms of the latter, and is valid, unless in fraud of creditors. Merlin, Répert de Jurisp. h. t. Acceptilation may be defined *verborum conceptio qua creditor debitori, quod debet, acceptum fert;* or, a certain arrangement of words by which on the question of the debtor, the creditor, wishing to dissolve the obligation, answers that he admits as received, what in fact he has not received. The acceptilation is an imaginary payment. Dig. 46, 4, 1 and 19; Dig. 2, 14, 27, 9; Inst. 3, 30, 1.

ACCEPTOR, *contracts.* The person who agrees to pay a bill of exchange drawn upon him. The acceptor of a bill is the principal debtor, and the drawer the surety. He is bound, though he accepted without consideration, and for the sole accommodation of the drawer. By his acceptance he admits the drawer's handwriting, for before acceptance it was incumbent upon him to inquire into the genuineness of the drawer's handwriting. 3 Burr. 1354; 1 Bla. Rep. 390, S. C.; 4 Dall. 234; 1 Binn. 27, S. C. When once made, the obligation of the acceptor is irrevocable. As to what amounts to an acceptance, see ante *Acceptance;* Chitty on Bills, 242, et seq.; 3 Kent, Com. 55, 6; Pothier, Traité du Contrat de Change, première part. n. 44.

The liability of the acceptor cannot in general be released or discharged, otherwise than by payment, or by express release or waiver, or by the act of limitations. Dougl. R. 247. What amounts to a waiver and discharge of the acceptor's liability, must depend on the circumstances of each particular case. Dougl. 236, 248; Bayl. on Bills, 90; Chitty on Bills, 249.

ACCEPTOR SUPRA PROTEST, *in contracts*, is a third person who, after protest for non-acceptance by the drawee, accepts the bill for the honour of the drawer, or of the particular endorser. By this acceptance he subjects himself to the same obligations as if the bill had been directed to him. An acceptor supra protest has his remedy against the person for whose honour he accepted, and against all persons who stand prior to that person. If he takes up the bill for the honour of the endorser, he stands in the light of an endorsee paying full value for the bill, and has the same remedies to which an endorsee would be entitled against all prior parties, and he can, of course, sue the drawer and endorser. 1 Ld. Raym. 574; 1 Esp. N. P. Rep. 112; Bayley on Bills, 209; 3 Kent. Com. 57; Chitty on Bills, 312. The acceptor supra protest is required to give the same notice, in order to charge a party,

which is necessary to be given by other holders. 8 Pick. 1, 79; 1 Pet. R. 262. Such acceptor is not liable, unless demand of payment is made on the drawee, and notice of his refusal given. 3 Wend. 491.

ACCESS, *persons*, the means or power of approaching. Sometimes by access is understood sexual intercourse; at other times the opportunity of communicating together so that sexual intercourse may have taken place is also called access. 1 Turn. & R. 141. In this sense a man who can readily be in company with his wife, is said to have access to her; and in that case her issue are presumed to be his issue. But this presumption may be rebutted by positive evidence that no sexual intercourse took place. Ib. Parents are not allowed to prove non-access for the purpose of bastardizing the issue of the wife; nor will their declarations after their deaths be received to prove the want of access, with a like intent. 1 P. A. Bro. R. App. xlviii.; Rep. tem. Hard. 79; Bull. N. P. 113; Cowp. R. 592; 8 East, R. 203; 11 East, R. 133. 2 Munf. R. 242; 3 Munf. R. 599; 7 N. S. 553; 4 Hayw. R. 221; 3 Hawks, R. 623; 1 Ashm. R. 269; 6 Binn. R. 283; 3 Paige's R. 139. See Shelf. on Mar. & Div. 711; and *Paternity*.

ACCESSARY, *criminal law*. He who is not the chief actor in the perpetration of the offence, nor present at its performance, but is some way concerned therein, either before or after the fact committed. *An accessary before the fact*, is one who being absent at the time of the crime committed, yet procures, counsels, or commands another to commit it. 1 Hale, P. C. 615. It is proper to observe that when the act is committed through the agency of a person who has no legal discretion nor a will, as in the case of a child or an insane person, the incitor, though absent when the crime was committed, will be considered, not an accessary, for none can be accessary to the acts of a madman, but a principal in the first degree. Fost. 340; 1 P. C. 118. *An accessary after the fact*, is one who knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. 4 Bl. Com. 37. No one who is a principal (q. v.) can be an accessary. In certain crimes, there can be no accessaries, all who are concerned are principals whether they were present or absent at the time of their commission. These are treason, and all offences below the degree of felony. 1 Russ. 21, et seq.; 4 Bl. Com. 35 to 40; 1 Hale, P. C. 615; 1 Vin. Abr. 113; Hawk. P. C. b. 2, c. 29, s. 16; such is the English Law. But whether it is law in the United States appears not to be determined as regards the cases of persons assisting traitors. Serg. Const. Law, 382; 4 Cranch, R. 472, 501; United States v. Fries, Pamphl. 199.

ACCESSION. The ownership of a thing, whether it be real or personal, moveable or immoveable, carries with it the right to all that the thing produces, and to all that becomes united to it, either naturally or artificially; this is called the right of accession. 1. The doctrine of property arising from accession, is grounded on the right of occupancy.—2. The original owner of any thing which receives an accession by natural or artificial means, as by the growth of vegetables, the pregnancy of animals; Louis. Code, art. 491; the embroidering of cloth, or the conversion of wood or metal into vessels or utensils, is entitled to his right of possession to the property of it, under such its state of improvement; 5 H. 7, 15; 12 H. 8, 10; Bro. Ab. Propertie, 23; Moor, 20; Poph. 38. But the owner must be able to prove the identity of the original materials, for,

if wine, oil, or bread, be made out of another man's grapes, olives, or wheat, they belong to the new operator, who is bound to make satisfaction to the former proprietor for the materials which he has so converted. 2 Bl. Com. 404. See *Adjunction. Confusion of Goods.*

See Generally, Louis. Code, tit. 2, c. 2 and 3.

ACCESSORY, *property.* Every thing which is joined to another thing, as an ornament, or to render it more perfect, is an accessory, and belongs to the owner of the principal thing. For example, the halter of a horse, the frame of a picture, the keys of a house, and the like; but a bequest of a house would not carry the furniture in it, as accessory to it. Domat, Lois Civ. Part. 2, liv. 4, tit. 2, s. 4; n. 1. *Accessorium non ducit, sed sequitur principale.* Co. Litt. 152, a. Co. Litt. 121, b, note (6); Vide *Accession. Adjunction. Appendant. Appurtenances. Appurtenant. Incident.*

ACCESSORY CONTRACT, is one made for assuring the performance of a prior contract, either by the same parties or by others; such as suretyship, mortgages, and pledges. It is a general rule, that payment of the debt due, or the performance of a thing required to be performed by the first or principal contract, is a full discharge of such accessory obligation. Poth. Ob. part. 1, c. 1, s. 1, art. 2, n. 14. Id. n. 182, 186.

ACCIDENT. The happening of an event without the concurrence of the will of the person by whose agency it was caused; or the happening of an event without any human agency; the burning of a house in consequence of a fire being made for the ordinary purpose of cooking or warming the house, which is an accident of the first kind; the burning of the same house by lightening would have been an accident of the second kind. 1 Fonb. Eq. 374, 5, note. It frequently happens that a lessee covenants to repair, in which case he is bound to do so, although the premises be burned down without his fault. 1 Hill Ab. c. 15, s. 75. But if a penalty be annexed to the covenant, inevitable accident will excuse the former, though not the latter. 1 Dyer, 33, a. Neither the landlord nor the tenant is bound to rebuild a house burned down, unless it has been so expressly agreed. Amb. 619; 1 T. R. 708; 4 Paige, R. 355; 6 Mass. R. 67; 4 M'Cord, R. 431; 3 Kent, Com. 373. In New Jersey, by statute, no action lies against any person on the ground that a fire began in a house or room occupied by him, if accidental. But this does not affect any covenant. 1 N. J. Rev. C. 210.

ACCIDENT, *practice.* This term in chancery practice, signifies such unforeseen events, misfortunes, losses, acts or omissions, as are not the result of any negligence or misconduct in the party. Francis's Max. M. 120, p. 87; 1 Story on Eq. § 78. Jeremy defines it as used in courts of equity, to be "an occurrence in relation to a contract, which was not anticipated by the parties, when the same was entered into, and which gives an undue advantage to one of them over the other in a court of law." Jer. on Eq. 358. This definition is objected to, because as accidents may arise in relation to other things besides contracts, it is inaccurate in confining accidents to contracts; besides it does not exclude cases of unanticipated occurrences, resulting from the negligence or misconduct of the party seeking relief. 1 Story on Eq. § 78, note 1. In general, courts of equity will relieve a party who cannot obtain justice in consequence of an accident which will justify the interposition of a court of equity. The jurisdiction being concurrent, will be maintained only, first, when a court of law can-

not grant suitable relief; and, secondly, when the party has a conscientious title to relief. There are many accidents supplied in a court of law; as loss of deeds, mistakes in receipts and accounts, wrong payments, death, which makes it impossible to perform a condition literally, and a multitude of other contingencies; and many cannot be redressed even in a court of equity; as if by accident a recovery is ill suffered, a contingent remainder destroyed, or a power of leasing omitted in a family settlement. 3 Bl. Com. 431. Vide, generally, Com. Dig. Chancery, 3, F 8; 1 Fonb. Eq. B. 1, c. 3, s. 7; Coop. Eq. Pl. 129; 1 Chit. Pr. 408; Harr. Ch. Index, h. t.; Dane's Ab. h. t.; Wheat. Dig. 48; Mitf. Pl. Index, h. t.; 1 Madd. Ch. Pr. 23; 10 Mod. R. 1, 3; 3 Chit. Bl. Com. 426, n.

ACCOMENDA, *mar. law.* In Italy is a contract which takes place when an individual entrusts personal property with the master of a vessel to be sold for their joint account. In such case two contracts take place; first, the contract called *mandatum*, by which the owner of the property gives the master power to dispose of it, and the contract of partnership, in virtue of which the profits are to be divided between them. One party runs the risk of losing his capital, the other his labour. If the sale produces no more than first cost, the owner takes all the proceeds; it is only the profits which are to be divided. Emer. on Mar. Loans, s. 5.

ACCOMMODATION, *com. law.* That which is done by one merchant or other person for the convenience of some other, by accepting or endorsing his paper, or by lending him his notes or bills. In general the parties who have drawn, endorsed or accepted bills or other commercial paper for the accommodation of others, are while in the hands of a holder who received them before they became due, other than the person for whom the accommodation was given, responsible as if they had received full value. Chit. Bills, 90, 91.

ACCOMMODATION, *contracts.* An amicable agreement or composition between two contending parties. It differs from *accord and satisfaction*, which may take place without any difference having existed between the parties.

ACCOMPLICE, *crim. law.* This term includes in its meaning all persons who have been concerned in the commission of a crime, all the *participeps criminis*, whether they are considered in strict legal propriety, as principals in the first or second degree, or merely as accessaries before or after the fact, Foster, 341; 1 Russell, 21; 4 Bl. Com. 331; 1 Phil. Ev. 28; Merlin, Répertoire, mot Complice. U. S. Dig. h. t.

ACCORD, *in contracts*, is a satisfaction agreed upon between the party injuring and the party injured, which when performed is a bar to all actions upon this account. 3 Bl. Com. 15; Bac. Abr. Accord. In order to make a good accord it is essential:—

1. That the accord be *legal*. An agreement to drop a criminal prosecution as a satisfaction for an assault and imprisonment, is void. 5 East, 294. See 2 Wils. 341; Cro. Eliz. 541.

2. It must be *advantageous* to the contracting party; hence restoring to the plaintiff his chattels, or his land, of which the defendant has wrongfully dispossessed him, will not be any consideration to support a promise by the plaintiff not to sue him for those injuries. Bac. Abr. Accord &c. A; Perk. s. 749; Dyer, 75; 5 East, R. 230; 1 Str. R. 426; 2 T. R. 24; 11 East, R. 390; 3 Hawks, R. 580; 2 Litt. R. 49; 1 Stew. R. 476; 5 Day, R. 360; 1 Root, R. 426; 3 Wend. R. 66; 1 Wend. R. 164; 14 Wend. R. 116; 3 J. J. Marsh. R. 497.

3. It must be *certain;* hence an agreement that the defendant shall relinquish the possession of a house in satisfaction, &c. is not valid, unless it is also agreed at what time it shall be relinquished. Yelv. 125. See 4 Mod. 88; 2 Johns. R. 342; 3 Lev. 189.

4. The defendant must be *privy* to the contract. If therefore the consideration for the promise not to sue proceeds from another, the defendant is a stranger to the agreement, and the circumstance that the promise has been made to him will be of no avail. Str. 592; 6 John. R. 37; 3 Monr. R. 302; but in such case equity will grant relief by injunction. 3 Monr. R. 302; 5 East, R. 294; 1 Smith's R. 515; Cro. Eliz. 541; 9 Co. 79, b; 3 Taunt. R. 117; 5 Co. 117, b.

5. The accord must be *executed.* 5 Johns. R. 386; 3 Johns. Cas. 243; 16 Johns. R. 86; 2 Wash. C. C. R. 180; 6 Wend. R. 390; 5 N. H. Rep. 136; Com. Dig. Accord, B 4.

Accord with satisfaction when completed has two effects; it is a payment of the debt; and it is a species of sale of the thing given by the debtor to the creditor, but it differs from it in this, that it is not valid until the delivery of the article, and there is no warranty of the thing sold, except perhaps the title, for in regard to this it cannot be doubted that if the debtor gave on an accord and satisfaction the goods of another, there would be no satisfaction. See *Dation en paiement.*

See in general Com. Dig. h. t.; Bac. Ab. h. t.; Com. Dig. Pleader, 2 V 6; 5 East, R. 230; 4 Mod. 88; 1 Taunt. R. 428; 7 East, R. 150; 1 J. B. Moore, 358, 460; 2 Wils. R. 86; 6 Co. 43, b; 3 Chit. Com. Law, 687 to 698; Harr. Dig. h. t.; 1 W. Bl. 388; 2 T. R. 24; 2 Taunt. 141; 3 Taunt. 117; 5 B. & A. 886; 2 Chit. R. 303, 324; 11 East, 390; 7 Price, 604; *Discharge of Obligations.*

ACCOUNT, *remedies.* This is the name of a writ or action more properly called *account render.* It lies against a bailiff or receiver, who by reason of his employment or business is to render an account to another, and refuses or neglects to do it. 8 Cowen, R. 304; 9 Conn. R. 556; 2 Day, R. 28; Kirby, 164; 3 Gill & John. 388; 3 Verm. 485; 4 Watts, 420; 8 Cowen, 220. It is also the proper remedy by one partner against another. 15 S. & R. 153; 3 Binn. 317; 10 S. & R. 220; 2 Conn. 425; 4 Verm. 137; 1 Dall. 340; 2 Watts, 86. In this action if the plaintiff succeeds, there are two judgments, the first that the defendant do account, *quod computet,* before auditors appointed by the court; the second that the plaintiff recover the amount to which he is found to be entitled. In those states where they have courts of chancery, this action is nearly superseded, by the better remedy which is given by a bill in equity, by which the complainant can elicit a discovery of the facts from the defendant under his oath, instead of relying merely on the evidence he may be able to produce. 9 John. R. 470; 1 Paige, R. 41; 2 Caines's Cas. Err. 1, 38, 52; 1 J. J. Marsh. R. 82; Cooke, R. 420; 1 Yerg. R. 360; 2 John. Ch. R. 424; 10 John. R. 587; 2 Rand. R. 449; 1 Hen. & M. 9; 2 M'Cord's Ch. R. 469; 2 Leigh's R. 6. When an account has once been stated, the plaintiff may recover in action of assumpsit. 3 Bl. Com. 162; 8 Com. Dig. 7; 1 Com. Dig. 180; 2 Ib. 468; 1 Vin. Ab. 135; Bac. Ab. h. t. Doct. Pl. 26; Yelv. 202; 1 Supp. to Ves. Jr. 117; 2 Ib. 48, 136. Vide 1 Binn. R. 191; 4 Dall. R. 434; Whart. Dig. h. t.; 3 Wils. 73, 94; 3 D. & R. 596; Bull. N. P. 128; 5 Taunt. 431; U. S. Dig. h. t.

ACCOUNT, *practice.* A statement of the receipts and payments of an executor, administrator, or other

trustee, of the estate confided to him. Every one who administers the affairs of another is required at the end of his administration to render an account of his management of the same. Trustees of every description can generally be compelled through the courts of chancery, and where there are no courts of chancery, as Pennsylvania, the courts of common pleas possess this equitable power. When a party has had the property of another as his agent, he may be compelled in some states to account by an action of account render. An account is also the statement of two merchants or others who have dealt together, showing the debits and credits between them.

ACCOUNT-BOOK. Vide *Books; Entry; Original entry.*

ACCOUNT IN BANK, *com. law.* 1. A fund which merchants, traders and others have deposited into the common cash of some bank, to be drawn out by checks from time to time as the owner or depositor may require.—2. The statement of the amount deposited and drawn, which is kept in duplicate, one in the depositor's bank book, and the other in the books of the bank.

ACCOUNT STATED. The settlement of an account between the parties, by which a balance is struck in favour of one of them, is called an account stated. An acknowledgment of a single item of debt due from the defendant to the plaintiff, is sufficient to support a count on an account stated. 13 East, 249; 5 M. & S. 65. It is proposed to consider, 1st, By whom an account may be stated; 2, The manner of stating the account; 3, The declaration upon such an account; 4, The evidence.

1. An account may be stated by a man and his wife of the one part and another person; and unless there is an express promise to pay by the husband, Foster v. Allanson, 2 T. R. 483, the action must be brought against husband and wife. Drue v. Thorne, Aleyn, 72. A plaintiff cannot recover against a defendant upon an account stated by him, partly as administrator and partly in his own private capacity. Herrenden v. Palmer, Hob. 88. Persons wanting a legal capacity to make a contract cannot, in general, state an account; as infants, Truman v. Hurst, 1 T. R. 40; and persons non compos mentis.

A plaintiff may recover on an account stated with the defendant, including debts due from the defendant alone, and from the defendant and a deceased partner jointly. Richards v. Heather, 1 B. & A. 29, and see Peake's Ev. 257. A settlement between partners and striking a balance will enable the plaintiff to maintain an action on such stated account for the balance due him, Ozeas v. Johnson, 4 Dall. 434; S. C. 1 Binn. 191; S. P. Andrews v. Allen, 9 S. & R. 241; and see Lamalere v. Caze, 1 W. C. C. R. 435.

2. It is sufficient although the account be stated of that which is due to the plaintiff only, without making any deduction for any counter-claim for the defendant, Styart v. Rowland, 1 Show. 215. It is not essential that there should be cross demands between the parties, or that the defendant's acknowledgment that a certain sum was due from him to the plaintiff should relate to more than a single debt or transaction. 5 Maule & Selw. 65; Knowles et al. v. Michel et al. 13 East, 249. The acknowledgment by the defendant that a certain sum is due, creates an implied promise to pay the amount. Milward v. Ingraham, 2 Mod. 44; Foster v. Allanson, 2 T. R. 480.

3. A count on an account stated is almost invariably inserted in declarations in assumpsit for the recovery of a pecuniary demand. See form 1 Chit. Pl. 336. It is advisable, gene-

rally, to insert such count, Milward v. Ingraham, 2 Mod. 44; Truman v. Hurst, 1 T. R. 42; unless the action be against persons who are incapable in law to state an account. It is not necessary to set forth the subject-matter of the original debt, Milward v. Ingraham, 2 Mod. 44; nor is the sum alleged to be due material, Rolls v. Barnes, 1 Bla. Rep. 65; S. C. 1 Burr. 9.

4. The count, upon *an account stated*, is supported by evidence of an acknowledgment on the part of the defendant of money due to the plaintiff, upon an account between them. But the second must have been stated between the parties; it is not sufficient that the balance may be deduced from partnership books, Andrews v. Allen, 9 S. & R. 241. It is unnecessary to prove the items of which the account consists, but sufficient to prove some existing antecedent debt or demand between the parties respecting which an account was stated, 5 Moore, 105; 4 B. & C. 235, 242; 6 D. & R. 306; and that a balance was struck and agreed upon. Bartlet v. Emery, 1 T. R. 42, n; for the stating of the account is the consideration of the promise. Bull. N. P. 129. An account stated does not alter the original debt, Aleyn, 72; and it seems not to be conclusive evidence against the party admitting the balance against him, 1 T. R. 42. He would probably be allowed to show a gross error or mistake in the account, if he could adduce clear evidence to that effect. See 1 Esp. R. 159. And see generally tit. *Partners*, Chit. Contr. 197; 2 Stark. Ev. 123; 1 Chit. Pl. 343.

ACCOUNT OF SALES, *comm. law.* An account delivered by one merchant or tradesman to another, or by a factor to his principal, of the disposal, charges, commissions and net proceeds of certain merchandize consigned to such merchant, tradesman or factor to be sold.

ACCOUNTANT. This word has several significations: 1. One who is versed in accounts; 2. A person or officer appointed to keep the accounts of a public company; 3. He who renders to another or to a court a just and detailed statement of the administration of property which he holds as trustee, executor, administrator or guardian. Vide 16 Vin. Ab. 155.

ACCOUPLE. To accouple, is to marry. See *Ne unques accouple.*

ACCUSATION, *crim. law.* A charge made to a competent officer against one who has committed a crime or misdemeanor so that he may be brought to justice and punishment. A neglect to accuse may in some cases be considered a misdemeanor, or misprision, (q. v.) 1 Bro. Civ. Law, 247; 2 Id. 389; Inst. lib. 4, tit. 18. It is a rule that no man is bound to accuse himself, or to testify against himself in a criminal case. Accusare nemo se debet nisi coram Deo. Vide *Evidence; Interest*, evidence; *Witness.*

ACCUSER, one who makes an accusation.

ACHAT. This French word signifies a purchase. It is used in some of our law books, as well as *achetor*, a purchaser, which in some ancient statutes means purveyor. Stat. 36 Edw. III.

ACHERSET, *obsolete.* An ancient English measure of grain, supposed to be the same with their quarter or eight bushels.

ACKNOWLEDGMENT, *conveyancing*, is the act of the grantor going before a competent officer, and declaring the instrument to be his act and deed, and desiring the same to be recorded as such. The certificate of the officer on the instrument that such a declaration has been made to him, is also called an acknowledgment. The acknowledgment is indispensable before the instrument can be

put upon record. Below will be found the law of the several states relating to the officer before whom the acknowledgment must be made. Justice requires that credit should be here given for the valuable information which has been derived on this subject from Mr. Hilliard's Abridgment of the American Law of Real Property, and from Griffith's Register. Much valuable information has also been received on this subject from the correspondents of the author.

Alabama. Before one of the judges of the superior court, or any one of the justices of the county court. Act of March 3, 1803; or before any one of the superior judges or justices of the quorum of the territory (state). Act of Dec. 12, 1812; or before the clerks of the circuit and county courts, within their respective counties. Act of Nov. 21, 1818; or any two justices of the peace. Act of Dec. 17, 1819; or clerks of the circuit courts, for deeds conveying lands anywhere in the state. Act of January 6, 1831; or before any notary public, Id. sec. 2; or before one justice of the peace. Act of January 5, 1836; or before the clerks of the county courts. Act of Feb. 1, 1839. See Aikin's Dig. 88, 89, 90, 91, 616; Meek's Suppl. 86. When the acknowledgment is out of the state, in one of the United States or territories thereof, it must be made before the chief justice or any associate judge of the supreme court of the United States, or any judge or justice of the superior court of any state or territory in the Union. Aikin's Dig. 89. When it is made out of the United States, it may be made before and certified by any court of law, mayor or other chief magistrate of any city, borough or corporation of the kingdom, state, nation, or colony, where it is made. Act of March 3, 1803. When a feme covert is a grantor, the officer must certify that she was examined "separately and apart from her said husband, and that on such private examination, she acknowlegded that she signed, sealed and delivered the deed as her voluntary act and deed, freely and without any threat, fear, or compulsion, of her said husband."

Arkansas. The proof or acknowledgment of every deed or instrument of writing for the conveyance of real estate, shall be taken by some one of the following courts or officers: 1. When acknowledged or proven within this state, before the supreme court, the circuit court, or either of the judges thereof, or the clerk of either of the said courts, or before the county court, or the judge thereof, or before any justice of the peace or notary public.—2. When acknowledged or proven without this state, and within the United States or their territories, before any court of the United States, or of any state or territory having a seal, or the clerk of any such court, or before the mayor of any city or town, or the chief officer of any city or town having a seal of office.—3. When acknowledged or proven without the United States, before any court of any state, kingdom or empire having a seal, or any mayor or chief officer of any city or town having an official seal, or before any officer of any foreign country, who, by the laws of such country, is authorised to take probate of the conveyance of real estate of his own country, if such officer has by law an official seal.—The conveyance of any real estate by any married woman, or the relinquishment of her dower in any of her husband's real estate, shall be authenticated and the title passed, by such married woman voluntarily appearing before the proper court or officer, and, in the absence of her husband, declaring that she had of her own free will executed the deed or instruments in question, or that she had signed and sealed the relin-

quishment of dower for the purposes therein contained and set forth, without any compulsion or undue influence of her husband. Act of Nov. 30, 1837, s. 13, 21, Rev. Stat. 190, 191.

In cases of acknowledgment or proof of deeds or conveyances of real estate taken within the United States or territories thereof, when taken before a court or officer having a seal of office, such deed or conveyance shall be attested under such seal of office; and if such officer have no seal of office, then under the official signature of such officer. Idem, s. 14, Rev. Stat. 190. In all cases of deeds and conveyances proven or acknowledged without the United States or their territories, such acknowledgment or proof must be attested under the official seal of the court, or officer before whom such probate is had. Idem, s. 15. Every court or officer that shall take the proof or acknowledgment of any deed or conveyance of real estate, or the relinquishment of dower of any married woman in any conveyance of the estate of her husband, shall grant a certificate thereof, and cause such certificate to be endorsed on the said deed, instrument, conveyance, or relinquishment of dower, which certificate shall be signed by the clerk of the court where the probate is taken in court, or by the officer before whom the same is taken and sealed, if he have a seal of office. Idem, s. 16.

Connecticut. In this state deeds must be acknowledged before a judge of the supreme or district court of the United States, or the supreme or superior court, or court of common pleas or county court of this state, or a notary public. When the acknowledgment is made in another state or territory of the United States, it must be before some officer or commissioner having power to take acknowledgments there. When made out of the United States before a resident American consul, a justice of the peace, or notary public. No different form is used and no different examination of a feme covert from others. See Act of 1828; Act of 1833; 1 Hill. Ab. c. 34, s. 82.

Delaware. Before the supreme court, or the court of common pleas of any county, or a judge of either court, or the chancellor, or two justices of the peace of the same county. The certificate of an acknowledgment in court must be under the seal of the court. A feme covert may also make her acknowledgment before the same officers, who are to examine her separately from her husband. An acknowledgment out of the state may be made before a judge of any court of the United States, the chancellor or judge of a court of record, or the said court itself, or the chief officer of a city or borough, the certificate to be under the official seal; if by a judge, the seal to be affixed to his certificate, or to that of the clerk or keeper of the seal. Commissioners appointed in other states may also take acknowledgments. 2 Hill. Ab. 441; Griff. Reg. h. t.

Georgia. Deeds of conveyance of land in the state must be executed in the presence of two witnesses, and proved before a justice of the peace, a justice of the inferior court, or one of the judges of the superior courts. If executed in the presence of one witness and a magistrate, no probate is required. Prince's Dig. 162; 1 Laws of Geo. 115. When out of the state, in the United States, they may be proved by affidavit of one or more of the witnesses thereto, before any governor, chief justice, mayor, or other justice, of either of the United States, and certified accordingly, and transmitted under the common or public seal of the state, court, city or place, where the same is taken. The affidavit must express the place of the

affiant's abode. Idem. There is no state law directing how the acknowledgment shall be made when it is made out of the United States. By an act of the legislature passed in 1826, the widow is barred of her dower in all lands of her deceased husband, that he aliens or conveys away during the coverture, except such lands as he acquired by his intermarriage with his wife; so that no relinquishment of the wife is necessary, unless the lands came to her husband by her. Prince's Dig. 249; 4 Laws of Geo. 217. The magistrate should certify that the wife did declare that freely, and without compulsion, she signed, sealed and delivered the instrument of writing between the parties (naming them), and that she did renounce all title or claim to dower, that she might claim or be entitled to after the death of her husband, (naming him). 1 Laws of Geo. 112; Prince's Dig. 160.

Indiana. Before the recorder of the county in which the lands may be situate, or one of the judges of the supreme court of this state, or before one of the judges of the circuit court, or some justice of the peace of the county within which the estate may be situate, before notaries public, or before probate judges. Ind. Rev. Stat. c. 44, s. 7; Id. ch. 74; Act of Feb. 24, 1840. All deeds and conveyances made and executed by any person without this state and brought hither to be recorded, the acknowledgment having been lawfully made before any judge or justice of the peace of the proper county in which such deed may have been made and executed, and certified under the seal of such county by the proper officer, shall be valid and effectual in law. Rev. Code, c. 44, s. 11; App. Jan. 24, 1831. When acknowledged by a feme covert, it must be certified that she was examined separate and apart from her husband; that the full contents of the deed were made known to her; that she did then and there declare that she had, as her own voluntary act and deed, signed, sealed and executed the said deed of her own free will and accord without any fear or compulsion from her said husband.

Illinois. Before a judge or justice of the supreme or district courts of the United States, a commissioner authorized to take acknowledgments, a judge or justice of the supreme, superior or district court of any of the United States or territories, a justice of the peace, the clerk of a court of record, mayor of a city, or notary public; the last three shall give a certificate under their official seal. The certificate must state that the party is known to the officer, or that his identity has been proved by a credible witness, naming him. When the acknowledgment is taken by a justice of the peace of the state, residing in the county where the lands lie, no other certificate is required than his own; when he resides in another county, there shall be a certificate of the clerk of the county commissioners' court of the *proper county*, under seal, to his official capacity. When the justice of the peace taking the acknowledgment resides out of the state, there shall be added to the deed a certificate of the *proper clerk*, that the person officiating is a justice of the peace. The deed of a feme covert is acknowledged before the same officers. The certificate must state that she is known to the officer, or that her identity has been proved by a witness who must be named; that the officer informed her of the contents of the deed; that she was separately examined; that she acknowledged the execution and release to be made freely, voluntarily, and without the compulsion of her husband. When the husband and wife reside in the state, and the latter

is over eighteen years of age, she may convey her lands, with formalities substantially the same as those used in a release of dower; she acknowledges the instrument *to be her act and deed*, and that *she does not wish to retract*. When she resides out of the state, if over eighteen, she may join her husband in any writing relating to lands in the state, in which case her acknowledgment is the same as if she were a feme sole. Ill. Rev. L. 135–8; 2 Hill. Ab. 455, 6.

Kentucky. Acknowledgments taken in the state must be before the clerk of a county court, clerk of the general court, or clerk of the court of appeals. 4 Litt. L. of K. 165; or before two justices of the peace, 1 Litt. L. of K. 152; or before the mayor of the city of Louisville. Acts of 1828, p. 219, s. 12. When in another state or territory of the United States, before two justices of the peace, 1 Litt. L. of K. 152; or before any court of law, mayor, or other chief magistrate of any city, town, or corporation of the county where the grantors dwell, Id. 567; or before any justice or judge of a superior or inferior court of law. Acts of 1831, p. 128. When made out of the United States, before a mayor of a city, or consul of the U. S. residing there, or before the chief magistrate of such state or country, to be authenticated in the usual manner such officers authenticate their official acts. Acts of 1831, p. 128, s. 5. When a feme covert acknowledges the deed, the certificate must state that she was examined by the officer separate and apart from her husband, that she declared that she did freely and willingly seal and deliver the said writing, and wishes not to retract it, and acknowledged the said writing again shown and explained to her, to be her act and deed, and consents that the same may be recorded.

Maine. Before a justice of the peace in this state, or any justice of the peace, magistrate, or notary public, within the United States, or any commissioner appointed for that purpose by the governor of this state, or before any minister or consul of the United States, or notary public in any foreign country. Rev. St. T. 7, c. 91, § 7; 6 Pick. 86. No peculiar form for the certificate of acknowledgment is prescribed; it is required that the husband join in the deed. "The joint deed of husband and wife shall be effectual to convey her real estate, but not to bind her to any covenant or estoppel therein." Rev. St. T. 7, c. 91, § 5.

Maryland. Before two justices of the peace of the county where the lands lie, or where the grantor lives, or a judge of the county court of the former county, or mayor of Annapolis for Anne Arundel county; when the acknowledgment is made in another county than that in which the lands are situated, and in which the party lives, the clerk of the court must certify under the court seal, the official capacity of the acting justices or judge. When the grantor resides out of the state, a commission issues on application of the purchaser, and with the written consent of the grantor, from the clerk of the county court where the land lies, to two or more commissioners at the grantee's residence; any two of whom may take the acknowledgment, and shall certify it under seal, and return the commission to be recorded with the deed; or the grantor may empower an attorney in the state to acknowledge for him, the power to be incorporated in the deed, or annexed to it, and proved by a subscribing witness before the county court, or two justices of the peace where the land lies, or a district judge, or the governor, or a mayor, notary public, court or judge thereof, of the place where it is executed; in each case the certificate

to be under an official seal. By the acts of 1825, c. 58, and 1830, c. 164, the acknowledgment in another state may be before a judge of the U. S. or a judge of a court of record of the state and county where the grantor may be, the clerk to certify under seal the official character of the magistrate. By the act of 1837, c. 97, commissioners may be appointed by authority of the state, who shall reside in the other states or territories of the United States, who shall be authorized to take acknowledgment of deeds. The act of 1831, c. 205, requires that the officer shall certify his knowledge of the parties. The acknowledgment of a feme covert must be made separate and apart from her husband. 2 Hill. Ab. 442; Griff. Reg. h. t. See, also, 7 Gill & J. 480; 2 Gill & J. 173; 6 Harr. & J. 336; 3 Harr. & J. 371; 1 Harr. & J. 178; 4 Harr. & M'H. 222.

Massachusetts. Before a justice of the peace or magistrate out of the state. Held an American consul at a foreign port was a magistrate. 13 Pick. R. 523. An acknowledgment by one of two grantors has been held sufficient to authorize the registration of a deed; and a wife need not, therefore, acknowledge the conveyance when she joins with her husband. 2 Hill. Ab. c. 34, s. 45.

Michigan. Before a judge of a court of record, notary public, justice of the peace, or master in chancery; and in case of the death of the grantor, or his departure from the state, it may be proved by one of the subscribing witnesses before any court of record of the state. Rev. St. 208; Laws of 1840, p. 166. When the deed is acknowledged out of the state of Michigan, in the United States or any of the territories of the U. S., it is to be acknowledged according to the laws of such state or territory, with a certificate of the proper county clerk, under his seal of office, that such deed is executed according to the laws of such state or territory, attached thereto. When acknowledged in a foreign country, it may be executed according to the laws of such foreign country, but it must in such case be acknowledged before a minister plenipotentiary, consul, or chargé des affaires of the United States, and the acknowledgment must be certified by the officer before whom the same was taken. Laws of 1840, p. 166, sec. 2 and 3. When the acknowledgment is made by a feme covert, the certificate must state that on a private examination of such feme covert, separate and apart from her husband, she acknowledged that she executed the deed without fear or compulsion from any one. Laws of 1840, p. 167, sec. 4.

Mississippi. When in the state, the deeds may be acknowledged, or proved by one or more of the subscribing witnesses to them, before any judge of the high court of errors and appeals, or a judge of the circuit courts, or judge of probate, and certified by such judge; or before any notary public, or clerk of any court of record in this state, and certified by such notary or clerk under the seal of his office. How. & Hutch. c. 34, s. 99, p. 368, Law of 1833; or before any justice of that county where the land, or any part thereof, is situated. Ib. p. 343, s. 1, Law of 1822; or before any member of the board of police, in his respective county. Ib. p. 455, c. 38, s. 50, Law of 1838.—When in another state or territory of the United States, such deeds must be acknowledged, or proved as aforesaid, before a judge of the supreme court or of the district courts of the United States, or before any judge of the supreme or superior court of any state or territory in the Union. How. & Hutch. 346, c. 34, s. 13, Law of 1822; or before and certified by any judge of any inferior

or county court of record, or before any justice of the peace of the state or territory and county, wherein such person or witness or witnesses may then be or reside, and authenticated by the certificate of the clerk or register of the superior county or circuit court of such county, with a seal of his office thereto affixed; or if taken before or certified by a justice of the peace, shall be authenticated by the certificate of either the clerk of the said inferior or county court of record of such county, with the seal of his office thereto affixed. Laws of Mississippi, Jan. 27, 1841, p. 132. When out of the United States, such acknowledgment, or proof as aforesaid, must be made before any court of law, or mayor or other chief magistrate of any city, borough or corporation of such foreign kingdom, state, nation or colony, in which the said parties or witnesses reside; certified by the court, mayor, or chief magistrate, in the manner such acts are usually authenticated by him. How. & Hutch. 346, c. 34, s. 14, Law of 1822. When made by a feme covert, the certificate must state that she made previous acknowledgment, on a private examination, apart from her husband, before the proper officer, that she sealed and delivered the same as her act and deed, freely, without any fear, threat or compulsion of her husband. How. & Hutch. 347, c. 34, s. 19, Law 1822.

Missouri. In the state, before some court having a seal, or some judge, justice or clerk thereof, or a justice of the peace in the county where the land lies. Rev. Code 1835, § 8, cl. 1, p. 120. Out of the state and in the United States, before any court of the United States, or of any state or territory, having a seal, or the clerk thereof. Id. cl. 2. Out of the United States, before any court of any state, kingdom or empire having a seal, or the mayor of any city having an official seal. Every court or officer taking the acknowledgment of such instrument or relinquishment of dower or the deed of the wife of the husband's land, shall endorse a certificate thereof upon the instrument; when made before a court, the certificate shall be under its seal; if by a clerk, under his hand and the seal of the court; when before an officer having an official seal, under his hand and seal; when by an officer having no seal, under his hand. The certificate must state that the party was personally known to the judge or other officer as the signer, or proved to be such by two credible witnesses. Misso. St. 120—122; 2 Hill. Ab. 453; Griff. h. t. When the acknowledgment is made by a feme covert, releasing her dower, the certificate must state that she is personally known to one judge of the court, or the officer before whom the deed is acknowledged, or that her identity was proved by two credible witnesses; it must also state that she was informed of the contents of the deed; that it was acknowledged separate and apart from her husband; that she releases her dower freely without compulsion or under influence of her husband. Ib. In the conveyance of her own lands, the acknowledgment may be made before any court authorized to take acknowledgments. It must be done as in the cases of release of dower, and have a similiar certificate. Ib.

New Hampshire. Before a justice of the peace or notary public; and the acknowledgment of a deed before a notary public in another state is good. 2 N. H. Rep. 420; 2 Hill. Ab. c. 34, s. 61.

New Jersey. In the state, before the chancellor, a justice of the supreme court of this state, a master in chancery, or a judge of any inferior court of common pleas, whether in the same or a different county. Rev.

Laws, 458, Act of June 7, 1799; or before a commissioner for taking the acknowledgments or proofs of deeds, two of whom are appointed by the legislature in each township, who are authorized to take acknowledgments or proof of deeds in any part of the state. Rev. Laws, 748, Act of June 5, 1820. In another state or territory of the United States, before a judge of the supreme court of the United States, or a district judge of the United States, or any judge or justice of the supreme or superior court of any state in the Union. Rev. Laws, 459, act of June 7, 1799; or before any mayor or other chief magistrate of any city in any other state or territory of the U. S., and duly certified under the seal of such city, or before a judge of any superior court, or court of common pleas of any state or territory; when taken before a judge of a court of common pleas, it must be accompanied by a certificate under the great seal of the state, or the seal of the county court in which it is made, that he is such officer. Rev. Laws, 747, act of June 5, 1820; or before a commissioner appointed by the governor, who resides in such state. Harr. Comp. 158, act of December 27, 1826; two of whom may be appointed for each of the states of New York and Pennsylvania. Elmer's Dig. Act of Nov. 3, 1836. When made out of the United States, the acknowledgment must be before any court of law, or mayor, or other magistrate of any city, borough or corporation of a foreign kingdom, state, nation or colony, in which the party or his witnesses reside, certified by the said court, mayor, or chief magistrate, in the manner in which such acts are usually authenticated by him. Rev. Laws, 459, act of June 7, 1799; the certificate in all cases must state that the officer who makes it, first made known the contents of the deed to the person making the acknowledgment, and that he was satisfied such person was the grantor mentioned in the deed. Rev. Laws, 749, act of June 5, 1820. When the acknowledgment is made by a feme covert, the certificate must state that on a private examination, apart from her husband, before a proper officer (ut supra), she acknowledged that she signed, sealed, and delivered the deed, as her voluntary act and deed, freely, without any fear, threats or compulsion of her husband. Rev. Laws, 459, act of June 7, 1799.

New York. Before the chancellor, or justice of the supreme court, circuit judge, supreme court commissioner, judge of the county court, mayor or recorder of a city, or commissioner of deeds; a county judge or commissioner of deeds for a city or county, not to act out of the same. When the party resides in another state, before a judge of the United States, or a judge or justice of the supreme, superior or circuit court of any state or territory of the United States, within his own jurisdiction. By a statute passed in 1840, chap. 290, the governor is authorized to appoint commissioners in other states, to take the acknowledgment and proof of deeds and other instruments. When the party is in Europe, or other parts of America, before a resident minister or chargé des affaires of the United States; in France, before the United States' consul at Paris; in Russia, before the same officer at St. Petersburg; in the British dominions, before the Lord Mayor of London, the chief magistrate of Dublin, Edinburgh or Liverpool, or the United States' consul at London. The certificate to be under the hand and official seal of such officer. It may also be made before any person specially authorized by the court of chancery of this state. The officer must in all cases be satisfied of the identity

of the party, either from his own knowledge or from the oath or affirmation of a witness, who is to be named in the certificate. A feme covert must be privately examined; but if out of the state this is unnecessary. 2 Hill. Ab. 434; Griff. Reg. h. t.

North Carolina. The acknowledgment or proof of deeds for the conveyance of lands, when taken or made in the state, must be "before one of the judges of the supreme court, or superior court, or in the court of the county where the land lieth." 1 Rev. Stat. c. 37, s. 1. When in another state or territory of the U. S., or the District of Columbia, the deed must be acknowledged, or proved, before some one of the judges of the superior courts of law, or circuit courts of law of superior jurisdiction, within the said state, &c., with a certificate of the governor of the said state or territory or of the secretary of state of the United States, when in the District of Columbia, of the official character of the judge; or before a commissioner appointed by the governor of this state according to law. 1 Rev. Stat. c. 37, s. 5. When out of the United States, the deeds must be acknowledged, or proved, before the chief magistrate of some city, town, or corporation of the said countries where the said deeds were executed; or before some ambassador, public minister, consul, or commercial agent, with proper certificates under their official seals. 1 Rev. Stat. c. 37, s. 6 and 7; or before a commissioner in such foreign country, under a commission from the county court where the land lieth. Sec. 8. When acknowledged by a feme covert, the certificate must state that she was privily examined by the proper officer, that she acknowledged the due execution of the deed, and declared that she executed the same freely, voluntarily, and without the fear or compulsion of her said husband, or any other person, and that she then assented thereto. When she is resident of another county, or so infirm that she cannot travel to the judge, or county court, the deed may be acknowledged by the husband, or proved by witnesses, and a commission in a prescribed form may be issued for taking the examination of the wife. 1 Rev. Stat. c. 37, s. 6, 8, 9, 10, 11, 13 and 14.

Ohio. In the state, deeds and other instruments affecting lands must be acknowledged before a judge of the supreme court, a judge of the court of common pleas, a justice of the peace, notary public, mayor, or other presiding officer of an incorporated town or city. Ohio Stat. vol. 29, p. 346, act of February 22, 1831, which went in force, June 1, 1831, Swan's Coll. L. 265, s. 1. When made out of the state, whether in another state or territory, or out of the U. S., they must be acknowledged, or proved, according to the laws of the state, territory or country, where they are executed, or according to the laws of the state of Ohio. Swan's Coll. L. 265, s. 5. When made by a feme covert, the certificate must state that she was examined by the officer, separate and apart from her husband, and the contents of the said deed were fully made known to her, that she did declare, upon such separate examination that she did voluntarily sign, seal, and acknowledge the same, and that she is still satisfied therewith.

Pennsylvania. Before a judge of the supreme court, the courts of common pleas, the district courts, or before any mayor or alderman, or justice of the peace of the commonwealth, or before the recorder of the city of Philadelphia. When made out of the state, and within the United States, the acknowledgment may be before one of the judges of the supreme or district courts of the United States, or before

any one of the judges or justices of the supreme or superior courts, or courts of common pleas of any state or territory within the United States; and so certified under the hand of the said judge, and the seal of the court. Commissioners appointed by the governor, residing in either of the United States or of the District of Columbia, are also authorised to take acknowledgment of deeds. When made out of the United States, the acknowledgment may be before any consul or vice-consul of the United States, duly appointed for and exercising consular functions in the state, kingdom, country or place where such an acknowledgment may be made, and certified under the public or official seal of such consul or vice-consul of the United States. Act of January 16, 1827. By the act May 27th, 1715, s. 4, deeds made out of the province [state] may be proved by the oath or solemn affirmation of one or more of the witnesses thereunto, before one or more of the justices of the peace of this province [state], or before any mayor or chief magistate or officer of the cities, towns or places, where such deed or conveyances are so proved. The proof must be certified by the officer under the common or public seal of the cities, towns, or places where such conveyances are so proved. But by construction it is now established that a deed *acknowledged* before such officer is valid, although the act declares it shall be *proved*. 1 Pet. R. 433. The certificate of the acknowledgment of a feme covert must state, 1, that she is of full age; 2, that the contents of the instrument have been made known to her; 3, that she has been examined separate and apart from her husband; and, 4, that she executed the deed of her own free will and accord, without any coercion or compulsion of her husband. It is the constant practice of making the certificate under seal, though if it be merely under the hand of the officer, it will be sufficient. Act of Feb. 19, 1835.

By the act of the 16th day of April, 1840, entitled "An act incorporating the Ebenezer Methodist Episcopal congregation for the borough of Reading, and for other purposes," Pamph. Laws, 357, 361, it is provided by § 15, "That any and every grant, bargain and sale, release, or other deed of conveyance or assurance of any lands, tenements, or hereditaments in this commonwealth, heretofore *bona fide* made, executed and delivered by husband and wife within any other of the United States, where the acknowledgment of the execution thereof has been taken, and certified by any officer or officers in any of the states where made and executed, who was, or were authorized by the laws of such state to take and certify the acknowledgment of deeds of conveyance of lands therein, shall be deemed and adjudged to be as good, valid and effectual in law for transferring, passing and conveying the estate, right, title and interest of such husband and wife of, in and to the lands, tenements and hereditaments therein mentioned, and be in like manner entitled to be recorded, as if the acknowledgment of the execution of the same deed had been in the same and like way, manner and form taken and certified by any judge, alderman, or justice of the peace, of and within this commonwealth. § 16, That no grant, bargain and sale, feoffment, deed of conveyance, lease, release, assignment, or other assurance of any lands, tenements and hereditaments whatsoever, heretofore *bona fide* made and executed by husband and wife, and acknowledged by them before some judge, justice of the peace, alderman, or other officer authorized by law, within this state, or an officer in one of the United States, to take such acknow-

ledgment, or which may be so made, executed and acknowledged as aforesaid, before the first day of January next, shall be deemed, held or adjudged, invalid or defective, or insufficient in law, or avoided or prejudiced, by reason of any informality or omission in setting forth the particulars of the acknowledgment made before such officer, as aforesaid, in the certificate thereof, but all and every such grant, bargain and sale, feoffment, deed of conveyance, lease, release, assignment or other assurance so made, executed and acknowledged as aforesaid, shall be as good, valid and effectual in law for transferring, passing and conveying the estate, right, title and interest of such husband and wife of, in, and to the lands, tenements and hereditaments mentioned in the same, as if all the requisites and particulars of such acknowledgment mentioned in the act, entitled an act for the better confirmation of the estates of persons holding or claiming under *feme coverts*, and for establishing a mode by which husband and wife may hereafter convey their estates, passed the twenty-fourth day of February, one thousand seven hundred and seventy, were particularly set forth in the certificate thereof, or appeared upon the face of the same."

By the act of the 3d day of April, 1840, Pamph. L. 233, it is enacted, "that where any deed, conveyance, or other instrument of writing has been or shall be made and executed, either within or out of this state, and the acknowledgment or proof thereof, duly certified, by any officer under seal, according to the existing laws of this commonwealth, for the purpose of being recorded therein, such certicate shall be deemed prima facie evidence of such execution and acknowledgment, or proof, without requiring proof of the said seal, as fully, to all intents and purposes, and with the same effect only, as if the same had been so acknowledged or proved before any judge, justice of the peace, or alderman within this commonwealth."

The act relating to executions and for other purposes, passed 16th April, 1840, Pamph. L. 412, enacts, § 7, "that the recorders of deeds should have authority to take the acknowledgment and proof of the execution of any deed, mortgage, or other conveyance of any lands, tenements, or hereditaments lying or being in the county, for which they are respectively appointed as recorders of deeds, or within every city, district, or part thereof, or for any contract, letter of attorney, or any other writing, under seal, to be used or recorded within their respective counties; and such acknowledgment or proof, taken or made in the manner directed by the laws of this state, and certified by the said recorder, under his hand and seal of office; which certificate shall be endorsed or annexed to said deed or instrument aforesaid, shall have the same force and effect, and be as good and available in law, for all purposes, as if the same had been made or taken before any judge of the supreme court, or president or associate judge of any of the courts of common pleas within this commonwealth."

Rhode Island. Before any senator, judge, justice of the peace, or town clerk. When the acknowledgment is made in another state or country, it must be before a judge, justice, mayor or notary public therein, and certified under his hand and seal. A wife releasing dower need not acknowledge the deed; but to a conveyance an acknowledgment and private examination are necessary. 2 Hill. Ab. c. 34, s. 94.

South Carolina. Before a judge of the supreme court. A feme covert may release her dower or convey her

own estate, by joining her husband in a deed, and being privately examined, in the latter case, seven days afterwards, before a judge of law or equity, or a justice of the quorum; she may also release dower by a separate deed. The certificate of the officer is under seal and signed by the woman. Deeds may be proved upon the oath of one witness before a magistrate, and this is said to be the general practice. When the deed is to be executed out of the state, the justices of the county where the land lies, or a judge of the court of common pleas, may by *dedimus* empower two or more justices of the county where the grantor resides to take his acknowledgment upon the oath of two witnesses to the execution. 2 Hill. Ab. 448, 9; Griff. Reg. h. t.

Tennessee. A deed or power of attorney to convey land must be acknowledged or proved by two subscribing witnesses, in the court of the county, or the court of the district where the land lies. The certificate of acknowledgment must be endorsed upon the deed by the clerk of the court. The acknowledgment of a feme covert is made before a court of record in the state, or, if the parties live out of it, before a court of record in another state or territory; and if the wife is unable to attend court, the acknowledgment may be before commissioners empowered by the court of the county in which the husband acknowledges —the commission to be returned certified with the court seal, and recorded. In all these cases the certificate must state that the wife has been privately examined. The seal of the court is to be annexed when the deed is to be used out of the state, when made in it, and *vice versa*; in which case there is to be a seal, and a certificate of the presiding judge or justice to the official station of the clerk, and the due formality of the attestation. By the statute of 1820, the acknowledgment in other states may be conformable to the laws of the state, in which the grantor resides. By the act of 1831, c. 90, s. 9, it is provided, that all deeds or conveyances for land made without the limits of this state, shall be proved as heretofore, or before a notary public under his seal of office. Caruthers & Nicholson's Compilation of the Stat. of Tenn. 593. The officer must certify that he is acquainted with the grantor, and that he is an inhabitant of the state. There must also be a certificate of the governor or secretary, under the great seal, or a judge of the superior court that the acknowledgment is in due form. Griff. Reg. h. t.; 2 Hill. Ab. 458. By an act passed during the session of 1839—1840, chap. 26, it is enacted,—§ 1. "That deeds of every description may be proved by two subscribing witnesses, or acknowledged and recorded, and may then be read in evidence. 2. That deeds executed beyond the limits of the United States may be proved or acknowledged before a notary public, or before any consul, minister, or ambassador of the United States, or before a commissioner of the state.—3. That the governor may appoint commissioners in other states and in foreign countries for the proof, &c. of deeds.—4. Affidavits taken as above, as to pedigree or heirship, may be received as evidence, by executors or administrators, or in regard to the partition and distribution of property or estates." See 2 Yerg. 91, 108, 238, 400, 520; 3 Yerg. 81; Cooke, 431.

Vermont. 1. All deeds and other conveyances of lands, or any estate or interest therein, shall be signed and sealed by the party granting the same, and signed by two or more witnesses, and acknowledged by the grantor, before a justice of the peace. Rev. Stat. tit. 14, c. 6, s. 4. Every

deed by the husband and wife shall contain an acknowledgment by the wife, made apart from her husband, before a judge of the supreme court, a judge of the county court, or some justice of the peace, that she executed such conveyance freely, and without any fear or compulsion of her husband; a certificate of which acknowledgment, so taken, shall be endorsed on the deed by the authority taking the same. Id. s. 7.—2. All deeds and other conveyances, and powers of attorney for the conveyance of lands, the acknowledgment or proof of which shall have been, or hereafter shall be taken without this state, if certified agreeably to the laws of the state, province, or kingdom in which it was taken, shall be as valid as though the same were taken before some proper officer or court, within this state; and the proof of the same may be taken, and the same acknowledged with like effect, before any justice of the peace, magistrate, or notary public, within the United States, or in any foreign country, or before any commissioner appointed for that purpose by the governor of this state, or before any minister, chargé des affaires, or consul of the United States in any foreign couutry; and the acknowledgment of a deed by a feme covert, in the form required by this chapter, may be taken by either of the said persons. Id. 9.

Virginia. Before the general court, or the court of the district, county, city, or corporation where some part of the land lies; when the party lives out of the state or of the district or county where the land lies, the acknowledgment must be before any court of law, or the chief magistrate of any city, town, or corporation of the country where the party resides, and certified by him in the usual form. When a married woman executes the deed, she appears in court and is examined privately by one of the judges, as to her freely signing the instrument, and continuing satisfied with it,—the deed being shown and explained to her. She acknowledges the deed before the court, or else before two justices of the county where she dwells, or the magistrate of a corporate town, if she lives within the United States, these officers being empowered by a commission from the clerk of the court where the deed is to be recorded, to examine her and to take her acknowledgment. If she is out of the United States, the commission authorises two judges or justices of any court of law, or the chief magistrate of any city, town, or corporation, in her county, and is executed as by two justices in the United States. The certificate is to be authenticated in the usual form. 2 Hill. Ab. 444, 5; Griff. Reg. h. t.; 2 Leigh's R. 186; 2 Call, R. 103; 1 Wash. R. 319.

ACQUETS, *estates, in the civil law.* Property which has been acquired by purchase, gift, or otherwise than by succession. Merlin Rép. h. t., confines acquets to immoveable property. In Louisiana they embrace 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 labour of both husband and wife, and of the estates which they may acquire during the marriage, either by donations, made jointly to them both, or by purchase, 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. Civ. Code, art. 2371. This applies to all marriages contracted in that state, or out of it,

when the parties afterwards go there to live, as to acquets afterwards made there. Ib. art. 2370. The acquets are divided into two equal portions between the husband and wife, or between their heirs at the dissolution of the marriage. Ib. art. 2375. The parties may however lawfully stipulate there shall be no community of profits or gains. Ib. art. 2369. But the parties have no right to agree that they shall be governed by the laws of another country. 3 Martin's Rep. 581. Vide 17 Martin's Rep. 571; 2 Kent's Com. 153, note.

ACQUIESCENCE, *contracts*, is the consent which is impliedly given by one or both parties, to a proposition, a clause, a condition, a judgment, or to any act whatever. When a party is bound to elect between a paramount right and a testamentary disposition, his acquiescence in a state of things which indicates an election, when he was aware of his rights, will be *primâ facie* evidence of such election. Vide 2 Ves. Jr. 371; 12 Ves. 136; 1 Ves. Jr. 335; 3 P. Wms. 315; 2 Rop. Leg. 439. The acts of acquiescence which constitute an implied election, must be decided rather by the circumstances of each case than by any general principle. 1 Swanst. R. 382, note, and the numerous cases there cited. Acquiescence in the acts of an agent, or one who has assumed that character, will be equivalent to an express authority. 2 Kent, Com. 478. Story on Eq. § 255; 4 W. C. C. R. 559; 6 Mass. R. 193; 1 John. Cas. 110; 2 John. Cas. 424; Liv. on Ag. 45; Paley on Ag. by Lloyd, 41; 3 Pet. R. 69, 81; 12 John. R. 300; 3 Cowen's R. 281; 3 Pick. R. 495, 505; 4 Mason's R. 296. Acquiescence differs from assent. (q. v.)

ACQUIETANDIS PLEGIIS, *obsolete*. A writ of justicies, lying for the surety against a creditor, who refuses to acquit him after the debt has been satisfied. Reg. of Writs, 158.

TO ACQUIRE, *descents, contracts*. To make property one's own. Title to property is acquired in two ways, by descent, (q. v.) and by purchase, (q. v.) Acquisition by purchase is either by, 1. Escheat. 2. Occupancy. 3. Prescription. 4. Forfeiture. 5. Alienation, which is either by deed or by matter of record. Things which cannot be sold, or which are in commerce, cannot be acquired.

ACQUISITION, *property, contracts, descent*. It is the act by which a person procures the property of a thing. The thing acquired, particularly when spoken of real estate, is also called an acquisition. An acquisition may be temporary or perpetual, and be procured either for a valuable consideration, for example, by buying the same; or without consideration, as by gift or descent. Acquisition may be divided into original and derivative. Original acquisition is procured by occupancy, 2 Kent, Com. 289; Menestr. Leç. du Dr. Civ. Rom. § 344; by accession, 2 Kent. Com. 293; by intellectual labour, namely, for inventions, which are secured by patent rights; and for the authorship of books, maps, and charts, which is protected by copyrights. Derivative acquisitions are those which are procured from others, either by act of law, or by act of the parties. Goods and chattels may change owners by act of law in the cases of forfeiture, succession, marriage, judgment, insolvency, and intestacy. And by act of the parties, by gift or sale. Property may be acquired by a man himself, or by those who are in his power, for him; as by his children while minors, 1 N. Hamps. R. 28; 1 United States Law Journ. 513; by his apprentices

or his slaves. Vide Ruth. Inst. ch. 6 & 7; Dig. 41, 1, 53; Inst. 2, 9; Ib. 2, 9, 3.

ACQUITTAL, *contracts*. A release, a discharge from an obligation or engagement. According to Lord Coke there are three kinds of acquittal, namely, 1, By deed, when the party releases the obligation; 2, By prescription; and, 3, By tenure. Co. Litt. 100, a.

ACQUITTAL, *crim. law, practice*, is the absolution of a party charged with a crime or misdemeanor. Acquittal is of two kinds, in fact and in law. The former takes place when the jury upon trial find a verdict of not guilty; the latter when a man is charged merely as an accessary, and the principal has been acquitted. 2 Inst. 384. An acquittal is a bar to any future prosecution for the same offence as that contained in the first indictment.

ACQUITTANCE, *contracts*, is an agreement in writing to discharge a party from an engagement to pay a sum of money; it is evidence of payment. It differs from a release in this, that the latter must be under seal, while an acquittance is not under seal. Poth. Oblig. n. 781. In Pennsylvania, a receipt (q. v.) though not under seal, has nearly the same effect as a release. 1 Rawle R. 391. Vide 3 Salk. 298, pl. 2; Off. of Ex. 217. Co. Litt. 212 a, 273 a.

ACRE, *measures*, is a quantity of land containing in length forty perches, and four in breadth, or one hundred and sixty square perches, of whatever shape may be the land. Serg. Land Laws of Penn. 185. See Cro. Eliz. 476, 665; 6 Co. 67; Poph. 55; Co. Litt. 5, b, and note 22.

ACREDULITARE, *obsolete*. To purge one's self of an offence by oath. It frequently happens that when a person has been arrested for a contempt, he comes into court and purges himself, on oath, of having intended any contempt.

ACT, *contracts, in the civil law*. Any writing which proves something, and which establishes the principal foundation of a cause. Acts are either public or private. *Public acts* usually denominated *authentic*, are those which have a public authority, and which have been made before public officers, are authorised by a public seal, have been made public by the authority of a magistrate, or which have been extracted and been properly authenticated from public records. *Acts under private signature* are those which have been made by private individuals, under their hands. An act of this kind does not acquire the force of an authentic act, by being registered in the office of a notary. 5 N. S. 693; 8 N. S. 568; 3 L. R. 419; 3 N. S. 396; 11 M. R. 243, unless it has been properly acknowledged before the officer by the parties to it. 5 N. S. 196. *Private acts* are those made by private persons, as registers in relation to their receipts and expenditures, schedules, acquittances, and the like. Nov. 73, c. 2; Code, lib. 7, tit. 32, l. 6; lib. 4, t. 21; Dig. lib. 22, tit. 4; Civ. Code of Louis. art. 2231 to 2254; Toull. Dr. Civ. Français, tom. 8, p. 94.

ACT, *evidence*. The performance of something, as the acts of one conspirator, committed in pursuance of their design, are evidence against them all; proof of an overt act of treason by two witnesses is required. See *Overt*. The term, *acts*, includes written correspondence, and other papers relative to the design of the parties, but whether it includes unpublished writings upon abstract questions, though of a kindred nature, has been doubted. Foster's Rep. 198; 2 Stark. R. 116, 141. In cases of partnership it is a rule that the act or declaration of each partner in furtherance

of the common object of the association, is the act of all. 1 Pet. R. 371; 5 B. & Ald. 267. And the acts of an agent, in pursuance of his authority, will be binding on his principal. Greenl. Ev. § 113.

ACT, *legislation*, is a statute or law made by a legislative body; as, an act of congress is a law by the Congress of the United States; an act of assembly, is a law made by a legislative assembly. Acts are *general* or *special*; *public* or *private*. A general or public act is a universal rule which binds the whole community; of which the courts are bound to take notice *ex officio*. Private or special acts are rather exceptions than rules, being those which operate only upon particular persons and private concerns; of these the courts are not bound to take notice, unless they are pleaded. 1 Bl. Com. 85, 6.

ACT OF BANKRUPTCY, is an act which subjects a person to be proceeded against as a bankrupt. The acts of bankruptcy enumerated in the act of congress of August 19th, 1841, s. 1, are the following:

1. Departure from the state, district, or territory of which a person, subject to the operation of the bankrupt laws, is an inhabitant, with intent to defraud his creditors. See as to what will be considered a departure, 1 Campb. R. 279; Dea. & Chit. 451; 1 Rose, R. 387; 9 Moore, R. 217; 2 V. & B. 177; 5 T. R. 512; 1 C. & P. 77; 2 Bing. R. 99; 2 Taunt. 176; Holt, R. 175.

2. Concealment to avoid being arrested. 1 M. & S. 676; 2 Rose, R. 137; 15 Ves. 447; 6 Taunt. R. 540; 14 Ves. 86; 9 Taunt. 176; 1 Rose, R. 362; 5 T. R. 512; 1 Esp. 334.

3. Willingly or fraudulently procuring himself to be arrested, or his goods and chattels, lands, or tenements to be attached, distrained, sequestered, or taken in execution.

4. Removal of his goods, chattels and effects, or concealment of them, to prevent their being levied upon, or taken in execution, or by other process.

5. Making any fraudulent conveyance, assignment, sale, gift, or other transfer of his lands, tenements, goods or chattels, credits, or evidences of debt. 15 Wend. R. 588; 5 Cowen, R. 67; 1 Burr. 467, 471, 481; 4 C. & P. 315; 18 Wend. R. 375; 19 Wend. R. 414; 1 Dougl. 295; 7 East, R. 137; 16 Ves. 149; 17 Ves. 193; 1 Smith, R. 33; Rose, R. 213.

ACT OF GOD, in *contracts*. This phrase denotes those accidents which arise from physical causes, and which cannot be prevented.

Where the law casts a *duty* on a party, the performance shall be excused, if it be rendered impossible by the act of God; but where the party, *by his own contract*, engages to do an act, it is deemed to be his own fault and folly that he did not thereby provide against contingencies, and exempt himself from responsibilities in certain events; and in such case, therefore, that is, in the instance of an absolute general contract, the performance is not excused by an inevitable accident, or other contingency, although not foreseen by, nor within the control of the party. Chitty on Contr. 272, 3; Aleyn, 27, cited by Lawrence, J. in 8 T. R. 267; Com. Dig. Action upon the Case upon Assumpsit, G; 6 T. R. 650; 8 T. R. 259; 3 M. & S. 267; 7 Mass. 325; 13 Mass. 94; Co. Litt. 206; Com. Dig. Condition, D 1; L 13; 2 Black. Com. 340; 1 T. R. 33; Jones on Bailm. 104, 5.

Special bail are discharged when the defendant dies, Tidd, 243; but if the defendant die after the return of the *ca. sa.*, and before it is filed, the bail are fixed, 6 T. R. 284; 5 Binn. 332, 338. It is, however, no ground for an exoneratur, that the

defendant has become deranged since suit was brought, and is confined in a hospital. 2 Wash. C. C. R. 464; 6 T. R. 133; 2 Bos. & Pull. 362; Tidd, 184. Vide 8 Mass. Rep. 264; 3 Yeates, 37; 2 Dall. 317; 16 Mass. Rep. 218; Stra. 128; 1 Leigh's N. P. 508; 11 Pick. R. 41; 2 Verm. R. 92; 2 Watts's Rep. 443.

See generally, *Fortuitous Event; Perils of the Sea.*

ACT OF GRACE, in the Scotch law, is the name by which the statute which provides for the aliment of prisoners, confined for civil debts, is usually known. This statute provides that where a prisoner for debt declares upon oath, before the magistrate of the jurisdiction, that he has not wherewith to maintain himself, the magistrate may set him at liberty, if the creditor, in consequence of whose diligence he was imprisoned, does not aliment him within ten days after intimation for that purpose, 1696, c. 32; Ersk. Pr. L. Scot. 4, 3, 14. This is somewhat similar to a provision in the insolvent act of Pennsylvania.

ACT OF LAW, those events which occur in consequence of some principle of law. If, for example, land out of which a rent charge has been granted, be recovered by an elder title, and thereby the rent charge becomes avoided; yet the grantee shall have a writ of annuity, because the rent charge is made void by due course or act of law, it being a maxim *actus legis nemini est damnosus.* 2 Inst. 287.

ACT OF MAN. Every man of sound mind and discretion is bound by his own acts, and the law does not permit him to do any thing against it; and all acts are construed most strongly against him who does them. Plowd. 140. A man is not only bound by his own acts, but by those of others who act or are presumed to act by his authority, and is responsible civilly in all such cases; and, in some cases, even when there is but a presumption of authority, he may be made responsible criminally; for example, a bookseller may be indicted for publishing a libel which has been sold in his store, by his regular salesman, although he may possibly have had no knowledge of it.

ACTIO COMMODATI CONTRARIA. The name of an action in the civil law, by the borrower against the lender, to compel the execution of the contract. Poth. Prêt à Usage, n. 75.

ACTIO COMMODATI DIRECTA. In the civil law, is the name of an action, by a borrower against a lender, the principal object of which is to obtain restitution of the thing lent. Poth. Prêt à Usage, n. 65, 68.

ACTIO CONDICTIO INDEBITI. The name of an action in the civil law, by which the plaintiff recovers the amount of a sum of money or other thing he paid by mistake. Poth. Promutuum, n. 140. See *Assumpsit.*

ACTIO EX CONDUCTIO, *civ. law.* The name of an action which the hirer of a thing might bring in order to compel the letter to deliver to him the thing hired. Poth. Du Contr. de Louage, n. 59.

ACTIO DEPOSITI CONTRARIA. The name of an action in the civil law which the depositary has against the depositor to compel him to fulfil his engagement towards him. Poth. Du Dépot, n. 69.

ACTIO DEPOSITI DIRECTA. In the civil law, this is the name of an action which is brought by the depositor against the depositary, in order to get back the thing deposited. Poth. Du Dépot, n. 60.

ACTIO NON, *pleading.* After stating the appearance and defence, special pleas begin with this allegation, "that the said plaintiff ought not to have or maintain his aforesaid action thereof against him," *actio non*

debere habet. This is technically termed the *actio non.* 1 Ch. Plead. 531; 2 Ch. Plead. 421; Steph. Plead. 394.

ACTIO PERSONALIS MORITUR CUM PERSONA. That a personal action dies with the person, is an ancient and uncontested maxim. But the term *personal action*, requires explanation. In a large sense all actions except those for the recovery of real property may be called *personal.* This definition would include contracts for the payment of money, which never were supposed to die with the person. The maxim must therefore be taken in a more restricted meaning. It extends to all wrongs attended with *actual force*, whether they affect the person or property; and to all injuries to the person only, though without actual force. Thus stood originally the common law, in which an alteration was made by the statute 4 Ed. 3, c. 7, which gave an action to an executor for an injury done to the personal property of his testator in his lifetime, which was extended to the executor of an executor, by statute of 25 Ed. 3, c. 5. And by statute 31 Ed. 3, c. 11, administrators have the same remedy as executors. These statutes received a liberal construction from the judges, but they do not extend to injuries to the *person* of the deceased, nor to his *freehold.* So that no action lies by an executor or administrator for an assault and battery of the deceased, or trespass *vi et armis* on his land, or for slander, because it is merely a personal injury. Neither do they extend to actions against executors or administrators for wrongs committed by the deceased. 13 S. & R. 184; Cowp. 376; 1 Saund. 216, 217, n. 1 Com. Dig. 241, B 13; 1 Salk. 252; 6 S. & R. 272; W. Jones, 215. Assumpsit may be maintained by executors or administrators, in those cases where an injury has been done to the personal property of the deceased, and he might in his lifetime have waived the tort, and sued in assumpsit. 1 Bay's R. 61; Cowp. 374; 3 Mass. 321; 4 Mass. 480; 13 Mass. 272; 1 Root, 216. An action for a breach of promise of marriage cannot be maintained by an executor, 2 M. & S. 408; nor against him, 13 S. & R. 183; 1 Picker. 71; unless, perhaps, in cases where the plaintiff's testator sustained special damages. 13 S. & R. 185. See further, 12 S. & R. 76; 1 Day's Cas. 180; Bac. Abr. Ejectment, H; 11 Vin. Abr. 123; 1 Salk. 314; 2 Ld. Raym. 971; 1 Salk. 12; Id. 295; Cro. Eliz. 377, 8; 1 Str. 60; Went. Ex. 65; 1 Vent. 176; Id. 30; 7 Serg. & R. 183; 7 East, 134-6; 1 Saund. 216, a, n. 1; 6 Mass. 394; 2 Johns. 227; 1 Bos. & Pull. 330, n. a.; 1 Chit. Pl. 86; this Dictionary, tit. *Death; Parties to Actions; Survivor; Actions.*

ACTIO PRO SOCIO. In the civil law, is the name by which either partner could compel his co-partners to perform their social contract. Poth. Contr. de Société, n. 134.

ACTION OF A WRIT This phrase is used when one pleads some matter by which he shows that the plaintiff had no cause to have the writ which he brought, and yet he may have a writ or action for the same matter. Such plea is called a plea to the action of the writ, whereas if by the plea it should appear that the plaintiff has no cause to have an action for the thing demanded, then it is called a plea to the action. Termes de la ley.

ACTION, *in practice.* Actions are divided into criminal and civil. Bac. Abr. Actions, A.

[1] § 1. A criminal action is a prosecution in a competent court of

justice, in the name of the government, against one or more individuals who are accused of having committed a crime. See 1 Chitty's Cr. Law.

[2] § 2. A civil action is a legal demand of one's right, or it is the form of a suit given by law for the recovery of that which is due. Co. Litt. 285; 3 Bl. Com. 116; Domat, Supp. des Lois Civiles, liv. 4, tit. 1, No. 1; Poth. Introd. générale aux Coutumes, 109; 1 Sell. Pr. Introd. s. 4, p. 73. Ersk. Princ. of Scot. Law, B. 4, t. 1, § 1. Till judgment the writ is properly called an action, but not after, and therefore, a release of all actions is regularly no bar of an execution. Co. Litt. 289 a; Roll. Ab. 291. They are real personal and mixed.

[3] 1. Real actions are those brought for the specific recovery of lands, tenements, or hereditaments. Steph. Pl. 3. They are either *droitural*, when the demandant seeks to recover the *property*; or *possessory*, when he endeavours to obtain the *possession*. Finch's Law, 257, 8. See Bac. Abr. Actions, A, contra. Real actions are, 1st, Writs of right; 2dly, Writs of entry, which lie in the *per*, the *per et cui*, or the *post*, upon *desseisin*, *intrusion*, or *alienation*; 3dly, Writs auncestrel possessory, as *Mort d'ancester*, *aiel*, *besaiel cosinage*, or *Nuper obiit*. Com. Dig. Actions, D 2. By these actions formerly all disputes concerning real estate, were decided; but now they are pretty generally laid aside in practice, upon account of the great nicety required in their management, and the inconvenient length of their process; a much more expeditious method of trying titles being since introduced by other actions personal and mixed. 3 Bl. Com. 118. See Booth on Real Actions.

[4] 2. Personal actions are those brought for the specific recovery of goods and chattels; or for damages or other redress for breach of contract, or other injuries, of whatever description; the specific recovery of lands, tenements, and hereditaments only excepted. Steph. Pl. 3; Com. Dig. Actions, D 3. Personal actions arise either upon contracts, or for wrongs independently of contracts. The former are account, assumpsit, covenant, debt, and detinue; see these several words. In Connecticut and Vermont there is an action used which is peculiar to those states, called the action of *book debt*, 2 Swift's Syst. Ch. 15. The actions arising for wrongs, injuries, or torts, are case, replevin, trespass, trover. See these several words, and see *Actio personalis moritur cum persona*.

[3] 5. Mixed actions are such as appertain, in some degree, to both the former classes, and, therefore, are properly reducible to neither of them, being brought for the specific recovery of lands, tenements, or hereditaments, and for damages for injury sustained in respect of such property. Steph. Pl. 3; Co. Litt. 284, 6; Com. Dig. Actions, D 4. Of this kind are ejectment and partition.

Actions are also divided into those which are *local*, and such as are *transitory*.

[6] 1. A *local* action is one in which the venue must still be laid in the county, in which the cause of action actually arose. The present locality of actions is founded in some cases, on common law principles, and in others on positive enactments of statute law. Of those which continue local, by the common law, are, 1st, all actions in which the *subject* or *thing* to be recovered is in its nature local. Of this class are real actions, actions of waste, when brought on the statute of Gloucester, (6 Edw. 1,) to recover with the damages, the *locus in quo*, or place wasted; and actions

of ejectment. Bac. Abr. Actions Local, &c. A, (a); Com. Dig. Actions, N 1; 7 Co. 2 b; 2 Bl. Rep. 1070. All these are local, because they are brought to recover the seisin or possession of lands or tenements, which are local subjects. 2dly. Various actions which do not seek the direct recovery of lands or tenements, are also local, by the common law; because they arise out of some local subject, or the violation of some local right or interest. For example the action of *quare impedit* is local, inasmuch as the benefice, in the right of presentation to which the plaintiff complains of being obstructed, is so. 7 Co. 3 a; 1 Chit. Pl. 271; Com. Dig. Actions, N 4. Within this class of cases are also many actions in which only pecuniary damages are recoverable. Such are the common law action of *waste*, and trespass *quare clausum fregit*; as likewise trespass on the case for injuries affecting things real, as for nuisances to houses or lands; disturbance of rights of way or of common; obstruction or diversion of ancient water courses, &c. 1 Chit. Pl. 271; Gould on Pl. ch. 3, § 105, 106, 107. The action of replevin also, though it lies for damages only, and does not arise out of the violation of any local right, is nevertheless local. 1 Saund. 347, (n. 1.) The reason of its locality appears to be the necessity of giving a local description of the taking complained of. Gould on Pl. ch. 3, § 111.

[7] 2. Personal actions which seek nothing more than the recovery of money or personal chattels, of any kind, are in most cases *transitory*, whether they sound in tort or in contract; Com. Dig. Actions, N 12; 1 Chit. Pl. 273; because actions of this class are, in most instances, founded on the violation of rights which, in contemplation of law, have no locality. And it will be found true, as a general position, that actions *ex delicto*, in which a mere personality is recoverable, are, by the common law, transitory; except when founded upon, or arising out of some *local* subject. Gould on Pl. ch. 3, § 112. The venue in a transitory action may be laid in any county which the plaintiff may prefer. Bac. Abr. Actions Local, &c. A. (a).

[8] In the civil law actions are divided into real, personal, and mixed.

A real action, according to the civil law, is that which he who is the owner of a thing, or has a right in it, has against him who is in possession of it, to compel him to give up such thing to the plaintiff, or to permit him to enjoy the right he has in it. It is a right which a person has in a thing, follows the thing, and may be instituted against him who possesses it; and this whether the thing be movable or immovable, and, in the sense of the common law, whether the thing be real or personal. See Domat, Supp. des Lois Civiles, Liv. 4, tit. 1, No. 5; Pothier, Introd. Générale aux Coutumes, 110; Ersk. Pr. Scot. Law, B. 4, t. 1, § 2.

[9] A personal action is that a creditor has against his debtor, to compel him to fulfil his engagement. Pothier, Ib. Personal actions are divided into civil actions and criminal actions. The former are those which are instituted to compel the payment or to do some other thing purely civil; the latter are those by which the plaintiff asks the reparation of a tort or injury which he or those who belong to him have sustained. Sometimes these two kinds of actions are united, when they assume the name of mixed personal actions. Domat, Supp. des Lois Civiles, Liv. 4, tit. No. 4; 1 Brown's Civ. Law, 440.

[10] Mixed actions participate both of personal and real actions.

Such are the actions of partition and to compel the parties to put down landmarks or boundaries. Domat, *ubi supra.*

TABLE.

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2. Personal, 9, which are
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  2. Criminal, 9.
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  1. Partition, 10.
  2. Actions to fix boundaries, 10.

ACTION AD EXHIBENDUM, *civil law.* This was an action instituted for the purpose of compelling the defendant to exhibit a thing or title, in his power. It was preparatory to another action, which was always a real action in the sense of the Roman law, that is, for the recovery of a *thing*, whether it was moveable or immoveable. Merl. Quest. de Dr. tome i. 84. This is not unlike a bill of discovery, (q. v.)

ACTION OF BOOK DEBT.—The name of an action in Connecticut and Vermont, resorted to for the purpose of recovering payment for articles usually charged on book. 1 Day, 105; 4 Day, 105; 2 Verm. 366; see 1 Root, 59; 1 Conn. 75; Kirby, 289; 2 Root, 130; 11 Conn. 205.

ACTION, REDHIBITORY,—*civil law.* An action instituted to avoid a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed the buyer would not have purchased it, had he known of the vice. Civ. Code of Louis. art. 2496.

ACTIONS, ORDINARY, in the Scotch law; by this term is understood all actions not rescissory. Ersk. Pr. L. Scot. 4, 1, 5.

ACTIONS RESCISSORY, in the Scotch law, are divided into, 1, Actions of proper improbation; 2. Actions of reduction-improbation; 3. Actions of simple reduction. Ersk. Pr. L. Scot. 4, 1, 5.

1. Proper improbation is an action brought for declaring writing false or forged.

2. Reduction-improbation is an action whereby a person who may be hurt, or affected by a writing, insists for producing or exhibiting it, in court, in order to have it set aside or its effects ascertained, under the certification, that the writing if not produced, shall be declared false and forged.

3. In an action of simple reduction, the certification is only temporary, declaring the writings called

for null until they be produced; so that they recover their full force after their production. Ib. 4, 1, 8.

ACTON BURNELL, statute of, vide *de Mercatoribus;* Cruise, Dig. tit. 14, s. 6.

ACTOR, *practice*, 1. A plaintiff or complainant. 2. He on whom the burden of proof lies. In actions of replevin both parties are said to be actors. The proctor or advocate in the courts of the civil law, was called actor.

ACTS OF COURT. In courts of admiralty, by this phrase is understood legal memoranda of the nature of pleas. For example, the English court of admiralty disregards all tenders, except those formally made by acts of court. Abbott on Ship. pt. 3, c. 10, § 2, p. 403; 4 Rob. R. 103; 1 Hagg. R. 157; Dunl. Adm. Pr. 104, 5.

ACTS OF SEDERUNT, in the laws of Scotland, are ordinances for regulating the forms of proceeding, before the court of session, in the administration of justice, made by the judges, who have a delegated power from the legislature for that purpose. Ersk. Pr. L. Scot. B. 1, t. 1, s. 14.

ACTUARY, is a clerk in some corporations vested with various powers. In the ecclesiastical law he is a clerk who registers the acts and constitutions of the convocation.

ACTUARIUS. An ancient name or appellation of a notary.

ACTUS. A foot way and horse way. Vide *Way*.

AD DAMNUM, *pleading*, to the damages. In all personal and mixed actions, with the exception of actions of debt *qui tam*, where the plaintiff has sustained no damages, the declaration concludes *ad damnum*. Archb. Civ. Pl. 169.

AD LARGUM, at large, as title at large, assize at large. See Dane's Abr. ch. 144, a, 16, § 7.

AD VITAM AUT CULPAM, an office to be so held as to determine only by the death or delinquency of the possessor; in other words it is held *quam diu se bene gesserit*.

AD INQUIRENDUM, *practice*, a judicial writ commanding inquiry to be made of any thing relating to a cause depending in court.

AD QUOD DAMNUM, *Eng. law*. The name of a writ issuing out of and returnable into chancery, directed to the sheriff, commanding him to inquire by a jury what damage it will be to the king, or any other, to grant a liberty, fair, market, highway, or the like.

AD TERMINUM QUI PRETERIIT. The name of a writ of entry which lay for the lessor or his heirs, when a lease had been made up of lands or tenements, for term of life or years, and, after the term had expired, the lands were withheld from the lessor by the tenant, or other person possessing the same. F. N. B. 201. The remedy now applied for holding over (q. v.) is by ejectment, or under local regulations, by summary proceedings.

ADDITION, whatever is added to a man's name by way of title, as additions of estate, mystery, or place. *Additions of an estate or quality* are esquire, gentleman, and the like; these titles can however be claimed by none, and may be assumed by any one. *Additions of mystery* are such as scrivener, painter, printer, manufacturer, &c. *Additions of places* are of Philadelphia, New York, Cincinnati and the like. See Bac. Ab. h. t.; Doct. Pl. 71; 2 Vin. Abr. 77; 1 Lilly's Reg. 39; 1 Metc. R. 151.

ADDITIONALES, *in contracts*, additional terms or propositions to be added to a former agreement.

ADDRESS, *legislation*. In Pennsylvania it is a resolution of both

branches of the legislature, two-thirds of each house concurring, requesting the governor to remove a judge from office. The constitution of that state, art. 5, s. 2, directs that "for any reasonable cause, which shall not be sufficient ground for impeachment, the governor may remove any of them [the judges], on the address of two-thirds of each branch of the legislature." The mode of removal by address is unknown to the constitution of the United States, but it is recognized in those of thirteen of the respective states. In some of these constitutions the language is imperative; the governor when thus addressed *shall* remove; in others it is left to his discretion, he *may* remove. The relative proportion of each house that must join in the address, varies also in different states. In some a bare majority is sufficient; in others, two-thirds are requisite; and in others three-fourths. 1 Journ. of Law, 154.

ADEMPTION, *wills*, is a taking away or revocation of a legacy by the testator. It is either express or implied. It is the former when revoked in express terms by a later will; it is implied when by the acts of the testator it is manifestly his intention to revoke it; for example, when a specific legacy of a chattel is made, and afterwards the testator sells it; or if a father makes provision for a child by his will and afterwards gives to such child, if a daughter, a portion in marriage; or, if a son, a sum of money to establish him in life, provided such portion or sum of money be equal to or greater than the legacy. 2 Fonbl. 368 et seq.; Toll. Ex. 320; 1 Vern. R. by Raithby, 85 n. and the cases there cited. 1 Roper Leg. 237, 256, for the distinction between specific and general legacies.

ADHERENCE, *action of*, in the Scotch law, is an action competent to a husband or wife to compel either party to adhere in case of desertion.

ADJOURNMENT, is the dismissal by some court, legislative assembly, or properly authorised officer, of the business before them, either finally, which is called an adjournment *sine die*, without day; or, to meet again at another time which is appointed and ascertained, which is called a temporary adjournment. The constitution of the United States, art. 1, s. 5, n. 4, directs that "neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place, than that in which the two houses shall be sitting." Vide Com. Dig. h. t.; Vin. Ab. h. t.; Dict. de Jur. h. t.

ADJOURNMENT-DAY, in English practice, is a day so called from its being a further day appointed by the judges at the regular sittings, to try causes at nisi prius.

ADJOURNMENT-DAY IN ERROR, in practice in the English courts, is a day appointed some days before the end of the term, at which matters left undone on the affirmance day are finished. 2 Tidd, 1224.

ADJUDICATIONS, *in the Scotch law*, are certain proceedings against debtors, by way of actions, before the court of session; and are of two kinds; special and general.

1. By statute 1672, c. 19, such part only of the debtor's lands is to be adjudged as is adjudged to the principal sum and interest of the debt, with the compositions due to the superior, and expenses of infeoffment, and a fifth-part more, in respect the creditor is obliged to take lands for his money; but without penalties or sheriff-fees. The debtor must deliver to the creditor a valid right to the lands to be adjudged, or transumpts thereof, renounce the possession in his favour, and ratify the decree of adjudication: and the law considers

the rent of the lands as precisely commensurate to the interest of the debt. In this, which is called a special adjudication, the time allowed the debtor to redeem the lands adjudged, (called the legal reversion or the legal,) is declared to be five years.

Where the debtor does not produce a sufficient right to the lands, or is not willing to renounce the possession and ratify the decree, the statute makes it lawful for the creditor to adjudge all right belonging to the debtor, in the same manner, and under the same reversion of ten years. In this kind, which is called a general adjudication, the creditor must limit his claim to the principal sum, interest and penalty without demanding a fifth part more. See Act 26 Feb. 1684; Ersk. Pr. L. Scot. B. 2, t. 12, s. 15, 16. See *Diligences.*

ADJUDICATION, *in practice*, is the giving or pronouncing a judgment in a cause; a judgment.

ADJUNCTION, *in the civil law*, takes place when the thing belonging to one person is attached or united to that which belongs to another, whether this union is caused by *inclusion*, as if one man's diamond be enchassed in another's ring; by *soldering*, as if one's guard be soldered on another's sword; by *sewing*, as by employing the silk of one to make the coat of another; by *construction*, as by building on another's land; by *writing*, as when one writes on another's parchment; or by *painting*, when one paints a picture on another's canvass. In these cases, as a general rule, the accessory follows the principal; hence those things which are attached to the things of another become the property of the latter. The only exception which the civilians made was in the case of a picture, which although an accession, drew to itself the canvass, on account of the importance which was attached to it. Inst. lib. 2, t. 1, § 34; Dig. lib. 41, t. 1, l. 9, § 2. See *Accession*, and 2 Bl. Com. 404; Bro. Ab. Propertie; Com. Dig. Pleader, M 28; Bac. Abr. Trespass, E 2.

ADJUSTMENT, *in maritime law*; the adjustment of a loss is the settling and ascertaining the amount of the indemnity which the insured, after all proper allowances and deductions have been made, is entitled to receive, and the proportion of this, which each underwriter is liable to pay, under the policy. Marsh. Ins. B. 1, c. 14, p. 617; or it is a written admission of the amounts of the loss as settled between the parties to a policy of insurance. 3 Stark. Ev. 1167, 8.

In adjusting a loss, the first thing to be considered is, how the *quantity* of damages for which the underwriters are liable, shall be ascertained. When a loss is a total loss, and the insured decides to abandon, he must give notice of this to the underwriters in a reasonable time, otherwise he will waive his right to abandon, and must be content to claim only for a partial loss. Marsh. Ins. B. 1, c. 13, s. 2; 15 East, 559; 1 T. R. 608; 9 East, 283; 13 East, 304; 6 Taunt. 383. When the loss is admitted to be total, and the policy is a valued one, the insured is entitled to receive the whole sum insured, subject to such deductions as may have been agreed by the policy to be made in case of loss.

The quantity of damages being known, the next point to be settled is by what rule this shall be appreciated. The price of a thing does not always afford a just criterion to ascertain its true value. It may have been bought very dear or very cheap. The circumstance of time and place cause a continual variation in the price of things. For this reason, in cases of general average, the things saved contribute not according to prime cost, but according to the price

for which they may be sold at the time of settling the average. Marsh. Ins. B. 1, c. 14, s. 2, p. 621; Laws of Wisbuy, art. 20; Laws of Oleron, art. 8; this Dict. tit. *Price*. And see 4 Dall. 430; 1 Caines's R. 80; 2 S. & R. 229; 2 S. & R. 257, 258.

An adjustment being endorsed on the policy, and signed by the underwriters, with the promise to pay in a given time, is *prima facie* evidence against them, and amounts to an admission of all the facts necessary to be proved by the insured to entitle him to recover in an action on the policy. It is like a note of hand, and being proved the insured has no occasion to go into proof of any other circumstances. Marsh. Ins. B. 1, c. 14, s. 3, p. 632; 3 Stark. Ev. 1167, 8; Park. ch. 4; Wesk. Ins. 8; Beaw. Lex. Mer. 310; Com. Dig. Merchant, E 9; Abbott on Shipp. 346 to 348. See *Damages*.

ADMEASUREMENT OF DOWER, *remedies*. This remedy is now nearly obsolete, even in England; the following account of it is given by Chief Baron Gilbert. "The writ of admeasurement of dower lieth where the heir, when he is within age, and endoweth the wife of more than she ought to have dower of, or if the guardian [in chivalry, for the guardian in socage cannot assign dower,] endoweth the wife of more than one-third part of the land of which she ought to have dower, then the heir, at full age, may sue out this writ against the wife; and thereby shall be admeasured, and the surplusage she hath in dower shall be restored to the heir; but in such case there shall not be assigned anew any lands to hold to dower, but to take from her so much of the lands as surpasseth the third part whereof she ought to be endowed; and he need not set forth of whose assignment she holds." Gilb. on Uses, 379; and see F. N. B. 148; Bac. Ab. Dower, K; F. N. B. 148; Co. Litt. 39 a; 2 Inst. 367; *Dower; Estate in Dower*.

ADMINICLE. 1. A term, in the Scotch and French law, for any writing or deed referred to by a party, in an action at law for proving his allegations. 2. An ancient term for aid or support. 3. A term in the civil law for imperfect proof. Tech. Dict. h. t.; Merl. Répert. mot Adminicule.

TO ADMINISTER, ADMINISTERING. The stat. 9 G. 4, c. 31, s. 11, enacts "that if any person unlawfully and maliciously shall *administer*, or attempt to administer to any person, or shall cause to be taken by any person any poison or other destructive thing," &c. every such offender, &c. In a case which arose under this statute, it was decided that to constitute the act of administering the poison, it was not absolutely necessary there should have been a delivery to the party poisoned, but that if she took it from a place where it had been put for her by the defendant, and any part of it went into her stomach, it was an administering. 4 Carr. & Payne, 369; S. C. 19 E. C. L. R. 423; 1 Moody's C. C. 114; Carr. Crim. L. 237. Vide *Attempt; To Persuade*.

ADMINISTRATION, *trusts*, is the management of the estate of an intestate, a minor, a lunatic, a habitual drunkard, or other person who is incapable of managing his own affairs, entrusted to an administrator or other trustee by authority of law. In a more confined sense, and in which it will be used in this article, administration is the management of an intestate's estate, or of the estate of a testator who at the time administration was granted had no executor. Administration is

granted by a public officer duly authorised to delegate the trust; he is sometimes called surrogate, judge of probate, register of wills and for granting letters of administration. It is to be granted to such persons as the statutory provisions of the several states direct. There are several kinds of administrations besides the usual kind which gives to the administrator the management of all the personal estate of the deceased for an unlimited time. Administration *durante minori ætate* is granted during the minority of an executor, and ceases on his coming of age. Administration *durante absentia* is granted to some person during the absence of the next of kin. Administration *pendente lite* is granted pending a suit commenced to test the validity of a paper purporting to be a will. Administration *de bonis non*, is where an executor or administrator is dead, and no one is left to administer the goods remaining unadministered. Administration *cum testamento annexo* is one which is granted with the will annexed.

ADMINISTRATION, *government*, is the management of the affairs of the government; this word is also applied to the persons in power who manage public affairs; as Washington's administration was always wise. That part of the public authority which is exercised by the mayor and other public officers is also called administration; as, this is the administration of the law in Pennsylvania.

ADMINISTRATOR, *trusts*. An administrator is a person lawfully appointed to manage and settle the estate of a deceased person who has left no executor. By the grant of letters of administration, the administrator is vested with full and ample power to take possession of all the personal estate of the deceased, and sell it; and to collect the debts due to him: he represents him in all matters which relate to his personal property. He is authorised to pay the debts of the intestate in the order directed by law; and for his trouble he is generally entitled to a compensation which is allowed him as commissions on the amount which passes through his hands. He is responsible for his neglect or mismanagement of the estate or for a devastavit (q. v.) When two or more administrators join in the administration of the estate, it seems to be settled, 16 Serg. & Rawle, 340, that like executors, the act of each one of them, which relates to the delivery, gift, sale, payment, possession or release of the testator's goods, is considered as of equal validity as the act of all, for they have a joint power and authority over the whole. Bac. Ab. Executor, C 4; 11 Vin. Ab. 358; Com. Dig. Administration, B 12; 2 Litt. R. 315; 1 Dane's Ab. 383. On the death of one of several joint administrators, the whole authority is vested in the survivor or survivors. Vide *Letters of Administration*.

ADMINISTRATOR DE BONIS NON, is one appointed to administer the goods of an estate, which has been partially administered by a former executor or administrator, who has since died, been discharged, or removed. He has all the powers of a common administrator. Bac. Ab. Executor, B; 1 Swinb. 396; Roll's Ab. 907; 1 Root's R. 171. Vide *De Bonis Non*.

ADMINISTRATOR MINORE ÆTATE, is an administrator appointed to act as such during the minority of an infant executor, until the latter shall attain the lawful age to act. Godolph. 102; 5 Co. 29. His powers extend to administer the estate so far as to collect the same, sell a sufficiency of the personal

chattels to pay the debts, sell *bona peritura*, and such other acts as require immediate attention. He may sue and be sued, Bac. Ab. Executor, B 1; Roll's Ab. 110; Cro. Eliz. 718. The powers of such an administrator determine as soon as the infant executor attains the age authorised by law for him to act, which at common law is seventeen years, but by statutory provisions in several states, the age required is twenty-one years.

ADMIRAL, *officer*, in some countries is the commander in chief of the naval forces. This office does not exist in the United States.

ADMIRALTY, is the name of a jurisdiction which takes cognizance of suits or actions which arise in consequence of acts done upon or relating to the sea; or, in other words, of all transactions and proceedings relative to commerce and navigation, and to damages or injuries upon the sea. 2 Gall. R. 468. In the great maritime nations of Europe, the term "admiralty jurisdiction," is uniformly applied to courts exercising jurisdiction over maritime contracts and concerns. It is familiarly known among the jurists of Scotland, France, Holland and Spain, as of England, and applied to their own courts, possessing substantially the same jurisdiction as the English Admiralty in the reign of Edward the Third. Ibid., and the authorities there cited; and see also Bac. Ab. Court of Admiralty; Merl. Répert. h. t.; Encyclopédie, h. t. The Constitution of the United States has delegated to the courts of the national government cognizance "of all cases of admiralty and maritime jurisdiction;" and the act of September 24, 1789, ch. 20, s. 9, has given the district court "cognizance of all civil causes of admiralty and maritime jurisdiction," including all seizures under laws of imposts, navigation or trade of the United States, where the seizures are made on waters navigable from the sea, by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas. It is not within the plan of this work to enlarge upon this subject. The reader is referred to the article *Courts of the United States*, where he will find all which it has been thought necessary to say upon the subject. Vide, generally, Dunlap's Adm. Practice; Bett's Adm. Practice; 1 Kent's Com. 353 to 380; Serg. Const. Law, Index, h. t.; 2 Gall. R. 398 to 476; 2 Chit. Pr. 508; Bac. Ab. Courts of Admiralty; 6 Vin. Ab. 505; Dane's Ab. Index, h. t.; 2 Bro. Civ. and Adm. Law; Wheat. Dig. 1; 1 Story L. U. S. 56, 60; 2 Id. 905; 3 Id. 1564, 1696; 4 Sharsw. cont. of Story's L. U. S, 2262; Clerke's Praxis; Collectanea Maritima: 1 U. S. Dig. tit. Admiralty Courts, XIII.

ADMISSIONS, *in pleading*.—Where one party means to take advantage of or rely upon some matter alleged by his adversary, and to make it part of his case, he ought to admit such matter in his own pleadings; as if either party states the title under which his adversary claims, in which instances it is directly opposite in its nature to a protestation. See *Protestando*. But where the party wishes to prevent the application of his pleading to some matter contained in the pleading of his adversary, and therefore makes an express admission of such matter (which is sometimes the case,) in order to exclude it from the issue taken, or the like, it is somewhat similar in operation and effect, to a protestation. The usual mode of making an express admission in pleading is, after saying that the plaintiff ought not to have or maintain his action, &c.

to proceed thus, "*Because he says that although it be true that*," &c. repeating such of the allegations of the adverse party as are meant to be admitted. Express admissions are only matters of fact alleged in the pleadings; it never being necessary expressly to admit their legal sufficiency, which is always taken for granted, unless some objection be made to them. Lawes Civ. Pl. 143, 144. See 1 Chit. Pl. 600; Archb. Civ. Pl. 215.

In chancery pleadings admissions are said to be plenary and partial. They are plenary by force of terms not only when the answer runs in this form, "the defendant admits it to be true," but also when he simply asserts, and generally speaking, when he says, that "he has been informed, and believes it to be true," without adding a qualification such as, "that he does not know it of his own knowledge to be so, and therefore does not admit the same." Partial admissions are those which are delivered in terms of uncertainty, mixed up as they frequently are, with explanatory or qualifying circumstances.

ADMISSION, *in corporations or companies*, is the act of the corporation or company by which an individual acquires the rights of a member of such corporation or company. In trading and joint stock corporations no vote of admission is requisite; for any person who owns stock therein, either by original subscription or by conveyance, is in general entitled to and cannot be refused, the rights and privileges of a member. 3 Mass. R. 364; Doug. 524; 1 Man. & Ry. 529. All that can be required of the person demanding a transfer on the books, is to prove to the corporation his right to the property. See 8 Pick. 90. In a mutual insurance company, it has been held, that a person may become a member by insuring his property, paying the premium and deposit-money, and rendering himself liable to be assessed according to the rules of the corporation. 2 Mass. R. 315.

ADMISSIONS, *in evidence*, are the declarations which a party, by himself or those who act under his authority, makes of the existence of certain facts. The term admission is usually applied to civil transactions, and to matters of fact, in criminal cases, where there is no criminal intent; the term confession, (q. v.) is generally considered as an admission of guilt. These admissions are generally evidence of those facts, when the admissions themselves are proved.

The admissibility and effect of evidence of this description will be considered generally, with respect to the nature and manner of the admission itself; and, secondly, with respect to the parties to be affected by it.

In the first place, as to the nature and manner of the admission; it is either made, first, expressly with a view to evidence; or, secondly, with a view to induce others to act upon the representation; or thirdly, it is an unconnected and casual representation. 1. As an instance of an admission made with a view to evidence may be mentioned the case where a party has solemnly admitted a fact under his hand and seal, in which case he is estopped not only from disputing the deed itself, but every fact which it recites. B. N. P. 298; 1 Salk. 186; Com. Dig. Estoppel, B. 5; Stark. Ev. pt. 4, p. 31.—2. Instances of this second class of admissions which have induced others to act upon them, are those where a man has cohabited with a woman, and treated her in the face of the world as his wife, 2 Esp. 637; and where he has held himself out to the world in a partic-

ular character, Ib.; 1 Camp. 245; he cannot in the one case deny her to be his wife when sued by a creditor who has supplied her with goods as such, nor in the other can he divest himself of the character he has assumed.—3. Where the admission or declaration is quite foreign to the question pending, although admissible, it is not in general conclusive evidence; and though a party may by falsifying his former declaration or oath, show that he has acted illegally and immorally, yet if he is not guilty of any breach of good faith in the existing transaction, and has not induced others to act upon his admission or declaration, nor derived any benefit from it against his adversary, he is not bound by it; the evidence in such cases is merely presumptive, and liable to be rebutted.

Secondly, with respect to the parties to be affected by it.—1. By a party to a suit, 1 Phil. Ev. 74; 7 T. R. 563; 1 Dall. 65. The admissions of the party really interested, although he is no party to the suit, are evidence, 1 Wils. 257.—2. The admissions of a partner during the existence of the partnership, are evidence against both, 1 Taunt. 104; Peake's C. 203; 1 Stark. C. 81. See 10 Johns. R. 66; Ib. 216; 1 M. & Selw. 249. As to admissions made *after* the dissolution of the partnership, see 3 Johns. R. 536; 15 Johns. R. 424; 1 Marsh. (Kentucky) R. 189. According to the English decisions, it seems, the admissions of one partner, after the dissolution, have been holden to bind the other partner; this rule has been partially changed by act of parliament. Colly. on Part. 282; Stat. 9 Geo. 4, c. 14, (May 9, 1828.) In the Supreme Court of the United States, a rule, the reverse of the English, has been adopted, mainly on the ground, that the admission is a new contract or promise, springing out of, and supported by the original consideration. 1 Pet. R. 351. The state courts have varied in their decisions; some have adopted the English rule; and in others it has been overruled. Story, Partn. § 324; 3 Kent, Com. Lect. 43, p. 49, 4th ed.; 17 S. & R. 126; 15 John. R. 409: 9 Cowen, R. 422; 4 Paige, R. 17; 11 Pick. R. 400; 7 Yerg. R. 534. 3. By one of several persons who have a community of interest, Stark. Ev. pt. 4, p. 47; 3 Serg. & R. 9.—4. By an agent, 1 Phil. Ev. 77–82; Paley Ag. 203–207.—5. By an attorney, 4 Camp. 133; by wife, Paley Ag. 139, n. 2; Whart. Dig. tit. Evidence, O; 7 T. R. 112; Nott & M'C. 374.

Admissions are express or implied. An express admission is one made in direct terms. An admission may be implied from the silence of the party, and may be presumed. As for instance, where the existence of the debt, or of the particular right has been asserted in his presence, and he has not contradicted it. And an acquiescence and endurance, when acts are done by another, which, if wrongfully done, are encroachments, and call for resistance and opposition, are evidence, as a tacit admission that such acts could not be legally resisted. See 2 Stark. C. 471.

See, generally, Stark. Ev. part 4, tit. Admissions; 1 Phil. Ev. part 1, c. 5, s. 4; 2 Evans's Pothier, 319; 8 East, 549, n. 1; Com. Dig. Testemoigne, Addenda, vol. 7, p. 434; Vin. Abr. Evidence, A. b. 2, A. b. 23; Ib. Confessions; this Dict. tit. *Confessions*, *Examination*; Bac. Abr. Evidence, L.; Toullier, Droit Civil Français, tome 10, p. 375, 450.

ADMISSIONS, *of attorneys and counsellors.* To entitle counsellors and attorneys to practice in court, they must be admitted by the court to practice there. Different statutes

and rules have been made to regulate their admission; they generally require a previous qualification by study under the care of some practising counsellor or attorney. See 1 Troub. & Haly's Pr. 18; 1 Arch. Pr. 16; Blake's Pr. 30.

ADMISSIONS, *in practice.* It frequently occurs in practice, that in order to save expenses as to mere formal proofs, the attorneys on each side consent to admit, reciprocally, certain facts in the cause without calling for proof of them. These are usually reduced to writing, and the attorneys shortly add to this effect, namely, "We agree that the above facts shall on the trial of this cause be admitted, and taken as proved on each side;" and signing two copies now called "admissions" in the cause, each attorney takes one. Gresl. Eq. Ev. c. 2, p. 38.

ADMITTANCE, *Eng. law*, is the act of giving possession of a copyhold estate, as livery of seisin is of a freehold; it is of three kinds, namely: upon a voluntary grant by the lord; upon a surrender by the former tenant; and upon descent.

ADMITTENDO IN SOCIUM, *Eng. law.* A writ associating certain persons to justices of assize.

ADMONITION, is a reprimand from a judge to a person accused, on being discharged, warning him of the consequences of his conduct, and intimating to him that should he be guilty of the same fault for which he has been admonished, he will be punished with greater severity. Merlin, Répert. h. t. The admonition was authorised by the civil law, as a species of punishment for slight misdemeanors. Vide *Reprimand.*

ADOLESCENCE, *persons*, is that age which follows puberty and precedes majority; it commences for males at fourteen and for females at twelve years completed, and continues till twenty-one years complete.

ADOPTION, *civil law*, the act by which a person chooses another from a strange family, to have all the rights of his own child. Merl. Répert, h. t. Dig. 1, 7, 15, 1, and see *Arrogation.* By art. 232, of the civil code of Louisiana, it is abolished in that state. It never was in use in any other of the United States.

ADROGATION, *civil law.* The adoption of one who was *impubes*, that is, if a male, under fourteen years of age; if a female, under twelve. Dig. 1, 7, 17, 1.

ADULT, *in the civil law*, is an infant who, if a boy, has attained his full age of fourteen years, and if a girl, her full age of twelve. Domat, Liv. Prel. t. 2, s. 2, n. 8. In the common law an adult is considered one of full age. 1 Swanst. R. 553.

ADULTERATION, *in criminal law*, is a general term for rendering the public coin of less value than it ought to be; which comprehends *debasing* the coin, by the admixture of improper metals, or the use of any undue alloy, &c. and *counterfeiting* the coin, which is forging a stamp to resemble the true coin upon baser metal. This is always done with a fraudulent purpose and is punishable by fine and imprisonment.

ADULTERINE, a term used in the civil law to denote the issue of an adulterous intercourse. See Nicholas on Adulterine Bastardy.

ADULTERIUM. In the old records this word does not signify the offence, but the fine imposed for its commission. Barr. on the Stat. 62, note.

ADULTERY, *in criminal law*, from *ad* and *alter* another person; a criminal conversation, between two married persons, or a married and unmarried person. The married person is guilty of adultery, the unmarried of fornication, (q. v.) 1 Yeates, 6; 2 Dall. 124; but see 2 Blackf. 318. The punishment of adultery in

the United States generally is fine and imprisonment. In England it is left to the feeble hands of the ecclesiastical courts to punish this offence. Adultery in one of the married persons is good cause for obtaining a divorce by the innocent partner. See 1 Pick. 136; 8 Pick. 433; 9 Mass. 492; 14 Pick. 518; 7 Greenl. 57; 8 Greenl. 75; 7 Conn. 267; 10 Conn. 372; 6 Verm. 311; 2 Fairf. 391; 4 S. & R. 449; 5 Rand. 634; 6 Rand. 627; 8 S. & R. 159; 2 Yeates, 278, 466; 4 N. H. Rep. 501; 5 Day, 149; 2 N. & M. 167.

ADVANCEMENT, is that which is given by a father to his child or presumptive heir, by anticipation of what he might inherit. 17 Mass. R. 358; 16 Mass. R. 200; 4 S. & R. 333; 11 John. R. 91; Wright, R. 339. The advancement which will exclude a child must be made by the father, and not by any other, not even the mother. 2 P. Wms. 356. There is, generally, in the statute laws of the several states, provisions relative to real and personal estates, similar to that which exists in the English statute of distribution, concerning an advancement to a child. If any child of the intestate has been advanced by him by settlement, either out of the real or personal estate, or both, equal or superior to the amount in value of the share of such child which would be due from the real and personal estate, if no such advancement had been made, then such child and his descendants, are excluded from any share in the real or personal estate of the intestate. But if the advancement be not equal, then such child, and in case of his death, his descendants, are entitled to receive, from the real and personal estate, sufficient to make up the deficiency, and no more. The advancement is either express or implied. As to what is an implied advancement see 2 Fonb. Eq. 121; 1 Supp. to Ves. Jr. 84; 2 Ib. 57; 1 Vern. by Raithby, 88, 108, 216; 5 Ves. 421; Bac. Ab. h. t.; 4 Kent, Com. 173.

A debt due by a child to his father differs from an advancement. In case of a debt, the money due may be recovered by action for the use of the estate, whether any other property be left by the deceased or not, whereas, an advancement merely bars the child's right to receive any part of his father's estate, unless he brings into hotch pot the property advanced. 17 Mass. R. 93, 359. See, generally, 17 Mass. R. 81, 356; 4 Pick. R. 21; 4 Mass. R. 680; 8 Mass. R. 143; 10 Mass. R. 437; 5 Pick. R. 527; 7 Conn. R. 1; 6 Conn. R. 355; 5 Paige's R. 318; 6 Watts's R. 86, 254, 309; 2 Yerg. R. 135; 3 Yerg. R. 95; Bac. Ab. Trusts, D; Math. on Pres. 59; 5 Hayw. 137; 11 John. 91; 1 Swanst. 13; 1 Ch. Cas. 28; 3 Conn. 31; 15 Ves. 43, 50; U. S. Dig. h. t.

ADVANCES, *contracts*, are said to take place when a factor or agent pays to his principal a sum of money on the credit of goods belonging to the principal, which are placed, or are to be placed, in the possession of the factor or agent, in order to reimburse himself out of the proceeds of the sale. In such case the factor or agent has a lien to the amount of his claim. Cowp. R. 251; 2 Burr. R. 931; Liverm. on Ag. 38; Journ. of Law, 146. The agent or factor has a right not only to advances made to the owner of goods, but also for expenses and disbursements, made in the course of his agency, out of his own moneys, on account of, or for the benefit of his principal; such as incidental charges for warehouse-room, duties, freight, general average, salvage, repairs, journeys, and all other acts done to preserve the property of the principal and to enable the agent to accomplish the objects of the principal, are to be paid fully by

the latter. Story on Bailm. § 196, 197; Story on Ag. § 335. The advances, expenses and disbursements of the agent must, however, have been made in good faith, without any default on his part. Liv. on Ag. 14-16; Smith on Merc. L. 56; Paley on Ag. by Lloyd, 109; 6 East, R. 392. When the advances and disbursements have been properly made, the agent is entitled not only to the return of the money so advanced, but to interest upon such advances and disbursements, whenever from the nature of the business, or the usage of trade, or the particular agreement of the parties, it may be fairly presumed to be stipulated for, or due to the agent. 7 Wend. R. 315; 3 Binn. R. 295; 3 Caines, R. 226; 1 H. Bl. 303; 3 Camp. R. 467; 15 East, R. 223. This just rule coincides with the civil law on this subject. Dig. 17, 1, 12, 9; Poth. Pand. lib. 17, t. 1, n. 74.

ADVENTITIOUS, *adventitius*, from advenio: what comes incidentally; as adventitia bona, goods that fall to a man otherwise than by inheritance; or adventitia dos, a dowry or portion given by some other friend beside the parent.

ADVENTURE, *bill of*, a writing signed by a merchant, to testify that the goods shipped on board a certain vessel are at the venture of another person, he himself being answerable only for the produce. Techn. Dict.

ADVERSE POSSESSION, *title to lands*, is the enjoyment of land, or such estate as lies in grant, under such circumstances as indicate that such enjoyment has been commenced and continued, under an assertion of right on the part of the possessor. 3 East, R. 394; 1 Pick. Rep. 466; 1 Dall. R. 67: 2 Serg. & Rawle, 527; 10 Watts, R. 289; when the possession has been adverse for twenty years, of which the jury are to judge from the circumstances, the law raises the presumption of a grant. Ang. on Wat. Courses, 85, et seq. But this presumption arises only when the user or occupation would otherwise have been unlawful. 3 Greenl. R. 120; 6 Binn. R. 416; 6 Cowen, R. 617, 677; 8 Cowen, R. 589; 4 S. & R. 456. See 2 Smith's Lead. Cas. 307-416.

ADVICE, *comm. law*, a letter containing information of any circumstances unknown to the person to whom it is written: when goods are forwarded by sea or land, the letter transmitted to inform the consignee of the fact, is termed advice of goods, or letter of advice. When one merchant draws upon another, he generally advises him of the fact. These letters are intended to give notice of the facts they contain.

ADVICE, *practice*, is the opinion given by counsel to their clients; this should never be done but upon mature deliberation to the best of the counsel's ability; and without regard to the fact that it will affect the client favourably or unfavourably.

ADVOCATE, *in the civil and ecclesiastical law*. 1. An officer who maintains or defends the rights of his client in the same manner as the counsellor does in the common law.—*Lord Advocate*, an officer of state in Scotland, appointed by the king, to advise about the making and executing the law, to prosecute capital crimes, &c.—*College* or *faculty of advocates*, a college consisting of 180 persons appointed to plead in all actions before the lords of sessions.—*Church* or *ecclesiastical advocates*, pleaders appointed by the church to maintain its rights.—2. A patron who has the advowson or presentation to a church. Techn. Dict.; Ayl. Per. 53; Dane Ab. ch. 31, § 20.

ADVOCATION, *in the Scotch law*. A writing drawn up in the form of a petition, called a *bill of ad-*

vocation, by which a party in an action applies to the supreme court to advocate its cause and to call the action out of an inferior court to itself. *Letters of advocation*, are the decree or warrant of the supreme court or court of sessions, discharging the inferior tribunal from all further proceedings in the matter, and advocating the action to itself. This proceeding is similar to a certiorari (q. v.) issuing out of the supreme court for the removal of a cause from an inferior tribunal.

ADVOWSON, *in ecclesiastical law*, from advow, or advocare, a right of presentation to a church or benefice. He who possesses this right is called the patron or advocate; (q. v.) when there is no patron or he neglects to exercise his right within six months, it is called a *lapse*, i. e. a title given to the ordinary to collate to a church; when a presentation is made by one who has no right it is called a *usurpation*. Advowsons are of different kinds, as—*Advowson appendant*, when it depends upon a manor, &c. —*Advowson in gross*, when it belongs to a person and not to a manor. —*Advowson presentative*, where the patron presents to the bishop.—*Advowson donative*, where the king or patron puts the clerk into possession without presentation.—*Advowson of the moiety of the church*, where there are two several patrons and two incumbents in the same church.—*A moiety of advowson*, where two must join the presentation of one incumbent.—*Advowson of religious houses*, that which is vested in any person who founded such a house. Techn. Dict; 2 Bl. Com. 21. Mirehouse on Advowsons; Com. Dig. Advowson, Quare Impedit; Bac. Ab. Simony; Burn's Eccl. Law, h. t.; Cruise's Dig. Index, h. t.

AFFECTION, *in contracts*, the making over, pawning, or mortgaging a thing to assure the payment of a sum of money, or the discharge of some other duty or service. Techn. Dict.

AFFEERERS, *in the English law;* those who upon oath settle and moderate fines in courts leet. Hawk. l. 2, ch. 112.

TO AFFERE, *in the English law*, signifies either "to affere an amercement," i. e. to mitigate the rigour of a fine; or "to affere an account," that is to confirm it on oath in the exchequer.

AFFIANCE, *in contracts*, from *affidare* or *dare fidem*, to give a pledge; a plighting of troth between a man and woman. Litt. s. 39; Pothier, Traité du Mariage, n. 24, defines it to be an agreement by which a man and a woman promise each other that they will marry together. This word is used by some authors as synonymous with marriage. Co. Litt. 34, a, note 2. See Dig. 23, 1, 1; Code, 5, 1, 4; Extrav. 4, 1.

AFFIDARE. To plight one's faith, or give fealty, i. e. fidelity by making oath, &c. Cunn. Dict. h. t.

AFFIDATIO DOMINORUM, *Eng. law*. An oath taken by a lord in parliament.

AFFIDAVIT, *in practice:* an oath or affirmation reduced to writing, sworn or affirmed to before some officer who has authority to administer it. It differs from a deposition in this, that in the latter the opposite party has had an opportunity to cross-examine the witness, whereas an affidavit is always taken *ex parte*. Gresl. Eq. Ev. 413. Vide Harr. Dig. h. t. *Affidavit to hold to bail*, is in many cases required before the defendant can be arrested; such affidavit must be made by a person who is acquainted with the fact, whether he be plaintiff or not, and must state, 1st, an indebtedness from the defendant to the plaintiff; 2dly, show a distinct cause of action; 3dly, the whole

must be clearly and certainly expressed. Sell. Pr. 104; 1 Chit. R. 165; S. C. 18 Com. Law R. 59, note; Id. 99.—*An affidavit of defence*, is made by a defendant or a person knowing the facts, in which must be stated a positive ground of defence on the merits. 1 Ashm. R. 4, 19, n. It has been decided that when a writ of summons has been served upon three defendants, and only one appears, a judgment for want of an affidavit of defence may be rendered against all. 8 Watts, R. 367. Vide Bac. Ab. h. t.

AFFINITY, is a connexion formed by marriage which places the husband in the same degree of nominal propinquity to the relations of the wife, as that in which she herself stands towards them, and gives to the wife the same reciprocal connexion with the relations of the husband. It is used in contradistinction to consanguinity, (q. v.) It is no real kindred. A person cannot, by legal succession, receive an inheritance from a relation by affinity; neither does it extend to the nearest relations of husband and wife, so as to create a mutual relation between them. The degrees of affinity are computed in the same way as those of consanguinity. See Pothier, Traité du Mariage, part 3, ch. 3, art. 2; and see 5 M. R. 296; Inst. 1, 10, 6; Dig. 38, 10, 4, 3; 1 Phillim. R. 210; S. C. 1 Eng. Eccl. R. 72; article *Marriage*.

TO AFFIRM, *practice*. 1. To ratify or confirm a former law or judgment; as the supreme court affirmed the judgment of the court of common pleas. 2. To make an affirmation, or to testify under an affirmation.

AFFIRMANCE-DAY, GENERAL, in the English Court of Exchequer, is a day appointed by the judges of the common pleas, and barons of the exchequer, to be held a few days after the beginning of every term for the general affirmance or reversal of judgments. 2 Tidd, 1091.

AFFIRMANT, *practice*, one who makes affirmation instead of making oath that the evidence which he is about to give shall be the truth, as if he had been sworn. He is liable to all the pains and penalty of perjury if he shall be guilty of wilfully and maliciously violating his affirmation.

AFFIRMATION, *practice*, a solemn declaration and asseveration, which a witness makes before an officer competent to administer an oath in a like case, to tell the truth as if he had been sworn. In the United States, generally, all witnesses who declare themselves conscientiously scrupulous against taking a corporal oath, are permitted to make a solemn affirmation, and this in all cases, as well criminal as civil. For the violation of the truth in such case, the witness is subject to the punishment of perjury as if he had been sworn.

AFFIRMATIVE. Averring a fact to be true; that which is opposed to negative, (q. v.) It is a general rule of evidence that the affirmative of the issue must be proved. Bull. N. P. 298; Peake, Ev. 2. But when the law requires a person to do an act, and the neglect of it will render him guilty and punishable, the negative must be proved, because every man is presumed to do his duty, and in that case they who affirm he did not, must prove it. B. N. P. 298; 1 Roll, R. 83; Comb. 57; 3 B. & P. 307; 1 Mass. R. 56.

AFFIRMATIVE PREGNANT, *pleading*. An affirmative allegation, implying some *negative*, in favour of the adverse party: for example, if to an action of assumpsit, which is barred by the act of limitations in *six* years, the defendant pleads that he did not undertake, &c. within *ten* years, a replication that he did un-

dertake, &c. within ten years, would be an affirmative pregnant; since it would impliedly admit that the defendant had not promised within six years. As no proper issue could be tendered upon such plea, the plaintiff should, for that reason, demur to it. Gould, Pl. c. 6, § 29, 37; Steph. Pl. 381; Lawes, Civ. Pl. 113; Bac. Ab. Pleas, N 6.

AFFRAY, *criminal law*, is the fighting of two or more persons in some public place to the terror of the people. To constitute this offence there must be, 1st, a fighting; 2d, the fighting must be between two or more persons; 3d, it must be in some public place; 4th, it must be to the terror of the people. It 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; and in that case none are guilty except those actually engaged in it. Hawk. b. 1, c. 65, s. 3; 4 Bl. Com. 146; 1 Russell, 271.

AFORETHOUGHT, *crim. law*, premeditated, prepense; the length of time during which the accused has entertained the thought of committing the offence is not very material, provided in fact he has entertained such thought; he is thereby rendered criminal in a greater degree than if he had committed the offence without premeditation. Vide *Malice Aforethought;* 2 Chit. Cr. 785; 4 Bl. Com. 199; Fost. 132, 291, 292; Cro. Car. 131; Palm. 545; W. Jones, 198; 4 Dall. R. 146; 1 P. A. Bro. App. xviii.; Addis. R. 148; 1 Ashm. R. 289.

AGAINST THE FORM OF THE STATUTE.—See *Contra formam statuti.*

AGAINST THE WILL, *pleadings.* In indictments for robbery from the person, the words "feloniously and against the will," must be introduced; no other words or phrase will sufficiently charge the offence. 1 Chit. Cr. *244.

AGE, the time when the law allows persons to do acts, which, for want of years, they were probibited from doing before. For *males*, before they arrive at fourteen years they are said not to be of discretion; at that age they may consent to marriage and choose a guardian; and twenty-one years is full age for all private purposes, and they may then exercise their rights as citizens by voting for public officers; and are eligible to all offices, unless otherwise provided for in the constitution. At 25 a man may be elected a representative in Congress; at 30, a senator; and at 35 he may be chosen president of the United States. He is liable to serve in the militia from 18 till 45 inclusive, unless exempted for some particular reason.—As to *females*, at 12 they arrive at years of discretion and may consent to marriage; at 14 may choose a guardian; and 21, as in males, is full age, when they may exercise all the rights which are inherent to their sex. This is the law of England as far as applicable. There no one can be chosen member of parliament till he has attained 21 years; ordained a priest till he is 24; nor made a bishop till he has completed his 30th year. The age of serving in the militia is from 16 to 45 years. By the laws of France many provisions are made in respect to age, among which are the following. To be a member of the legislative body the person must have attained 40 years; 25 to be a judge of a tribunal de première instance; 27 to be its president, or to be judge or clerk of a cour royale; 30 to be its president or procureur général; 25 to be a justice of the peace; 30 to be judge of a tribunal of commerce, and 35 to be its president; 25 to be a notary public; 21

to be a testamentary witness; 30 to be a juror; at 16 a minor may devise one half of his property as if he were a major; the male cannot contract marriage till after the 18th year, nor the female before full 15 years. At 21 both males and females are capable to perform all the acts of civil life. Toull. Dr. Civ. Fr. Liv. 1, Intr. n. 188. In the civil law, the age of man was divided as follows; namely, infancy as it regards males extended till the full accomplishment of the 14th year; at 14 he entered the age of puberty, and was said to have acquired full puberty at 18 years accomplished, and was major on completing his 25th year. The female was an infant until 7 years, at 12 she entered puberty, and acquired full puberty at 14; she became of full age on completing her 25th year. Leçons Elem. du Dr. Civ. Rom. 22. See Com. Dig. Baron and Feme, (B 5.) Dower, (A 3.) Enfant, (C 9, 10, 11, D 3.) Pleader, (2 G 3.—2 W 22.—2 Y 8.) Bac. Ab. Infancy and Age; 2 Vin. Ab. 131; Constitution of the United States; Domat, Lois Civ. tom, 1, p. 10; Merlin, Répert. de Jurisp. mot Age; Ayl. Pand. 62; 1 Coke Inst. 78; 1 Bl. Com. 463. See *Witness.*

AGE-PRAYER, *in the English law, in practice.* When an action is brought against an infant for lands which he had by descent, he may show this to the court, and pray *quod loquela remaneat* until he shall become of age; which is called his age-prayer. Upon this being ascertained the proceedings are stayed accordingly. When the lands did not descend, he is not allowed this privilege. 1 Lilly's Reg. 54.

AGED WITNESS. When a deposition is wanted to be taken on account of the age of a witness, he must be at least seventy years old to be considered an aged witness. Coop. Eq. Pl. 57; Amb. R. 65; 13 Ves. 56, 261.

AGENCY, *contracts*, is an agreement, express or implied, by which one of the parties, called the principal, confides to the other denominated the agent, the management of some business, to be transacted in his name, or on his account, and by which the agent assumes to do the business and to render an account of it. When the agency is express, it is created either by deed, or in writing not by deed, or verbally without writing. 3 Chit. Com. Law, 104; 9 Ves. 250; 11 Mass. Rep. 27; Ib. 97, 288; 1 Binn. R. 450. When the agency is not express, it may be inferred from the relation of the parties and the nature of the employment, without any proof of any express appointment. 1 Wash. R. 19; 15 East, R. 400; 5 Day's R. 556. The agency must be antecedently given, or subsequently adopted; and in the latter case there must be an act of recognition, or an acquiescence in the act of the agent, from which a recognition may be fairly implied. 2 Kent, Com. 478; Paley on Agency; Livermore on Agency.

An agency may be dissolved in two ways: 1, by the act of the principal or the agent; 2, by operation of law.

1. The agency may be dissolved by the act of one of the parties. 1st. As a general rule it may be laid down that the principal has a right to revoke the powers which he has given; but this is subject to some exceptions, of which the following are examples. When the principal has expressly stipulated that the authority shall be irrevocable, and the agent has an interest in its execution: it is to be observed, however, that although there may be an express agreement not to revoke, yet if the agent has no interest in its execution, and there is no consideration for the agreement, it

will be considered a nude pact, and the authority may be revoked. But when an authority or power is coupled with an interest, or when it is given for a valuable consideration, or when it is a part of a security, then, unless there is an express stipulation that it shall be revocable, it cannot be revoked, whether it be expressed on the face of the instrument giving the authority, that it be so, or not. Story on Ag. 477; Smith on Merc. L. 71; 2 Liv. on Ag. 308; Paley on Ag. by Lloyd, 184; 3 Chit. Com. L. 223; 2 Mason's R. 244; Id. 342; 8 Wheat. R. 170; 1 Pet. R. 1; 2 Kent, Com. 643, 3d edit.; Story on Bailm. § 209; 2 Esp. R. 565; 3 Barnw. & Cressw. 842; 10 Barnw. & Cressw. 731; 2 Story, Eq. Jur. § 1041, 1042, 1043.—2dly. The agency may be determined by the renunciation of the agent. If the renunciation be made when it has been partly executed, the agent by renouncing it, becomes liable for the damages, which may thereby be sustained by his principal. Story on Ag. § 478; Story on Bailm. § 436; Jones on Bailm. 101; 4 John. R. 84.

2. The agency is revoked by operation of law in the following cases: 1st. When the agency terminates by the expiration of the period, during which it was to exist, and to have effect; as, if an agency be created by the principal to endure a year, or till the happening of a contingency, it becomes extinct at the end of the year, or on the happening of the contingency.—2dly. When a change of condition, or of state, produces an incapacity in either party; as, if the principal, being a woman, marry, this would be a revocation, because the power of creating an agent is founded on the right of the principal to do the business himself, and a married woman has no such power. For the same reason, when the principal becomes insane, the agency is *ipso facto* revoked. 8 Wheat. R. 174, 201 to 204; Story on Ag. § 481; Story on Bailm. § 206; 2 Liv. on Ag. 307. The incapacity of the agent also amounts to a revocation in law, as in case of insanity, and the like, which render an agent altogether incompetent, but the rule does not reciprocally apply in its full extent. For instance, an infant or a married woman may in some cases be agents, although they cannot act for themselves.—3dly. The death of either principal or agent revokes the agency, unless in cases where the agent has an interest in the thing actually vested in the agent. 8 Wheat. R. 174; Story on Ag. § 486 to 499.—4thly. The agency is revoked in law, by the extinction of the subject-matter of the agency, or of the principal's power over it, or by the complete execution of the trust. Story on Bailm. § 207.

AGENT, *practice;* an agent is an attorney who transacts the business of another attorney. The agent owes to his principal the unremitted exertions of his skill and ability, and that all his transactions in that character, shall be distinguished by punctuality, honour and integrity. Lee's Dict. of Practice. The rules of the supreme court of the state of New York require that every attorney shall have an agent in such place where there is a clerk's office, except in the city or town where such attorney keeps his office; such agent must be an attorney of the court, or deputy clerk in the clerk's office. Rule 7; Graham's Pr. 34.

AGENT, *contracts.* One who undertakes to manage some affair to be transacted for another, by his authority, on account of the latter, who is called the *principal*, and to render an account of it. There are various descriptions of agents, to whom different appellations are given according to the nature of their employ-

ments; as brokers, factors, supercargoes, attorneys and the like; they are all included in this general term. The authority is created either by deed, by simple writing, by parol, or by mere employment, according to the capacity of the parties, or the nature of the act to be done. Vide *Authority*. It is said to be *general* or *special* with reference to its object, i. e. according as it is confined to a single act, or is extended to all acts connected with a particular employment. With reference to the manner of its execution, it is either *limited* or *unlimited*, i. e. the agent is bound by precise instructions (q. v.), or left to pursue his own discretion. It is the duty of an agent, 1, To perform what he has undertaken in relation to his agency. 2, To use all necessary care. 3, To render an account. Pothier, Tr. du Contrat de Mandat, *passim;* Paley, Agency, 1 and 2; 1 Liverm. Agency, 2; 1 Suppl. to Ves. Jr. 67, 97, 409; 2 Id. 153, 165, 240; Bac. Abr. Master and Servant, I; 1 Ves. Jr. R. 317. Vide Smith on Merc. Law, ch. 3, p. 43, et seq.; and the articles *Agency*, *Authority*, and *Principal*.

Agents are either joint or several. It is a general rule of the common law, that when an authority is given to two or more persons to do an act, and there is no several authority given, all the agents must concur in doing it, in order to bind the principal. 3 Pick. R. 232; 2 Pick. R. 345; 12 Mass. R. 185; Co. Litt. 49 b, 112 b, 113, and Harg. n. 2; Id. 181 b; 6 Pick. R. 198; 6 John. R. 39; 5 Barn. & Ald. 628. This rule has been so construed that when the authority is given jointly and severally to three persons, two cannot properly execute it; it must be done by all or by one only. Co. Litt. 181 b; Com. Dig. Attorney, C 11; but if the authority is so worded as to be apparent the principal intended to give power to either of them, an execution by two will be valid. Co. Litt. 49 b; Dy. R. 62; 5 Barn. & Ald. 628. This rule applies to private agencies, for in public agencies an authority executed by a majority would be sufficient. 1 Co. Litt. 181 b; Com. Dig. Attorney, C 15; Bac. Ab. Authority, C; 1 T. R. 592. The rule in commercial transactions is, however, very different; and generally when there are several agents each possesses the whole power. For example, on a consignment of goods for sale to two factors, (whether they are partners or not,) each of them is understood to possess the whole power over the goods for the purposes of the consignment. 3 Wils. R. 94, 114; Story on Ag. § 43.

As to the persons who are capable of becoming agents, it may be observed, that but few persons are excluded from acting as agents, or from exercising authority delegated to them by others. It is not, therefore, requisite that a person be *sui juris*, or capable of acting in his own right, in order to be qualified to act for others. Infants, femes covert, persons attainted or outlawed, aliens and other disabled persons for many other purposes, may act as agents for others. Co. Litt. 52; Bac. Ab. Authority, B; Com. Dig. Attorney, C 4; Id. Baron and feme, P 3. But in the case of a married woman, it is to be observed, that she cannot be an agent for another when her husband expressly dissents, particularly when he may be rendered liable for her acts. Persons who have clearly no understanding, as idiots and lunatics, cannot be agents for others. Story on Ag. § 7. There is another class who, though possessing understanding, are incapable of acting as agents for others; there are persons whose duties and characters are incompatible with their obligations to the principal. For example, a person can-

not act as agent in buying for another goods belonging to himself. Paley on Ag. by Lloyd, 33 to 38; 2 Ves. Jr. 317.

AGENT AND PATIENT. This phrase is used to indicate the state of a person who is required to do a thing, and is at the same time the person to whom it is done; as, when a man is indebted to another and he appoints him his executor, the latter is required to pay the debt in his capacity of executor, and entitled to receive it in his own right, he is then *agent and patient*.

AGIO. This term is used to denote the difference of price between the value of bank notes and the coin of the country.

AGGRAVATION, *in pleading*, is the introduction of matter in the declaration which only tends to increase the amount of damages, and does not concern the right of action itself. Steph. Pl. 257; 12 Mod. 597. An example of which is found in the case where a plaintiff declares in trespass for entering his house, and breaking his close, and tossing his goods about; the entry of the house is the principal ground and foundation of the action, and the rest is only stated by way of aggravation, 3 Wils. R. 294; and this matter need not be proved by the plaintiff or answered by the defendant.

AGGRESSOR, *crim. law*. He who has begun a quarrel or dispute, either by threatening or striking another. No man is justified to strike another because he has threatened, or in consequence of the use of any words. He is to seek his redress for such abuse by an appeal to the law, and not by a violation of it.

AGISTATE, *in contracts*, 1. The taking of other men's cattle on one's own ground at a certain rate. 2 Inst. 643.—2. The profit from such feeding or pasturage.

AGISTMENT, *contracts*, is the taking of another person's cattle into one's own ground to be fed for a consideration to be paid by the owner. The person who receives the cattle is called an agister. As this is an interested bailment, the agister is bound to ordinary diligence, and of course responsible for losses by ordinary negligence; but he does not insure the safety of the cattle agisted. Jones, Bailm. 91; 1 Bell's Com. 458; Holt's N. P. Rep. 547; Story, Bailm. § 443.

AGNATES, in the sense of the Roman law, were those whose propinquity was connected by males only; in the relation of cognates, one or more females were interposed. By the Scotch law, agnates are all those who are related by the father, even though females intervene; cognates are those who are related by the mother. Ersk. L. Scot. B. 1, t. 7, s. 4.

AGNATI, *in descents*. Relations on the father's side; they are different from the *cognati*, they being relations on the mother's side *affines*, who are allied by marriage, and the *propinqui*, or relations in general. 2 Bl. Com. 235; Toull. Dr. Civ. Fr. tome 1, p. 139; Poth. Pand. tom. 22, p. 27.

AGNATION, *in descents*. The relation by blood which exists between such males as are descended from the same father; in distinction from cognation or consanguinity, which includes the descendants from females. This term is principally used in the civil law.

AGREEMENT, *contract*, is the consent of two or more persons concurring, respecting the transmission of some property, right or benefit, with a view of contracting an obligation. Bac. Ab. h. t.; Com. Dig. h. t.; Vin. Ab. h. t.; Plowd. 17; 1 Com. Contr. 2; 5 East's R. 16. To render an agreement complete, six

things must concur; there must be, 1, a person able to contract; 2, a person able to be contracted with; 3, a thing to be contracted for; 4, a lawful consideration, or *quid pro quo;* 5, clear and explicit words to express the agreement; 6, the assent of the contracting parties. Plowd. 161; Co. Litt. 35, b. As to their form, agreements are of two kinds, 1, by parol, or in writing, as contradistinguished from specialties; 2, by specialty or under seal. In relation to their performance, agreements are *executed* or *executory.* An agreement is executed, when one party has given the other the consideration for it; as if the buyer pay the price of the thing purchased. It is also executed when he performs the act required, and the party afterwards agrees to it. An agreement is executory when it is to be performed in future. Agreements are also *conditional* and *unconditional.* They are conditional when some condition must be fulfilled before they can have any effect; as if A B agrees to buy the house of C D at such a price as shall be fixed on it by E F, there is no agreement until E F shall fix the price; they are unconditional when there is no condition attached.

The writing or instrument containing an agreement is also called an agreement, and sometimes articles of agreement. Vide *Contract; Deed; Guaranty; Parties to Contracts.*

AGRI. Arable land in the common fields. Cunn. Dict. h. t.

AGRICULTURE. The art of cultivating the earth in order to obtain all the divers things which it can produce; and particularly what is useful to man for his food, as grain, fruits and the like; or to his clothing, as cotton, flax, and all other things which are produced by the labour of man. Domat, Dr. Pub. liv. tit. 14, s. 1, n. 1.

AID PRAYER, *English law,* is a petition to the court calling in help from another person who has an interest in the matter in dispute. For example, a tenant for life, by the courtesy or for years, being impleaded, may pray aid of him in reversion; that is, desire the court that he may be called by writ to allege what he thinks proper for the maintenance of the right of the person calling him, and of his own. F. N. B. 50.

AIDERS, *crim. law.* Those who assist, aid or abet the principal, and who are principals in the second degree. 1 Russell, 21.

AIDS, *Engl. law.* Formerly they were certain sums of money granted by the tenant to his lord in times of difficulty and distress; but, as usual in such cases, what was received as a gratuity by the rich and powerful from the weak and poor, was soon claimed as a matter of right; and aids became a species of taxes to be paid by the tenant to his lord, in these cases: 1. To ransom the lord's person, when taken prisoner; 2. To make the lord's eldest son a knight; 3. To marry the lord's eldest daugther, by giving her a suitable portion. The first of these remained uncertain; the other two were fixed by act of parliament at twenty shillings each, being the supposed twentieth part of a knight's fee. 2 Bl. Com. 64.

AILE or AYLE, *domestic relations.* This is a corruption of the French word *aïeul*, grandfather, *avus*, 3 Bl. Com. 186.

AIR, is that fluid transparent substance which surrounds our globe. No property can be had in the air, it belongs equally to all men, being indispensable to their existence. To poison or materially to change the air, to the annoyance of the public, is a nuisance. Cro. Car. 510; 2 Ld. Raym. 1163; 1 Burr. 333; 1 Str. 686; Hawk. B. 1, c. 75, s. 10; Dane's Ab. Index, h. t. Vide *Nuisance.*

AJUTAGE. A conical tube used

in drawing water through an aperture, by the use of which the quantity of water drawn is much increased. When a privilege to draw water from a canal, through the forebay or tunnel, by means of an aperture has been granted, it is not lawful to add an *ajutage*, unless such was the intention of the parties. 2 Whart. R. 477.

ALABAMA. The name of one of the new states of the United States of America. This state was admitted into the Union by the resolution of congress, approved December 14th, 1819, 3 Sto. L. U. S. 1804, by which it is resolved that the state of Alabama shall be one, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever. The convention which framed the constitution in this state, assembled at the town of Huntsville, on Monday the fifth day of July, 1819, and continued in session by adjournment, until the second day of August, 1819, when the constitution was adopted. The powers of the government are divided by the constitution into three distinct departments; and each of them confided to a separate body of magistracy, to wit: those which are legislative, to one; those which are executive, to another; and those which are judicial, to another. Art. 2, s. 1.—1st. The *legislative* power of the state is vested in two distinct branches; the one styled the senate, the other the house of representatives, and both together, the general assembly of the state of Alabama. 1. The *senate* is never to be less than one-fourth, nor more than one-third of the number, of the whole number of representatives. Senators are chosen by the qualified electors for the term of three years, at the same time, in the same manner, and at the same place, where they vote for members of the house of representatives; one-third of the whole number of senators are elected every year. Art. 3, s. 12.—2. The *house of representatives* is to consist of not less than forty-four, nor more than sixty members, until the number of white inhabitants shall be one hundred thousand; and after that event, the whole number of representatives shall never be less than sixty, nor more than one hundred. Art. 3, s. 9. The members of the house of representatives are chosen by the qualified electors for the term of one year, from the commencement of the general election, and no longer. 2. The supreme *executive* power is vested in a chief magistrate, styled the governor of the state of Alabama. He is elected by the qualified electors, at the time and places when they respectively vote for representatives; he holds his office for the term of two years from the time of his installation, and until a successor is duly qualified; and is not eligible more than four years in any term of six years. Art. 4. He is invested, among other things, with the veto power. Ib. s. 16. In cases of vacancies, the president of the senate acts as governor, Art. 4, s. 18.—3d. The *judicial* power is vested in one supreme court, circuit courts to be held in each county in the state, and such inferior courts of law and equity, to consist of not more than five members, as the general assembly may, from time to time direct, ordain and establish. Art. 5, s. 1.

ALBA FIRMA, *Eng. law.* When quit rents were reserved payable in silver or white money, they were called *white rents*, or *blanch farms*, *reditus albi*. When they were reserved payable in work, grain, or the like, they were called *reditus nigri*, or *black mail*. 2 Inst. 19.

ALBINATUS JUS. In the ancient French law, the right of the

crown to all the personal property of which an alien died possessed in France was so called, *droit d'aubaine*. This unjust law was swept away with multitudes of others of a similar character, during the French revolution.

ALCADE, *Span. law*, the name of a judicial officer in Spain, and in those countries which have received the body of their laws from those of Spain.

ALDERMAN, is an officer, generally appointed or elected in towns corporate or cities, possessing various powers in different places. The aldermen of the cities of Pennsylvania, possess all the powers and jurisdictions, civil and criminal, of justices of the peace. They are besides, in conjunction with the respective mayors or recorders, judges of the mayor's courts. Among the Saxons there was an officer called the *ealderman*, *ealdorman*, or *alderman*, which appellation signified literally elderman. Like the Roman senator he was so called, not on account of his age, but because of his wisdom and dignity, *non propter ætatum sed propter sapientiam et dignitatem*. He presided with the bishop at the scyregemote, and was, ex officio, a member of the witenagemote. At one time he was a military officer, but afterwards his office was purely judicial. There were several kinds of aldermen, as king's alderman, alderman of all England, alderman of the county, alderman of the hundred, &c., to denote difference of rank and jurisdiction.

ALEATORY CONTRACTS, *civil law*. A mutual agreement of which the effects, with respect both to the advantages and losses, whether to all the parties, or to some of them, depend on an uncertain event. Civ. Code of Louis. art. 2951. These contracts are of two kinds; namely, 1. When one of the parties exposes himself to lose something which will be a profit to the other, in consideration of a sum of money which the latter pays for the risk. Such is the contract of insurance; the insurer takes all the risk of the sea, and the assured pays a premium to the former for the risk which he runs.—2. In the second kind, each runs a risk which is the consideration of the engagement of the other; for example, when a person buys an annuity, he runs the risk of losing the consideration, in case of his death soon after, but he may live so as to receive three times the amount of the price he paid for it. Merlin Répert. mot Aléatoire.

ALER SANS JOUR or *aller sans jour*, *in practice*. A French phrase which means *go without day;* and is used to signify that the case has been finally dismissed the court, because there is no further day assigned for appearance. Kitch. 146.

ALFET, *obsolete*. A vessel in which hot water was put for the purpose of dipping a criminal's arms in it up to the elbow.

ALIA ENORMIA, *pleading*. And other wrongs. In trespass the declaration ought to conclude "and other wrongs to the said plaintiff then and there did, against the peace," &c. Under this allegation of *alia enormia*, some matters may be given in evidence in aggravation of damages, though not specified in other parts of the declaration. Bull. N. P. 89; Holt, R. 699, 700. For example, a trespass for breaking and entering a house, the plaintiff may in aggravation of damages give in evidence the debauching of his daugher, or the beating of his servants under the general allegation *alia enormia*, &c. 6 Mod. 127. But under the *alia enormia* no evidence of the loss of service, or any other matter which would of itself bear an action; for if it would, it should be stated specially.

In trespass *quare clausum fregit*, therefore, the plaintiff would not, under the above general allegation be permitted to give evidence of the defendant's taking away a horse, &c. Bull. N. P. 89; Holt, R. 700; 1 Sid. 225; 2 Salk. 643; 1 Str. 61; 1 Chit. Pl. 388.

ALIAS, *practice*. This word is prefixed to the name of a second writ of the same kind issued in the same cause; as, when a summons has been issued and it is returned by the sheriff, nihil, and *another* is issued, this is called an alias summons. The term is used to all kinds of writs, as alias fi. fa., alias vend. exp. and the like. *Alias dictus*, otherwise called, a description of the defendant by an addition to his real name of that by which he is bound in the writing; or when a man is indicted and his name is uncertain he may be indicted as A B, alias dictus C D. See 4 John. 118.

ALIBI, *in evidence*. This is a Latin word which signifies *elsewhere*. It is that proof which a party who is accused of having committed a crime or other offence, or done any act at a particular place, produces to show that when the crime or offence was committed or act done, he was *at another place*. This proof is usually made out by the testimony of witnesses, but it is presumed it might be made out in writing, as if the party could prove by a record, properly authenticated, that on the day or at the time in question, he was in another place. If the proof is made out, it is clear he did not commit the crime or offence or do the act. It must be admitted that mere alibi evidence lies under a great and general prejudice, and ought to be heard with uncommon caution; but if it appears to be founded in truth, it is the best negative evidence that can be offered; it is really positive evidence, which in the nature of things necessarily implies a negative; and in many cases, it is the only evidence which an innocent man can offer.

ALIEN, *persons*, is one born out of the jurisdiction of the United States, who has not since been naturalized under their constitution and laws. To this there are some exceptions, as the children of the ministers of the United States at foreign courts. Aliens are subject to *disabilities*, have *rights*, and are bound to perform *duties*, which will be briefly considered. 1 *Disabilities*. An alien cannot in general acquire title to real estate by the descent or by other mere operation of law; and if he purchase land, he may be divested of the fee, upon an inquest of office found. To this general rule there are statutory exceptions in some of the states; in Pennsylvania, Ohio, Louisiana, New Jersey, Rev. Laws, 604, and Michigan, Rev. St. 266, s. 26, the disability has been removed; in North Carolina, (but see Mart. R. 48; 3 Dev. R. 138; 2 Hayw. 104, 108; 3 Murph. 194; 4 Dev. 247,) Vermont and Virginia, by constitutional provision; and in Alabama, 3 Stew. R. 60; Connecticut, act of 1824, Stat. tit. Foreigners, 251; Indiana, Rev. Code, c. 3; act of January 25, 1842; Illinois, Kentucky, 1 Litt. 399; 6 Monr. 266; Maine, Rev. St. tit. 7, c. 93, s. 5; Maryland, act of 1825, ch. 66; 2 Wheat. 259; and Missouri, Rev. Code, 1825, p. 66, by statutory provision, it is partly so. An alien even after being naturalized cannot at any time be president of the United States, or in some states, as in New York, governor; he cannot be a member of congress, till the expiration of seven years after that event. An alien can exercise no political rights whatever; he cannot therefore vote at any political election, fill any office, or serve as a juror, 6 John. R. 332. 2. An alien has a *right* to

acquire personal estate, make and enforce contracts in relation to the same, he is protected from injuries and wrongs, to his person and property, his relative rights and character; he may sue and be sued. 3. He owes a temporary local allegiance, and his property is liable to taxation. Aliens are either alien friends or alien enemies. It is only alien friends who have the rights above enumerated, alien enemies are incapable during the existence of war to sue, and may be ordered out of the country. See generally 2 Kent, Com. 43 to 63; 1 Vin. Ab. 157; 13 Vin. Ab. 414; Bac. Ab. h. t.; 1 Saund. 8 n. 2; Wheat. Dig. h. t.

TO ALIENATE, *estates, titles.* This is a generic term applicable to all those modes of parting with property of which the direct object is to deprive the heirs of the substantial interest in the estate; modes, which it is impossible to enumerate, and which must vary and multiply with the ingenuity of practitioners, and the progress of society. It was, therefore, held, that under a prohibition to alienate, long leases were comprehended. 2 Dow's Rep. 210.

ALIENATION, *in contracts*, is the act whereby an estate is voluntarily resigned by one person, and accepted by another. Co. Litt. 118 b; Cruise Real Prop. tit. 32, c. 1, s. 1. Alienations may be made by deed; by matter of record; and by devise. Alienations by *deed* may be made by *original* or *primary* conveyances, which are those by means of which the benefit or estate is created or first arises; by *derivative* or *secondary* conveyances, by which the benefit or estate originally created, is enlarged, restrained, transferred, or extinguished. These are conveyances by the common law. To these may be added some conveyances which derive their force and operation from the statute of uses. The *original* conveyances are the following: 1. Feoffment; 2. Gift; 3. Grant; 4. Lease; 5. Exchange; 6. Partition: the *derivative* are, 7. Release; 8. Confirmation; 9. Surrender; 10. Assignment; 11. Defeasance: those deriving their force from the statute of uses, are, 12. Covenants to stand seised to uses; 13. Bargains and sale; 14. Lease and release; 15. Deeds to lead or declare the uses of other more direct conveyances; 16. Deeds of revocation of uses. 2 Bl. Com. ch. 20. Vide *Conveyance; Deed.* Alienations by *matter of record* may be, 1. By private acts of the legislature; 2. By grants, as by patents of lands; 3. By fines; 4. By common recovery. Alienations may also be made by *devise*, (q. v.)

ALIENATION OFFICE, *in the English law*, is an office to which all writs of covenants and entries are carried for the recovery of fines levied thereon.

TO ALIENE, *in contracts.* To convey the property of a thing to another. *To aliene in fee*, is to convey the fee simple. *To aliene in mortmain*, is to make over lands or tenements to a religious house or body politic.

ALIMENTS. In the Roman and French law, this word signifies the food, and other things necessary to the support of life, as a dwelling, clothing, and the like. The same name is given to the money allowed for aliments. Dig. 50, 16, 43. By the common law parents and children reciprocally owe each other aliments or maintenance, (q. v.) Vide 1 Bl. Com. 447; Merl. Rép. h. t.; Dig. 25, 3, 5. In the common law the word alimony (q. v.) is used. Vide *Allowance to a Prisoner.*

ALIMONY, is the maintenance or support which a husband is bound to give to his wife upon a separation from her; or the support which either father or mother is bound to

give to his or her children, through this is more usually called maintenance. The causes for granting alimony to the wife are, 1, desertion, (q. v.) 2, cruelty, (q. v.) 4 Desaus. R. 79; 1 M'Cord's Ch. R. 205; 4 Rand. R. 662; 2 J. J. Marsh. R. 324; 1 Edw. R. 62; and 3, divorce, 4 Litt. R. 252; 1 Edw. R. 382; 2 Paige, R. 62; 2 Binn. R. 202; 3 Yeates, R. 56; 3 S. & R. 248; 9 S. & R. 191; 3 John. Ch. R. 519; 6 John. Ch. R. 91. In Louisiana by alimony is meant the nourishment, lodging and support of the person who claims it. It includes education when the person to whom alimony is due is a minor. Civil Code of L. 246. Alimony is granted in proportion to the wants of the person requiring it, and the circumstances of those who are to pay it. By the common law parents and children owe each other alimony. 1 Black. Comm. 447; 2 Com. Dig. 498; 3 Ves. 358; 4 Vin. Ab. 175; Ayl. Parerg. 58; Dane's Ab. Index, h. t.; Dig. 34, 1, 6. Alimony is allowed to the wife, *pendente lite*, almost as a matter of course, whether she be plaintiff or defendant, for the obvious reason that she has generally no other means of living. 1 Clarke's R. 151; but there are special cases where it will not be allowed, as when the wife, pending the progress of the suit, went to her father's who agreed with the husband to support her for services. 1 Clarke's R. 460. See Shelf. on Mar. & Div. 586.

ALLEGATION, *in the English ecclesiastical law;* according to the practice of the prerogative court, the facts intended to be relied on in support of the contested suit are set forth in the plea, which is termed an allegation; this is submitted to the inspection of the counsel of the adverse party, and, if it appear to them objectionable in form or substance, they oppose the admission of it. If the opposition goes to the substance of the allegation, and is held to be well founded, the court rejects it; by which mode of proceeding the suit is terminated without going into any proof of the facts. 1 Phill. 1, n.; 1 Eccl. Rep. 11, n. S. C. See 1 Brown's Civ. Law, 472, 3, n.

ALLEGATION, *in the common law*, is the declaration or statement of a party of what he can prove.

ALLEGATION, *in the civil law*, is the citation or reference to a voucher to support a proposition. Dict. de. Jurisp.; Encyclopédie, mot, Allegation; 1 Brown's Civ. Law, 473, n.

ALLEGATION OF FACULTIES. When a suit is instituted in the English ecclesiastical courts, in order to obtain alimony, before it is allowed an allegation must be made on the part of the wife, stating the property of the husband. This allegation is called an *allegation of faculties*. Shelf. on Mar. & Div. 587.

ALLEGIANCE, is the tie or ligament which binds the citizen to the government, in return for the protection which the government affords him. It is natural, acquired, or local. Natural allegiance is such as is due from all men born within the United States; acquired allegiance is that which is due by a naturalized citizen: it has never been decided whether a citizen can, by expatriation, divest himself absolutely of that character, 2 Cranch, 64; 1 Peters's C. C. Rep. 159; 7 Wheat. R. 283; 9 Mass. R. 461. It seems, however, that he cannot renounce his allegiance to the United States without the permission of the government to be declared by law. But for commercial purposes he may acquire the rights of a citizen of another country, and the place of his domicil determines the character of a party as to trade. 1 Kent, Com. 71; Com. Rep. 677; 2 Kent, Com. 42. Local allegiance is that which

is due from an alien, while resident in the United States, for the protection which the government affords him. 1 Bl. Com. 366, 372; Com. Dig. h. t.; Dane's Ab. Index, h. t.; 1 East, P. C. 49 to 57.

ALLIANCE, *relationship*, is the union or connexion of two persons or families by marriage, which is also called affinity. This word is derived from the Latin preposition *ad* and *ligare*, to bind. Vide Inst. 1, 10, 6; Dig. 38. 10, 4, 3; and *Affinity*.

ALLIANCE, *international law*, is a contract, treaty, or league, between two sovereigns or states, made to insure their safety and common defence. Alliances made for warlike purposes are divided in general into defensive and offensive; in the former the nation only engages to defend her ally in case he be attacked; in the latter, she unites with him for the purpose of making an attack, or jointly waging the war against another nation. Some alliances are both offensive and defensive; and there seldom is an offensive alliance which is not also a defensive one. Vattel, B. 3, c. 6, § 79.

ALLOCATIONE FACIENDA, *Eng. law*. A writ commanding that an allowance be made to an accountant, for such moneys as he has lawfully expended in his office. It is directed to the lord treasurer and barons of the exchequer.

ALLOCATUR, *practice*, is the allowance of a writ; e. g. when a writ of *habeas corpus* is prayed for, the judge directs it to be done, by writing the word allowed, and signing his name, this is called the allocatur. In the English courts this word is used to indicate the master or prothonotary's allowance of a sum referred for his consideration, whether touching costs, damages, or matter of account. Lee's Dict. h. t.

ALLODIUM, *estates*, signifies an absolute estate of inheritance in contradistinction to a feud. In this country the title to land is essentially allodial, and every tenant in fee simple has an absolute and perfect title, yet in technical language his estate is called an estate in fee simple, and the tenure free and common socage. 3 Kent. Com. 390. Vide Cruise, Prel. Dis. c. 1, § 13; 2 Bl. Com. 45. For the etymology of this word vide 3 Kent, Com. 398, note.

ALLOTMENT. Distribution by lot; partition; Merl. Rép. h. t.

ALLOWANCE TO A PRISONER. By the insolvent laws of, it is believed, all the states, when a poor debtor is in arrest in a civil suit, the plaintiff is compelled to pay an allowance regulated by law, for his maintenance and support, and in default of such payment, at a time required, the prisoner is discharged. It is scarcely possible to ascertain what sum is allowed in each state, and it will not, therefore, be attempted to state it; in the city and county of Philadelphia, the plaintiff is bound to pay to the gaoler one dollar and twenty-six cents on the Monday of every week. Notice must be given the plaintiff before the defendant can be discharged.

ALLOY, is an inferior metal used with gold and silver in making coin or public money. The act of congress of 2d of April, 1792, sect. 12, directs that the standard for all gold coins of the United States, shall be eleven parts fine to one part of alloy; and sect. 13, that the standard for all silver coins of the United States, shall be one thousand four hundred and eighty-five parts fine, to one hundred and seventy-nine parts alloy. 1 Story's L. U. S. 230.

ALLUVIAL, belonging to a deluge or alluvion; as *alluvial soil*, i. e. soil that has been brought to other lands by means of floods.

ALLUVION is the additions made

to land by the washing of the sea or rivers. The characteristic of alluvion is its imperceptible increase, so that it cannot be perceived how much is added in each moment of time. What is taken from one side is usually carried on the opposite bank; in cases where the change is so gradual as not to be perceived in any one moment of time, the proprietor whose bank on the river is increased is entitled to the addition. Alluvion differs from avulsion, (q. v.) in the latter the change is sudden and perceptible. See 2 Bl. Com. 262, and note by Chitty; 1 Swift's Dig. 111; Coop. Just. lib. 2, t. 1; Angell on Water Courses, 219; 3 Mass. R. 352; 1 Gill & Johns. R. 249; Schultes on Aq. Rights, 116; 2 Amer. Law Journ. 282, 393; Angell on Tide Waters, 213; Inst. 2, 1, 20; Dig. 41, 1, 7; Dig. 39, 2, 9; Dig. 6, 1, 23; 41, 1, 5.

ALLY, *international law*, is a power which has entered into an alliance with another power. A citizen or subject of one of the powers in alliance is sometimes called an ally; for example, the rule which renders it unlawful for a citizen of the United States to trade or carry on commerce with an enemy, also precludes an ally from similar intercourse. 4 Rob. Rep. 251; 6 Rob. Rep. 405; Dane's Ab. Index, h. t.

ALMANAC. A table or calendar, in which are set down the revolutions of the seasons, the rising and setting of the sun, the phases of the moon, the most remarkable conjunctions, positions and phenomena of the heavenly bodies, the month of the year, the days of the month and week, and a variety of other matter. The courts will take judicial notice of the almanac, for example, whether a certain day of the month was on a Sunday or not. Vin. Ab. h. t.; 6 Mod. 41; Cro. Eliz. 227, pl. 12; 12 Vin. Ab. Evidence (A b, 4.) In dating instruments some sects, the Quakers, for example, instead of writing January, February, March, &c., use the terms, First month, Second month, Third month, &c., and these are equally valid in such writings. Vide 1 Smith's Laws of Pennsylvania, 217.

ALMS. In its most extensive sense this term comprehends every species of relief bestowed upon the poor, and, therefore, including all charities. In a more limited sense it signifies what is given by public authority for the relief of the poor. Shelford on Mortmain, 802, note (*x*); 1 Dougl. Election Cas. 370; 2 Id. 107; Heywood on Elections, 263.

TO ALTER. To change. Alterations are made either in the contract itself, or the instrument which is evidence of it. The contract may at any time be altered with the consent of the parties, and the alteration may be either in writing or not in writing. It is a general rule that the terms of a contract under seal, cannot be changed by a parol agreement. Cooke, 500; 3 Blackf. R. 353; 4 Bibb, 1. But it has been decided that an alteration of a contract by specialty, made by parol, makes it all parol. 2 Watts, 451; 1 Wash. R. 170; 4 Cowen, 564; 3 Harr. & John. 438; 9 Pick. 298; 1 East, R. 619; but see 3 S. & R. 579. When the contract is in writing, but not under seal, it may be varied by parol, and the whole will make but one agreement. 9 Cowen, 115; 5 N. H. Rep. 99; 6 Harr. & John. 38; 18 John. 420; 1 John. Cas. 22; 5 Cowen, 506; Pet. C. C. R. 221; 1 Fairf. 414. For alteration of instruments see *Erasure; Interlineation.* See, generally, 7 Greenl. 76, 121, 394; 15 John. 200; 2 Penna. R. 454.

ALTERNAT, the name of a usage among diplomatists by which the rank and places of different powers,

who have the same rights and pretentions to precedence, are changed, from time to time, either in a certain regular order, or one determined by lot. In drawing up treaties and conventions, for example, it is the usage of certain powers to alternate, both in the preamble and the signatures, so that each power occupies, in the copy intended to be delivered to it, the first place. Wheat. Intern. Law, pt. 2, c. 3, § 4.

ALTERNATIVE. Vide *Election; Obligation; Alternative.*

ALTIUS NON TOLLENDI, *civil law*, is the name of a servitude due by the owner of a house, by which he is restrained from building beyond a certain height. Dig. 8, 2, 4, and l. 12, 17, 25.

ALTIUS TOLLENDI, *civil law.* The name of a servitude which consists in the right, to him who is entitled to it, to build his house as high as he may think proper. In general, however, every one enjoys this privilege, unless he is restrained by some contrary title.

ALTO ET BASSO, high and low. This phrase is applied to an agreement made between two contending parties to submit all matters in dispute, alto et basso, to arbitration.

ALUMNUS, *civil law.* A child which one has nursed; a foster child. Dig. 40, 2, 14.

AMBASSADOR, *international law*, is a public minister sent abroad by some sovereign state or prince, with a legal commission and authority to transact business on behalf of his country with the government to which he is sent. He is a minister of the highest rank, and represents the person of his sovereign. 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's Com. 39, n. Ambassadors, when acknowledged as such, are exempted absolutely from all allegiance, and from all responsibility to the laws. If, however, they should be so regardless of their duty, and of the object of their privilege, as to insult or openly to attack the laws of the government, their functions may be suspended by a refusal to treat with them, or application can be made to their own sovereign for their recall, or they may be dismissed, and required to depart within a reasonable time. By fiction of law, an ambassador is considered as if he were out of the territory of the foreign power; and it is an implied agreement among nations, that the ambassador, while he resides in the foreign state, shall be considered as a member of his own country, and the government he represents has exclusive cognizance of his conduct and control of his person. The attendants of the ambassador are attached to his person, and the effects in his use are under his protection and privilege; and, generally, equally exempt from foreign jurisdiction.

Ambassadors are ordinary or extraordinary. The former designation is exclusively applied to those sent on permanent missions, the latter to those employed on particular or extraordinary occasions, or residing at a foreign court for an indeterminate period. Vattel, Droit des Gens, l. 4, c. 6, §§ 70–79.

The act of Congress of April 30th, 1790, s. 25, makes void any writ or process sued forth or prosecuted against any ambassador authorised and received by the president of the United States, or any domestic servant of such ambassador; and the 25th section of the same act punishes any person who shall sue forth or prosecute such writ or process, and all attorneys and solicitors prosecuting or soliciting in such case, and all officers executing such writ or process with an imprisonment not ex-

ceeding three years, and a fine at the discretion of the court. The act provides that citizens or inhabitants of the United States who were indebted when they went into the service of an ambassador, shall not be protected as to such debt; and it requires also that the names of such servants shall be registered in the office of the secretary of state. The 16th section imposes the like punishment on any person offering violence to the person of an ambassador or other minister. Vide 1 Kent, Com. 14, 38, 182; Rutherf. Inst. b. 2, c. 9; Vatt. b. 4, c. 8, s. 113; 2 Wash. C. C. R. 435; Ayl. Pand. 245; 1 Bl. Com. 253; Bac. Ab. h. t.; 2 Vin. Ab. 286; Grot. lib. 2, c. 8, 1, 3; 1 Whart. Dig. 382; 2 Id. 314; Dig. l. 50, t. 7; Code, l. 10, t. 63, l. 4.

AMBIDEXTER. It is intended by this Latin word to designate one who plays on both sides; in a legal sense it is taken for a juror or embraceor who takes money from the parties for giving his verdict. This is seldom or never done in the United States.

AMBIGUITY, *contracts, construction.* When an expression has been used in an instrument of writing which may be understood in more than one sense, it is said there is an ambiguity. There are two sorts of ambiguities of words, *ambiguitas latens* and *ambiguitas patens.* The first occurs where the deed or instrument is sufficiently certain and free from ambiguity, but the ambiguity is produced by something extrinsic, or some collateral matter out of the instrument; for example, if a man devise property to his cousin A B, and he has two cousins of that name, in such case parol evidence will be received to explain the ambiguity. The second or patent ambiguity occurs when a clause in a deed, will, or other instrument, is so defectively expressed, that a court of law, which has to put a construction on the instrument, is unable to collect the intention of the party. In such case evidence of the declaration of the party cannot be admitted to explain his intention, and the clause will be void for its uncertainty. In Pennsylvania this rule is somewhat qualified. 3 Binn. 587; 4 Binn. 482. Vide generally, Baç. Max. Reg. 23; 1 Phil. Ev. 410 to 420; 3 Stark. Ev. 1021; 1 Com. Dig. 575; Sugd. Vend. 113. The civil law on this subject will be found in Dig. lib. 50, t. 17, l. 67; lib. 45, t. 1, l. 8; and lib. 22, t. 1, l. 4.

AMBULATORIA VOLUNTAS, a phrase used to designate that a man has the power to alter his will or testament as long as he lives.

AMENABLE. Responsible; subject to answer in a court of justice; liable to punishment.

AMENDE HONOURABLE, *in the old English law.* A penalty imposed upon a person by way of disgrace or infamy, as a punishment for any offence, or for the purpose of making reparation for any injury done to another, as the walking into church in a white sheet, with a rope about the neck, and a torch in the hand, and begging the pardon of God or the king, or any private individual for some delinquency. A punishment somewhat similar to this, and which bore the same name, was common in France; it was abolished by the law of the 25th of September, 1791. Merlin, Rép. de Jur. h. t.

AMENDMENT, *legislation,* is an alteration or change of something proposed in a bill. Either house of the legislature has a right to make amendments; but, when so made, they must be sanctioned by the other house before they can become a law. The senate has no power to originate any *money bills,* (q. v.) but may propose and make amendments to such as have passed the house of re-

presentatives. Vide *Congress; Senate.*

The constitution of the United States, art. 5, and the constitutions of some of the states, provide for their amendment. The provisions contained in the constitution of the United States are as follows:—"Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a Convention for proposing amendments, which, in either case, shall be valid, to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress: Provided, that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall, in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate."

AMENDMENT, *practice*, is the correction by the court of an error committed in the progress of a cause. Amendments at common law, independently of any statutory provision on the subject, are in all cases in the discretion of the court, for the furtherance of justice; they may be made while the proceedings are in paper, that is, until judgment is signed, and during the term in which it is signed; for until at the end of the term the proceedings are considered only in *fieri*, and consequently subject to the control of the court; 2 Burr. 756; 3 Bl. Com. 407; 1 Salk. 47; 2 Salk. 566; 3 Salk. 31; Co. Litt. 260; and even after judgment is signed, and up to the latest period of the action, amendment is, in most cases, allowable at the discretion of the court, under certain statutes passed for allowing amendments of the record; and in late times the judges have been much more liberal than formerly, in the exercise of this discretion. Amendments are, however, always limited by due consideration of the rights of the opposite party; and, when by the amendment he would be prejudiced or exposed to unreasonable delay, it is not allowed. Vide Bac. Ab. h. t.; Com. Dig. h. t.; Viner's Ab. h. t.; 2 Arch. Pr. 230; Grah. Pr. 524; Steph. Pl. 97; 2 Sell. Pr. 453; 3 Bl. Com. 406.

AMENDS is a satisfaction given by a wrong doer to the party injured for a wrong committed. 1 Lilly's Reg. 81. Upon being notified of an intended suit against them, justices of the peace, and some other officers, may make a tender of amends, and if the plaintiff recover no more than the amount tendered, he shall pay the costs.

AMERCEMENT, *in practice.* A pecuniary penalty imposed upon a person who is in misericordia; as, for example, when the demandant or plaintiff, tenant or defendant *se retraxit*, or *recessit in contemptum curiæ.* 8 Co. 58; Bar. Ab. Fines and Amercements. Formerly if the sheriff failed in obeying the writs, rules, or orders of the court, he might be amerced; that is, a penalty might be imposed upon him; but this practice has been superseded by attachment. In New Jersey and Ohio, the sheriff may, by statutory provision, be amerced for making a return contrary to the provision of the statute. Coxe, 136, 169; 6 Halst. 334; 3 Halst. 270, 271; 5 Halst. 319; 1 Green, 159, 341; 2 Green, 350; 2 South. 433; 1 Ham. 275; 2 Ham. 503; 6 Ham. 452; Wright, 720.

AMERCIAMENT, or AMERCEMENT, *in the English law.* A pecuniary punishment arbitrarily im-

posed by some lord or count, in distinction from a fine, which is expressed according to the statute. Kitch. 78.—*Amerciament royal*, when the amerciament is made by the sheriff, or any other officer of the king. 4 Bl. Com. 372.

AMI. Vide *Prochein amy*.

AMICABLE ACTION, *in Pennsylvania practice*, is an action entered by agreement of parties on the dockets of the courts; when entered, such action is considered as if it had been adversely commenced, and the defendant had been regularly summoned. An amicable action may be entered by attorney, independently of the provisions of the act of 1806. 8 S. & R. 567.

AMICUS CURIÆ, *a friend of the court, in practice*. One who as a stander by, when a judge is doubtful or mistaken in a matter of law, may inform the court. 2 Inst. 178; 2 Vin. Abr. 475; and any one, as *amicus curiæ*, may make an application to the court in favour of an infant, though he be no relation, 1 Ves. Sen. 313.

AMNESTY, *government*, is an act of oblivion of past offences, granted by the government to those who have been guilty of any neglect or crime, usually upon condition that they return to their duty within a certain period. An amnesty is either express or implied; it is express when so declared in direct terms; and it is implied when a treaty of peace is made between contending parties. Vide Vattel, liv. 4, c. 2, § 20, 21, 22; Encyclop. Amer. h. t.

AMORTIZATION, *contracts, in the English law*. An alienation of lands or tenements in mortmain, 2 stat. Ed. 1.

AMORTISE, *in contracts:* to alien lands in mortmain.

AMOTION, in corporations and companies, is the act of removing an officer from his office; it differs from disfranchisement which is applicable to *members* as such. Willc. on Corp. n. 708. The power of amotion is incident to a corporation, 2 Str. 819; 1 Burr. 539. In Rex. v. Richardson, Lord Mansfield specified three sorts of offences for which an officer might be discharged; first, such as have no immediate relation to the office, but are in themselves of so infamous a nature, as to render the offender unfit to execute any public franchise; secondly, such as are only against his oath, and the duty of his office as a corporator, and amount to breaches of the tacit condition annexed to his office; thirdly, the third offence is of a mixed nature; as being an offence not only against the duty of his office, but also a matter indictable at common law. 2 Binn. R. 448. And Lord Mansfield considered the law as settled, that though a corporation has express power of amotion, yet for the first sort of offences, there must be a previous indictment and conviction; and that there was no authority since Bagg's Case, 11 Rep. 99, which says that the power of trial as well as of amotion, for the second offence is not incident to every corporation. He also observed: "We think that from the reason of the thing, from the nature of the corporation, and for the sake of order and good government, this power is incident as much as the power of making by-laws." Doug. 149.

See generally, Willcock on Mun. Corp. 268; 6 Conn. Rep. 532; 6 Mass. R. 462; Ang. & Am. on Corpor. 236.

AMOTION, *tort*. An amotion of possession from an estate is an ouster which happens by a species of disseisin or turning out of the legal proprietor before his estate is determined. 3 Bl. Com. 198, 199. Amotion is also applied to personal chattels where they are taken unlawfully out of the possession of the owner, or of

one who has a special property in them.

AMPLIATION, *civil law*. A deferring of judgment until the cause is further examined. In this case the judges pronounced the word *amplius*, or by writing the letters N. L. for *non liquet*, signifying that the cause was not clear. In practice it is usual in the courts, when time is taken to form a judgment to enter a *curia advisare vult; cur. adv. vult*, (q. v.)

AMPLIATION, *French law*. It signifies the giving a duplicate of an acquittance or other instrument, in order that it may be produced in different places. The copies which notaries make out of acts passed before them, and which are delivered to the parties, are also called *ampliations*. Diet. de Jur. h. t.

AMY or *ami*, a French word signifying *friend*. *Prochein amy*, (q. v.) the next friend. *Alien amy*, a foreigner, citizen or subject to some friendly power or prince.

AN, JOUR, ET WASTE. See *Year, day, and waste*.

ANALOGY, *construction*, is the similitude of relations which exist between things compared; it is the induction made from a known fact. To reason analogically is to draw conclusions based on this similitude of relations, on the resemblance, on the connexion which is perceived between the objects compared. "It is this guide" says Toullier, "which leads the lawgiver like other men, without his observing it. It is analogy which induces us with reason to suppose that following the example of the Creator of the universe, the lawgiver has established general and uniform laws, which it is unnecessary to repeat in all analagous cases." Dr. Civ. Fr. liv. 3, t. 1, c. 1. Vide Ang. on Adv. Enjoym. 30, 31; Hale's Com. Law, 141. Analogy has been declared to be an argument or guide in forming legal judgments, and is very commonly a ground of such judgments. 7 Barn. & Cres. 168; 3 Bing. R. 265; 8 Bing. R. 557, 563; 3 Atk. 313; 1 Eden's R. 212; 1 W. Bl. 151; 6 Ves. jr. 675, 676; 3 Swanst. R. 561; 1 Turn. & R. 103, 338; 1 R. & M. 352, 475, 477; 4 Burr. R. 1962, 2022, 2068; 4 T. R. 591; 4 Barn. & Cr. 855; 7 Dowl. & Ry. 251; Cas. T. Talb. 140; 3. P. Wms. 391; 3 Bro. C. C. 639, n.

ANATOCISM, *in the civil law*, is usury, which consists in taking interest on interest, or receiving compound interest. This is forbidden. Code, lib. 4, t. 32, 1. 30.

Courts of equity have considered contracts for compounding interest illegal and within the statute of usury. Cas. T. Talbot, 40; et vide Com. Rep. 349; Mass. 247; 1 Ch. Cas. 129; 2 Ch. Cas. 35. And contra 1 Vern. 190. But when the interest has once accrued, and a balance has been settled between the parties, they may lawfully agree to turn such interest into principal, so as to carry interest *in futuro*. Com. on Usury, ch. 2, s. 14, p. 146 et seq.

ANCESTOR, *descents*, one who has preceded another in a direct line of descent; an ascendant. It differs from the word predecessor, for ancestor is applied to natural persons, while predecessor refers to a body corporate. Vide 2 Black. Com. 209; Bac. Ab. h. t.; 1 Ayl. Pand. 58.

ANCESTREL. What relates to or has been done by one's ancestors, as homage ancestrel, and the like.

ANCHORAGE, *mer. law*. A toll paid for every anchor cast from a ship into a river, and sometimes a toll bearing this name is paid although there be no anchor cast. This toll is said to be incident in almost every port. 1 Wm. Bl. 413; 2 Chit. Com. Law, 16.

ANCIENT DEMESNE, *Engl. law*, are those lands which either were reserved to the crown at the

original distribution of landed property, or such as came to it afterwards, by forfeiture or other means. 1 Salk. 57; Hob. 88; 4 Inst. 264; 1 Bl. Com. 286; Bac. Ab. h. t.; F. N. B. 14.

ANCIENT LIGHTS, *estates*, are windows which have been opened for twenty years and enjoyed without molestation by the owner of the house. 5 Har. & John. 477; 12 Mass. R. 157, 220. It is proposed to consider, 1, How the right of ancient light is gained. 2, What amounts to interruption of an ancient light. 3, The remedy for obstructing an ancient light.

§ 1. How the right of opening or keeping a window open is gained. 1. By grant. 2. By lapse of time. Formerly it was holden that a party could not maintain an action for a nuisance to an ancient light, unless he had gained a right to the window by prescription. 1 Leon. 188; Cro. Eliz. 118. But the modern doctrine is, that upon proof of an adverse enjoyment of lights for twenty years or upwards, unexplained, a jury may be directed to presume a right by grant, or otherwise, 2 Saund. 175, a; 12 Mass. 159; 1 Esp. R. 148. See also 1 Bos. & Pull. 400; 3 East, 299; Phil. Ev. 126; 11 East, 372; Esp. Dig. 636. But if the window was opened during the seisin of a mere tenant for life, or a tenancy for years, and the owner in fee did not acquiesce in, or know of the use of the light, he would not be bound. 11 East, 372; 3 Camp. 444; 4 Campb. 616. If the owner of a close builds a house upon one half of it, with a window lighted from the other half, he cannot obstruct lights on the premises granted by him; and in such case no lapse of time is necessary to confirm the grantee's right to enjoy them. 1 Vent. 237, 289; 1 Lev. 122; 1 Keb. 553; Sid. 167, 227; L. Raym. 87; 6 Mod. 116; 1 Price, 27; 12 Mass. 159; Rep. 24; 2 Saund. 114, n. 4; Hamm. N. P. 202; Selw. N. P. 1090; Com. Dig. Action on the case for a Nuisance, A. Where a building has been used twenty years to one purpose, (as a malt house,) and it is converted to another (as a dwelling-house,) it is entitled in its new state only to the same degree of light which was necessary in its former state. 1 Campb. 322; and see 3 Campb. 80. It has been justly remarked, that the English doctrine as to ancient lights can hardly be regarded as applicable to narrow lots in the new and growing cities of this country; for the effect of the rule would be greatly to impair the value of vacant lots, or those having low buildings upon them, in the neighbourhood of other buildings more than twenty years old. 3 Kent, Com. 446, n.

§ 2. What amounts to an interruption of an ancient light. Where a window has been completely blocked up for twenty years, it loses its privilege. 3 Camp. 514. An abandonment of the right by express agreement, or by acts from which an abandonment may be inferred, will deprive the party having such ancient light of his right to it. The building of a blank wall where the lights formerly existed, would have that effect. 3 B. & Cr. 332. See Ad. & Ell. 325.

§ 3. Of the remedy for interrupting an ancient light. 1. An action on the case will lie against a person who obstructs an ancient light. 9 Co. 58; 2 Rolle's Abr. 140, l. Nusans, G. 10. And see Bac. Ab. Actions on the Case, (D); Carth. 454; Comb, 481; 6 Mod. 116.—2. Total deprivation of light is not necessary to sustain this action, and if the party cannot enjoy the light in so free and ample a manner as he did before, he may sustain the action, but there should be some sensible diminution

of the light and air, 4 Esp. R. 69.—3. The building a wall which merely obstructs the sight is not actionable, 9 Co. 58, b; 1 Mod. 55.—4. Nor is the opening windows and destroying the privacy of the adjoining property; but such new window may be immediately obstructed to prevent a right to it being acquired by twenty years' use. 3 Campb. 82.

See generally on this subject, 1 Nels. Abr. 56, 7; 16 Vin. Abr. 26; 1 Leigh's N. P. c. 6, s. 8, p. 558; 12 E. C. L. R. 218; 24 Id. 401; 21 Id. 373; 1 Id. 161; 10 Id. 99; 28 Id. 143; 23 Am. Jur. 46 to 64; 3 Kent, Com. 446, 2nd ed.; 7 Wheat. R. 109; 19 Wend. R. 309; Math. on Pres. 318 to 323.

ANCIENT WRITINGS, *evidence.* Deeds, wills, and other writings more than thirty years old, are considered ancient writings. They may in general be read in evidence, without any other proof of their execution than that they have been in the possession of those claiming rights under them. Tr. per Pais, 370; 7 East, R. 279; 4 Esp. R. 1; 9 Ves. Jr. 5; 3 John. R. 292; 1 Esp. R. 275; 5 T. R. 259; 2 T. R. 466; 2 Day's R. 280. But in the case of deeds possession must have accompanied them. Plowd. 6, 7. See Math. Pres. 271, n. (2).

ANCIENTLY, *in the English law*, a term for eldership or seniority used in the statute of Ireland, 14 Hen. 8.

ANCIENTS, *in the English law.* A term for gentlemen in the Inns of Courts who are of a certain standing. In the middle temple all who have passed their readings are termed ancients. In Gray's Inn, the ancients are the oldest barristers; besides which the society consists of benchers, barristers and students. In the Inns of Chancery, it consists of ancients, and students or clerks.

ANIENS. In some of our law books signifies void, of no force. F. N. B. 214.

ANIMAL, *property.* A name given to every animated being provided with digestive organs. In law it signifies all animals except those of the human species. Animals have the power of locomotion, or they are deprived of that faculty. Those which possess the locomotive power, are distinguished into such as are *domitæ*, and such as are *feræ naturæ.* It is laid down, that in tame or domestic animals, such as horses, kine, sheep, poultry, and the like, a man may have an absolute property, because they continue perpetually in his possession, and occupation, and will not stray from his house and person unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property. 2 Bl. Com. 390; 2 Mod. 319. But in animals *fere naturæ*, a man can have no absolute property; his property in them is qualified; they belong to him only while they continue in his keeping or actual possession; for if at any time they regain their natural liberty, his property instantly ceases, unless they have *animum revertendi*, which is only to be known by their usual habit of returning. 2 Bl. Com. 396; 3 Binn. 546; Bro. Ab. Propertie, 37; Com. Dig. Biens, (F); 7 Co. 17 b; 1 Ch. Pr. 87; Inst. 2, 1, 15.

The owner of a mischievous animal, known to him to have this vice, is responsible, when he permits him to go at large and do mischief, for the damages he may occasion, 2 Esp. Cas. 482; 4 Campb. 198; 1 Starkie's Cas. 285; 1 Holt, 617; 2 Str. 1264; Lord Raym. 110; B. N. P. 77; 1 B. & A. 620; 2 C. M. & R. 496; 5 C. & P. 1; S. C. 24 E. C. L. R. 187. This principle agrees with the civil law. Domat, Lois Civ. liv. 2, t. 8, s. 2. And any person may justify the killing of such

ferocious animal, 9 Johns. 233; 10 Johns. 365; 13 Johns. 312. The owner of such an animal may be indicted for a common nuisance, 1 Russ. Cr. 303; Ch. Cr. Law, 643; Burn's Just., Nuisance, 1. In Louisiana, the owner of an animal is answerable for the damage he has caused; but if the animal had been lost, or had strayed more than a day, he may discharge himself from this responsibility, by abandoning him to the person who has sustained the injury; except where the master has turned loose a dangerous or noxious animal; for then he must pay all the harm done, without being allowed to make the abandonment. Civ. Code, art. 2301.

ANIMALS OF A BASE NATURE, are such animals, which though they may be reclaimed, are not such that at common law a larceny may be committed of them, by reason of the baseness of their nature. Some animals which are now usually tamed come within this class, as dogs and cats; and others which, though wild by nature, and oftener reclaimed by art and industry, clearly fall within the same rule; as, bears, foxes, apes, monkeys, polecats, ferrets, and the like, 3 Inst. 109; 1 Hale, P. C. 511, 512; 1 Hawk. P. C. c. 33, s. 36; 4 Bl. Com. 236; 2 East, P. C. 614.

ANIMUS, the intent, the mind with which a thing is done, as animus cancellandi, the intention of cancelling; animus furandi, the intention of stealing; animus manendi, the intention of remaining; animus morandi, the intention or purpose of delaying. Contracts are valid, when legal in other respects, when the parties intended to bind themselves, but when such an intention was absent, they are not binding. Whether the act of a man, when in appearance criminal, is so or not, depends upon the intention with which it was done. Vide *Intention.*

ANIMUS FURANDI, *crim. law*, an intention to steal. In order to constitute larceny, (q. v.) the thief must take the property *animo furandi*, but this is expressed in the definition of larceny by the word felonious, 3 Inst. 107; Hale, 503; 4 Bl. Com. 229. Vide 2 Russ. on Cr. 96; 2 Tyler's R. 272. When the taking of property is lawful, although it may afterwards be converted, *animo furandi*, to the taker's use, it is not larceny, 3 Inst. 108; Bac. Ab. Felony, (C); 14 Johns. R. 294; Ry. & Mood. C. C. 160; Ib. 137; Prin. of Pen. Law, ch. 22, § 3, p. 279, 281.

ANIMUS REVERTENDI, an intention of returning. A man retains his domicil, if he leaves it animo revertendi, 3 Rawle R. 312; 1 Ashm. R. 126; Fost. 97; 4 Bl. Com. 225; 2 Russ. on Cr. 18; Pop. 42, 52; 4 Co. 40.

ANN, or more properly *An.* This is a French word used by some of our old law writers. It signifies year. Vide Com. Dig. h. t.

ANNATES, *eccl. law.* First fruits paid out of spiritual benefices to the pope, being the value of one year's profit.

ANNEXATION, *property*, is the union of one thing to another. In the law relating to fixtures, (q. v.) annexation is actual or constructive. By actual annexation is understood every mode by which a chattel can be joined or united to the freehold. By constructive annexation is understood the union of such things as have been holden parcel of the realty, but which are not actually annexed, fixed, or fastened to the freehold; for example, deeds, or chattels, which relate to the title of the "inheritance." Shep. Touch. 469. Vide Amos & Fer. on Fixtures, 2.

ANNI NUBILES, the age a girl becomes by law fit for marriage, which is twelve.

ANNIENTED, from the French

aneantir; abrogated or made null. Litt. sect. 741.

ANNO DOMINI, *in the year of our Lord*, abbreviated A. D.; the computation of time from the incarnation of our Saviour, which is used as the date of all public deeds in the United States and Christian countries, on which account it is called the "Vulgar æra."

ANNONÆ CIVILES, *civil law.* A species of rent issuing out of certain lands, which were paid to some monastaries.

ANNUAL PENSION. *Annual rent*, in the Scotch law, a yearly profit due to a creditor by way of interest for a given sum of money. *Right of annual rent*, the original right of burdening land with yearly payment for the payment of money.

ANNUITY, *in contracts.* An annuity is a yearly sum of money granted by one party to another in fee for life or years, charging the person of the grantor only. Co. Litt. 144; 1 Lilly's Reg. 89; 2 Bl. Com. 40; 5 M. R. 312. An annuity is an incorporeal hereditament. It is different from a rent charge, with which it is frequently confounded, in this; a rent charge is a burden imposed upon and issuing out of *lands*, whereas an annuity is chargeable only upon the *person*, of the grantee. Bac. Abr. Annuity, A. See for many regulations in England relating to annuities, the stat. 17 Geo. 3, c. 26.

An annuity may be created by contract, or by will.

The first payment of an annuity is to be made at the time appointed in the instrument creating it. In cases where a testator directs the annuity to be paid at the end of the first quarter, or other period before the expiration of the first year after his death, it is then due; but in fact it is not payable by the executor till the end of the year; 3 Mad. Ch. R. 167. When the time is not appointed, as frequently happens in wills, the following distinction is presumed to exist. If the bequest be merely in the form of an annuity, as a gift to a man of "an annuity of one hundred dollars for life," the first payment will be due at the end of the year after the testator's death. But if the disposition be of a sum of money, and the interest to be given as an annuity to the same man for life, the first payment will not accrue before the expiration of the second year after the testator's death. This distinction, though stated from the bench, does not appear to have been sanctioned by express decision. 7 Ves. 96, 97.

The Civil Code of Louisiana makes the following provisions in relation to annuities; namely. The contract of annuity is that by which one party delivers to another a sum of money, and agrees not to reclaim it, so long as the receiver pays the rent agreed upon, art. 2764. This annuity may be perpetual or for life, art. 2765. The amount of the annuity for life can in no case exceed the double of the conventional interest. The amount of the perpetual annuity cannot exceed the double of the conventional interest, art. 2766. Constituted annuity is essentially redeemable, art. 2767. The debtor of a constituted annuity may be compelled to redeem the same: 1, If he ceases fulfilling his obligation during three years: 2, If he does not give the lender the securities promised by the contract, art. 2768. If the debtor should fail, or be in a state of insolvency, the capital of the constituted annuity becomes exigible, but only up to the amount at which it is rated, according to the order of contribution amongst the creditors, art. 2769. A similar rule to that contained in the last article has been adopted in England.

See stat. 6 Geo. 4, c. 16, s. 54 and 108; note to Ex parte James, 5 Ves. 708, 1 Sup. to Ves. Jr. 431; note to Franks v. Cooper, 4 Ves. 763; 1 Supp. to Ves. Jr. 308. The debtor, continues the code, may be compelled by his security to redeem the annuity within the time which has been fixed in the contract, if any time has been fixed, or after ten years if no mention be made of the time in the act, art. 2770. The interest of the sums lent, and the arrears of constituted and life annuity, cannot bear interest but from the day a judicial demand of the same has been made by the creditor, and when the interest is due for at least one whole year. The parties may only agree that the same shall not be redeemed prior to a time which cannot exceed ten years, or without having warned the creditor a time before, which they shall limit. Art. 2771.

See generally, Vin. Abr. Annuity; Bac. Abr. Annuity and Rent; Com. Dig. Annuity; 8 Com. Dig. 909; Doct. Plac. 84; 1 Rop. on Leg. 588; Dict. de Jurisp. aux mots Rentes viagères, Tontine. 1 Harr. Dig. h. t.

ANONYMOUS. Without name. This word is applied to such books, letters or papers, which are published without the author's name. No man is bound to publish his name in connexion with a book or paper he has published; but if the publication is libellous, he is equally responsible as if his name were published.

ANSWER, *pleading in equity*, is a defence in writing made by a defendant, to the charges contained in a bill or information, filed in a court of equity by the plaintiff against him. The word answer involves an ambiguity; it is one thing when it simply replies to a question, another when it meets a charge; the answer in equity includes both senses, and may be divided into an examination and a defence. In that part which consists of an examination, a direct and full answer, or reply, must in general be given to every question asked. In that part which consists of a defence, the defendant must state his case distinctly; but is not required to give information respecting the proofs that are to maintain it. Gresl. Eq. Ev. 16. As a defendant is called by a bill or information to make a discovery of the several charges it contains, he must do so, unless he is protected either by a demurrer, a plea or disclaimer. It may be laid down as an invariable rule, that whatever part of a bill or information is not covered by one of these must be defended by answer. Redesd. Tr. Ch. Pl. 244. In *form* it usually begins, 1st, with its title, specifying which of the defendants it is the answer of, and the names of the plaintiffs in the cause in which it is filed as answer; 2d, it reserves to the defendant all advantages which might be taken by exception to the bill; 3d, the substance of the answer, according to the defendant's knowledge, remembrance, information and belief, then follows, in which the matter of the bill, with the interrogatories founded thereon, are answered, one after the other, together with such additional matter as the defendant thinks necessary to bring forward in his defence, either for the purpose of qualifying, or adding to, the case made by the bill, or to state a new case on his own behalf; 4th, this is followed by a general traverse or denial of all unlawful combinations charged in the bill, and of all other matters therein contained; 5th, the answer is always upon oath or affirmation, except in the case of a corporation, in which case it is under the corporate seal. In *substance* the answer ought to contain, 1st, a statement of facts and not arguments; 2d,

a confession and avoidance, or traverse and denial of the material parts of the bill; 3d, its languuge ought to be direct and without evasion. Vide generally as to answers, Redes. Tr. Ch. Pl. 244 to 254; Coop. Pl. Eq. 312 to 327; Beames Pl. Eq. 34 et seq. For an historical account of this instrument, see 2 Bro. Civ. Law, 371, n.

ANTEDATE. To put a date to an instrument of a time before the time it was written. Vide *Date*.

ANTENATI. Born before. This term is applied to those who were born or resided within the United States before or at the time of the declaration of independence. These had all the rights of citizens. 2 Kent, Com. 51, et seq.

ANTHETARIUS, *obsolete.*—When a man was accused of an offence, and he endeavoured to discharge himself of the fact by recriminating and charging the accuser with the same fact, he was called anthetarius. Jacob, h. t.

ANTICHRESIS, *in contracts.* A word used in the civil law to denote the contract by which a creditor acquires the right of reaping the fruit or other revenues of the immovables given to him in pledge, on condition of deducting annually their proceeds from the interest, if any is due to him, and afterwards from the principal of his debt. Louis. Code, art. 3143; Dict. de Juris. Antichrèse, Mortgage; Code Civ. 2085. Dig. 13, 7, 7; 4, 24, 1; Code, 8, 28, 1.

ANTINOMY. A term used in the civil law to signify the real or apparent contradiction between two laws or two decisions. Merl. Répert. h. t. Vide *Conflict of Laws.*

ANTITHETARIUS, *old English law.* The name given to a man who endeavours to discharge himself of the crime of which he is accused by retorting the charge on the accuser. He differs from an approver (q. v.) in this, that the latter does not charge the accuser but others.

APOSTACY, *Eng. law*, is a total renunciation of the Christian religion, and differs from heresy, (q. v.) This offence is punished by the statute of 9 & 10 W. 3, c. 32. Vide *Christianity.*

APOSTLES. In the British courts of admiralty when a party appeals from a decision made against him, he prays *apostles* from the Judge, which are brief letters of dismission, stating the case, and declaring that the record will be transmitted. 2 Brown's Civ. and Adm. Law, 438.

APPARATOR or APPARITOR, *eccles. law.* An officer or messenger employed to serve the process of the spiritual courts in England.

APPARLEMENT. Resemblance. It is said to be derived from pareillement, French, in like manner. Cunn. Dict. h. t.

APPEAL, *Eng. crim. law.* Is the accusation, in a legal form, of a person for a crime by him committed; or, it is the lawful declaration of another man's crime, before a competent judge, by one who sets his name to the declaration, and undertakes to prove it, upon the penalty which may ensue thereon, Vide Co. Litt. 123 b, 287 b; 5 Burr. R. 2643, 2793; 2 W. Bl. R. 713; 1 B. & A. 405. Appeals of murder, as well as of treason, felony or other offences, together with wager of battle, are abolished by stat. 59 Geo. 3, c. 46.

APPEAL, *practice*, is the act by which a party submits to the decision of a superior court, a cause which has been tried in an inferior tribunal. The appeal generally annuls the judgment of the inferior court, so far that no action can be taken upon it until after the final decision of the cause. Its object is to review the whole case, and to secure a just judgment upon the merits. An appeal differs from proceedings in error, under which the

errors committed in the proceedings are examined, and if any have been committed the first judgment is reversed; because in the appeal the whole case is examined and tried as if it had not been tried before. Vide Dane's Ab. h. t.; Serg. Const. Law, Index, h. t.; and article *Courts of the United States*.

APPEARANCE, *in practice*, signifies the filing common or special bail to an action. The appearance of the parties is no longer (as formerly) by the actual presence in court, either of themselves or their attorneys. It is to be observed, however, that an appearance of this kind is still supposed; and exists in fiction or contemplation of law. But in fact the appearance is effected on the part of the defendant (where he is not arrested) by making certain formal entries in the proper office of the court, expressing his appearance, or, in case of arrest, it may be considered as effected by giving bail to the action. On the part of the plaintiff, no formality expressive of appearance is observed, but upon the appearance of the defendant, effected in the manner above described, both parties are considered as in court. Impey's Pr. 215. The appearance of either party may in general purport to be either in his own person or by attorney, but when he appears by attorney, there ought regularly, and there is always supposed to be, a warrant in writing executed by him for that purpose. There are certain persons, namely, *infants*, *married women* (when sued without their husbands,) and *idiots*, who are incapable of appointing an attorney, to appear for them in court. The appearance and pleadings of such persons must consequently not purport to be by attorney, nor be so entered on record, whether an attorney in fact be employed or not. See 1 Tidd, Pr. 68, 75; 1 Arch. Pr. 22; 2 John. 192; 8 John. 418; 14 John. 417; 5 Pick. 413. The appearance, in common with all other subsequent proceedings supposed to take place in court, should (in accordance with the ancient practice) purport to be in term time. It is to be observed, however, that though the proceedings are expressed as if occurring in term time, yet much business is now, in fact, done during the periods of vacation.

In most suits and prosecutions the proceedings are *managed* by attorneys, and parties in general may prosecute or appear and defend either by person or by attorney, yet there are many cases in which it must *purport otherwise on the pleadings*. For example, infants cannot appoint an attorney, they must therefore prosecute or appear by guardian or prochein amy. An idiot can appear only in person; as plaintiff he may sue in person or by next friend; but a lunatic may, if of full age, appear by attorney, if under age, by guardian. 2 Wms. Saund. 335; Ib. 332 (*a*) n. (4). A feme covert, when sued alone, should defend in person. 3 Wms. Saund. 209 b; and when the cause of action accrued, and she afterwards marries, and she is sued as a feme sole, she must plead her coverture in person, and not by attorney. Co. Litt. 125. When the party pleads to the jurisdiction, he must plead in person. Summary on Pleading, 51; Merrif. Law of Att. 58. A plea of misnomer must always be in person unless it be by special warrant of attorney. 1 Chit. on Pl. 398; Summary on Pleading, 50; 3 Wms. Saund. 209 b.

APPELLANT, *practice*, he who makes an appeal from one jurisdiction to another.

APPELLEE, *practice*. The party in a cause on which an appeal has been made, who is not the appellant.

APPENDANT, is an inheritance

belonging to another inheritance. Land cannot be appendant to land; Co. Litt. 121; 4 Co. 86; an incorporeal hereditament may be appendant to land as a right of way. Appendant differs from appurtenance in this, that the former always arise from prescription, whereas an appurtenance may be created at any time. 1 Tho. Co. Litt. 206; Wood's Inst. 121; Dane's Ab. Index, h. t; 2 Vin. Ab. 594; Com. h. t.

APPENDITIA, from *appendo*, to hang at or on; the appendages or pertinencies of an estate; the appurtenances to a dwelling, &c.; thus *pent-houses* are the *appenditia domus*, &c.

APPOINTMENT, *in chancery practice*, is the act of a person authorised by a will or other instrument to direct how trust property shall be disposed of, directing such disposition agreeably to the general directions of the trust. The appointment must be made in such a manner as to come within the spirit of the power. And although at law the rule only requires that some allotment, however small, shall be given to each person, when the power is to appoint to and among several persons; the rule in equity differs, and requires a real and substantial portion to each, and a mere nominal allotment to one is deemed illusory and fraudulent. When the distribution is left to discretion, without any prescribed rule, as to *such* of the children as the trustee shall think proper, he may appoint to one only, 5 Ves. 857; but if the words be, *amongst* the children as he should think proper, each must have a share, and the doctrine of illusory appointment applies, 4 Ves. 771; Prec. Ch. 256; 2 Vern. 513. Vide, generally, 1 Supp. to Ves. Jr. 40, 95, 201, 235, 237; 2 Id. 127; 1 Vern. 67, n.; 1 Ves. Jr. 310, n.; 4 Kent, Com. 337; Sugd. on Pow. Index, h. t.; 2 Hill. Ab. Index, h. t.

APPOINTMENT, *government, wills.* The act by which a person is selected and invested with an office; as the appointment of a judge, of which the making out of his commission is conclusive evidence, 1 Cranch, 137, 155; 10 Pet. 343. The appointment of an executor, which is done by nominating him as such in a will or testament. By appointment is also understood a public employment, nearly synonymous with office. The distinction is this, that the term *appointment* is of a more extensive signification, than office; for example, the act of authorising a man to print the laws of the United States by authority, and the right conveyed by such act, is an appointment, but the right thus conveyed is not an office. 17 S. & R. 219, 233.

APPORTIONMENT, *contracts.* Lord Coke defines it to be a division or partition of a rent, common, or the like, or the making it into parts. Co. Litt. 147. This definition seems incomplete. Apportionment frequently denotes, not division but distribution; and in its ordinary technical sense, the distribution of one subject in proportion to another previously distributed. 1 Swanst. C. 338, n. Apportionment may be considered in two points of view; 1, when it can take place in relation to the subject-matter of the contract; 2, when there are two or more persons claiming the performance of the contract, and each of whom is entitled to a proportion; and, 3, when rents can be apportioned as to time.

1. When there is a special contract between the parties, generally speaking according to the rules of the common law, no compensation can be recovered, unless the contract has been entirely fulfilled; 4 Greenl. R. 454; 2 Pick. R. 267; 10 Pick. R. 209; 4 Pick. R. 103; 4 McCord, R. 26, 246; 6 Verm. R. 35; the subject of the contract being a com-

plex event, constituted by the performance of various acts, the imperfect completion of the event, by the performance of some only of those acts, cannot by virtue of that contract of which it is not the subject, afford a title to the whole, or any part of the stipulated benefit. See in support of this principle, 1 Swanst. c. 338, n. and the cases there cited; Story, Bailm. § 441; Chitty, Contr. 168; 3 Watts, R. 331; 2 Mass. R. 147; 2 Id. 436; 3 Hen. & Munf. R. 407; 2 John. Cas. 17; 13 John. R. 365; 14 Wend. R. 257; 5 N. H. Rep. 343; 8 Cowen, R. 84; 7 Cowen, R. 184; 2 Pick. R. 332.

2. When there is but one debtor and one creditor, neither can apportion the obligation without the consent of the other. In such case the creditor cannot force his debtor to pay him a part of the debt only, and leave the other unpaid, nor can the debtor compel his creditor to receive a part only of what is due him, on account of his claim. But when there is a subsisting obligation to pay a rent, the reversioner may sell his estate in different parts, to as many persons as he may deem proper, and the lessee or tenant will be bound to pay to each a proportion of the rent, 3 Watts, R. 404. By stat. 11 Geo. 2, c. 19, s. 15, the rent due by a tenant for life, who dies during the currency of a quarter of a year, or other division of time at which the rent was made payable, shall be apportioned to the day of his death. In Delaware, Missouri, New Jersey, and New York, it is provided by statutes, that if the tenant for life, lessor, die on the rent day, his executors may recover the whole rent; if before, a proportional part. In Delaware, Missouri and New York, where one is entitled to rents depending on the life of another, he may recover them notwithstanding the death of the latter. In Kentucky, the rent is to be apportioned when the lease is determined upon any contingency. When the wife dies, the husband may, after her death, recover the rents of her lands, in Delaware, Kentucky, Missouri and Virginia. The stat. 11 Geo. 2, c. 19, s. 15, is in force in Pennsylvania. Rob. Dig. 236. See Hill Ab. c. 16. s. 50. Vide 2 Bro. C. C. 662; 8 Ves. 311. See generally, 3 Watts, R. 394; 17 Serg. & Rawle, 171; 3 Vin. Ab. 4; 1 Chitty, Bl. 324; 2 Supp. to Ves. Jun. 237; Bac. Ab. Rent, M; 1 Am. Dig. 267; for the doctrine of the civil law on this subject, see Dumoulin, de dividuo et individuo, 2e part, n. 6 & 7; Toull. Dr. Civ. Fr. liv. 3, t. 3, c. 4, n. 750 et seq. Vide, generally, Stark. Ev. part 4, p. 1622; 1 Taunt. R. 430; 3 Chitty's Comm. Law, 129; Com. Dig. Chancery, 2 E and 4 N 5; 6 T. R. 320; Chitty on Contr. 273; Newl. Contr. 159; Hall's Dig. 63; Long on Sales, 108; 16 Vin. Ab. 138; 22 Vin. Ab. 13, pl. 21; 8 Serg. & Rawle, 299.

3. At common law, there could be no apportionment of rent as to time, either in law or equity. Hence when a lessor, tenant for life, died before the rent day, the rent was lost; the statute 11 Geo. 2, c. 19, was passed to remedy this defect. The states of New York, New Jersey, Missouri, and Delaware, have enacted, that if a tenant for life, lessor, die on the rent day, his executors may recover the whole rent; if before, a proportional part of it. In Missouri, Delaware, Kentucky, and New York, when one is entitled to rents depending on the life of another, he may recover them notwithstanding the death of the latter. In Delaware, Virginia, Missouri and Kentucky, it is specially provided, that a husband, after the death of his wife, may recover the rents of her lands, 1 Hill. Ab. c. 16, § 50. When the tenant is deprived of the land, as by eviction by title para-

mount, or by his quitting the premises, with the landlord's consent, in the absence of an agreement to the contrary, his obligation to pay rent ceases, as regards the current quarter or half year, or other day of payment, as the case may be. But rent which is due may be recovered. Gilb. on Rents, 145; 1 Har. & Gill, 308; 11 Mass. R. 493; 3 Kent, Com. 376; 8 Cowen, R. 727; 4 Wend. R. 423. See 4 McCord's R. 447; 3 Call's R. 268; 4 Cruise, Dig. 206; 1 Bailey's R. 469. See *Eviction*.

APPOSAL OF SHERIFFS, *in the English law*. The charging them with money received upon account of the Exchequer, 22 Car. 2.

APPOSER, *in the English law*. An officer of the Court of Exchequer, called the foreign apposer.

APPOSTILLE, *French law*. In general this means an addition or annotation made in the margin of an act, [contract in writing,] or of some writing. Merlin, Répertoire.

APPRAISEMENT is a just valuation of property. Appraisements are required to be made of the property of decedents, insolvents and others; an inventory (q. v.) and description (q. v.) of the article ought to be made, and a just valuation put upon them. When property real or personal is taken for public use, an appraisement of it must be made so that the owner may be paid its value.

APPRAISER, *practice*. A person appointed by competent authority to appraise or value goods; as in case of the death of a person an appraisement and inventory must be made of the goods of which he died possessed, or was entitled to. Appraisers are sometimes appointed to value damages done to property, as when such property is taken for public use, it must be paid for at the appraisement made of it.

APPREHENSION, *practice*.—The capture or arrest of a person.

APPRENTICE, *person, contracts*, is a minor who is bound in due form of law to a master, and who is to learn from him his art, trade or business, and to serve him during the time of his apprenticeship, (q. v.) 1 Bl. Com. 426; 2 Kent, Com. 211; 3 Rawle, Rep. 307; Chit. on Apprentices. Formerly the name of *apprentice en la ley* was given indiscriminately to all students of law. In the reign of Edward IV. they were sometimes called *apprentici ad barras*. And in some of the ancient law writers, the term apprentice and barrister are synonymous. 2 Inst. 214; Eunom. Dial. 2, § 53, p. 155.

APPRENTICESHIP, *contracts*, is a contract entered into between a person who understands some art, trade or business, and called the master, and another person during his or her minority, who is called the apprentice, with the consent of his or her parent or next friend; by which the former undertakes to teach such minor his art, trade or business, and to fulfil such other covenants as may be agreed upon; and the latter agrees to serve the master during a definite period of time, in such art, trade or business. The term during which the apprentice is to serve is also called his apprenticeship. Pardessus Dr. Com. n. 34. This contract is generally entered into by indenture or deed, and is to continue no longer than the minority of the apprentice. The English statute law as to binding out minors as apprentices to learn some useful art, trade or business, has been generally adopted in the United States, with some variations which cannot be noticed here. 2 Kent, Com. 212. The principal duties of the parties are as follows: 1st, *Duties of the master*. He is bound to instruct the apprentice by teaching him, bona fide, the knowledge of the

art of which he has undertaken to teach him the elements. He ought to watch over the conduct of the apprentice, giving him prudent advice and showing him a good example, and fulfilling towards him the duties of a father, as, in his character of master, he stands in loco parentis. He is also required to fulfil all the covenants he has entered into by the indenture. He cannot abuse his authority, either by bad treatment, or by employing his apprentice in menial employments, wholly unconnected with the business he has to learn. He cannot dismiss his apprentice except by application to a competent tribunal, upon whose decree the indenture may be cancelled. After the apprenticeship is at an end, he cannot retain the apprentice on the ground that he has not fulfilled his contract, unless specially authorised by the statute. 2d. *Duties of the apprentice.* On his side, the apprentice is bound to obey his master in all his lawful commands, take care of his property, and promote his interest, endeavour to learn his trade or business, and perform all the covenants in his indenture not contrary to law. He cannot leave his master's service during the term of the apprenticeship. The apprentice is entitled to payment for extraordinary services, when promised by the master, 1 Penn. Law. Jour. 368; and even when no express promise has been made, under peculiar circumstances. 2 Cranch, 240, 270; 3 Rob. Ad. Rep. 237; but see 1 Whart. 113. See, generally, 2 Kent, Com. 211–214; Bac. Ab. Master and Servant; 1 Saund. R. 313, n. 1, 2, 3, and 4; 3 Rawle, R. 307; 3 Vin. Ab. 19. The law of France on this subject is strikingly similar to ours. Pardessus, Droit Commerc. n. 518–522.

APPRIZING, a name for an action in the Scotch law, by which a creditor formerly carried off the estates of his debtor in payment of debts due to him; in lieu of which adjudications are now resorted to.

APPROPRIATION, *contracts*, is the application of the payment of a sum of money, made by a debtor to his creditor, to one of several debts which are due by the former to the latter. The debtor has a right to appropriate the payment to which debt he pleases; but if, at the time of making such payment, he neglects to make such appropriation, the creditor has a right to make it, unless the circumstances show, or raise an inference that the debtor had, at the time of making payment, an intention to make such an appropriation. The nature of the debts or claims makes no difference. Chitty, Contr. 277; 3 Stark. Ev. 1093, n. (1); Pet. Dig. Payment, 2, for the American cases on this subject; 1 Vern. R. by Raithby, 23, 24; 3 Vin. Ab. 33; Wheat. Dig. tit. Payment. When neither party avails himself of his power to make the appropriation, in consequence of which it devolves on the court, such an equitable appropriation will be made as will extinquish those debts first for which the security is most precarious. 6 Cranch, R. 8, 28. See 6 Cranch, R. 253, 264; 7 Cranch, 572, 575. In Louisiana by statutory enactment, Civ. Code, art. 1159, et seq., it is provided that "the debtor of several debts has a right to declare, when he makes a payment, what debt he means to discharge. The debtor of a debt which bears interest or produces rents, cannot without the consent of the creditor, impute to the reduction of the capital, any payment he may make, when there is interest or rent due. When the debtor of several debts has accepted a receipt, by which the creditor has imputed what he has received to one of the debts especially, the debtor can no longer require the imputation to be made to a different

debt, unless there have been fraud or surprise on the part of the creditor. When the receipt bears no imputation, the payment must be imputed to the debt which the debtor had at the time most interest in discharging of those that are equally due, otherwise to the debt which has fallen due, though less burdensome than those which are not yet payable. If the debts be of a like nature, the imputation is made to the less burdensome; if all things are equal, it is made proportionally." This is a translation of the Code Napoléon, art. 1253–1256, slightly altered. See Poth. Obl. n. 528, translated by Evans, and the notes. Bac. Ab. Obligations, F.

TO APPROVE, *approbare;* to increase the profits upon a thing; as to approve land by increasing the rent. 2 Inst. 784.

APPROVEMENT, *Engl. crim. law*, is the act by which a person indicted of treason or felony, and arraigned for the same confesses the same before any plea pleaded, and accuses others, his accomplices, of the same crime, in order to obtain his pardon. This practice is disused. 4 Bl. Com. 330; 1 Phil. Ev. 37. In modern practice an accomplice is permitted to give evidence against his associates. 9 Cowen, R. 707; 2 Virg. Cas. 490; 4 Mass. R. 156; 12 Mass R. 20; 4 Wash. C. C. R. 428; 1 Dev. R. 363; 1 City Hall Rec. 8. In Vermont, on a trial for adultery it was held that a *particeps criminis* was not a competent witness, because no person can be allowed to testify his own guilt or turpitude to convict another. N. Chap. R. 9.

APPROVEMENT, *in the English law.* 1. The enclosing the common land within the lord's waste, so as to leave egress and regress to the tenant who is a commoner.—2. The augmentation of the profits of land. Stat. of Merton, 20 Hen. 8; F. N. B. 72; Crompt. Just. 250; 1 Lilly's Reg. 110.

APPROVER, *in the English criminal law.* One confessing himself guilty of felony, and approving others of the same crime to save himself. Crompt. Inst. 250; 3 Inst. 129.

APPURTENANCES, in common parlance and legal acceptation, is used to signify something belonging to another thing as principal, and which passes as incident to the principal thing. 10 Peters, R. 25; Angell, Wat. C. 43; 1 Serg. & Rawle, 169; Cro. Jac. 121; 3 Saund. 401, n. 2; Wood's Inst. 121; 4 Rawle, R. 342; 1 P. Wms. 603; Cro. Jac. 526; 2 Co. 32; Co. Litt. 5 b, 56 a, b; 1 Plowd. 171; 2 Saund. 401, n. (2); 1 Lev. 131; 1 Sid. 211.

AQUÆ DUCTUS, *civil law.* The name of a servitude which consists in the right to carry water by means of pipes or conduits over or through the estate of another. Dig. 8, 3, 1; Inst. 2, 3; Lalaure, Des Serv. ch. 5, p. 23.

AQUÆ HAUSTUS, *civil law.* The name of a servitude which consists in the right to draw water from the fountain, the pool, or spring of another. Inst. 2, 3, 2; Dig. 8, 3, 1, 1.

AQUÆ IMMITTENDÆ, *civil law.* The name of a servitude, which frequently occurs among neighbours, when a house is built in such a manner as to be surrounded by other buildings, so that it has no outlet for its waters. It is in the obligation on the part of him who owes it, to permit the owner of the dominant building to cast water out of his windows on his own or on his soil. Lalaure, Des Serv. 23.

AQUAGIUM, i. e. aquæ agium; 1. A water course;—2. A toll for water.

ARBITRARY PUNISHMENTS, *practice.* Those punishments which

are left to the decision of the judge, in distinction from those which are defined by statute.

ARBITRATION, *practice*, is a reference and submission of a matter in dispute concerning property, or of a personal wrong, to the decision of one or more persons as arbitrators. They are voluntary or compulsory. The *voluntary* are, 1st. Those made by mutual consent, in which the parties select the arbitrators, and bind themselves by bond to abide by their decision; these are made without any rule of court; 3 Bl. Com. 16.—2d. Those which are made in a cause depending in court, by a rule of court, before trial; these are arbitrators at common law, and the award is enforced by attachment, Kyd on Awards, 21.—3d. Those which are made by virtue of the statute, 9 & 10 Will. 3, c. 15, by which it is agreed to refer a matter in dispute not then in court, to arbitrators, and agree that the submission be made a rule of court, which is enforced as if it had been made a rule of court; Kyd on Aw. 22; there are two other voluntary arbitrations which are peculiar to Pennsylvania,—4th. The first of these is the arbitration under the act of June 16, 1836, which provides that the parties to any suit may consent to a rule of court for referring all matters of fact in controversy to referees, reserving all matters of law for the decision of the court, and the report of the referees shall have the effect of a special verdict, which is to be proceeded upon by the court as a special verdict, and either party may have a writ of error to the judgment entered thereupon.—5th. Those by virtue of the act of 1806, which authorises "any person or persons desirous of settling any dispute or controversy, by themselves, their agents or attorneys to enter into an agreement in writing, or refer such dispute or controversy to certain persons to be by them mutually chosen; and it shall be the duty of the referees to make out an award and deliver it to the party in whose favour it shall be made, together with the written agreement entered into by the parties; and it shall be the duty of the prothonotary on the affidavit of a subscribing witness to the agreement, that it was duly executed by the parties, to file the same in his office; and on the agreement being so filed as aforesaid, he shall enter the award on record, which shall be as available in law as an award made under a reference issued by the court, or entered on the docket by the parties." *Compulsory* arbitrations are perhaps confined to Pennsylvania. Either party in a civil suit or action, or his attorney, may enter at the prothonotary's office a rule of reference wherein he shall declare his determination to have arbitrators chosen, on a day certain to be mentioned therein, not exceeding thirty days, for the trial of all matters in variance in the suit between the parties. A copy of this rule is served on the opposite party. On the day appointed they meet at the prothonotary's, and endeavour to agree upon arbitrators; if they cannot, the prothonotary makes out a list on which are inscribed the names of a number of citizens, and the parties alternately strike each one of them from the list, beginning with the plaintiff, until there are but the number agreed upon or fixed by the prothonotary left, who are to be the arbitrators; a time of meeting is then agreed upon—or appointed by the prothonotary, when the parties cannot agree,—at which time the arbitrators, after being sworn or affirmed justly and equitably to try all matters in variance submitted to them, proceed to hear and decide the case; their award is filed in the office of the prothonotary and has

the effect of a judgment, subject, however, to appeal, which may be entered at any time within twenty days after the filing of such award, Act of 16th June, 1836, Pamphl. p. 715. This is somewhat similar to the arbitrations of the Romans; there the prætor selected from a list of citizens made for the purpose, one or more persons, who were authorised to decide all suits submitted to them, and which had been brought before him; the authority which the prætor gave them conferred on them a public character, and their judgments were without appeal. Toull. Dr. Civ. Fr. liv. 3, t. 3, ch. 4, n. 820. See generally, Kyd on Awards: Caldwell on Arbitrations; Bac. Ab. h. t.; 1 Salk. R. 69, 70-75; 2 Saund. R. 133, n. 7; 2 Sell. Pr. 241; Doct. Pl. 96; 3 Vin. Ab. 40.

ARBITRATOR. A private extraordinary judge chosen by the parties who have a matter in dispute, invested with power to decide the same. Arbitrators are so called because they have generally an arbitrary power, there being in common no appeal from their sentences, which are called awards. Vide Caldw. on Arb. Index, h. t.; Kyd on Awards, Index, h. t.

ARCHAIONOMIA. The name of a collection of Saxon laws, published during the reign of the English Queen Elizabeth, in the Saxon language, with a Latin version by Mr. Lambard. Dr. Wilkins enlarged this collection in his work, entitled, Leges Anglo Saxonicæ, containing all the Saxon laws extant, together with those ascribed to Edward the Confessor, in Latin; those of William the Conqueror, in Norman and Latin; and of Henry I., Stephen, and Henry II., in Latin.

ARCHBISHOP, *eccl. law.* The chief of the clergy of 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 also his own diocese, in which he exercises episcopal jurisdiction, as in his province he exercises archiepiscopal authority. 1 Bl. Com. 380; L. Raym. 541; Code, 1, 2.

ARCHES' COURT. Vide *Court of Arches.*

ARCHIVES. Ancient charters or titles, which concern a nation, state, or community, in their rights or privileges. The place where the archives are kept bears the same name. Jacob, L. D. h. t; Merl. Rép. h. t.

ARE. A French measure of surface. This is a square, the sides of which are of the length of ten mètres, or what is equal to one hundred square mètres. The *are* is equal to 1076.441 square feet. Vide *Measure.*

ARGENTUM ALBUM. White money; silver coin. See *Alba Firma.*

ARGUMENT, *practice.* Cicero defines it a probable reason proposed in order to induce belief. Ratio probabilis et idonea ad faciendam fidem. The logicians define it more scientifically to be a means, which by its connexion between two extremes, establishes a relation between them. This subject belongs rather to rhetoric and logic than to law.

ARGUMENTUM AB INCONVENIENTI. An argument arising from the inconvenience which the construction of the law would create, is to have effect only in a case where the law is doubtful; where the law is certain, such an argument is of no force. Bac. Ab. Baron & Feme, H.

ARISTOCRACY, is that form of government in which the sovereign power is exercised by a small number of persons to the exclusion of the remainder of the people.

ARKANSAS. The name of one of the new states of the United States. It was admitted into the

Union by the act of Congress of June 15th, 1836, 4 Sharsw. cont. of Story's L. U. S. 2444, by which it is declared that the state of Arkansas shall be one, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatever.

A convention assembled at Little Rock, on Monday the 4th day of January 1836, for the purpose of forming a constitution, by which it is declared that "We, the people of the Territory of Arkansas, by our representatives in convention assembled," "in order to secure to ourselves and our posterity the enjoyments of all the rights of life, liberty and property, and the free pursuit of happiness, do mutually agree with each other to form ourselves into a free and independent state, by the name and style of 'The State of Arkansas.'" The constitution was finally adopted on the 30th day of January 1836.

The powers of the government are divided into three departments, each of them is confided to a separate body of magistry, to wit: those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

§ 1. The legislative authority of the state is vested in a general assembly, which consists of a senate and house of representatives.

Each house shall appoint its own officers, and shall judge of the qualifications, returns and elections of its own members. Two thirds of each shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and compel the attendance of absent members, in such manner, and under such penalties as each house shall provide. Sect. 15. Each house may determine the rules of its own proceedings, punish its own members for disorderly behaviour, and with the concurrence of two thirds of the members elected, expel a member; but no member shall be expelled a second time for the same offence. They shall each from time to time publish a journal of their proceedings, except such parts as, in their opinion, require secrecy; and the yeas and nays shall be entered on the journal, at the desire of any five members. Sect. 16. The doors of each house while in session or in a committee of the whole, shall be kept open, except in cases which may require secrecy; and each house may punish by fine and imprisonment, any person, not a member, who shall be guilty of disrespect to the house, by any disorderly or contemptuous behaviour in their presence, during their session; but such imprisonment shall not extend beyond the final adjournment of that session. Sect. 17. Bills may originate in either house, and be amended or rejected in the other; and every bill shall be read on three different days in each house, unless two thirds of the house where the same is pending shall dispense with the rules: and every bill having passed both houses shall be signed by the president of the senate, and the speaker of the house of representatives. Sect. 18. Whenever an officer, civil or military, shall be appointed by the joint concurrent vote of both houses, or by the separate vote of either house of the general assembly, the vote shall be taken *viva voce*, and entered on the journal. Sect. 19. The senators and representatives shall, in all cases execept treason, felony, or breach of the peace, be privileged from arrest, during the session of the general assembly, and for fifteen days before the commencement and after the termination of each session; and for any speech or debate in either house, they shall not be questioned

in any other place. Sect. 20. The members of the general assembly shall severally receive, from the public treasury, compensation for their services, which may be increased or diminished; but no alteration of such compensation of members, shall take effect during the session at which it is made. Sect. 21.

1st. The *senate* shall never consist of less than seventeen nor more than thirty-three members. Art. 4. Sect. 31. The members shall be chosen for four years, by the qualified electors of the several districts. Art. 4, Sect. 5. No person shall be a senator who shall not have attained the age of thirty years; who shall not be a free white male citizen of the United States; who shall not have been an inhabitant of this state for one year; and who shall not, at the time of his election, have an actual residence in the district he may be chosen to represent. Art. 4, Sect. 6.

All impeachments shall be tried by the senate; and when sitting for that purpose, the senators shall be on oath or affirmation to do justice according to law and evidence. When the governor shall be tried, the chief justice of the supreme court shall preside; and no person shall be convicted without the concurrence of two-thirds of the senators elected. Art. 4, Sect. 27.

2dly. The *house of representatives* shall consist of not less than fifty-four, nor more than one hundred representatives, to be apportioned among the several counties in this state, according to the number of free white male inhabitants therein, taking five hundred as the ratio, until the number of representatives amounts to seventy-five; and when they amount to seventy-five, they shall not be further increased until the population of the state amounts to five hundred thousand souls. Provided that each county now organized shall, although its population may not give the existing ratio, always be entitled to one representative. The members are chosen every second year, by the qualified electors of the several counties. Art. 4, Sect. 2. The qualification of an elector is as follows: he must 1, be a free white male citizen of the United States; 2, have attained the age of twenty-one years, 3; have been a citizen of this state six months; 4, he must actually reside in the county or district where he votes for an office made elective under this state or the United States. But no soldier, seaman, or marine, in the army of the United States, shall be entitled to vote at any election within this state. Art. 4, Sect. 2.

No person shall be a member of the house of representatives, who shall not have attained the age of twenty-five years; who shall not be a free white male citizen of the United States; who shall not have been an inhabitant of this state one year; and who shall not at the time of his election, have an actual residence in the county he may be chosen to represent. Art. 4, Sect. 4.

The house of representatives shall have the sole power of impeachment. Art. 4, Sect. 27.

§ 2. The *supreme executive* power of this state is vested in a chief magistrate, who is styled "The Governor of the State of Arkansas." Art. 5. Sect. 1.—1. He is elected by the electors of the representatives.—2. He must be thirty years of age, a native born citizen of Arkansas, or a native born citizen of the United States, or a resident of Arkansas ten years previous to the adoption of this constitution, if not a native of the United States; and shall have been a resident of the same at least four years next before his election. Art. 4, s. 4.—3. The governor holds his office for the term of four years from the time of his installation, and until

his successor shall be duly qualified; but he is not eligible for more than eight years in any term of twelve years. Art. 5, s. 4.—4. His principal duties are enumerated in the fifth article of the constitution, and are as follows: He shall be commander-in-chief of the army of this state, and of the militia thereof, except when they shall be called into the service of the United States; s. 6. He may require information, in writing, from the officers of the executive department, on any subject relating to the duties of their respective offices; s. 7. He may by proclamation, on extraordinary occasions, convene the general assembly, at the seat of government, or at a different place, if that shall have become, since their last adjournment, dangerous from an enemy or from contagious diseases. In case of disagreement between the two houses, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper, not beyond the day of the next meeting of the general assembly; s. 8. He shall from time to time, give to the general assembly information of the state of the government, and recommend to their consideration such measures as he may deem expedient; s. 9. He shall take care that the laws be faithfully executed; s. 10. In all criminal and penal cases, except those of treason and impeachment, he shall have power to grant pardons, after conviction, and remit fines and forfeitures, under such rules and regulations as shall be prescribed by law. In cases of treason, he shall have power, by and with the advice and consent of the senate, to grant reprieves and pardons; and he may, in the recess of the senate, respite the sentence until the end of the next session of the general assembly; s. 11. He is the keeper of the seal of the state, which is to be used by him officially; s. 12. Every bill which shall have passed both houses, shall be presented to the governor. If he approve, he shall sign it; but if he shall not approve it, he shall return it, with his objections, to the house in which it shall have originated, who shall enter his objections at large upon their journals, and proceed to reconsider it. If, after such reconsideration, a majority of the whole number elected to that house shall agree to pass the bill, it shall be sent with the objections to the other house, by which, likewise, it shall be reconsidered; and if approved by a majority of the whole number elected to that house, it shall be a law; but in such cases, the votes of both houses shall be determined by yeas and nays; and the names of persons voting for or against the bill, shall be entered on the journals of each house respectively. If the bill shall not be returned by the governor within three days, Sundays excepted, after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the general assembly, by their adjournment, prevent its return; in such case it shall not be a law; s. 16.—5. In case of the impeachment of the governor, his removal from office, death, refusal to qualify, or absence from the state, the president of the senate shall exercise all the authority appertaining to the office of governor, until another governor shall have been elected and qualified, or until the governor absent or impeached, shall return or be acquitted; s. 18. If, during the vacancy of the office of governor, the president of the senate shall be impeached, removed from office, refuse to qualify, resign, die, or be absent from the state, the speaker of the house of representatives shall, in like manner, administer the government; s. 19.

§ 3. The *judicial* power of this state is vested by the sixth article of the constitution, as follows:

§ 1. The judicial power of this state shall be vested in one supreme court, in circuit courts, in county courts, and in justices of the peace. The General Assembly may also vest such jurisdiction as may be deemed necessary, in corporation courts; and, when they deem it expedient, may establish courts of chancery.

§ 2. The supreme court shall be composed of three judges, one of whom shall be styled chief justice, any two of whom shall constitute a quorum; and the concurrence of any two of the said judges shall, in every case, be necessary to a decision. The supreme court, except in cases otherwise directed by this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state, under such rules and regulations as may, from time to time, be prescribed by law; it shall have a general superintending control over all inferior and other courts of law and equity; it shall have power to issue writs of error and supersedeas, certiorari and *habeas corpus*, *mandamus*, and *quo warranto*, and other remedial writs, and to hear and determine the same; said judges shall be conservators of the peace throughout the state, and shall severally have power to issue any of the aforesaid writs.

§ 3. The circuit court shall have jurisdiction over all criminal cases which shall not be otherwise provided for by law; and exclusive original jurisdiction of all crimes amounting to felony at common law; and original jurisdiction of all civil cases which shall not be cognizable before justices of the peace, until otherwise directed by the General Assembly; and original jurisdiction in all matters of contract, when the sum in controversy is over one hundred dollars. It shall hold its terms at such place in each county; as may be by law directed.

§ 4. The state shall be divided into convenient circuits, each to consist of not less than five nor more than seven counties contiguous to each other, for each of which a judge shall be elected, who, during his continuance in office, shall reside and be a conservator of the peace within the circuit for which he shall have been elected.

§ 5. The circuit courts shall exercise a superintending control over the county courts, and over justices of the peace, in each county in their respective circuits; and shall have power to issue all the necessary writs to carry into effect their general and specific powers.

§ 6. Until the General Assembly shall deem it expedient to establish courts of chancery, the circuit courts shall have jurisdiction in matters of equity, subject to appeal to the supreme court, in such manner as may be prescribed by law.

§ 7. The General Assembly shall, by joint vote of both houses, elect the judges of the supreme and circuit courts, a majority of the whole number in joint vote being necessary to a choice. The judges of the supreme court shall be at least thirty years of age; they shall hold their offices for eight years from the date of their commissions. The judges of the circuit courts shall be at least twenty-five years of age, and shall be elected for the term of four years from the date of their commissions.

§ 9. There shall be established in each county, a court to be holden by the justices of the peace, and called the county court, which shall have jurisdiction in all matters relating to county taxes, disbursements of money for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties.

§ 10. There shall be elected by the justices of the peace of the respective counties, a presiding judge of the

county court, to be commissioned by the governor, and hold his office for the term of two years, and until his successor is elected or qualified. He shall, in addition to the duties that may be required of him by law, as presiding judge of the county court, be a judge of the court of probate, and have such jurisdiction in matters relative to the estate of deceased persons, executors, administrators and guardians, as may be prescribed by law, until otherwise directed by the General Assembly.

§ 12. No judge shall preside in the trial of any cause, in the event of which he may be interested, or where either of the parties shall be connected with him by affinity or consanguinity, within such degrees as may be prescribed by law, or in which he shall have been of counsel, or have presided in any inferior court, except by consent of all the parties.

§ 15. The qualified voters in each township shall elect the justices of the peace for their respective townships. For every fifty voters there may be elected one justice of the peace, provided, that each township, however small, shall have two justices of the peace. Justices of the peace shall be elected for two years, and shall be commissioned by the governor, and reside in the townships for which they shall have been elected, during their continuance in office. They shall have individually, or two or more of them jointly, exclusive original jurisdiction in all matters of contract, except in actions of covenant, where the sum in controversy is of one hundred dollars and under. Justices of the peace shall in no case have jurisdiction to try and determine any criminal case or penal offence against the state; but may sit as examining courts, and commit, discharge, or recognize to the court having jurisdiction, for further trial, offenders against the peace. For the foregoing purposes they shall have power to issue all necessary process; they shall also have power to bind to keep the peace, or for good behaviour.

ARM OF THE SEA. Lord Coke defines an arm of the sea to be where the sea or tide flows or reflows. Constable's Case, 5 Co. 107. This term includes bays, roads, creeks, coves, ports, and rivers where the water flows and reflows, whether it be salt or fresh. Ang. Tide Wat. 61. Vide *Creek; Haven; Navigable; Port; Reliction; Road; River.*

ARMS. Any thing that a man wears for his defence, or takes in his hands, or uses in his anger, to cast at or strike at another. Co. Litt. 161 b, 162 a; Crompt. Just. P. 65; Cunn. Dict. h. t. The Constitution of the United States, Amendm. 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 hear arms shall not be infringed." In Kentucky a statute "to prevent persons from wearing concealed arms," has been declared to be unconstitutional. 2 Litt. R. 90; while in Indiana a similar statute has been holden valid and constitutional. 3 Blackf. R. 229. Vide Story, Const. § 1889, 1890; Amer. Citizen, 176; 1 Tuck. Black, App. 300: Rawle on Const. 125.

ARMS, *in heraldry.* Vide *Seal of the United States.*

ARMISTICE. Vide *Truce.*

ARPENT. A quantity of land containing a French acre. 4 Hall's Law Journal, 518.

ARPENTATOR, from *arpent*, a measurer or surveyor of land.

ARRAIGNMENT, *crim. law. practice*, signifies the calling of the defendant to the bar of the court, to answer the accusation contained in the indictment. It consists of three parts.

1. Calling the defendant to the bar by his name, and commanding him to hold up his hand; this is done for the purpose of completely

identifying the prisoner as the person named in the indictment; the holding up his hand is not, however, indispensable, for if the prisoner should refuse to do so, he may be inentified by any admission, that he is the person intended.

2. The reading of the indictment to enable him fully to understand the charge to be produced against him. The mode in which it is read is, after saying, "A B, hold up your hand," to proceed, "you stand indicted by the name of A B, late of, &c., for that you, on, &c.," and then go through the whole of the indictment.

3. After this is concluded, the clerk proceeds to the third part by adding, "How say you, A B, are you guilty or not guilty?" Upon this, if the prisoner confesses the charge, the confession is recorded, and nothing further is done till judgment; if on the contrary he answers "not guilty," that plea is entered for him, and the clerk or attorney general replies that he is guilty; when an issue is formed.

Vide generally, Dalt. J. h. t.; Burn's J. h. t.; Williams's J. h. t.; 4 Bl. Com. 322; Harg. St. Tr. 4 vol. 777, 661; 2 Hale, 219; Cro. C. C. 7; 1 Chit. Cr. Law, 414.

ARRAMEUR, *maritime law*. The name of an ancient officer of a port, whose business was to load and unload vessels. In the Laws of Oleron, art. 11, (published in English in the App. to 1 Pet. Adm. R. xxv.) some account of arrameurs will be found in these words: "There were formerly, in several ports of *Guyenne*, certain officers called *arrameurs* or stowers, who were master-carpenters by profession, and were paid by the merchants, who loaded the ship. Their business was to dispose right, and stow closely all goods in casks, bales, boxes, bundles or otherwise; to balance both sides, to fill up the vacant spaces, and manage every thing to the best advantage. It was not but that the greatest part of the ship's crew understood this as well as these stowers; but they would not meddle with it, nor undertake it, to avoid falling under the merchant's displeasure, or being accountable for any ill accident that might happen by that means. There were also *sacquiers*, who were very ancient officers, as may be seen in the 14th book of the Theodosian code, *Unica de Saccariis Portus Romæ*, lib. 14. Their business was to load and unload vessels loaded with salt, corn, or fish, to prevent the ship's crew defrauding the merchant by false tale, or cheating him of his merchandise otherwise." See *Sacquier; Stevedore*.

ARRAS, *Span. law*. The property contributed by the husband, ad sustinenda onera matrimonii, is called *arras*. The husband is under no obligation to give arras, but it is a donation purely voluntary. He is not permitted to give in *arras* more than a tenth of his property. The *arras* is the exclusive property of the wife, subject to the husband's usufruct during his life. Burge on the Confl. of Laws, 417. By arras is also understood the donation which the husband makes to his wife, by reason or on account of marriage, and in consideration of the *dote*, or portion, which he receives from her. Aso & Man. Inst. B. 1, t. 7, c. 3.

ARRAY, *practice*, is the whole body of jurors summoned to attend a court, as they are *arrayed* or arranged on the panel. Vide *Challenges*, and Dane's Ab. Index, h. t.; 1 Chit. Cr. Law, 536; Com. Dig. Challenge, B.

ARREARAGE, money remaining unpaid after it becomes due; as rent unpaid; interest remaining due; Pow. Mortgages, Index, h. t.; a sum of

money remaining in the hands of an accountant. Merl. Rép. h. t.; Dane's Ab. Index, h. t.

ARREST IN CIVIL CASES, *practice*. An arrest is the apprehension of a person by virtue of a lawful authority, to answer the demand against him in a civil action. To constitute an arrest, no actual force or manual touching of the body is requisite; it is sufficient if the party be within the power of the officer, and submit to the arrest. 2 N. H. Rep. 318; 1 Baldw. 239; Harper, 453; 8 Greenl. 127; 1 Wend. 215; 2 Blackf. 294. Arrests are made either on mesne or final process. 1. An arrest on mesne process is made in order that the defendant shall answer after judgment, to satisfy the claim of the plaintiff; on being arrested, the defendant is entitled to be liberated on giving sufficient bail, which the officer is bound to take. 2. When the arrest is on final process, as a ca. sa., the defendant cannot generally be discharged on bail; and his discharge is considered as an escape. Vide, generally, Yelv. 29, a, note; 3 Bl. Com. 288, n.; 1 Sup. to Ves. Jr. 374; Wats. on Sher. 87; 11 East, 440; 18 E. C. L. R. 169, note.

In all governments there are persons who are privileged from arrest in civil cases. In the United States this privilege continues generally while the defendant remains invested with a particular character. Members of congress and of the state legislatures are exempted while attending the respective assemblies to which they belong; parties and witnesses, while lawfully attending court; electors, while attending a public election; ambassadors and other foreign ministers; insolvent debtors, when they have been lawfully discharged; married women, when sued upon their contracts, are generally privileged; and executors and administrators, when sued in their representative characters, generally enjoy the same privilege. The privilege in favour of members of congress, or of the state legislatures, of electors, and of parties and witnesses in a cause extends to the time of going to, remaining at, and returning from the places to which they are thus legally called.

The code of civil practice of Louisiana enacts as follows, namely: Art. 210. The arrest is one of the means which the law gives the creditor to secure the person of his debtor while the suit is pending, or to compel him to give security for his appearance after judgment.—Art. 211. Minors of both sexes, whether emancipated or not, interdicted persons, and women married or single, cannot be arrested.—Art. 212. Any creditor, whose debtor is about to leave the state, even for a limited time, without leaving in it sufficient property to satisfy the judgment which he expects to obtain in the suit he intends to bring against him, may have the person of such debtor arrested and confined until he shall give sufficient security that he shall not depart from the state without the leave of the court.—Art. 213. Such arrest may be ordered in all demands brought for a debt, whether liquidated or not, when the term of payment has expired, and even for damages for any injury sustained by the plaintiff in either his person or property.—Art. 214. Previous to obtaining an order of arrest against his debtor, to compel him to give sufficient security that he shall not depart from the state, the creditor must swear in the petition which he presents to that effect to any competent judge, that the debt, or the damages which he claims, and the amount of which he specifies, is really due to him, and that he verily believes that the defendant is about to remove from the

state without leaving in it sufficient property to satisfy his demand; and lastly, that he does not take this oath with the intention of vexing the defendant, but only in order to secure his demand.—Art. 215. The oath prescribed in the preceding article may be taken either by the creditor himself, or, in his absence, by his attorney in fact or his agent, provided either the one or the other can swear to the debt from his personal and direct knowledge of its being due, and not by what he may know or have learned from the creditor he represents.—Art. 216. The oath which the creditor is required to take of the existence and nature of the debt of which he claims payment, in the cases provided in the two preceding articles, may be taken either before any judge or justice of the peace of the place where the court is held, before which he sues, or before the judge of any other place, provided the signature of such judge be proved or duly authenticated. Vide *Auter action pendant; Lis pendens; Privilege; Rights.*

ARREST, *in criminal cases*, is the apprehending or detaining of the person, in order to be forthcoming to answer an alleged or suspected crime. It will be convenient to consider, 1, who may be arrested; 2, for what crimes; 3, at what time; 4, in what places; 5, by whom and by what authority.—1. *Who may be arrested.* Generally all persons properly accused of a crime or misdemeanor, may be arrested; by the laws of the United States, ambassadors (q. v.) and other public ministers are exempt from arrest.—2. *For what offences an arrest may be made.* It may be made for treason, felony, breach of the peace or other misdemeanor.—3. *At what time.* An arrest may be made in the night as well as in the day time; and for treasons, felonies, and breaches of the peace, on Sunday as well as on other days. It may be made before as well as after indictment found. Wallace's R. 23.—4. *In what places.* No place affords protection to offenders against the criminal law; a man may therefore be arrested in his own house (q. v.) which may be broken for the purpose of making the arrest. —5. *Who may arrest and by what authority.* An offender may be arrested either without a warrant or with a warrant. First, An arrest may be made without a warrant by a private individual or by a peace officer. *Private* individuals are enjoined by law to arrest an offender when present at the time a felony is committed, or a dangerous wound given, 11 Johns. R. 486; and Vide Hawk. B. 1, c. 12, s. 1; c, 13, s. 7, 8; 4. Bl. Com. 292; 1 Hale, 587; Com. Dig. Imprisonment, (H 4); Bac. Ab. Trespass, (D 3.) *Peace officers* may, a fortiori, make an arrest for a crime or misdemeanor committed in their view, without any warrant; 8 Serg. & R. 47. An arrest may therefore be made by a constable, (q. v.) a justice of the peace (q. v.), sheriff, (q. v.) and coroner, (q. v.) Secondy, an arrest may be made by virtue of a warrant (q. v.) which is the proper course when the circumstances of the case will permit it. Vide, generally, 1 Chit. Cr. Law, 11 to 71; Russ. on Cr. Index, h. t.

ARREST OF JUDGMENT, see *Judgment, Arrest of.*

ARRESTANDIS *bonis ne dissipentur*, in the English law, a writ for him whose cattle or goods, being taken during a controversy, are likely to be wasted and consumed.

ARRESTEE, *in the law of Scotland*, is he in whose hands a debt, or property in his possession, has been arrested by a regular arrestment. If, in contempt of the arrestment, he shall make payment of the sum,

or deliver the goods arrested to the common debtor, he is not only liable criminally for breach of the arrestment, but he must pay the debt again to the arrester. Ersk. Pr. L. Scot. 3, 6, 6.

ARRESTER, *in the law of Scotland*, is one who sues out and obtains an arrestment of his debtor's goods or movable obligations. Ersk. Pr. L. Scot., 3, 6, 1.

ARRESTMENT, *in the Scotch law;* by this term is sometimes meant the securing of a criminal's person till trial, or that of a debtor till he give security judicio sisti, Ersk. Pr. L. Scot. 1, 2, 12. It is also the order of a judge, by which he who is debtor in a movable obligation to the arrester's debtor, is prohibited to make payment or delivery till the debt due to the arrester be paid or secured, Ersk. Pr. L. Scot. 3, 6, 1. See *Attachment, foreign.* Where arrestment proceeds on a depending action, it may be loosed by the common debtor's giving security to the arrester for his debt, in the event it shall be found due. Ib. 3, 6, 7.

ARRETTED, *arrectatus*, i. e. *ad rectum vocatus;* convened before a judge and charged with a crime.—*Ad rectum malefectorem*, is, according to Bracton, to have a malefactor forthcoming to be put on his trial. Sometimes it is used for imputed or laid to his charge; as, no folly may be *arretted* to any one under age, Bract. l. 3, tr. 2, c. 10; Cunn. Dict. h. t.

ARRHÆ, *contracts, in the civil law*, are money or other valuable things given by the buyer to the seller for the purpose of evidencing the contract; earnest. There are two kinds of arrhæ; one kind given when a contract has only been proposed; the other when a sale has actually taken place. Those which are given when a bargain has been merely proposed, before it has been concluded, form the matter of the contract, by which he who gives the arrhæ consents and agrees to lose them, and to transfer the title to them in the opposite party, in case he should refuse to complete the proposed bargain; and the receiver of the arrhæ is obliged on his part, to return double the amount to the giver of them in case he should fail to complete his part of the contract. Poth. Contr. de Vente, n. 498. After the contract of sale has been completed, the purchaser usually gives arrhæ as evidence that the contract has been perfected; arrhæ are therefore defined quod anté pretium datur, et fidem fecit contractus, facti totiusque pecuniæ solvendæ, Ib. n. 506; Code, 4, 45, 2.

ARROGATION, *civil law*, signifies nearly the same as adoption; the only difference between them is this, that adoption was of a person under full age, but as arrogation required the person arrogated, sui juris, no one could be arrogated till he was of full age. Dig. 1, 7, 5; Inst. 1, 11, 3; 1 Brown's Civ. Law, 119.

ARSER IN LE MAIN. Burning in the hand. This punishment was inflicted on those who received the benefit of clergy. Terms de la Ley.

ARSON, *criminal law*, is at common law an offence of the degree of felony; and is defined by Lord Coke to be the malicious and voluntary burning the house of another, by night or day; 3 Inst. 66. In order to make this crime complete there must be, 1st, a burning of the house, or some part of it; it is sufficient if any part be consumed, however small it may be. 9 C. & P. 45; 38 E. C. L. R. 29; 16 Mass. 105. 2nd. The house burnt must belong to another; but if a man set fire to his own house with a view to burn his neighbour's, and does so, it is at least

a great misdemeanor, if not a felony, 1 Hale P. C. 568; 2 East P. C. 1027; 2 Russ. 487. 3d. The burning must have been both malicious and wilful.

The offence of arson at common law does not extend further than the burning of the *house* of another. By statute this crime is greatly enlarged in some of the states, as in Pennsylvania, where it is extended to the burning of any barn, or out-house having hay or grain therein; any barrack, rick or stack of hay, grain or bark; any public buildings, church or meeting-house, college, school or library. Act 23 April, 1829; 2 Russell on Crimes, 486; 1 Hawk. P. C. c. 39; 4 Bl. Com. 220; 2 East, P. C. c. 21, s. 1, p. 1015; 16 John. R. 203; 16 Mass. 105; as to the extension of the offence by the laws of the United States, see stat. 1825, c. 276, 3 Story's L. U. S. 1999.

ARSURA. The trial of money by fire after it was coined. This word is obsolete.

ART. The power of doing something not taught by nature or instinct; Johnson. Eunomus defines art to be, a collection of certain rules for doing any thing in a set form. Dial. 2, p. 74. The arts are divided into mechanical and liberal arts. The mechanical arts are those which require more bodily than mental labour; they are usually called trades, and those who pursue them are called artisans or mechanics. The liberal are those which have for the sole or principal object, works of the mind, and those who are engaged in them are called artists; Pard. Dr. Com. n. 35. The act of congress of July, 4, 1836 s. 6, in describing the subjects of patents, uses the term *art*. The sense of this word in its usual acceptation is perhaps too comprehensive. The thing to be patented is not a mere elementary principle, or intellectual discovery, but a principle put in practice, and applied to some art, machine, manufacture or composition of matter. 4 Mason, 1.

ART AND PART, *in the Scotch law*, is where one is accessary to a crime committed by another; a person may be guilty, art and part, either by giving advice or counsel to commit the crime; or, 2, by giving warrant or mandate to commit it; or, 3, by actually assisting the criminal in the execution.

In the more atrocious crimes, it seems agreed, that the adviser is equally punishable with the criminal; and that in the slighter offences, the circumstances arising from the adviser's lesser age, the jocular or careless manner of giving the advice, &c. may be received as pleas for softening the punishment.

One who gives a mandate to commit a crime, as he is the first spring of the action, seems more guilty than the person employed as the instrument in executing it.

Assistance may be given to the committer of a crime, not only in the actual execution, but previous to it, by furnishing him, with a criminal intent, with poison, arms, or other means of perpetrating it. That sort of assistance which is not given till after the criminal act, and which is commonly called abetting, though it be itself criminal, does not infer art and part of the principal crime. Ersk. Pr. L. Scot. 4, 4, 4; Mack. Cr. Treat. tit. Art and Part.

ARTICLES, *chan. practice*. An instrument in writing, filed by a party to a proceeding in chancery, containing reasons why a witness in the cause should be discredited. As to the matter which ought to be contained in these articles Lord Eldon gave some general directions in the case of Carlos v. Brook, 10 Ves. 49. "The court," says he, "attending with great caution to an application to permit

any witness to be examined after publication, has held, where the proposition was to examine a witness to credit, that the examination is either to be confined to general credit; that is, by producing witnesses to swear, that the person is not to be believed upon his oath; or, if you find him swearing to a matter, not to issue in the cause, (and therefore not thought material to the merits,) in that case, as the witness is not produced to vary the case in evidence by testimony that relates to matters in issue, but is to speak only to the truth or want of veracity, with which a witness had spoken to a fact, not in issue, there is no danger in permitting him to state that such fact, not put in issue, is false; and, for the purpose of discrediting a witness, the court has not considered itself at liberty to sanction such a proceeding as an examination, to destroy the credit of another witness, who had deposed only to points put in issue. In Purcell v. M'Namara it was agreed that after publication it was competent to examine any witness to the point, whether he would believe that man upon his oath. It is not competent even at law to ask the ground of that opinion; but the general question only is permitted. In Purcell v. M'Namara the witness went into the history of his whole life; and as to his solvency, &c. It was not at all put in issue whether he had been insolvent, or had compounded with his creditors; but, having sworn the contrary, they proved by witnesses, that he, who had sworn to a matter not in issue, had sworn falsely in that fact; and that he had been insolvent and had compounded with his creditors; and it would be lamentable, if the court could not find means of getting at it; for he could not be indicted for perjury, though swearing falsely; the fact not being material. The rule is, in general cases the cause is heard upon evidence given before publication; but that you may examine after publication, provided you examine to credit only, and do not go to matters in issue in the cause, or in contradiction of them, under pretence of examining to credit only. Those depositions," he continued, "appear to me material to what is in issue in the cause; and therefore must be suppressed." See a form of articles in Gresl. Eq. Ev. 140, 141; and also 8 Ves. 327; 9 Ves. 145; 1 S. & S. 469.

ARTICLES OF AGREEMENT, *in contracts*, relate either to real or personal estate, or to both. An article is a memorandum or minute of an agreement, reduced to writing to make some future disposition or modification of property; and such an instrument will create a trust or equitable estate, of which a specific performance will be decreed in chancery. Cruise on Real Pr. tit. 32, c. 1, s. 31. And see Ib. tit. 12, c. 1.

ARTICLES OF CONFEDERATION. The compact which was made by the original thirteen states of the United States of America, bore the name of the "Articles of Confederation and perpetual union between the states of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia." It was adopted and went into force on the first day of March, 1781, and remained as the supreme law until the first Wednesday of March, 1789; 5 Wheat. R. 420. The following analysis of this celebrated instrument is copied from Judge Story's Commentaries on the constitution of the United States, Book 2, c. 3.

"In pursuance of the design already announced, it is now proposed to give an analysis of the articles of confederation, or, as they are deno-

minated in the instrument itself, the "Articles of Confederation and Perpetual Union between the States," as they were finally adopted by the thirteen states in 1781.

"The style of the confederacy was, by the first article, declared to be, 'The United States of America.' The second article declared, that each state retained its sovereignty, freedom, and independence, and every power, jurisdiction and right, which was not by this confederation *expressly* delegated to the United States, in Congress assembled. The third article declared, that the states severally entered into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare; binding themselves to assist each other against all force offered to, or attacks made upon them, on any of them, on account of religion, sovereignty, trade, or any other pretence whatever. The fourth article declared, that the free inhabitants of each of the states (vagabonds and fugitives from justice excepted) should be entitled to all the privileges of free citizens in the several states; that the people of each state should have free ingress and regress to and from any other state, and should enjoy all the privileges of trade and commerce, subject to the same duties and restrictions, as the inhabitants; that fugitives from justice should, upon demand of the executive of the state, from which they fled, be delivered up; and that full faith and credit should be given, in each of the states, to the records, acts, and judicial proceedings of the courts and magistrates of every other state.

"Having thus provided for the security and intercourse of the states, the next article (5th) provided for the organization of a general Congress, declaring that delegates should be chosen in such manner, as the legislature of each state should direct; to meet in Congress on the first Monday in every year, with a power, reserved to each state, to recall any or all of the delegates, and to send others in their stead. No state was to be represented in Congress by less than two, nor more than seven members. No delegate was eligible for more than three, in any term of six years; and no delegate was capable of holding any office of emolument under the United States. Each state was to maintain its own delegates; and, in determining questions in Congress, was to have one vote. Freedom of speech and debate in Congress was not to be impeached or questioned in any other place; and the members were to be protected from arrest and imprisonment, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

"By subsequent articles, Congress was invested with the sole and exclusive right and power of determining on peace and war, unless in case of an invasion of a state by enemies, or an imminent danger of an invasion by Indians; of sending and receiving ambassadors; entering into treaties and alliances, under certain limitations, as to treaties of commerce; of establishing rules for deciding all cases of capture on land and water, and for the division and appropriation of prizes taken by the land or naval forces, in the service of the United States; of granting letters of marque and reprisal in times of peace; of appointing courts for the trial of piracies and felonies committed on the high seas; and of establishing courts for receiving and finally determining appeals in all cases of captures.

"Congress was also invested with power to decide in the last resort, on appeal, all disputes and differences between two or more states concern-

ing boundary, jurisdiction, or any other cause whatsoever; and the mode of exercising that authority was specially prescribed. And all controversies concerning the private right of soil, claimed under different grants of two or more states before the settlement of their jurisdiction, were to be finally determined in the same manner, upon the petition of either of the grantees. But no state was to be deprived of territory for the benefit of the United States.

"Congress was also invested with the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or that of the United States; of fixing the standard of weights and measures throughout the United States; of regulating the trade and managing all affairs with the Indians, not members of any of the states, provided, that the legislative right of any state within its own limits should not be infringed or violated; of establishing and regulating post-offices from one state to another, and exacting postage to defray the expenses; of appointing all officers of the land forces in the service of the United States, except regimental officers; of appointing all officers of the naval forces, and commissioning all officers whatsoever in the service of the United States; and of making rules for the government and regulation of the land and naval forces, and directing their operations.

"Congress was also invested with authority to appoint a committee of the states to sit in the recess of congress, and to consist of one delegate from each state, and other committees and civil officers, to manage the general affairs under their direction; to appoint one of their number to preside, but no person was to serve in the office of president more than one year in the term of three years; to ascertain the necessary sums for the public service, and to appropriate the same for defraying the public expenses; to borrow money, and emit bills on credit of the United States; to build and equip a navy; to agree upon the number of land forces, and make requisitions upon each state for its quota, in proportion to the number of white inhabitants in such state. The legislature of each state were to appoint the regimental officers, raise the men, and clothe, arm, and equip them at the expense of the United States.

"Congress was also invested with power to adjourn for any time not exceeding six months, and to any place within the United States; and provision was made for the publication of its journal, and for entering the yeas and nays thereon, when desired by any delegate.

"Such were the powers confided in congress. But even these were greatly restricted in their exercise; for it was expressly provided, that congress should never engage in a war; nor grant letters of marque or reprisal in time of peace; nor enter into any treaties or alliances; nor coin money, or regulate the value thereof; nor ascertain the sums or expenses necessary for the defence and welfare of the United States; nor emit bills; nor borrow money on the credit of the United States; nor appropriate money; nor agree upon the number of vessels of war to be built, or purchased; or the number of land or sea forces to be raised; nor appoint a commander in chief of the army or navy; unless nine states should assent to the same. And no question on any other point, except for adjourning from day to day, was to be determined, except by a vote of the majority of the states.

"The committee of the states or any nine of them, were authorized in the recess of congress to exercise such powers, as congress, with the

assent of nine states, should think it expedient to vest them with, except such powers, for the exercise of which, by the articles of confederation, the assent of nine states was required, which could not be thus delegated.

"It was further provided, that all bills of credit, moneys borrowed, and debts contracted by or under the authority of congress before the confederation, should be a charge against the United States; that when land forces were raised by any state for the common defence, all officers of or under the rank of colonel should be appointed by the legislature of the state, or in such manner as the state should direct; and all vacancies should be filled up in the same manner; that all charges of war, and all other expenses for the common defence or general welfare, should be defrayed out of a common treasury, which should be supplied by the several states, in proportion to the value of the land within each state granted or surveyed, and the buildings and improvements thereon to be estimated according to the mode prescribed by congress; and the taxes for that proportion were to be laid and levied by the legislatures of the states within the time agreed upon by congress.

"Certain prohibitions were laid upon the exercise of powers by the respective states. No state, without the consent of the United States, could send an embassy to, or receive an embassy from, or enter into, any treaty with any king, prince or state; nor could any person holding any office under the United States, or any of them, accept any present, emolument, office or title, from any foreign king, prince or state; nor could congress itself grant any title of nobility. No two states could enter into any treaty, confederation, or alliance with each other, without the consent of congress. No state could lay any imposts or duties, which might interfere with any proposed treaties. No vessels of war were to be kept up by any state in time of peace, except deemed necessary by congress for its defence, or trade, nor any body of forces, except such, as should be deemed requisite by congress to garrison its forts, and necessary for its defence. But every state was required always to keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and to be provided with suitable field-pieces, and tents, and arms, and ammunition, and camp equipage. No state could engage in war without the consent of congress, unless actually invaded by enemies, or in danger of invasion by the Indians. Nor could any state grant commissions to any ships of war, nor letters of marque and reprisal, except after a declaration of war by congress, unless such state were infested by pirates, and then subject to the determination of congress. No state could prevent the removal of any property imported into any state to any other state, of which the owner was an inhabitant. And no imposition, duties, or restriction, could be laid by any state on the property of the United States or of either of them.

"There was also provision made for the admission of Canada into the union, and of other colonies with the assent of nine states. And it was finally declared, that every state should abide by the determinations of congress on all questions submitted to it by the confederation; that the articles should be inviolably observed by every state; that *the union should be perpetual;* and that no alterations should be made in any of the articles, unless agreed to by congress, and confirmed by the legislatures of every state.

"Such is the substance of this

celebrated instrument, under which the treaty of peace, acknowledging our independence, was negotiated, the war of the revolution concluded, and the union of the states maintained until the adoption of the present constitution."

ARTICLES OF IMPEACHMENT. An instrument, which in cases of impeachment, (q. v.) is used, and performs the same office which an indictment does in a common criminal case, is known by this name. These articles do not usually pursue the strict form and accuracy of an indictment. Woodd. Lect. 40, p. 605; Foster, 389, 390; Com. Dig. Parliament, L 21. They are sometimes quite general in the form of the allegations, but always contain, or ought to contain, so much certainty, as to enable the party to put himself on the proper defence, and in case of an acquittal, to avail himself of it, as a bar to another impeachment. Additional articles may, perhaps, be exhibited at any stage of the prosecution. Story on the Const. § 806; Rawle on the Const. 216. The answer to articles of impeachment is exempted from observing great strictness of form; and it may contain arguments as well as facts. It is usual to give a full and particular answer to each article of the accusation. Story, § 808.

ARTICLES OF PARTNERSHIP. The name given to an instrument of writing by which the parties enter into a partnership, upon the conditions therein mentioned. This instrument generally contains certain provisions which it is the object here to point out. But before proceeding more particularly to the consideration of the subject, it will be proper to observe that sometimes preliminary agreements to enter into a partnership are formed, and that questions, not unfrequently, arise as to their effects. These are not partnerships, but agreements to enter into partnership at a future time. When such an agreement has been broken, the parties may apply for redress to a court of law, where damages will be given, as a compensation. Application is sometimes made to courts of equity for their more efficient aid to compel a specific performance. In general these courts will not entertain bills for specific performance of such preliminary contracts; but in order to suppress frauds, or manifestly mischievous consequences, they will compel such performance. 3 Atk. 383; Colly. Partn. B. 2, c. 2, § 2; Wats. Partn. 60; Gow, Partn. 109; Story, Eq. Jur. § 666, note; Story, Partn. § 189; 1 Swanst. R. 513, note. When, however, the partnership may be immediately dissolved, it seems the contract cannot be specifically enforced. 9 Ves. 360.

It is proper to premise that under each particular head, it is intended briefly to examine the decisions which have been made in relation to it. The principal parts of articles of partnership are here enumerated.

1. The names of the contracting parties. These should all be severally set out.

2. The agreement that the parties actually by the instrument enter into partnership, and care must be taken to distinguish this agreement from a covenant to enter into partnership at a future time.

3. The commencement of the partnership. This ought always to be expressly provided for. When no other time is fixed by it, the commencement will take place from the date of the instrument. Colly. Partn. 140; 5 Barn. & Cres. 108.

4. The duration of the partnership. This may be for life, or for a specific period of time; partnerships may be conditional or indefinite in their duration, or for a single adventure or

dealing; this period of duration is either express or implied, but it will not be presumed to be beyond life. 1 Swanst. R. 521. When a term is fixed, it is presumed to endure until that period has elapsed; and, when no term is fixed, for the life of the parties, unless sooner dissolved by the acts of one of them, by mutual consent, or operation of law. Story, Partn. § 84.

A stipulation may lawfully be introduced for the continuance of the partnership after the death of one of the parties, either by his executors or administrators, or for the admission of one or more of his children into the concern. Colly. Partn. 147; 9 Ves. 500. Sometimes this clause provides that the interest of the partner shall go to such persons, as he shall by his last will name and appoint, and for want of appointment on such persons as are there named. In these cases it seems that the executors or administrators have an option to continue the partnership or not. Colly. Partn. 149; 1 McCl. & Yo. 569; Colles, Parl. Rep. 157.

When the duration of the partnership has been fixed by the articles, and the partnership expires by mere effluxion of time, and, after such determination it is carried on by the partners without any new agreement, in the absence of all circumstances which may lead as to the true intent of the partners, the partnership will not, in general, be deemed one for a definite period, 17 Ves. 298; but in other respects the old articles of the expired partnership are to be deemed adopted by implication as the basis of the new partnership during its continuance. 5 Mason, R. 176, 185; 15 Ves. 218; 1 Molloy, R. 466.

5. The business to be carried on, and the place where it is to be conducted. This clause ought to be very particularly written, as courts of equity will grant an injunction when one or more of the partners attempt, against the wishes of one or more of them, to extend such business beyond the provision contained in the articles. Story, Partn. § 193; Gow, Partn. 398.

6. The name of the firm, as for example John Doe and Company, ought to be ascertained. The members of the partnership are required to use the name thus agreed upon, and a departure from it will make them individually liable to third persons or to their partners, in particular cases. Colly. Partn. 141; 2 Jac. & Walk. 266; 9 Adol. & Ellis, 314; 11 Adol. & Ellis, 339; Story, Partn. § 102, 136, 142, 202.

7. A provision is not unfrequently inserted that the business shall be managed and administered by a particular partner, or that one of its departments shall be under his special care. In this case, courts of equity will protect such partner in his rights. Story, Partn. § 172, 182, 193, 202, 204; Colly. Partn. 753. In Louisiana, this provision is incorporated in its civil code, art. 2838 to art. 2840. The French and civil law also agree as to this provison. Poth. de Societé, n. 71; Dig. 14, 1, 1, 13; Poth. Pand. 14, 1, 4.

Sometimes a provision is introduced that a majority of the partners shall have the management of the affairs of the partnership. This is requisite, particularly when the associates are numerous. As to the rights of the majority see *Partners*.

8. A provision should be inserted as to the manner of furnishing the capital or stock of the partnership. When a partner is required to furnish his proportion of the stock at stated periods, or pay by instalments, he will, where there are no stipulations to the contrary, be considered a debtor to the firm. Colly. Partn. 141; Story, Partn. § 203; 1 Swanst. R.

89. Sometimes a provision is inserted that real estate and fixtures belonging to the firm shall be considered, as between the partners, not as partnership but as several property. In cases of bankruptcy this property will be treated as the separate property of the partners. Colly. Partn. 141, 595, 600; 5 Ves. 189; 3 Madd. R. 63.

9. A provision for the apportionment of the profits and losses among the partners should be introduced. In the absence of all proof, and controlling circumstances, the partners are to share in both equally, although one may have furnished all the capital, and the other only his skill. Wats. Partn. 59; Colly. Partn. 105; Story, Partn. § 24; 3 Kent, Com. 28; 4th ed.; 6 Wend. R. 263; but see 7 Bligh, R. 432; 5 Wils. & Shaw 16.

10. Sometimes a stipulation for an annual account of the property of the partnership whether in possession or in action, and of the debts due by partnership is inserted. These accounts when settled are at least *prima facie* evidence of the facts they contain. Colly. Partn. 146; Story, Partn. § 206; 7 Sim. R. 239.

11. A provision is frequently introduced forbidding any one partner to carry on any other business. This should be provided for, though there is an implied provision in every partnership that no partner shall carry on any separate business inconsistent or contrary to the true interest of the partnership. Story, Partn. § 178, 179, 209.

12. When the partners are numerous a provision is often made for the expulsion of a partner for gross misconduct, for insolvency, bankruptcy, or other cases particularly enumerated. This provision will govern when the case occurs.

13. This instrument should always contain a provision for winding up the business. This is generally provided for in one of three modes: first, by turning all the assets into cash, and, after paying all the liabilities of the partnership, dividing such money in proportion to the several interests of the parties; secondly, by providing that one or more of the partners shall be entitled to purchase the shares of the others at a valuation; thirdly, that all the property of the partnership shall be appraised, and that after paying the partnership debts, it shall be divided in the proper proportions. The first of these modes is adopted by courts of equity in the absence of express stipulations. Colly. Partn. 145; Story, Partn. § 207; 8 Sim. R. 529.

14. It is not unusual to insert in these articles a provision that in case of disputes the matter shall be submitted to arbitration. This clause seems nugatory, as no action will lie for a breach of it, as that would deprive the courts of their jurisdiction, which the parties cannot do. Story, Partn. § 215; Gow, Partn. 72; Colly. Partn. 165; Wats. Partn. 383.

15. The articles should be dated, and executed by the parties. It is not requisite that the instrument should be under seal.

Vide *Parties to contracts; Partners; Partnership.*

ARTICLES OF WAR. The name commonly given to a code made for the government of the army. The act of April 10, 1806, 2 Story's Laws U. S. 992, contains the rules and articles by which the armies of the United States shall be governed. The act of April 23, 1800, 1 Story's L. U. S. 761, contains the rules and rogulations for the government of the navy of the United States.

ARTICLES, *eccl. law*, a complaint in the form of a libel, exhibited to an ecclesiastical court.

ARTICULATE ADJUDICATION, a term used in the Scotch

law in cases where there is more than the debt due to the adjudging creditor, when it is usual to accumulate each debt by itself, so that any error which may arise in ascertaining one of the debts need not reach to all the rest.

ARTIFICERS. Persons whose employment or business consists chiefly of bodily labour. Those who are masters of their arts. Cunn. Dict. h. t. Vide *Art*.

AS. The name of a kind of money among the Romans. They divided it into twelve parts or twelve ounces, which made a Roman pound. The Romans also divided an inheritance into twelve parts, the whole inheritance was therefore called *as*, whence this expression, hæres ex asse, or, legetarius ex asse, the heir of the whole estate.

ASCENDANTS, are those from whom a person is descended, or from whom he derives his birth, however remote they may be. Every one has two ascendants at the first degree, his father and mother; four at the second degree, his paternal grandfather and grandmother, and his maternal grandfather and grandmother; eight at the third. Thus in going up we ascend by various lines which fork at every generation. By this progress sixteen ascendants are found at the fourth degree; thirty-two, at the fifth; sixty-four, at the sixth; one hundred and twenty-eight at the seventh, and so on; by this progressive increase, a person has at the twenty-fifth generation, thirty-three millions five hundred and fifty-four thousand, four hundred and thirty-two ascendants. But as many of the ascendants of a person have descended from the same ancestor, the lines which were forked, reunite to the first common ancestor, from whom the other, descend; and this multiplication thus frequently interrupted by the common ancestors, may be reduced to a few persons. Vide *Line*.

ASCRIPTITIUS, *civil law*.—Among the Romans ascriptitii were foreigners who had been naturalized, who had in general the same rights as natives. Nov. 22, ch. 17; Code, 11, 47.

ASPORTATION. Vide *Carrying away*.

ASSASSIN, *crim. law*. An assassin is one who attacks another either traitorously, or with the advantage of arms or place, or of a number of persons who support him, and kills his victim. This being done with malice aforethought is murder. The term assassin is but little used in the common law, it is borrowed from the civil law.

ASSASSINATION, *crim. law*, is a murder committed by an assassin.

ASSAULT, *crim. law*. An assault is any attempt or offer with force or violence to do a corporal hurt to another, whether from malice or wantonness; for example, by striking at him or even holding up the fist at him in a threatening or insulting manner, or with other circumstances as denote at the time an intention, coupled with a present ability, of actual violence against his person, as by pointing a weapon at him when he is within reach of it. 6 Rogers's Rec. 9. When the injury is actually inflicted, it amounts to a battery, (q. v.) Assaults are either simple or aggravated. 1. A simple assault is one where there is no intention to do any other injury. This is punished at common law by fine and imprisonment. 2. An aggravated assault is one that has in addition to the bare intention to commit it, another object which is also criminal; for example if a man should fire a pistol at another and miss him, the former would be guilty of an assault with intent to murder; so an assault with intent to rob a man, or with intent to spoil his clothes, and the like, are aggravated assaults, and

they are more severely punished than simple assaults. General references, 1 East, P. C. 406; Bull. N. P. 15; Hawk. P. C. b, 1, c. 62, s. 12; 1 Russ. Cr. 604; 2 Camp. Rep. 650; 1 Wheeler's Cr. C. 364; 6 Rogers's Rec. 9; 1 Serg. & Rawle, 347; Bac. Ab. h. t.; Roscoe, Cr. Ev. 210.

ASSAY. A chemical examination of metals by which the quantity of valuable or precious metal contained in any mineral or metallic mixture is ascertained. By the acts of Congress of March 3, 1823, 3 Story's L. U. S. 1924; of June 25, 1834, 4 Sharsw. cont. of Story's L. U. S. 2373; and of June 28, 1834, Ibid. 2377, it is made the duty of the secretary of the treasury to cause assays to be made at the mint of the United States, of certain coins made current by the said acts, and to make report of the result thereof to congress.

ASSEMBLY, is a reunion of a number of persons in the same place. There are several kinds of assemblies. Political, authorised by the constitution and laws; for example, the general assembly which includes, the senate and house of representatives; the meeting of the electors of president and vice-president of the United States, may also be called an assembly. Popular assemblies are those where the people meet to deliberate upon their rights; these are guaranteed by the constitution. Const. U. S. Amendm. art. 1; Const. of Penn. art. 9, s. 20.

ASSEMBLY, *unlawful, in criminal law*, the meeting of three or more persons to do an unlawful act, although they may not carry their purpose into execution. It differs from a riot or rout (q. v.) because in each of the latter cases there is some act done besides the simple meeting.

ASSENT, *contracts*, is an agreement to something that has been done before. It is either express, where it is openly declared; or implied, where it is presumed by law. For instance, when a conveyance is made to a man, his assent to it is presumed, for the following reasons; 1. Because there is a strong intendment of law, that it is for a person's benefit to take, and no man can be supposed to be unwilling to do that which is for his advantage.—2. Because it would seem incongruous and absurd, that when a conveyance is completely executed on the part of the grantor, the estate should continue in him.—3. Because it is contrary to the policy of law to permit the freehold to remain in suspense and uncertainty. 2 Ventr. 201; 3 Mod. 296; 3 Lev. 284; Show. P. C. 150; 3 Barn. & Alders. 31; 1 Binn. R. 502; 2 Hayw. 234; 12 Mass. R. 461; 5 S. & R. 523; 20 John. R. 184; 14 S. & R. 296; 15 Wend. R. 656; 4 Halst. R. 161; 6 Verm. R. 411. When a devise draws after it no charge or risk of loss, and is, therefore, a mere bounty, the assent of the devisee to take it will be presumed. 17 Mass. 73, 4. A dissent properly expressed would prevent the title from passing from the grantor unto the grantee. 12 Mass. R. 461. See 3 Munf. R. 345; 4 Munf. R. 332, pl. 9; 5 Serg. & Rawle, 523; 8 Watts, R. 9, 11; 20 Johns. R. 184. The rule requiring an express dissent does not apply however when the grantee is bound to pay a consideration for the thing granted. 1 Wash. C. C. Rep. 70. When an offer to do a thing has been made, it is not binding on the party making it until the assent of the other party has been given; and such assent must be to the same subject-matter in the same sense. 1 Sumn. 218. When such assent is given, before the offer is withdrawn, the contract is complete. 6 Wend. 103. See 5 Wend. 523; 5 Greenl. R. 419; 3 Mass. 1; 8 S. & R. 243; 12 John.

190; 19 John. 205; 4 Call, R. 379; 1 Fairf. 185; and *Offer*.

TO ASSESS, 1. To rate or to fix the proportion which every person has to pay of any particular tax. 2. To assess damages is to ascertain what damages are due to the plaintiff; in actions founded on writings in many cases after interlocutory judgment, the prothonotary is directed to assess the damages; in cases sounding in tort the damages are assessed on a writ of inquiry by the sheriff and a jury.

ASSESSMENT, is the making out a list of property and fixing its valuation or appraisement; it is also applied to making out a list of persons, and appraising their several occupations, chiefly with a view of taxing the said persons and their property.

ASSESSORS, *in the civil law*, were so called from the word *adsidere*, which signifies to be seated with the judge. They were lawyers who were appointed to assist by their advice the Roman magistrates, who were generally ignorant of law, being mere military men. Dig. lib. 1, t. 22; Code, lib. 1, t. 51. In our law, an assessor is one who has been legally appointed to value and appraise property, generally with a view of laying a tax on it.

ASSETS. The property in the hands of an heir, executor, administrator or trustee, which is legally or equitably liable to discharge the obligations, which such heir, executor, administrator or other trustee, is, as such, required to discharge, is called assets. The term is derived from the French word *assez*, enough, that is, the heir or trustee has enough property. But the property is still called assets although there may not be enough to discharge *all* the obligations; and the heir, executor, &c. is chargeable in distribution as far as such property extends. Assets are sometimes divided by all the old writers, into assets enter mains and assets per descent; considered as to their mode of distribution, they are legal or equitable; as to the property from which they arise, they are real or personal.

Assets enter mains, or assets in hand, is such property as at once comes to the executor or other trustee for the purpose of satisfying claims against him as such. Termes de la Ley.

Assets per descent, is that portion of the ancestor's estate which descends to the heir, and which is sufficient to charge him, as far as it goes, with the specialty debts of his ancestor. 2 Williams on Ex. 1011.

Legal assets, are such as constitute the fund for the payment of debts according to their legal priority.

Equitable assets, are such as can be reached only by the aid of a court of equity, and are to be divided, *pari passu*, among all the creditors; as when a debtor has made his property subject to his debts generally, which, without his act, would not have been so subject. 1 Madd. Ch. 586; 2 Fonbl. 401, et seq.; Willis on Trust. 118.

Real assets, are such as descend to the heir, as an estate in fee simple.

Personal assets, are such goods and chattels to which the executor or administrator is entitled.

Vide, generally, Williams on Exec. Index, h. t.; Toll. on Exec. Index, h. t.; 2 Bl. Com. 510, 511; 3 Vin. Ab. 141; 11 Vin. Ab. 239; 1 Vern. 94; 3 Ves. Jr. 117; Gordon's Law of Decedents, Index, h. t.; Ram on Assets.

TO ASSIGN, *contracts, practice*. 1. To make a right over to another; as to assign an estate, an annuity, a bond, &c., over to another. 5 John. Rep. 391. 2. To appoint; as to appoint a deputy, &c. Justices are also said to be assigned to keep the

peace. 3. To set forth or point out, as to "assign errors," to show where the error is committed; or to assign false judgment, to show wherein it was unjust. F. N. B. 19.

ASSIGNATION, *in the Scotch law*, the ceding or yielding a thing to another of which intimation must be made.

ASSIGNEE. One to whom an assignment has been made. Assignees are either assignees in fact or assignees in law. An assignee in fact is one to whom an assignment is made in fact by the party having the right. An assignee in law is one on whom the law vests the right, as an executor or administrator. Co. Litt. 210 a note (1); Hob. 9. Vide *Assigns*, and 1 Vern. 425; 1 Salk. 81; 7 East, 337; Bac. Ab. Covenant, E; 3 Saund. 182, note 1; Arch. Civ. Pl. 50, 58, 70; 1 Supp. to Ves. Jr. 72; 2 Phil. Ev. Index, h. t.

ASSIGNMENT, *contracts*. In common parlance this word signifies the transfer of all kinds of property, real, personal and mixed, and whether the same be in possession or in action; as, a general assignment. In a more technical sense it is usually applied to the transfer of a term for years; but it is more properly used to signify a transfer of some particular estate or interest in lands. The proper technical words of an assignment are assign, transfer and set over; but the words grant, bargain and sell, or any other words which will show the intent of the parties to make a complete transfer, will amount to an assignment. A chose in action cannot be assigned at law, though it may be done in equity; but the assignee takes it subject to all the equity to which it was liable in the hands of the original party. 2 John. Ch. Rep. 443, and the cases there cited. 2 Wash. Rep. 233. The deed in which an assignment is written is also called an assignment. Vide, generally. Com. Dig. h. t.; Bac. Ab. h. t.; Vin. Ab. h. t.; Nelson's Ab. h. t.; Civ. Code of Louis. art. 2612. In relation to general assignments, see Angell on Assignments, passim.

ASSIGNS, *contracts*, means those to whom rights have been transmitted by particular title, such as sale, gift, legacy, transfer or cession. Vide Ham. Parties, 230; Lofft. 316.

ASSISES OF JERUSALEM. The name of a code of feudal law, made at a general assembly of lords, after the conquest of Jerusalem. It was compiled principally from the laws and customs of France. 2 Profession d'Avocat, par Dupin, 674 to 680.

ASSIZE, *Eng. law*. A particular court where writs of assize and other causes were decided. Vide Dane's Ab. Index, h. t.; Bract. lib. 3; Merl. Répert. h. t. By assize is also understood a remedy for the restitution of a freehold, of which the complainant has been disseised. Bac. Ab. h. t.

ASSIZE, *remedies*, is an old remedy which was used for the restitution of a freehold, of which the complainant had been disseised. This remedy has given way to others less perplexed, and which are more expeditious. Bac. Ab. h. t.; Co. Litt. 153, 154, 155.

ASSOCIATE. This term is applied to a judge who is not the president of a court, as associate judge.

ASSUMPSIT, *in contracts*, is an undertaking, either express or implied, to perform a parol agreement. 1 Lilly's Reg. 132.

ASSUMPSIT, *remedies, practice*, is a form of action which may be defined to be an action for the recovery of damages for the non-performance of a parol or simple contract; or, in other words, a contract not under seal, nor of record; circumstances which distinguish this remedy from others. 7 T. R. 351; 3 Johns. Cas.

60. This action differs from the action of *debt;* for, in legal consideration, that is for the recovery of a debt *eo nomine*, and *in numero*, and may be upon a deed as well as upon any other contract. 1 H. Bl. 554; B. N. P. 167. It differs from *covenant*, which, though brought for the recovery of damages, can only be supported upon a contract under *seal*. See *Covenant*. It will be proper to consider this subject with reference, 1, to the contract upon which this action may be sustained; 2, the declaration; 3, the plea; 4, the judgment.

1. Assumpsit lies to recover damages for the breach of all parol or simple contracts, whether written or not written; express or implied; for the payment of money, or for the performance or omission of any other act. For example, to recover money lent, paid, or had and received, to the use of the plaintiff; and in some cases, where money has been received by the defendant, in consequence of some tortious act to the plaintiff's property, the plaintiff may waive the tort, and sue the defendant in assumpsit. 5 Pick. 285; 1 J. J. Marsh. 543; 3 Watts, R. 277; 4 Binn. 374; 3 Dana, R. 552; 1 N. H. Rep. 151; 12 Pick. 120; 4 Call. R. 451; 4 Pick. 452. Assumpsit lies to recover the purchase money for land sold, 14 Johns. R. 210; 14 Johns. R. 162; 20 Johns. R. 338; 3 M'Cord, R. 421; and it lies, specially, upon wagers, 2 Chit. Pl. 114; feigned issues, 2 Chit. Pl. 116; upon foreign judgments, 8 Mass. 273; Dougl. 1; 3 East, 221; 11 East, 124; 4 T. R. 493; 5 Johns. N. 132. But it will not lie on a judgment obtained in a sister state. 1 Bibb, 361; 19 Johns. 162; 3 Fairf. 94; 2 Rawle, 431. Assumpsit is the proper remedy upon an account stated. Bac. Ab. Assumpsit, A. It will lie for a corporation, 2 Lev. 252; 1 Camp. 466; In England it does not lie against a corporation, unless by express authority of some legislative act, 1 Chit. Pl. 98; but in this country it lies against a corporation aggregate, on an express or implied promise, in the same manner as against an individual. 7 Cranch, 297; 9 Pet. 541; 3 S. & R. 117; 4 S. & R. 16; 12 Johns. 231; 14 Johns. 118; 2 Bay, 109; 1 Chipm. 371, 456; 1 Aik. 180; 10 Mass. 397. But see 3 Marsh. 1; 3 Dall. 496.

2. The declaration must invariably disclose the consideration of the contract, the contract itself, and the breach of it. Bac. Ab. h. t. F; 5 Mass. 98; but in a declaration on a negociable instrument under the statute of Anne, it is not requisite to allege any consideration, 2 Leigh, R. 198; and on a note expressed to have been given for value received, it is not necessary to aver a special consideration. 7 Johns. 321. See 5 Mass. 97. The gist of this action is the promise, and it must be averred. 2 Wash. 187; 2 N. H. Rep. 289; Hardin, 225. Damages should be laid in a sufficient amount to cover the real amount of the claim. See 4 Pick. 497; 2 Rep. Const. Ct. 339; 4 Munf. 95; 5 Munf. 23; 2 N. H. Rep. 289; 1 Breese, 286; 1 Hall, 201; 4 Johns. 280; 11 S. & R. 27; 5 S. & R. 519; 6 Conn. 176; 9 Conn. 508; 1 N. & M. 342; 6 Cowen, 151; 2 Bibb, 429; 3 Caines, 286.

3. The usual plea is *non-assumpsit*, (q. v.) under which the defendant may give in evidence most matters of defence. Com. Dig. Pleader, 2 G 1. When there are several defendants they cannot plead the general issue severally, 6 Mass. 444; nor the same plea in bar, severally. 13 Mass. 152. The plea of *not guilty*, in an action of assumpsit, is cured by verdict. 8 S. & R. 541; 4 Call, 451. See 1 Marsh. 602; 17 Mass. 623; 2 Greenl. 362; Minor, 254.

4. Judgment. Vide *Judgment in Assumpsit.*

Vide Bac. Ab. h. t.; Com. Dig. Action upon the case upon assumpsit; Dane's Ab. Index, h. t.: Viner's Ab. h. t.; 1 Chit. Pl. h. t.; Petersd. h. t; Lawes's Pl. in Assumpsit; the various digests, h. t. *Actions; Covenant; Debt; Indebitatus assumpsit; Pactum Constitutæ pecuniæ.*

ASSURANCE, *comm. law.* Insurance, (q. v.)

ASSURANCE, *conveyancing.*—The deed by which lands and tenements are conveyed. Vide Touchst. on Com. Assurances.

ASYLUM. A place of refuge where debtors and criminals fled for safety. At one time in Europe, churches and other consecrated places served as asylums, to the disgrace of the law. These never protected criminals in the United States. It may be questioned whether the house of an ambassador (q. v.) would not afford protection, temporarily, to a person who should take refuge there.

ASSYTHMENT, *in the Scotch law*, is an indemnification which a criminal is bound to make to the party injured or his executors, though the crime itself should be extinguished by pardon. Ersk. Pr. L. Scot. 4, 3, 13.

ATHEIST, one who denies the existence of God. As atheists have not any religion that can bind their consciences to speak the truth, they are excluded from being witnesses. Bull. N. P. 292; 1 Atk. 40; Gilb. Ev. 129; 1 Phil. Ev. 19. See also, Co. Litt. 6 b.; 2 Inst. 606; 3 Inst. 165; Willes R. 451; Hawk. P. C., B. 2, c. 46, s. 148; 2 Hale's P. C. 279.

TO ATTACH, *crim. law, practice*, to take or apprehend by virtue of the order of a writ or precept, commonly called an attachment. It differs from arrest in this, that he who arrests a man, takes him to a person of higher power, to be disposed of; but he who attaches, keeps the party attached, according to the exigency of his writ, and brings him into court on the day assigned. Kitch. 279; Bract. lib. 4; Fleta, lib. 5, c. 24.

ATTACHE', connected with, attached to. This word is used to signify those persons who are attached to a foreign legation. An attaché is a public minister within the meaning of the act of April 30, 1790, s. 37, 1 Story's L. U. S. 89, which protects from violence "the person of an ambassador or other public minister." 1 Bald. 240. Vide 2 W. C. C. R. 205; 4 W. C. C. R. 531; 1 Dall. 117; 1 W. C. C. R. 232; 4 Dall. 321. Vide *Ambassador; Consul; Envoy; Minister.*

ATTACHMENT, *crim. law, practice*, is a writ requiring a sheriff to arrest a particular person, who has been guilty of a contempt of court, and to bring the offender before the court. Tidd's Pr. Index, h. t.; Grah. Pr. 555. It may be awarded by the court upon a bare suggestion, though generally an oath stating what contempt has been committed is required, or on their own knowledge without indictment or information. An attachment may be issued against officers of the court for disobedience or contempt of their rules and orders, for disobedience of their process, and for disturbing them in their lawful proceedings. Bac. Ab. h. t. A. An attachment for contempt for the non-performance of an award is considered in the nature of a civil execution, and, it was therefore held it could not be executed on Sunday, 1 T. R. 266; Cowper, 394; Willes, R. 292, note (b); yet, in one case, it was decided, that it was so far criminal, that it could not be granted in England on the affirmation of a Quaker. Stra. 441.

See 5 Halst. 63; 1 Cowen, 121, note; Bac. Ab. h. t.

ATTACHMENT, *remedies*, is a writ issued by a court of competent jurisdiction, commanding the sheriff or other proper officer to seize any property, credit, or right belonging to the defendant, in whatever hands the same may be found, to satisfy the demand which the plaintiff has against him. This writ always issues before judgment and is intended to compel an appearance; in this respect it differs from an execution. In some of the states this process can be issued only against absconding debtors, or those who conceal themselves; in others it is issued in the first instance, so that the property attached may respond to the exigency of the writ, and satisfy the judgment.

[2] In New York, when a person who is indebted within the state, absconds, or is concealed, a creditor to whom he owes one hundred dollars, or any two creditors to whom he owes one hundred and fifty dollars, or any three to whom he owes two hundred dollars may, on application to a judge or commissioner, on legal proof of the departure or concealment, procure his real or personal estate to be attached; and on due public notice of the proceedings, if, within three months, the debtor does not return and satisfy the creditor, or appear and contest the validity of the demand, and give the requisite security, then trustees are to be appointed, in whom the debtor's estate becomes vested; and they are to collect and sell it, settle controversies, and make dividends among all his creditors in the mode prescribed. From the time of the notice, all sales and assignments are declared void. The property of a debtor who resides out of the state may be attached and sold in like manner, but the trustees are not to be appointed until one year after public notice of the proceeding. Persons imprisoned in the state prison for a less period than life, are liable to be proceeded against as absconding debtors. 2 Kent, Com. 327.

[3] There are two kinds of attachment in Pennsylvania, the foreign attachment, and the domestic attachment. 1. The *foreign* attachment is a mode of proceeding by a creditor against the property of his debtor, when the debtor is out of the jurisdiction of the state, and is not an inhabitant of the same. The object of this process is in the first instance to compel an appearance by the debtor, although his property may eventually be made liable to the amount of the plaintiff's claim. It will be proper to consider, 1, by whom it be issued; 2, against what property; 3, mode of proceeding. 1. The plaintiff must be a creditor of the defendant: the claim of the plaintiff need not, however, be technically a debt, but it may be such on which an action of assumpsit would lie, but an attachment will not lie for a demand which arises *ex delicto;* or when special bail would not be regularly required. Serg. on Att. 51. 2. The writ of attachment may be issued against the real and personal estate of any person not residing within the commonwealth, and not being within the county in which such writ may issue, at the time of the issuing thereof. And proceedings may be had against persons convicted of crime, and sentenced to imprisonment. 3. The writ of attachment is in general terms not specifying in the body of it, the name of the garnishee, or the property to be attached, but commanding the officer to attach the defendant, by all and singular his goods and chattels, in whose hands or possession soever the same may be found in his bailiwick, so that he be and appear before the court at a certain

time to answer, &c. The foreign attachment is issued solely for the benefit of the plaintiff. 2. The *domestic attachment* is issued by the court of common pleas of the county in which any debtor, being an inhabitant of the commonwealth may reside; if such debtor shall have absconded from the place of his usual abode within the same, or shall have remained absent from the commonwealth, or shall have confined himself to his own house, or concealed himself elsewhere, with a design, in either case, to defraud his creditors. It is issued on an oath or affirmation, previously made by a creditor of such person, or by some one on his behalf, of the truth of his debt, and of the facts upon which the attachment may be founded. Any other creditor of such person, upon affidavit of his debt as aforesaid, may suggest his name upon the record, and thereupon such creditor may proceed to prosecute his said writ, if the person suing the same shall refuse or neglect to proceed thereon, or if he fail to establish his right to prosecute the same, as a creditor of the defendant. The property attached is vested in trustees to be appointed by the court, who are, after giving six months' public notice of their appointment, to distribute the assets attached among the creditors under certain regulations prescribed by the act of assembly. Perishable goods may be sold under an order of the court, both under a foreign and domestic attachment. Vide Serg. on Attachments; Whart. Dig. title Attachment.

[4] By the code of practice of Louisiana, an attachment in the hands of third persons is declared to be a mandate which a creditor obtains from a competent officer, commanding the seizure of any property, credit or right, belonging to his debtor, in whatever hands they may be found, to satisfy the demand which he intends to bring against him. A creditor may obtain such attachment of the property of his debtor, in the following cases. 1. When such debtor is about leaving permanently the state, without there being a possibility, in the ordinary course of judicial proceedings, of obtaining or executing judgment against him previous to his departure; or when such debtor has already left the state never again to return: 2. When such debtor resides out of the state: 3. When he conceals himself to avoid being cited or forced to answer to the suit intended to be brought against him. Articles 239, 240.

[5] By the local laws of some of the New England states, and particularly of the states of Massachusetts, New Hampshire and Maine, personal property and real estate may be attached upon mesne process to respond the exigency of the writ, and satisfy the judgment. In such cases it is the common practice for the officer to bail the goods attached to some person, who is usually a friend of the debtor, upon an express or implied agreement on his part, to have them forthcoming on demand, or in time to respond the judgment, when the execution thereon shall be issued. Story on Bailm. § 124. As to the rights and duties of the officer or bailor in such cases, and as to the rights and duties of the bailee, who is commonly called the receiptor, see 2 Mass. 514; 9 Mass. 112; 11 Mass. 211; 6 Johns. R. 195; 9 Mass. 104, 265; 10 Mass. 125; 15 Mass. 310; 1 Pick. R. 232, 389. See Metc. & Perk. Dig. tit. Absent and Absconding Debtors.

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ATTACHMENT OF PRIVILEGE, *Eng. law*, a process by which a man by virtue of his privilege calls another to litigate in that court to which he himself belongs; and who has the privilege to answer there.

ATTAINDER, *English criminal law;* attinctura, the stain or corruption of blood which arises from being condemned for any crime.—*Attainder by confession*, is either by pleading guilty at the bar before the judges, and not putting oneself on one's trial by a jury; or before the coroner in sanctuary, when, in ancient times, the offender was obliged to abjure the realm.—*Attainder by verdict*, is when the prisoner at the bar pleads not guilty to the indictment, and is pronounced guilty by the verdict of the jury.—*Attainder by process* or *outlawry*, is when the party flies, and is subsequently outlawed. Co. Litt. 391. *Bill of attainder* is a bill brought into parliament for attainting persons condemned for high treason. By the constitution of the United States, art. 1, sect. 9, § 3, it is provided that no bill of attainder or ex post facto law shall be passed.

ATTAINT, *English Law*, 1. *Attinctus*, attainted, stained or blackened. 2. A writ which lies to inquire whether a jury of twelve men gave a false verdict. A verdict cannot be attainted by less than twelve men. Bract. lib. 4, tr. 1, c. 134; Fleta, lib. 5, c. 22, § 2.

ATTEMPT, *criminal law*. An attempt to commit a crime, is an endeavour to accomplish it, carried beyond mere preparation but falling short of execution of the ultimate design, in any part of it. Between preparations and attempts to commit a crime, the distinction is in many cases very indeterminate. A man who buys poison for the purpose of committing a murder, and mixes it in the food intended for his victim, and places it on a table where he may take it, will or will not be guilty of an attempt to poison from the simple circumstance of his taking back the poisoned food before or after the victim has had an opportunity to take it; for if immediately on putting it down, he should take it up, and, awakened to a just consideration of the enormity of the crime, destroy it, this would amount only to preparations; and certainly if before he placed it on the table, or before he mixed the poison with the food, he had repented of his intention, there would have been no attempt to commit a crime; the law gives this as a *locus penitentiæ*. An attempt to commit a crime is a misdemeanor; and an attempt to commit a misdemeanor, is itself a misdemeanor. 1 Russ. on Cr. 44; 2 East, R. 8; 3 Pick. R. 26; 3 Benth. Ev. 69; 6 C. & P. 368.

ATTENDANT. One who owes a duty or service to another, or in some sort depends upon him. Termes de la Ley, h. t. As to attendant terms, see Powell on Mortg. Index, tit. Attendant terms; Park on Dower, ch. 17.

ATTENTAT. In the language of the civil and canon laws, is any thing whatsoever wrongfully innovated or attempted in the suit by the judge *a quo* pending an appeal. 1 Addams, R. 22, n.; Ayl. Par. 100.

ATTERMINING. The granting a time or term for the payment of a debt. This word is not used. See *Delay*.

ATTESTATION, *in contracts, and evidence*, is the act of witnessing

an instrument of writing, at the request of the party making the same, and subscribing it as a witness. It will be proper to consider, 1st, how it is to be made; 2dly, how it is proved; 3dly, its effects upon the witness; 4thly, its effects upon the parties.

1. The attestation should be made, in the case of wills, agreeably to direction of the statute of frauds, Com. Dig. Estates, E 1; and in the case of deeds or other writings at the request of the party executing the same. A person who sees an instrument executed, but is not desired by the parties to attest it, is not therefore an attesting witness, although he afterwards subscribes it as such. 3 Camp. 232. See as to the form of attestation, 2 South. R. 449.

2. The general rule is that an attested instrument must be proved by the attesting witness. But to this rule there are various exceptions, namely; 1. If he reside out of the jurisdiction of the court, 22 Pick. R. 85; 2, or is dead; 3, or becomes insane, 3 Camp. 283; 4, or has an interest, 5 T. R. 371; 5, or has married the party who offers the instrument, 2 Esp. C. 698; 6, or refuses to testify, 4 M. & S. 353; 7, or where the witness swears he did not see the writing executed; 8, or becomes infamous, Str. 833; 9, or blind, 1 Ld. Raym. 734. From these numerous cases, and those to be found in the books, it would seem that whenever from any cause the attesting witness cannot be had, secondary evidence may be given. But this inability of procuring the witness must be absolute, and, therefore, where he is unable to attend from sickness only, his evidence cannot be dispensed with. 4 Taunt. 46. See 4 Halst. R. 322; Andr. 236; 2 Str. 1096; 10 Ves. 174; 4 M. & S. 353; 7 Taunt. 251; 6 Serg. & Rawle, 310; 1 Rep. Const. Co. So. Ca. 310; 5 Cranch, 13; Com. Dig. tit. Testmoigne, Evidence, Addenda; 5 Com. Dig. 441; 4 Yeates, 79.

3. When the witness attests an instrument which conveys away, or disposes of his property or rights, he is estopped from denying the effects of such instrument, but in such case he must have been aware of its contents, and this must be proved. 1 Esp. C. 58.

4. Proof of the attestation is evidence of the sealing and delivery. 6 Serg. & Rawle, 311; 2 East, R. 250; 1 Bos. & Pull. 360; 7 T. R. 266.

See, in general, Starkie's Ev. part 2, 332; 1 Phil. Ev. 419 to 421; 12 Wheat. 91; 2 Dall. 96; 3 Rawle's Rep. 312; 1 Ves. Jr. 12; 2 Eccl. Rep. 60; 214, 289, 367; 1 Bro. Civ. Law, 279, 286; Gresl. Eq. Ev. 119.

ATTESTATION CLAUSE, *in wills and contracts*, is that clause wherein the witnesses certify that the instrument has been executed before them, and the manner of the execution of the same. The usual attestation clause to a will is in the following formula, to wit: "Signed, sealed, published and declared by the above named A B, as and for his last will and testament, in the presence of us, who have hereunto subscribed our names as witnesses thereto, in the presence of the said testator, and of each other." That of contracts is generally in these words: "Sealed and delivered in the presence of us."

When there is an attestation clause to a will, unsubscribed by witnesses, the presumption, though slight, is that the will is in an unfinished state; and it must be removed by some extrinsic circumstances, 2 Eccl. Rep. 60. This presumption is infinitely slighter, where the writer's intention to have it regularly attested, is to be collected only from the single word "witnesses." Ib. 214. See 3 Phillim. R. 323; S. C. 1 Eng. Eccl. R. 407.

ATTORNEY IN FACT, *contracts*, is a person to whom the authority of another, who is called the constituent, is by him lawfully delegated. This term is employed to designate persons who act under a special agency, or a special letter of attorney, so that they are appointed *in factum*, for the deed, or special act to be performed; but in a more extended sense it includes all other agents employed in any business, or to do any act or acts *in pais* for another. Bac. Ab. Attorney; Story, Ag. § 25. All persons who are capable of acting for themselves, and even those who are disqualified from acting in their own capacity, if they have sufficient understanding, as infants of a proper age and femes coverts, may act as attorneys of others. Co. Litt. 52 a; 1 Esp. Cas. 142; 2 Esp. Cas. 511; 2 Stark. Cas. N. P. 204. The form of his appointment is by letter of attorney, (q. v.) The object of his appointment is the transaction of some business of the constituent by the attorney. The attorney is bound to act with due diligence after having accepted the employment, and in the end to render an account to his principal of the acts which he has performed for him. Vide *Agency; Agent; Authority;* and *Principal.*

ATTORNEY AT LAW, *officers*, an officer in a court of justice, who is employed by a party in a cause to manage the same for him, as his advocate. In some courts, as in the Supreme Court of the United States, advocates are divided into counsellors at law, (q. v.) and attorneys. The business of attorneys is to carry on the practical and more mechanical parts of the suit. 1 Kent, Com. 307; see as to their powers, 2 Supp. to Ves. Jr. 241, 454; 3 Chit. Bl. 23, 338; Bac. Ab. h. t.; 3 Penna. R. 74; 3 Wils. 374; 16 S. & R. 368; 14 S. & R. 307; 7 Cranch, 452; 1 Penna. R. 264.

The name of attorney is given to those officers who practice in courts of common law; solicitors, in courts of equity; and proctors, in courts of admiralty and in the English ecclesiastical courts.

The principal duties of an attorney are, 1. To be true to the court and to his client; 2. To manage the business of his client with care, skill and integrity. 4 Burr. 2061; 1 B. & A. 202; 2 Wils. 325; 1 Bing. R. 347; 3. To keep his client informed as to the state of his business; 4. To keep his secrets confided to him as such. See *Client; Confidential Communication.* For a violation of his duties, an action will in general lie; and, in some cases, he may be punished by an attachment. His rights are, to be justly compensated for his services. Vide 1 Keen's R. 668; *Client; Counsellor at law.*

ATTORNEY GENERAL OF THE UNITED STATES, is an officer appointed by the president. He must be learned in the law, and be sworn or affirmed to a faithful execution of his office. His duties are to prosecute and conduct all suits in the Supreme Court, in which the United States shall be concerned; and give his advice upon questions of law, when required by the president, or when requested by the heads of any of the departments, touching matters that may concern their departments; Act of 24 Sept. 1789; his salary is three thousand five hundred dollars per annum, and he is allowed one clerk, whose compensation shall not exceed one thousand per annum; Act 20 Feb. 1819, 3 Story's Laws, 1720, and Act 20 April, 1818, s. 6, 3 Story's Laws, 1693. By the act of May 29, 1830, 4 Sharsw. cont. of Story, L. U. S. 2208, § 10, his salary is increased five hundred dollars per annum.

ATTORNMENT, *estates*, was the agreement of the tenant to the grant of the seignory, or of a rent, or the agreement of the donee in tail, or tenant for life, or years, to a grant of a reversion or of a remainder made to another, Co. Litt. 309; Touchs. 253; attornments are rendered unnecessary, even in England, by virtue of sundry statutes, and they are abolished in the United States, 4 Kent, Com. 479; 1 Hill. Ab. 128, 9. Vide 3 Vin. Ab. 317; 1 Vern. 330, n.; Saund. 234, n. 4; Roll. Ab. h. t.; Nelson's Ab. h. t.; Com. Dig. h. t.

AUBAINE. Vide *Albinatus Jus*.

AUCTION, *commerce*, *contract*, is a place, authorised by law, where property is publicly sold to the highest bidder. Auctions are generally held by express authority, and the persons who keep them are licensed to do so under various regulations. The sale of the property is also called an auction. The manner of conducting an auction is immaterial; whether it be by public outcry or by any other manner. The essential part is the selection of a purchaser from a number of bidders. In a case where a woman continued silent during the whole time of the sale, but whenever any one bid she gave him a glass of brandy, and when the sale broke up the person who received the last glass of brandy was taken into a private room, and he was declared to be the purchaser; this was adjudged to be an auction. 1 Dow. 115. The law requires fairness in auction sales, and when a puffer is employed to raise the property offered for sale on bona fide bidders, or a combination is entered into between two or more persons not to overbid each other, the contract may in general be avoided. Vide *Puffer*, and 6 John. R. 194; 8 John. R. 444; 3 John. Cas. 29; Cowp. 395; 6 T. R. 642; Harr. Dig. Sale, IV.; and the article *Conditions of Sale*. Vide Harr. Dig. Sale, IV.; 13 Price, R. 76; M'Clel. R. 25; 6 East, R. 392; 5 B. & A. 257; S. C. 2 Stark. R. 295; 1 Esp. R. 340; 5 Esp. R. 103; 4 Taunt. R. 209; 1 H. Bl. R. 81; 2 Chit. R. 253; Cowp. R. 395.

AUCTIONEER, *contracts*, *commerce*, is a person authorised by law to keep an action, and sell the goods of others at public sale. He is the agent of both parties, the seller and the buyer, 2 Taunt. 38, 209; 4 Greenl. R. 1; Chit. Contr. 208. His rights are, 1st, to charge a commission for his services; 2ndly, he has an interest in the goods sold coupled with the possession; 3dly, he has a lien for his commissions; 4thly, he may sue the buyer for the purchase-money. He is liable, 1st, to the owner for a faithful discharge of his duties in the sale, and if he gives credit without authority, for the value of the goods; 2dly, he is responsible for the duties due to the government; 3dly, he is answerable to the purchaser when he does not disclose the name of the principal; 4thly, he may be sued when he sells the goods of a third person, after notice not to sell them. Peake's Rep. 120; 2 Kent, Com. 423, 4; 4 John. Ch. R. 659; 3 Burr. R. 1921; 2 Taunt. R. 38; 1 Jac. & Walk. R. 350; 3 V. & B. 57; 13 Ves. R. 472; 1 Y. & J. R. 389; 5 Barn. & Ald. 333; 1 H. Bl. 81; 7 East, R. 558; 4 B. & Adolp. R. 443; 7 Taunt. 209; 3 Chit. Com. L. 210; Story on Ag. § 27; 2 Liv. Ag. 335; Cowp. 395; 6 T. R. 642; 6 John. 194.

AUDIENCE COURT, *Eng. eccl. law*. A court belonging to the archbishop of Canterbury, having the same authority with the court of arches, 4 Inst. 337.

AUDIENDO ET TERMINANDO, *English crim. law*. A writ or rather a commission directed to certain persons for the trial and punish-

ment of such persons as have been concerned in a riotous assembly, insurrection or other heinous misdemeanor.

AUDITA QUERELA. A writ the object of which is to be relieved from a judgment or execution for some injustice of the party who obtained it, which could not be pleaded in bar to the action. 13 Mass. 453; 12 Mass. 270; 6 Verm. 243; Bac. Ab. h. t.; 2 Saund. 148, n. 1; 2 Sell. Pr. 252. It is a remedial process which bears solely on the wrongful acts of the opposite party, and not upon the erroneous judgments or acts of the court. 10 Mass. 103; 17 Mass. 159; 1 Aik. 363. It will not lie, therefore, where the cause of complaint is a proper subject for a writ of error. 1 Verm. 433, 491; Brayt. 27. An audita querela is in the nature of an equitable suit, in which the equitable rights of the parties will be considered. 10 Mass. 101; 14 Mass. 448; 2 John. Cas. 227. An *audita querela* is a regular suit, in which the parties may plead, take issue, &c.. 17 John. 484. But the writ must be allowed in open court, and is not of itself, a *supersedeas*, which may or may not be granted, in the discretion of the court, according to circumstances. 2 John. 227. In modern practice, it is usual to grant the same relief on motion, which might be obtained by *audita querela*. 4 John. 191; 11 S. & R. 274; and in Virginia, 5 Rand. 639, and South Carolina, 2 Hill, 298, the summary remedy by motion, has superseded this ancient remedy. In Pennsylvania, this writ, it seems, may still be maintained, though relief is more generally obtained on motion. 11 S. & R. 274. Vide, generally, Pet. C. C. R. 269; Brayt. 27, 28; Walker, 66; 1 Chipm. 387; 3 Conn. 260; 10 Pick. 439; 1 Aik. 107; 1 Overt. 425; 2 John. Cas. 227; 1 Root, 151; 2 Root, 178; 9 John. 221.

AUDITOR. An officer whose duty is to examine the accounts of officers who have received and disbursed public moneys by lawful authority. See Acts of Congress, April 3, 1817, 3 Story's Laws U. S. 1630; and the Act of February 24, 1819, 3 Story's L. U. S. 1722.

AUDITORS, *practice*, are persons lawfully appointed to examine and digest accounts referred to them, take down the evidence in writing, which may be lawfully offered in relation to such accounts, and prepare materials on which a decree or judgment may be made; and to report the whole, together with their opinion, to the court in which such accounts originated. 6 Cranch, 8; 1 Aik. 145; 12 Mass. 412. Their report is not, *per se*, binding and conclusive, but will become so, unless excepted to. 5 Rawle, R. 323. It may be set aside, either with or without exceptions to it being filed. In the first case, when errors are apparent on its face, it may be set aside or corrected. 2 Cranch, 124; 5 Cranch, 313. In the second case, it may be set aside for any fraud, corruption, gross misconduct, or error. 6 Cranch, 8; 4 Cranch, 308; 1 Aik. 145. The auditors ought to be sworn, but this will be presumed. 8 Verm. 396. Auditors are also persons appointed to examine the accounts subsisting between the parties in an action of account render after a judgment *quod computet*. Bac. Ab. Accompt, F. The auditors are required to state a special account, 4 Yeates, 514, and the whole is to be brought down to the time when they make an end of their account. 2 Burr. 1086, and auditors are to make proper charges and credits without regard to time, or the verdict. 2 S. & R. 317. When the facts or matters of law are disputed before them, they are to report them to the court, when the former will be decided by a jury, and the

latter by the court, and the result sent to the auditors for their guidance. 5 Binn. 433.

AUGMENTATION, *old English law*. The name of a court erected by Henry VIII., which was invested with the power of determining suits and controversies relating to monasteries and abbey lands.

AULA REGIS. Vide *Curia Regis*.

AUNT, *domestic relations*, is the sister of one's father or mother; she is a relation in the third degree. Vide 2 Com. Dig. 474; Dane's Ab. c. 126, a. 3, § 4.

AUTER ACTION PENDENT, *pleading*, another action depending. In cases where the plaintiff has commenced two actions for the same cause, the defendant may plead that there is another action depending for the same cause, in the same or any other court of competent jurisdiction. In general, the pendency of another action must be pleaded in abatement, 3 Rawle, R. 320; 1 Mass. 495; 5 Mass. 174, 179; 2 N. H. Rep. 36; 7 Verm. 124; 3 Dana, 157; 1 Ashm. R. 4; 2 Browne, 175; 4 H. & M. 487; but in a penal action at the suit of a common informer, the priority of a former suit for the same penalty in the name of a third person may be pleaded in bar, because the party who first sued is entitled to the penalty. 1 Ch. Plead. 443. Having once arrested a defendant, the plaintiff cannot, in general, arrest him again for the same cause of action. Tidd, 184. But under special circumstances, of which the court will judge, a defendant may be arrested a second time. 2 Miles, R. 99, 100, 141, 142. Vide Bac. Ab. Bail in Civ. Cas. B 3; Grah. Pr. 98; Troub. & Hal. Pr. 44; 4 Yeates, R. 206; 1 John. Cas. 397; 7 Taunt. R. 151; 1 Marsh. R. 395; 1 Metc. & P. Dig. 6, and article *Lis pendens*.

AUTER DROIT, or more properly, *Autre Droit*, another's right. A man may sue or be sued in another's right; this is the case with executors and administrators.

AUTHENTIC. This term signifies an original of which there is no doubt.

AUTHENTIC ACT, *civil law*, *contracts*, *evidence*. The authentic act is that which has been executed before a notary or other public officer authorised to execute such functions, or which is testified by a public seal, or has been rendered public by the authority of a competent magistrate, or which is certified as being a copy of a public register. Nov. 73, c. 2; Code, 7, 52, 6; Ib. 4, 21; Dig. 22, 4. In Louisiana, the authentic act, as it relates to contracts, is that which has been executed before a notary public or other officer authorised to execute such functions, in presence of two witnesses, free, male, and aged at least fourteen years; or of three witnesses if the party be blind. If the party does not know how to sign, the notary must cause him to affix his mark to the instrument. Civil Code of Lo., art. 2231. The authentic 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. Ib. art. 2233. Vide Merl. Rép. h. t.

AUTHENTICATION, *practice*, is an attestation made by a proper officer, by which he certifies that a record is in due form of law, and that the person who certifies it is the officer appointed by law to do so. The constitution of the U. S., art. 4, s. 1, declares, "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And congress may by general laws prescribe the manner in which such acts, records and proceedings, shall be proved, and the effect thereof." The object of the authentication is to

supply all other proof of the record. The laws of the United States have provided a mode of authentication of public records and office papers; these acts are here transcribed.

By the act of May 26, 1790, it is provided, "That the act of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto: That the records and judicial proceedings of the courts of any state shall be proved or admitted, in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every court within the United States, as they have, by law or usage, in the courts of the state from whence the said records are, or shall be taken."

The above act having provided only for one species of record, it was necessary to pass the act of March 27, 1804, to provide for other cases. By this act it is enacted,

§ 1. "That, from and after the passage of this act, all records and exemplifications of office books, which are or may be kept in any public office of any state, not appertaining to a court, shall be proved or admitted in any other court or office in any other state, by the attestation of the keeper of the said records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept; or of the governor, the secretary of state, the chancellor or the keeper of the great seal of the state, that the said attestation is in due form, and by the proper officer; and the said certificate, if given by the presiding justice of a court, shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or if the said certificate be given by the governor, the secretary of state, the chancellor or keeper of the great seal, it shall be under the great seal of the state in which the said certificate is made. And the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States, as they have by law or usage in the courts or offices of the state from whence the same are or shall be taken."

§ 2. "That all the provisions of this act, and the act to which this is a supplement, shall apply, as well to the public acts, records, office books, judicial proceedings, courts, and offices of the respective territories of the United States, and countries subject to the jurisdiction of the United States, as to the public acts, records, office books, judicial proceedings, courts and offices of the several states."

The act of May 8, 1792, s. 12, provides, "That all the records and proceedings of the court of appeals, heretofore appointed, previous to the adoption of the present constitution, shall be deposited in the office of the clerk of the supreme court of the United States, who is hereby authorized and directed to give copies of all such records and proceedings, to any person requiring and paying for the same, in like manner as copies of the records and other proceedings of the said court are by law directed to be given: which copies shall have like faith and credit as all other proceedings of the said court."

By authentication is also understood whatever act is done either by the party or some other person with a view of causing an instrument to be known and identified; as for example the acknowledgment of a deed by the grantor; the attesting a deed by witnesses. 2 Benth. on Ev. 449.

AUTHENTICS, *civ. law.* This is the name given to a collection of the Novels of Justinian, made by an anonymous author. It is called authentic on account of its authority. There is also another collection which bears the name of *authentics.* It is composed of extracts made from the Novels, by a lawyer named Irnier, and which he inserted in the code at such places as they refer; these extracts have the reputation of not being correct. Merlin, Répertoire, mot Authentique.

AUTHORITIES, *practice.* By this word is understood the citations which are made of laws, acts of the legislature, and decided cases, and opinions of elementary writers. In its more confined sense, this word means, cases decided upon solemn argument which are said to be authorities for similar judgments in like cases. 1 Lilly's Reg. 219. These latter are sometimes called precedents, (q. v.) Merlin, Répertoire, mot Autorités.

It has been remarked that when we find an opinion in a text writer upon any particular point, we must consider it not merely as the opinion of the author, but as the supposed result of the authorities to which he refers, 3 Bos. & Pull. 301; but this is not always the case, and frequently the opinion is advanced with the reasons which support it, and it must stand or fall as these are or are not well founded. A distinction has been made between writers who have, and those who have not holden a judicial station; the former are considered authority, and the latter are not so considered unless their works have been judicially approved as such. Ram on Judgments, 93. But this distinction appears not to be well founded: some writers who have occupied a judicial station do not possess the talents or the learning of others who have not been so elevated, and the works or writings of the latter are much more deserving the character of an authority than those of the former.

AUTHORITY, *contracts,* is the lawful delegation of power by one person to another. We will consider, 1. The delegation. 2. The nature of the authority. 3. The manner it is to be executed. 4. The effects of the authority.

1. The authority may be delegated by deed, or by parol. 1. It may be delegated by deed for any purpose whatever, for whenever an authority by parol would be sufficient, one by deed will be equally so. When the authority is to do something which must be performed through the medium of a deed, then the authority must also be by deed, and executed with all the forms to render that instrument perfect; unless, indeed, the principal be present, and verbally or impliedly authorises the agent to fix his name to the deed, 4 T. R. 313; W. Jones R. 268; as, if a man be authorised to convey a tract of land, the letter of attorney must be by deed. Bac. Ab. h. t.; 7 T. R. 209; 2 Bos. & Pull. 338; 5 Binn. 613; 14 S. & R. 331; 6 S. & R. 90. 2 Pick. R. 345; 5 Mass. R. 11; 1 Wend. 424; 9 Wend. R. 54, 68; 12 Wend. R. 525; Story, Ag. § 49; 3 Kent, Com. 613, 3d edit.; 3 Chit. Com. Law, 195. But it does not require a written authority to sign an unsealed paper, or a contract in writing not under seal. Paley on Ag. by Lloyd, 161; Story, Ag. § 50. 2. For many purposes however, the authority may be by parol, either in writing not under seal, or verbally,

or by the mere employment of the agent. Pal. on Agen. 2. The exigencies of commercial affairs render such an appointment indispensable: business would be greatly embarrassed, if a regular letter of attorney were required to sign or negotiate a promissory note or bill of exchange, or sell or buy goods, or write a letter, or procure a policy for another. This rule of the common law has been adopted and followed from the civil law. Story, Ag. § 47; Dig. 3, 3, 1, 1; Poth. Pand. 3, 3, 3; Domat, liv. 1, tit. 15, § 1, art. 5; see also 3 Chit. Com. Law, 5, 195, 7 T. R. 350.

2. The authority given must have been possessed by the person who delegates it, or it will be void; and it must be of a thing lawful, or it will not justify the person to whom it is given. Dyer, 102; Kielw. 83. Authorities are divided into general or special. A *general* authority is one which extends to all acts connected with a particular employment; a *special* authority is one confined to "an individual instance." 15 East, 408; Id. 38. They are also divided into limited and unlimited. When the agent is bound by precise instructions, it is *limited*, and *unlimited* when he is left to pursue his own discretion. An authority is either express or implied. An *express* authority must be by deed or by parol, that is in writing not under seal, or verbally. The authority must have been actually given. An *implied* authority is one which, although no proof exists of its having been actually given, it may be inferred from the conduct of the principal, that it was given; for example, when a man leaves his wife without support, the law presumes he authorizes her to buy necessaries for her maintenance; or if a master, usually send his servant to buy goods for him upon credit, and the servant buy some things without the master's orders, yet the latter will be liable upon the implied authority. Show. 95; Pal. on Ag. 137 to 146.

3. In considering in what manner the authority is to be executed, it will be necessary to examine, 1. By whom the authority must be executed; 2. In what manner; 3. In what time.—1. A delegated authority can be executed only by the person to whom it is given, for the confidence being personal, cannot be assigned to a stranger. 1 Roll. Ab. 330; 2 Roll. Ab. 9; 9 Co. 77 b.; 9 Ves. 236, 251; 3 Mer. R. 237; 2 M. & S. 299, 301. An authority given to two cannot be executed by one. Co. Litt. 112, b, 181, b. And an authority given to three *jointly* and *separately*, is not, in general, well executed by two. Co. Litt. 181, b, sed vide 1 Roll. Abr. 329, l. 5; Com. Dig. Attorney, C 8. 3 Pick. R. 232; 2 Pick. R. 345; 12 Mass. R. 185; 6 Pick. R. 198; 6 John. R. 39; Story, Ag. § 42. These rules apply to an authority of a private nature, which must be executed by all to whom it is given; and not to a power of a public nature, which may be executed by a majority. 9 Watts, R. 466. 2. When the authority is particular, it must in general be strictly pursued, or it will be void, unless the variance be merely circumstantial. Co. Litt. 49, b, 303, b; 6 T. R. 591; 2 H. Bl. 623. As to the form to be observed in the execution of an authority, it is a general rule that an act done under a power of attorney must be done in the name of the person who gives the power, and not in the attorney's name. 9 Co. 76, 77; It has been holden that the name of the attorney is not requisite. 1 W. & S. 328, 332. Moor, pl. 1106; Str. 705; 2 East, R. 142; Moor, 818. Paley on Ag. by Lloyd, 175; Story on A. § 146; 9 Ves. 236; 1 Y. & J. 387; 2 M. & S. 299; 4 Campb. R. 184; 2 Cox R. 84; 9 Co. R. 75; 6 John. R. 94; 9 John. R. 334; 10

Wend. R. 87; 4 Mass. R. 595; 2 Kent, Com. 631, 3d ed. But it matters not in what words this is done, if it sufficiently appear to be in the name of the principal, as, for A B, (the principal,) C D, (the attorney,) which has been held to be sufficient. See 15 Serg. & R., 55; 2 East, R. 142; 7 Watts's R. 121; 6 John. R. 94. But see contra, Bac. Ab. Leases, S. 10; 9 Co. 77.—3. The execution must take place during the continuance of the authority; this is determined either by revocation, or performance of the commission. In general, an authority is revocable, unless it be given as a security, or it be coupled with an interest. 2 Esp. Cas. 365; Bac. Ab. h. t. The revocation (q. v.) is either express or implied; when it is express and made known to the person authorized, the authority is at an end; the revocation is implied when the principal dies, or, if a female marries; or the subject of the authority is destroyed, as if a man have authority to sell my house, and it is destroyed by fire; or to buy for me a horse, and before the execution of the authority, the horse dies. When once the agent has exercised all the authority given to him, the authority is at an end.

4. An authority is to be so construed as to include all necessary or usual means of executing it with effect. 2 H. Bl. 618; 1 Roll. R. 390; Palm. 394; 10 Ves. 441; 6 Serg. & R. 149; Com. Dig. Attorney, C 15; 4 Campb. R. 163; Story on Ag. § 58 to 142; 1 J. J. Marsh. R. 293; 5 Johns. R. 58; 1 Liv. on Ag. 103, 4; and when the agent acts, as such, within his authority, he is not personally responsible. Pal. on Ag. 4, 5.

Vide, generally, 3 Vin. Ab. 416; Bac. Ab. h. t.; 1 Salk. 95; Com. Dig. h. t., and the titles there referred to. 1 Roll. Ab. 330; 2 Roll. Ab. 9; and the articles, *Attorney; Agency; Agent; Principal.*

AUTHORITY, *government*, is the right and power which an officer has in the exercise of a public function to compel obedience to his lawful commands. A judge, for example, has authority to enforce obedience to his lawful orders. Domat, Dr. Pub. lib. 1, tit. 9, s. 1, n. 13.

AUTRE VIE. Another's life. Vide, *Pur autre vie.*

AUTREFOIS, is a French word, signifying, formerly, at another time; and is usually applied to signify that something was done formerly, as autrefois acquit, autrefois convict, &c.

AUTREFOIS ACQUIT, *crim. law, pleading*, is a plea made by a defendant indicted for a crime or misdemeanor, that he has formerly been tried and acquitted of the same offence. See a form of this plea in Arch. Cr. Pl. 90. To be a bar, the acquittal must have been by trial, and by the verdict of a jury on a valid indictment. Hawk. B. 2, c. 25, s. 1; 4 Bl. Com. 335. There must be an acquittal of the offence charged in law and in fact. Stark. Cr. Pl. 355; 2 Swift's Dig. 400; 1 Chit. Cr. Law, 452; 2 Russ. on Cr. 41. The Constitution of the U. S., Amendm. Art. 5, provides that no person shall be subject for the same offence to be twice put in jeopardy of life or limb. Vide, generally, 12 Serg. & Rawle, 389; Yelv. 205, a, note.

AUTREFOIS CONVICT, *crim. law, pleading*, is a plea made by a defendant indicted for a crime or misdemeanor that he has formerly been tried and convicted of the same. As a man once tried and acquitted of an offence is not again to be placed in jeopardy for the same cause, so *a fortiori*, if he has suffered the penalty due to his offence, his conviction ought to be a bar to a second indictment for the same cause, least he should be punished twice for the same crime. 2 Hale, 251; 4 Co.

394; 2 Leon. 83. The form of this plea is like that of autrefois acquit, (q. v.) it must set out the former record, and show the identity of the offence and of the person by proper averments. Hawk. B. 2, c. 36; Stark. Cr. Pl. 363; Arch. Cr. Pl. 92; 1 Chit. Cr. Law, 462; 4 Bl. Com. 335; 11 Verm. R. 516.

AUTREFOIS ATTAINT, *crim. law*, formerly attainted. This is a good plea in bar where a second trial would be quite superfluous. Co. Litt. 390 b, note 2; 4 Bl. Com. 336. Where, therefore, any advantage either to public justice, or private individuals would arise from a second prosecution, the plea will not prevent it; as where the criminal is indicted for treason after an attainder of felony, in which case the punishment will be more severe and more extensive. 3 Chit. Cr. Law, 464.

AVERAGE is a term used in commerce to signify a contribution made by the owners of the ship, freight and goods, on board, in proportion to their respective interests, towards any particular loss or expense sustained for the general safety of the ship and cargo; to the end that the particular loser may not be a greater sufferer than the owner of the ship and the other owners of goods on board. Marsh. Ins. B. 1, c. 12, s. 7; Code de Com. art. 397; 2 Hov. Supp. to Ves. jr. 407; Poth. Aver. art. Prel.

Average is called general or gross average, because it falls generally upon the whole or gross amount of the ship, freight and cargo; and also to distinguish it from what is often though improperly termed particular average, but which in truth means a particular or partial and not a general loss, and has no affinity to average properly so called. Besides these there are other small charges called petty or accustomed averages. Such as pilotage, towage, light-money, beaconage, anchorage, bridge toll, quarantine, river charges, signals, instructions, castle money, pier-money, digging the ship out of the ice, and the like.

A contribution upon general average can only be claimed in cases where, upon as much deliberation and consultation between the captain and his officers as the occasion will admit of, it appears that the sacrifice at the time it was made, was absolutely and indispensably necessary for the preservation of the ship and cargo. To entitle the owner of the goods to an average contribution, the loss must evidently conduce to the preservation of the ship and the rest of the cargo; and it must appear that the ship and the rest of the cargo were in fact saved. Show. Ca. Parl. 20.

See generally Code de Com. tit. 11 and 12; Park, Ins. c. 6; Marsh. Ins. B. 1, c. 12, s. 7; 4 Mass. 548; 6 Mass. 125; 8 Mass. 467; 1 Caines's R. 196; 4 Dall. 459; 2 Binn. 547; 4 Binn. 513; 2 Serg. & Rawle, 237, in note; 2 Serg. & Rawle, 229; 3 Johns. Cas. 178; 1 Caines's R. 43; 2 Caines's R. 263; Ib. 274; 8 Johns. R. 237, 2d edit.; 9 Johns. R. 9; 11 Johns. R. 315. 1 Caines's R. 573; 7 Johns. R. 412; Ib. 412; Wesk. Ins. tit. Average; 2 Barn. & Cress. 811; 1 Rob. Adm. Rep. 293; 2 New Rep. 378; 18 Ves. 187; Lex. Mer. Amer. ch. 9; Bac. Abr. Merchant, F; Vin. Abr. Contribution and Average; Stev. on Av.; Ben. on Av.

AVERIA, cattle. This word in its most enlarged signification is used to include horses of the plough, oxen and cattle. Cunn. Dict. h. t.

AVERMENT, *in pleading*, comes from the Latin *verificare*, or the French *averrer*, and signifies a positive statement of facts in opposition to argument or inference. Cowp. 683,

684; Lord Coke says averments are twofold, namely, general and particular. A *general* averment is that which is at the conclusion of an offer to make good or prove whole pleas containing new affirmative matter, (but this sort of averment only applies to pleas, replications, or subsequent pleadings; for counts and avowries which are in the nature of counts, need not be averred,) the form of such averment being *et hoc paratus est verificare*. *Particular* averments are assurances of the truth of particular facts, as the life of tenant or of tenant in tail is averred: and, in these, says Lord Coke, *et hoc*, &c., are not used. Co. Litt. 362 b. Again, in a particular averment the party merely protests and avows the truth of the fact or facts averred; but in general averments he makes an offer to prove and make good by evidence what he asserts. Averments must contain not only matter but form. General averments are always in the same form. The most common form of making particular averments is in express and direct words, for example, And the party *avers* or *in fact saith*, or *although*, or *because*, or *with this that*, or *being*, &c. But they need not be in such words, for any words which necessarily imply the matter intended to be averred are sufficient.

See, in general, 3 Vin. Abr. 357; Bac. Abr. Pleas, B 4; Com. Dig. Pleader, C 50, C 67, 68, 69, 70; 1 Saund. 235 a, n. 8; 3 Saund. 352, n. 3; 1 Chit. Pl. 308; Arch. Civ. Pl. 163; Doct. Pl. 120; 1 Lilly's Reg. 209.

AVOIDANCE, *eccl. law*. It is when a benefice becomes vacant for want of an incumbent; and, in this sense, it is opposed to plenarty. Avoidances are in fact, as by the death of the incumbent; or in law.

AVOIR DU POIS, *comm. law*, a French phrase which signifies "to have weight." This kind of weight is so named in distinction from the Troy weight. One pound avoir du pois contains 7000 grains Troy; that is, fourteen ounces, eleven pennyweights and sixteen grains Troy; a pound avoir du pois contains sixteen ounces, and an ounce sixteen drams. Thirty-two cubic feet of pure spring-water at the temperature of fifty-six degrees of Fahrenheit's thermometer make a ton of 2000 pounds avoir du pois, or two thousand two hundred and forty pounds net weight. Dane's Abr. ch. 211, art. 12, § 6. The avoir du pois ounce is less than the troy ounce in the proportion of 72 to 79; though the pound is greater. Encyc. Amer. art. Avoir du pois. For the derivation of this phrase, see Barr. on the Stat. 206.

AVOW or ADVOW, *practice*, signifies to justify or maintain an act formerly done. For example, when replevin is brought for a thing distrained, and the distrainer justifies the taking, he is said to avow. Termes de la Ley. This word also signifies to bring forth any thing: formerly when a stolen thing was found in the possession of any one, he was bound *advocare*, i. e. to produce the seller from whom he alleged he had bought it, to justify the sale, and so on till they found the thief. Afterwards the word was taken to mean any thing which a man admitted to be his own or done by him, and in this sense it is mentioned in Fleta, lib. 1, c. 5, par. 4. Cunn. Dict. h. t.

AVOWANT, *practice, pleading*. One who makes an avowry.

AVOWEE, *eccl. law*. An advocate of a church benefice.

AVOWRY, *pleading*. An avowry is where the defendant in an action of replevin, avows the taking of the distress in his own right, or in right of his wife, and sets forth the cause of it, as for arrears of rent, damage

done, or the like. Lawes on Pl. 35. Hamm. N. P. 464.

AVULSION is where by the immediate and manifest power of a river or stream, the soil is taken suddenly from one man's estate and carried to another. In such case the property belongs to the first owner. An acquiescence on his part however, will in time entitle the owner of the land to which it is attached to claim it as his own. Bract. 221; Harg. Tracts, De jure maris, &c. Toull. Dr. Civ. Fr. tom. 3, p. 106; 2 Bl. Com. 262; Schultes on Aq. Rights, 115 to 138. Avulsion differs from alluvion (q. v.) in this, that in the latter case the change of the soil is gradual.

AWAIT, *crim. law.* Seems to signify what is now understood by lying in wait, or way-laying.

AWARD. It is the judgment of an arbitrator or arbitrators on a matter submitted to him or them. The writing which contains such judgment is also called an award. The qualifications requisite to the validity of an award are, that it be consonant to the submission; that it be certain; be of things possible to be performed, and not contrary to law or reason; and lastly that it be final. 1. It is manifest that the award must be confined within the powers given to the arbitrators, because if their decision extends beyond that authority, this is an assumption of power not delegated, which cannot legally affect the parties. Kyd on Aw. 140; 1 Binn. 109; 13 Johns. 187; Ib. 271; 6 Johns. 13, 39; 11 Johns. 133; 2 Mass. 164; 8 Mass. 399; 10 Mass. 442; Caldw. on Arb. 98. If the arbitrators, therefore, transcend their authority, their award *pro tanto* will be void; but if the void part affect not the merits of the submission, the residue will be valid. 1 Wend. 326; 13 John. 264; 1 Cowen, 117; 2 Cowen, 638; 1 Greenl. 300; 6 Greenl. 247; 8 Mass. 399; 13 Mass. 244; 14 Mass. 43; 6 Harr. & John. 10; Hardin, 326.—2. The award ought to be certain and so expressed that no reasonable doubt can arise on the face of it, as to the arbitrator's meaning, or as to the nature and extent of the duties imposed by it on the parties: an example of such uncertainty may be found in the following cases; an award directing one party to bind himself in an obligation for the quiet enjoyment of lands, without expressing in what sum the obligor should be bound, 5 Co. 77; Roll. Arbit. Q 4; again, an award that one should give security to the other, for the payment of a sum of money, or the performance of any particular act, when the kind of security is not specified. Vin. Ab. Arbitr. Q 12; Com. Dig. Arbitrament, E 11; Kyd on Aw. 194; 3 S. & R. 340; 9 John. 43; 2 Halst. 90; 2 Caines, 235; 3 Harr. & John. 383; 3 Ham. 266.—3. It must be possible to be performed, be lawful and reasonable. An award that could not by any possibility be performed, as if it directed that the party should deliver a deed not in his possession, or pay a sum of money at a day past, it would of course be void. But the award that the party should pay a sum of money, although he might not then be able to do so, would be binding. The award must not direct any thing to be done contrary to law, such as the performance of an act which would render the party a trespasser or a felon, or would subject him to an action. It must also be reasonable, for if it be of things nugatory in themselves and offering no advantage to either of the parties, it cannot be enforced. Kirby, 353.—4. The award must be final; that is, it must conclusively adjudicate of the matters submitted, 1 Dall. 173; 2 Yeates, 539; 4 Rawle, 304; 1 Caines, 304; 2 Harr. & Gill, 67; Charlt. 289;

11 Wheat. 446; but if the award is as final as, under the circumstances of the case it might be expected, it will be considered as valid. Com. Dig. Arbitrament, E 15. As to the *form*, the award may be by parol or by deed, but in general it must be made in accordance with the provisions and requirements of the submission, (q. v.) Vide, generally, Kydon Awards, Index, h. t.; Caldwell on Arbitrations, Index, h. t.; Dane's Ab. ch. 13; Com. Dig. Arbitrament, E; Ib. Chancery, 2 K 1, &c. 3 Vin. Ab. 52, 372; 1 Vern. 158; 15 East, R. 215; 1 Ves. jr. 364; 1 Saund. 326, notes 1, 2, and 3; Wats. on Arbitrations and Awards.

AWM, or AUME. An ancient measure, used in measuring Rhenish wines; it contained forty gallons.

B.

BACHELOR. The first in the arts and sciences, as bachelor of arts, &c. It is called in Latin *Baccalœureus*, from *bacalus*, a staff, because it was supposed that a staff was given by way of distinction, into the hands of those who had completed their studies; some, however, have derived the word from the French, *bas chevalier*, i. e. knights of a lower order.

BACK WATER. It is that water in a stream, which, in consequence of some obstruction below, flows back up the stream. Every riparian owner is entitled to the benefit of the water, as it subsists in its natural state. Whenever, therefore, the owner of an inferior property dams or impedes the water in such a manner as to back it on his superior neighbour, and thereby causes him an injury, he is liable to an action; for no one has a right to alter the level of the water, either where it enters, or where it leaves his property. 9 Co. 59; 1 B. & Ald. 258; 1 Wils. R. 178; 6 East, R. 203; 1 S. & Stu. 190; 4 Day, R. 244; 7 Cowen, R. 266; 1 Rawle, R. 218; 5 N. H. Rep. 282; 9 Mass. R. 316; 7 Pick. R. 198; 4 Mason, R. 400; 1 Rawle, R. 27; 2 John. Ch. R. 162, 463; 1 Coxe's R. 460. Vide *Dam*; *Inundation*; *Water course*; and 5 Ohio R. 322.

BACKING, *crim. law, practice.* When a warrant has been issued for the apprehension of a person accused of some crime in one county, and he is not found there, the constable must make his return without arresting the accused, unless he can follow him into another county; but as the justice's warrant does not run into such county, he must procure some justice of the peace to endorse the same with his name, which is called *backing a warrant*; the constable may then execute it in such county.

BACKSIDE, *estates.* In England this term was formerly used in conveyances and even in pleadings, and is still adhered to with reference to ancient descriptions in deeds, in continuing the transfer of the same property; it imports a yard at the back part of, or behind a house, and belonging thereto; but although formerly used in pleadings, it is now unusual to adopt it, and the word yard is preferred. 1 Chitty's Pr. 177; 2 Ld. Raym. 1399.

BADGER, *obsolete*, from *baggage* and *bagagier*, a carrier of bundles; one who buys corn and victuals in one place and sells them in another. Stat. 5 & 6 Edw. 6; 3 Eliz. c. 12.

BAGGAGE. Such articles as are carried by a traveller; luggage. Every thing which a passenger carries with him, however, is not bag-

gage. Large sums of money, for example, carried in a travelling trunk, will not be considered baggage, so as to render the carrier responsible. 9 Wend. R. 85. In general a common carrier of passengers is responsible for the baggage, if lost, though no distinct price be paid for transporting it, it being included in the passenger's fare. Ib. The carrier's responsility for the baggage begins as soon as it has been delivered to him, or to his servants, or to some other person authorised by him to receive it. Then the delivery is complete. The risk and responsibility of the carrier is at an end as soon as he has delivered the baggage to the owner or his agent; and, if an offer to deliver it be made, at a proper time, the carrier will be discharged from responsibility, as such; and, if the baggage remain in his custody afterwards, he will hold as bailee, and be responsible for it according to the terms of such bailment. 3 Dana, R. 92. Vide *Common Carriers*. By the act of congress of March 2, 1799, sect. 46, 1 Story's L. U. S. 612, it is declared that all wearing apparel and other personal baggage, &c., of persons who shall arrive in the United States, shall be free and exempted from duty.

BAIL, *practice, contracts.* Bail is civil or criminal; these will be separately considered. 1. *Civil bail* is that which is entered in civil cases, and is common or special bail. *Common bail* is a formal entry of fictitious sureties in the proper office of the court, which is called filing common bail to the action. It is in the same form as special bail, but differs from it in this, that the sureties are merely fictitious, as John Doe and Richard Roe: it has, consequently, none of the incidents of special bail. It is only allowed to the defendant when he has been discharged from arrest without bail, after the return day of the writ, and it is necessary in such case to perfect the appearance of the defendant. Steph. Pl. 56, 7; Grah. Pr. 155; Highm. on Bail, 13. *Special bail* is an undertaking by one or more persons for another, before some officer or court properly authorised for that purpose, that he shall appear at a certain time and place to answer a certain charge to be exhibited against him. The person who enters into this undertaking is also called the bail. The essential qualifications to enable a person to become bail, are that he must be, 1, a freeholder or housekeeper; 2, liable to the ordinary process of the court; 3, capable of entering into a contract; and 4, able to pay the amount for which he becomes responsible.—1. He must be a freeholder or housekeeper, (q. v.); 2 Chit. R. 96; 5 Taunt. 174; Lofft, 148; 3 Petersd. Ab. 104. 2. He must be subject to the ordinary process of the court, and a person privileged from arrest, either permanently or temporarily will not be taken, 4 Taunt. 249; 1 D. & R. 127; 2 Marsh. 232. 3. He must be competent to enter into a contract; a feme covert, an infant, or a person non compos mentis, cannot therefore become bail. 4. He must be able to pay the amount for which he becomes responsible. But it is immaterial whether his property consists of real or personal estate, provided it be his own, in his own right, 3 Peterd. Ab. 196; 2 Chit. Rep. 97; 11 Price, 158; and it be liable to the ordinary process of the law, 4 Burr. 2526; though this rule is not invariably adhered to, for when part of the property consisted of a ship, shortly expected, bail was permitted to justify in respect of such property. 1 Chit. R. 286, n. As to the persons who cannot be received because they are not responsible, see 1 Chit. R. 9, 116; 2 Chit. R. 77, 8; Lofft, 72, 184;

3 Petersd. Ab. 112; 1 Chit. R. 309, n. The term bail is sometimes applied, with a want of exactness, to the security given by a defendant in order to obtain a stay of execution, after judgment. It is a general rule that a defendant having once been held to bail, cannot be held a second time for the same cause of action. Tidd, Pr. 184; Grah. Pr. 98; Troub. & Hal. 44; 1 Yeates, R. 206; 8 Ves. Jr. 594. See articles *Auter action pendent; Lis Pendens.*—2. Bail in *criminal* cases is defined to be a delivery or bailment of a person to his sureties, upon their giving, together with himself, sufficient security for his appearance, he being supposed to be in their friendly custody, instead of going to prison. The constitution of the United States directs that "excessive bail shall not be required." Amendm. art. 8. By the acts of congress of September, 24, 1789, s. 33, and March 2, 1793, s. 4, authority is given to take bail for any crime or offence against the United States, except where the punishment is death, to any justice or judge of the United States, or to any chancellor, judge of the supreme or superior court, or first judge of any court of common pleas, or mayor of any city of any state, or to any justice of the peace or other magistrate of any state, where the offender may be found; the recognizance taken by any of the persons authorised, is to be returned to the court of the United States having cognizance of the offence. When the punishment by the laws of the United States is death, bail can be taken only by the supreme or circuit court, or by a judge of the supreme court, or a judge of the district court of the United States. If the person committed by a justice of the supreme court, or by a judge of the district court, for an offence not punishable with death, shall, after commitment procure bail, any judge of the supreme or superior court of law, of any state, (there being no judge of the United States in the district to take such bail,) may admit such person to bail. Justices of the peace have in general power to take bail of persons accused; and, when they have such authority, they are required to take such bail. There are many cases, however, under the laws of the several states, as well as under the laws of the United States, as above mentioned, where justices of the peace cannot take bail, but must commit; and, if the accused offers bail, it must be taken by a judge or other officer lawfully authorised. In Pennsylvania, for example, in cases of murder, or when, the defendant is charged with stealing of any horse, mare, or gelding, on the direct testimony of one witness; or shall be taken having possession of such horse, mare or gelding, the justice of the peace cannot admit the party to bail. 1 Smith's L. of Pa. 581. In all cases where the party is admitted to bail, the recognizance is to be returned to the court having jurisdiction of the offence charged. Vide *Act of God; Arrest; Auter action pendent; Death; Lis pendens.*

BAIL ABOVE, *practice*, is putting in bail to the action, which is an appearance. Bail above are bound either to satisfy the plaintiff his debt and costs, or to surrender the defendant in custody, provided judgment should be against him and he should fail to do so. Sell. Pr. 137.

BAIL BELOW, *practice*, is bail given to the sheriff in civil cases, when the defendant is arrested on bailable process; which is done by giving him a bail bond; it is so called to distinguish it from *bail above*, (q. v.) The sheriff is bound to admit a man to bail, provided good and sufficient sureties be tendered,

but not otherwise. The sheriff is not however bound to demand bail, and may, at his risk, permit the defendant to be at liberty, provided he will appear, that is, enter bail above or surrender himself in proper time. 1 Sell. Pr. 126, et seq. The undertaking of bail below is that the defendant will appear or put in bail to the action on the return day of the writ.

BAIL BOND, *practice, contracts.* A specialty by which the defendant and other persons, usually not less than two, though the sheriff may take only one, become bound to the sheriff in a penalty equal to that for which bail is demanded, conditioned for the due appearance of such defendant to the legal process therein described, and by which the sheriff has been commanded to arrest him. It is only where the defendant is arrested or in the custody of the sheriff, under other than final process, that the sheriff can take such bond. On this bond being tendered to him, which he is compelled to take if the sureties are good, he must discharge the defendant. With some exceptions, as for example, where the defendant surrenders, 6 T. R. 754; 7 T. R. 123; 1 East, 387; 1 Bos. & Pull. 326, nothing can be a performance of the condition of the bail bond, but putting in bail to the action. 5 Burr. 2683. The plaintiff has a right to demand from the sheriff an assignment of such bond, so that he may sue it for his own benefit. Wats. on Sheriff, 99; 1 Sell. Pr. 126, 174. For the general requisites of a bail bond, see 1 T. R. 422; 2 T. R. 569; 15 East, 320; 2 Wils. 69; 6 T. R. 702; 9 East, 55; 5 D. & R. 215; 4 M. & S. 338; 1 Moore, R. 514; 6 Moore, R. 264; 4 East, 568; Hurls. on Bonds, 56; U. S. Dig. Bail V.

BAIL PIECE, is a certificate given by the clerk of the court, or person lawful authorised to keep the record, in which it is certified that A B, the bail, became bail for C D, the defendant, in a certain sum, and in a particular case. As the bail is supposed to have the custody of the defendant, when he is armed with this process, he may arrest the latter, though he is out of the jurisdiction of the court in which he became bail, and even in a different state. 1 Baldw. 578; 3 Conn. 84, 421; 2 Yeates, 263; 8 Pick. 138; 7 John. 145; 3 Day 485; the bail may take him even while attending court as a suitor, or any time even on Sunday, 4 Yeates, 123; 4 Conn. 170. He may break even an outer door, to seize him, command the assistance of the sheriff or other officers. 8 Pick. 138; and depute his power to others. 1 John. Cas. 413; 8 Pick. 140. See 1 Serg. & R. 311.

BAILEE, *contracts*, is one to whom goods are bailed. His duties are to act in good faith; he is bound to use extraordinary diligence in those contracts or bailments, where he alone receives the benefit, as in loans; he must observe ordinary diligence in those bailments, which are beneficial to both parties, as hiring; and he will be responsible for gross negligence in those bailments which are only for the benefit of the bailor, as, deposit and mandate. Story's Bailm. § 17, 18, 19. He is bound to return the property as soon as the purpose for which it was bailed shall have been accomplished. And he has generally a right to retain and use the thing bailed, according to the contract, until the object of the bailment shall have been accomplished.

BAILIFF, *office.* Magistrates who formerly administered justice in the parliaments or courts of France, answering to the English sheriffs as mentioned by Bracton. There are still bailiffs of particular towns in England; as the bailiff of Dover

Castle, &c., otherwise bailiffs are now only officers or stewards, &c.; as *Bailiffs of liberties*, appointed by every lord within his liberty, to serve writs, &c. *Bailiff errant* or *itenerant*, appointed to go about the country for the same purpose. *Sheriff's bailiffs*, sheriff's officers to execute writs; these are also called *bound bailiffs*, because they are usually bound in a bond to the sheriff for the due execution of their office. *Bailiffs of court baron*, to summon the court, &c. *Baliffs of husbandry*, appointed by private persons to collect their rents and manage their estates. *Water bailiffs*, officers in port towns for searching ships, gathering tolls, &c. Bac. Ab. h. t.

BAILMENT, *contracts*. This word is derived from the French, *bailler*, to deliver. 2 Bl. Com. 451; Jones's Bailm. 90; Story on Bailm. c. 1, § 2. It is a compendious expression to signify a contract resulting from delivery. It has been defined to be a delivery of goods, on a condition express or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they are bailed, shall be answered. Jones's Bailm. 1. Or it is a delivery of goods in trust, on a contract either expressed or implied, that the trust shall be duly executed, and the goods redelivered, as soon as the time or use for which they were bailed, shall have elapsed or be performed. Jones's Bailm. 117. Each of these definitions, says Judge Story, seems redundant and inaccurate, if it be the proper office of a definition to include those things only which belong to the genus or class. Both these definitions suppose that the goods are to be restored or redelivered; but in a bailment for sale, as upon a consignment to a factor, no redelivery is contemplated between the parties. In some cases no use is contemplated by the bailee; in others, it is of the essence of the contract; in some cases time is material to terminate the contract; in others, time is necessary to give a new accessorial right. Story on Bailm. c. 1, § 2. Mr. Justice Blackstone has defined a bailment to be a delivery of goods in trust, upon a contract either express or implied, that the trust shall be faithfully executed on the part of the bailee. 2 Bl. Com. 451. And in another place as the delivery of goods to another person for a particular use. 2 Bl. Com. 395. Vide Kent's Comm. Lect. 40, 437. Mr. Justice Story says, that a 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 on Bailm. c. 1, § 2. This corresponds very nearly with the definition of Merlin. Vide Répertoire, mot Bail.

Bailments are divisible into three kinds; 1, Those in which the trust is for the benefit of the bailor, as deposits and mandates. 2, Those in which the trust is for the benefit of the bailee, as gratuitous loans for use. 3, Those in which the trust is for the benefit of both parties, as pledges or pawns, and hiring and letting to hire. See *Deposit; Hire; Loans; Mandates;* and *Pledges*. Sir Wm. Jones has divided bailments into five sorts, namely, 1, Depositum, or deposit; 2, Mandatum, or commission without recompense; 3, Commodatum, or loan for use, without pay; 4, Pignori acceptum, or pawn; 5, Locatum, or hiring, which is always with reward. This last is subdivided into, 1, Locatio rei, or hiring, by which the hirer gains a temporary use of the thing; 2. Locatio operis faciendi, when something is to be done to the thing delivered; 3, Locatio operis mercium vehendarum when the thing is merely to be carried from one

place to another. See these several words.

As to the obligations and duties of bailees in general, see *Diligence*, and Story on Bailm. c. 1; Chit. on Cont. 141; 3 John. R. 170; 17 Mass. R. 479; 5 Day, 415; 1 Conn. Rep. 487; 10 Johns. R. 1, 471; 12 Johns. R. 144, 232; 11 Johns. R. 107; 15 Johns. R. 39; 2 John. C. R. 100; 2 Caines's Cas. 189; 19 Johns. R. 44; 14 John. R. 175; 2 Halst. 105; 2 South. 738; 2 Harr. & M'Hen. 453; 1 Rand. 3; 2 Hawks, 145; 1 Murphy, 417; 1 Hayw. 14; 1 Rep. Con. Ct. 121, 186; 2 Rep. Con. Ct. 239; 1 Bay, 101; 2 Nott & M'Cord, 88, 489; 1 Browne, 43, 176; 2 Binn. 72; 4 Binn. 127; 5 Binn. 457; 6 Binn. 129; 6 Serg. & Rawle, 439; 8 Serg. & Rawle, 500, 533; 14 Serg. & R. 275. Bac. Ab. h. t.

BAILOR, *contracts*, he who bails a thing to another. The bailor must act with good faith towards the bailee. Story's Bailm. § 75, 76, 77; permit him to enjoy the thing bailed according to contract; and, in some bailments, as hiring, warrant the title and possession of a thing hired, and probably, to keep it in suitable order and repair for the purpose of the bailment. Ib § 388—392. Vide Inst. lib. 3, tit. 25.

BAILIWICK, is the district over which a sheriff has jurisdiction; it signifies also the same as county, the sheriff's bailiwick extending over the county. In England, it signifies generally that liberty which is exempted from the sheriff of the county over which the lord of the liberty appoints a bailiff. Vide Wood's Inst. 206.

BAIR-MAN, *Scottish law*. A poor insolvent debtor left bare.

BAIRN'S PART, *Scottish law*. Children's part; a third part of the defunct's free movables, debts deducted, if the wife survive, and a half if there be no relict.

BALANCE, *comm. law*, is the amount which remains due by one of two persons, who have been dealing together, to the other, after the settlement of their accounts. In the case of mutual debts the balance only can be recovered by the assignee of an insolvent, or the executor of a deceased person. But this mutuality must have existed at the time of the assignment by the insolvent, or at the death of the testator. The term *general balance* is sometimes used to signify the difference which is due to a party claiming a lien on goods in his hands, for work or labour done, or money expended in relation to those and other goods of the debtor. 3 B. & P. 485; 3 Esp. R. 268.

BALANCE, *evidence*. When a witness has an interest in the cause which renders him incompetent, and there is a countervailing interest on the other side which reduces him to a state of neutrality, his interest is said to be balanced; as, when a person acknowledges he has received money as an agent, he may prove whether he received it for the plaintiff or the defendant. 7 T. R. 481, note; 2 East, R. 458; but the least interest, as where in the one case the witness would be liable for costs, and in the other he would not, the equilibrium is destroyed. 4 Taunt. 464.

BALANCE OF TRADE, *comm. law*, is the difference between the exports and importations between two countries. The balance of trade is against that country which has imported more than it has exported, for which it is debtor to the other country.

BALIVA, a bailiwick or jurisdiction.

BALIVO AMOVENDO, *English practice*. A writ to remove a bailiff out of his office.

BALLASTAGE, *mar. law*, a toll paid for the privilege of taking up ballast from the bottom of the port. This arises from the property in the soil. 2 Chit. Com. Law, 16.

BALLOT, *government*, a diminutive ball, i. e. a little ball used in giving votes; the act itself of giving votes. A little ball or ticket used in voting privately, and, for that purpose, put into a box, commonly called a ballot-box, or in some other contrivance.

BAN. A proclamation, or public notice; any summons or edict by which a thing is forbidden or commanded. Vide *Bans of Matrimony; Proclamation.*

BANC or BANK. The first of these is a French word signifying bench, pronounced improperly *bank.* 1. The seat of judgment as *banc le roy*, the king's bench; *banc le common pleas*, the bench of common pleas. 2. The meeting of all the judges or such as may form a quorum, as, the court sit in *banc.*

BANE, this word was formerly used to signify a malefactor. Bract. l. 2, t. 8, c. 1.

BANISHMENT, *crim. law.* A punishment inflicted upon criminals, by compelling them to quit a city, place or country, for a specified period of time, or for life. Vide *Deportation; Relegation.*

BANK, *com. law.* 1. A place for the deposit of money. 2. An institution, generally incorporated, authorised to receive deposits of money, to lend money, and to issue promissory notes, usually known by the name of bank notes. 3. Banks are said to be of three kinds, viz. of *deposit*, of *discount*, and of *circulation*; they generally perform all these operations. Vide Metc. & Perk. Dig. Banks and Banking.

BANK BOOK, *commerce*, is a book which persons dealing with a bank keep, in which the officers of the bank enter the amount of money deposited by him, and of all notes or bills deposited by him, or discounted for his use.

BANK NOTE, *contracts.* A bank note resembles a common promissory note, (q. v.) issued by a bank or corporation authorised to act as a bank. It is in fact a promissory note, but such notes are not, for many purposes, to be considered as mere securities for money, but are treated as money or cash, (q. v.) 1 Sch. & Lef. 318, 319; 11 Ves. 662; 1 Roper, Leg. 3; 1 Ham. R. 189, 524; 15 Pick. 177; 5 G. & John. 58; 3 Hawks, 328; 5 J. J. Marsh. 643. These notes are not like bills of exchange, mere securities, or documents for debts, nor are they so esteemed; but are treated as money, in the ordinary course and transactions of business, by the general consent of mankind; and, on payment of them, when a receipt is required, the receipts are always given as for money, not as for securities or notes. 1 Burr. R. 457; 12 John. R. 200; 1 John. Ch. R. 231; 9 John. R. 120; 19 John. 144. Bank notes are assignable by delivery, Rep. Temp. Hard. 53; 9 East, R. 48; 4 East, R. 510; Dougl. 236. The holder of a bank note is *prima facie* entitled to prompt payment of it, and cannot be affected by the fraud of any former holder in obtaining it, unless evidence be given to bring it home to his privity. 13 East, R. 135; Dane's Ab. Index, h. t.; Pow. on Mortg. Index, h. t.; U. S. Dig. h. t. Vide *Note; Promissory note; Reissuable note.*

BANK STOCK is the capital of a bank. It is usually divided in shares of a certain amount, as five hundred dollars, one hundred dollars, and the like. This stock is generally transferable on the books of the bank, and considered as personal property. Vide *Stock.*

BANKER, *comm. law.* A banker is one engaged in the business of receiving other persons' money on deposit, to be returned on demand, discounting other persons' notes, and issuing his own for circulation; one

who performs the business usually transacted by a bank. Private bankers are generally not permitted. The business of bankers is generally performed through the medium of incorporated banks. A banker may be declared a bankrupt by adverse proceedings against him. Act of congress of 19 Aug. 1841. See 1 Atk. 218; 2 H. Bl. 235; 1 Mont. B. L. 12. Among the ancient Romans there were bankers called *argentarii*, whose office was to keep registers of contracts between individuals, either to loan money, or in relation to sales and stipulations. These bankers frequently agreed with the creditor to pay him the debt due to him by the debtor.

BANKERS' NOTE, *contracts.* In England a distinction is made between bank notes, (q. v.) and bankers' notes. The latter are promissory notes, and resemble bank notes in every respect, except that they are given by persons acting as private bankers. 6 Mod. 29. 3 Chit. Com. Law, 590; 1 Leigh's N. P. 338.

BANKRUPT. A person who has done, or suffered some act to be done, which is by law declared an act of bankruptcy; in such case he may be declared a bankrupt. This definition does not include voluntary bankrupts who may be declared to be so under their own petitions. It is proper to notice that there is much difference between a bankrupt and an insolvent. A man may be a bankrupt and yet be perfectly solvent, that is, eventually able to pay all his debts; or, he may be insolvent, and, in consequence of not having done, or suffered, an act of bankruptcy, he may not be a bankrupt. Again, the bankrupt laws are intended mainly to secure creditors from the waste, extravagance and mismanagement, by seizing the property out of the hands of the debtors, and placing it in the custody of the law; whereas the insolvent laws only relieve a man from imprisonment for debt after he has assigned his property for the benefit of his creditors. It is true in the bankrupt law of the United States, to be noticed presently, an unusual clause has been added, which enables a person to become a *voluntary* bankrupt; in which case the object seems to be to relieve the bankrupt regardless of the benefits of creditors. Both under bankrupt and insolvent laws the debtor is required to surrender his property for the benefit of his creditors. Bankrupt laws discharge the person from imprisonment, and his property, acquired after his discharge, from all liabilities for his debts; insolvent laws simply discharge the debtor from imprisonment, or liability to be imprisoned, but his after-acquired property may be taken in satisfaction of his former debts. 2 Bell, Com. B. 6, part 1, c. 1, p. 162.

This subject will be considered by taking a view of, 1, the courts and officers; 2, the bankrupt; 3, the bankrupt's property; 4, the proceedings in bankruptcy before a decree; 5, the hearing and decree; 6, the proof of debts; 7, the dividends; 8, bankrupt partners; 9, the crimes committed in bankrupt proceedings.

Chap. 1. *Of courts, and officers.*

Sect. 1. *Of the district courts.*

[2] The sixth section of the act of congress directs that for the purpose of exercising its jurisdiction in bankrupt cases, the district court shall be deemed always open. Jurisdiction is given to this court in all matters and proceedings in bankruptcy arising under this act, and any other act which may hereafter be passed on the subject of bankruptcy. In considering its jurisdiction, it will be convenient to take a view of its judicial, legislative, and executive capacities.

1. *Of its judicial jurisdiction.*

[3] The subjects of its judicial

jurisdiction will be first examined, and, secondly, the manner of exercising it.

1st. The jurisdiction conferred on this court by the sixth section of the act extends:

To all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors, who shall claim any debt or demand under the bankruptcy.

To all cases and controversies between such creditor or creditors, and the assignee of the estate, whether in office or removed.

To all cases and controversies between such assignee and the bankrupt, and to all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution, and settlements of the estate of the bankrupt and the close of the proceedings in bankruptcy.

2dly. This jurisdiction is to be exercised summarily, in the nature of summary proceedings in equity. And the district judge may adjourn any point or question arising in any case in bankruptcy, into the circuit court for the district, in his discretion to be there heard and determined. Sect. 6.

By the first section of the act, it is provided, however, that any person so declared a bankrupt at the instance of a creditor, may, at his election, by petition to such court within ten days after its decree, be entitled to a trial by jury before such court, to ascertain the facts of such bankruptcy; or if such person shall reside at a great distance from the place of holding such court, the judge in his discretion may direct such trial by jury to be had in the county of such person's residence, in such manner and under such directions as the said court may prescribe and give.

And again, when a majority in number and value of the creditors of the bankrupt, who shall have proved their debts at the time of the hearing of the petition of the bankrupt for a discharge, shall, at such hearing, file their written dissent to the allowance of a discharge and certificate to such bankrupt, or if, upon such hearing, a discharge shall not be decreed for him, the bankrupt may demand a trial by jury, upon a proper issue to be directed by the court, at such time and place, and in such manner as the court may order. Sect. 4.

By the eighth section it is enacted that all proofs of debts and other claims shall be open to contestation in the proper court, having jurisdiction over the proceedings in the particular case in bankruptcy, and as well the assignee as the creditor shall have the right to a trial by jury, upon an issue to be directed by such court, to ascertain the validity and amount of such debts or claims; and the result therein unless a new trial shall be granted, if in favour of the claims, shall be evidence of the validity and amount of such debts or claims.

2. *Of the legislative capacity of the district court.*

[4] In its legislative capacity the court has power:

To prescribe, from time to time, suitable rules, regulations, and forms of proceedings in all matters of bankruptcy; which rules, regulations, and forms, shall be subject to be altered, added to, revised, or annulled, by the circuit court of the same district, and other regulations and forms, substituted therefor; and in all such rules, regulations, and forms, it shall be the duty of the said courts to make them as simple and brief as practicable, to the end to avoid all unnecessary expenses, and facilitate the use thereof by the public at large.

To prescribe, from time to time, a tariff or table of fees and charges, to be taxed by the officers of the court, or other persons, for services under this act, or any other on the subject of bankruptcy; which fees shall be as low as practicable with reference

to the nature and character of such services. Sect. 6.

3. *Of the executive capacity of the district court.*

[5] In its executive capacity the district court has authority

To appoint commissioners. Sect. 5, 7. And doubtless for gross misconduct or negligence may remove them. 14 Ves. 204; Viner's Ab. Creditor and Bankrupt, O, pl. 3.

To appoint or remove assignees at its discretion, *toties quoties.* Sect. 3.

Sect. 2. *Of the circuit court.*

[6] For the purpose of hearing and determining any point or question arising in any case of bankruptcy which may have been adjourned by the district judge into the circuit court, this latter shall be deemed always open. Sect. 6.

[7] By the eighth section of the act of congress, it is enacted that the circuit court within and for the district where the decree of bankruptcy is passed, shall have concurrent jurisdiction with the district court of the same district of all suits at law or in equity which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt, transferable to, or vested in, such assignee.

[8] Jurisdiction is given to the circuit court to entertain appeals from the district court; which appeal is to be tried at the first term of the circuit court after it has been taken, unless, for a sufficient reason a continuance shall be granted. It may be heard and determined by the said court summarily, or by a jury, at the option of the bankrupt. This court has power to discharge the bankrupt and grant him a certificate, as provided in the act. Sect. 4.

Sect. 3. *Of the courts of the District of Columbia, and of the territories of the United States.*

[9] The sixteenth section of the act confers and vests all jurisdiction, power, and authority conferred upon and vested in the district courts of the United States by the act of congress of the 19th of August, 1841, in cases of bankruptcy, upon and in the circuit court of the United States for the District of Columbia, and in and upon the supreme or superior courts of any of the territories of the United States, in cases of bankruptcy, when the bankrupt resides in the said District of Columbia, or in either of the said territories.

Sect. 4. *Of commissioners of bankruptcy.*

[10] These are officers appointed by the court. Sec. 4, and sections 5 and 7, of the act of Congress. They must reside in the county where the bankrupt lives, when appointed to receive proof of debts, and perform other duties under the provisions of this act. Sect. 5. They are required to perform many important duties, the principal of which are

To take proof of debts and other claims. Sect. 5.

To report to the court.

To examine the bankrupt and report the result to the court.

To examine witnesses in cases of exceptions and to report the evidence to the court. Sect. 4.

Sect. 5. *Of assignees of bankrupt.*

[11] The assignees are appointed by the court, and may be removed at its discretion.

Sect. 3. They have powers, duties, and are subject to liabilities, which will be separately considered.

1. *Of the power of assignees.*

[12] Among their powers the following may be enumerated:

Generally to administer the property of the bankrupt. Sect. 3, 9.

To allow bankrupt property not exceeding in value three hundred dol-

lars, subject to the supervision of the court. Sect. 3.

To compound debts under the direction of the court. Sect. 11.

By and under the direction of the court, to redeem or discharge any mortgage or other pledge, or deposit, or lien upon any property, real or personal, whether payable *in presenti* or at a future day, and to tender a due performance of the condition thereof. Sect. 11.

2. *Of the duties of assignees.*

[13] Their duties are:

To give a bond, when required by the court, with at least two sureties, in such sum as it may deem proper, conditioned for the due and faithful discharge of all their duties, and their compliance with the orders and directions of the court; which bond shall be taken in the name of the United States; and shall, if there be any breach thereof, be sued and suable, under the order of such court, for the benefit of the creditors and other persons in interest. Sect. 9.

To prosecute or defend all suits in law or in equity, then pending, in which the bankrupt is a party, to their final conclusion. Sect. 3.

To pay all assets received by him in money, within sixty days afterwards, into court, subject to its order respecting its future safe-keeping and disposition. Sect. 9.

To sell and convey the property of the bankrupt under the orders of the court. Sect. 9.

3. *Of the liabilities of assignees.*

[14] For any act committed by him inconsistent with the power delegated to him by law, he is personally responsible; if, for example, he seize or retain the possession of property which is not vested in him, he may be sued by the owner. 2 Stark. R. 354. And he will be liable, in general, for the acts of his agents, 1 Atk. 86; but when he uses sufficient and proper precaution, he will not be held responsible; as, when he employs a broker to sell goods, who immediately fails; if, at the time he was employed, he enjoyed a good reputation, and the assignee exercised a due degree of circumspection, he will not be liable. 1 Keny. R. 38; Amb. 218; 1 Atk. 90.

The assignee of a bankrupt, like any other assignee, is liable to the performance of the covenants of a lease of premises of which the bankrupt was lessee, or assignee, while he occupies such premises; but, by assigning the same over, he will be discharged from all future liability. Dougl. R. 183. But he is not bound to take possession, unless the lease will yield some profit to the estate.

Sect. 6. *Of the clerk of the court.*

[15] The clerk is required by the thirteenth section to keep the records of the court. See § 81.

He is allowed for affixing his name and seal to any form, or certifying a copy thereof, when required thereto, as a compensation, the sum of twenty-five cents, and no more. Sect. 13. And to such fees as are prescribed by the fee bill established by the judge.

Chap. 2. *Of the bankrupt.*

[16] The act of congress classifies bankrupts into two kinds, namely into *voluntary* and *involuntary* bankrupts; and they will be here so considered.

Sect. 1. *Of voluntary bankrupts.*

[17] It is enacted by the first section of the act of congress, that there be, and hereby is, established throughout the United States, a uniform system of bankruptcy, as follows: All persons whatsoever residing in any state, district, or territory of the United States, owing debts, which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, who shall by petition sup-

ported by oath or affirmation, apply to the proper court, and therein declare themselves to be unable to meet their debts and engagements, shall be deemed bankrupts within the purview of this act, and may be so declared accordingly by a decree of such court.

The terms of the act are very full, "all persons whatsoever;" these include not only all persons who may be made bankrupts by adverse proceedings, but also all other persons who "declare themselves to be unable to meet their debts and engagements." The exceptions in the act are the cases of a person, some of whose debts have been created in consequence of a defalcation, either

As a public officer; or

As executor, administrator, guardian or trustee; or

While acting under any other fiduciary capacity.

This just provision excludes from the benefit of this law, on their own petitions, all persons who have been guilty of a breach of trust; that is, when they received money or property belonging to others for a specific purpose, or in a confidential character, and subsequently converted this property or money to their own use. 1 Atk. 146; 1 V. & B. 494; 14 Ves. 603; 3 C. & P. 283; 4 Campb. R. 164. See *Breach of Trust*.

Sect. 2. *Of involuntary bankrupts.*

[18] This section will be divided by considering, first, the persons who may be declared bankrupts; secondly, the acts for which such person may be so declared; thirdly, the manner in which a person may be declared a bankrupt.

1. *Of the persons who may be declared involuntary bankrupts.*

[19] The persons who may be declared bankrupts are such as owe debts to the amount of not less than two thousand dollars; namely,

1. All persons being merchants or using the trade of merchandise. Sect. 1.

In England, a commission of bankruptcy cannot, in general, be supported against a person under age. 3 C. & P. 283; 1 Ves. & B. 494; 4 Campb. R. 164; 14 Ves. R. 603; 6 Taunt. R. 106; 1 Marsh. R. 469; 2 Rose, 269; 9 Bing. R. 365; but where the infant had represented himself to be an adult, the court refused to supersede the commission. 16 Ves. R. 265.

A married woman cannot, in general, be made a bankrupt, but when she carries on business as a feme sole, and is responsible as such, she may be so declared. See 1 W. Bl. R. 570; 3 Burr. 1776; 1 Desaus. R. 445; 18 John. R. 141; 8 John. R. 72; 8 T. R. 546; 7 Bing. R. 762; S. C. 20 Eng. Com. Law R. 323; 2 Bell's Com. 166, 5th ed.

A lunatic who has contracted a debt and committed an act of bankruptcy, during a lucid interval, 13 Ves. R. 590; 9 Bingh. R. 365; 4 Cowen, R. 207; an alien who commits an act of bankruptcy in the United States, 5 T. R. 530; an executor who trades for the benefit of testator's family, 3 Esp. 88; 10 Ves. R. 110; may be declared bankrupts.

The party must be a trader; as to who is one, see Bac. Ab. (Bouv. ed.) Bankrupt, Q 1; 1 Leigh, N. P. 205, note (a); and article *Trader*.

A corporation is not a person within the meaning of the act of congress.

2. All retailers of merchandise. Sect. 1. Vide *Retailer of Merchandise*.

3. All bankers. A banker may be made a bankrupt if he act as such, although he may not actually keep an open banking house. 1 Atk. 218. Vide 2 H. Bl. 235; 1 Mont. B. L. 12; and the article *Banker*.

4. All factors. Vide *Factor*.

5. All brokers. A pawnbroker is

a broker within the English statute, 5 Geo. 2, c. 30, § 39; 5 B. & A. 124. And under this term, it is said, all kinds of brokers will be included. Cullen, B. L. 48. Vide *Broker*.

6. All underwriters or marine insurers. Sect. 1. Vide 4 Ves. Jr. 168; vide *Underwriters*.

2. *Of the acts of bankruptcy.*

[20] Whenever a person being a merchant, or actually using the trade of merchandise, or being a banker, factor, broker, underwriter, or marine insurer, shall commit any of the following acts, he may be declared a bankrupt; namely;

1. Whenever he shall depart from the state, district or territory of which he is an inhabitant, with intent to defraud his creditors. Sect. 1. Under the former bankrupt law of the United States, it was considered doubtful whether the flight of a person to his own house in another state, was an act of bankruptcy. 1 Dall. 390; 2 Dall. 126; 1 Yeates, 50. When at the moment of departure the party intends to delay his creditors by that act, the bankruptcy is complete; but if that intention do not exist, although the creditors may be delayed, it has not been considered a departure. 1 Atk. 193; 7 T. R. 509; 5 Ves. 576; 1 Rose, 387; 1 Ves. & Bea. 177; 1 Holt, N. P. C. 175. See B. N. P. 39; Co. B. L. 111.

2. Whenever he shall conceal himself to avoid being arrested. Sect. 1. Vide 1 Wash. C. C. R. 29; 4 Day, 81, note; 5 T. R. 575; 5 Moore, 129; Selw. N. P. 180; 1 B. & C. 55; Holt, 159; 3 Campb. 349; Bac. Ab. (Bouv. ed.) Bankrupt, Q 2, note (*i*).

3. Whenever he shall willingly or fraudulently procure himself to be arrested, or his goods or chattels, lands or tenements, to be attached, distrained, sequestered or taken in execution. Sect. 1. Under the bankrupt law of 1800, the imprisonment and arrest of the debtor were both necessary to constitute an act of bankruptcy, and the imprisonment must have been for two months or more. Coop. B. L. 153; 1 Murph. R. 149; the arrest must be a legal one. 3 Lev. 57; 1 Vent. 370; T. Raym. 479; 1 Har. & John. 327.

4. Whenever he shall willingly or fraudulently remove his goods, chattels or effects, or conceal them to prevent their being levied upon, or taken in execution, or by other process. Sect. 1. Under the act of 1800, the concealment of goods must have been actual and not merely constructive. 3 Mass. R. 486.

5. Whenever he shall make any fraudulent conveyance, assignment, sale, gift, or other transfer of his lands, tenements, goods or chattels, credits, or evidences of debt. Sect. 1. The term "conveyance" in the bankrupt law of 1800, meant an instrument under seal. 3 Mass. 487; see 1 Adol. & Ell. 456; S. C. 28 Eng. C. L. R. 124. A conveyance in contemplation of an act of bankruptcy to secure a *bona fide* creditor, made before the bankrupt law went into operation, was holden to be valid. 3 John. R. 446; 1 Cranch, 239; Owen, B. L. 22.

3. *Of the manner of declaring a person an involuntary bankrupt.*

[21] The persons who are subject to adverse proceedings under the bankrupt law, and who have committed an act of bankruptcy, when they are owing debts to the amount of not less than two thousand dollars, shall be liable to become bankrupts, within the true intent and meaning of the act; and may, upon the petition of one or more of their creditors, to whom they owe debts amounting in the whole to not less than five hundred dollars, to the appropriate court, be so declared accordingly. Sect. 1.

Sect. 3. *Of the bankrupt's discharge.*

[22] Under this section will be considered, first, when his discharge will be granted; secondly, when it

will be refused; and thirdly, the effect of the discharge.

1. *When discharge will be granted.*

[23] It is provided by section 4, that every bankrupt who shall *bona fide* surrender all his property and rights of property, with the exceptions before mentioned, (see § 12 and 26,) for the benefit of his creditors, and shall fully comply with and obey all the orders and directions which may from time to time be passed by the proper court; and shall otherwise conform to all the requisitions of this act; shall, (unless a majority in number and value of his creditors, who have proved their debts, shall file their written dissent thereto,) be entitled to a full discharge from all his debts, to be decreed and allowed by the court which has declared him a bankrupt, and a certificate thereof granted to him by such court accordingly, upon his petition filed for that purpose; such discharge and certificate not, however, to be granted until after ninety days from the decree of bankruptcy, nor until seventy days' notice in some public newspaper, designated by such court, to all creditors who have proved their debts, and other persons in interest, to appear at a particular time and place, to show cause why such discharge and certificate shall not be granted; at which time and place such creditors, or other persons in interest, may appear and contest the right of the bankrupt thereto. Provided, that in all cases where the residence of the creditor is known, a service on him personally, or by letter addressed to him at his known usual place of residence, shall be prescribed by the court, as in their discretion they shall deem proper, having regard to the distance at which the creditor resides from such court. Sect. 4. "And if, in any case of bankruptcy, a majority, in number and value, of the creditors, who shall have proved their debts at the time of hearing of the petition of the bankrupt for a discharge as hereinbefore provided, shall at such hearing file their written dissent to the allowance of a discharge and certificate to such bankrupt, or if, upon such hearing, a discharge shall not be decreed to him, the bankrupt may demand a trial by jury upon a proper issue to be directed by the court, at such time and place and in such manner as the court may order; or he may appeal from that decision, at any time within ten days thereafter, to the circuit court next to be held for the same district, by simply entering in the district court, or with the clerk thereof, upon record, his prayer for an appeal. The appeal shall be tried at the first term of the circuit court after it shall be taken, unless, for sufficient reason a continuance be granted; and it may be heard and determined by said court summarily, or by a jury, at the option of the bankrupt; and the creditors may appear and object against a decree of discharge and the allowance of the certificate, as hereinbefore provided. And if upon a full hearing of the parties it shall appear to the satisfaction of the court, or the jury shall find, that the bankrupt has made a full disclosure and surrender of all his estate, as by this act required, and has in all things conformed to the directions thereof, the court shall make a decree of discharge, and grant a certificate, as provided in this act."

2. *When his discharge will not be granted.*

[24] But the certificate shall not be granted in the following cases:

1. If any such bankrupt

Shall be guilty of any fraud or wilful concealment of his property, or rights of property; or

Shall have preferred any of his creditors contrary to the provisions of this act; sect. 2, 4; or

Shall wilfully omit or refuse to comply with any orders or directions of such courts; or to conform to any other requisites of this act; or

Shall in the proceeding under this act, admit a false or fictitious debt against his estate. Sect. 4.

2. If any person who, after the passing of this act shall apply trust funds to his own use. Sect. 4.

3. If any person being a merchant, banker, factor, broker, underwriter or marine insurer, who shall have become a bankrupt, and who shall not have kept proper books of account, after the passing of this act. Sect. 4.

4. If the bankrupt, his application being voluntary, has, subsequent to the first day of January last, (1841); or at any other time, in contemplation of the passage of a bankrupt law, by assignments or otherwise, given or secured any preference to one creditor over another, unless his discharge be assented to by a majority in interest of those of his creditors who have not been so preferred. Sect. 2.

3. *Effect of his discharge.*

[25] It is enacted by the 4th section of the act of congress of August 19, 1841, that the bankrupt's discharge shall be "from all his debts;" and afterwards in the same section that "such certificate, when duly granted, shall in all courts of justice, be deemed a full and complete discharge of all debts, contracts and other engagements of such bankrupt, which are provable under this act, and shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever, and the same shall be conclusive evidence of itself in favour of such bankrupt, unless the same shall be impeached for some fraud or wilful concealment by him of his property, or rights of property, as aforesaid, contrary to the provisions of this act, on prior reasonable notice specifying in writing of such fraud or concealment."

By the second section of the act it is provided, that nothing in this act contained shall be construed to annul, destroy or impair, any lawful rights of married women or minors, or any liens, mortgages or other securities on property, real or personal, which may be valid by the laws of the states respectively, and which are not inconsistent with the second and fifth sections of this act.

By section 4, it is provided, that no discharge of any bankrupt under this act shall release or discharge any person who may be liable for the same debt as a partner, joint-contractor, endorser, surety or otherwise, for or with the bankrupt.

The discharge and certificate under a joint decree, has the effect to extinguish both joint and separate debts. 2 Str. 965, 1157; and a discharge and certificate under a separate decree has the same effect. 3 P. Wms. 24 note.

There are three classes of debts which are not discharged by the certificate, namely; 1. Contingent debts; 2. Debts contracted in a foreign country; and, 3. Debts which the bankrupt has made a new promise to pay. See Bac. Ab. (Bouv. ed.) Bankrupt, Q 4, note (*a*.)

Sect. 4. *Of the allowance to the bankrupt.*

[26] The bankrupt is entitled to "the necessary household and kitchen furniture, and such other articles and necessaries of such bankrupt as the assignee shall designate and set apart, having reference in the amount to the family, condition and circumstances of the bankrupt; but altogether not to exceed in value, in any case, the sum of three hundred dollars; and also, the wearing apparel of such bankrupt, and that of his wife and children; and the determination of the

assignee in the matter shall, on exception taken, be subject to the final decision of the said court." Sect. 3.

Sect. 5. *Of a second bankruptcy.*

[27] "If any person who shall have been discharged under this act shall afterwards become bankrupt, he shall not again be entitled to a discharge under this act, unless his estate shall produce (after all charges) sufficient to pay every creditor seventy-five per cent. on the amount of the debt which shall have been allowed to each creditor." Sect. 12.

Chap. 3. *Of the bankrupt's property.*

[28] In the first section will be considered what property passes to the assignee; in the second, what does not pass; and, in the third, how the property is to be distributed.

Sect. 1. *Of the property which passes to the assignee.*

[29] By the third section it is enacted, that all the property, and rights of property, of every name and nature, and whether real, personal, or mixed, of every bankrupt except as hereinafter provided, (see 26) who shall by a decree of the proper court be declared to be a bankrupt within this act, shall, by the mere operation of law, *ipso facto*, from the time of such decree, be deemed to be divested out of such bankrupt without any other act, assignment or other conveyance whatsoever, and the same shall be vested in such assignee as from time to time shall be appointed by the proper court for this purpose.

It is enacted by the second section that all future payments, securities, conveyances, or transfers of property, or agreements made or given by any bankrupt in contemplation of bankruptcy, and for the purpose of giving any creditor, endorser, surety, or other person any preference or priority over the general creditors of such bankrupts; and all other payments, securities, conveyances, or transfers of property or agreements made or given by such bankrupt, in contemplation of bankruptcy, to any person or persons whatever, not being a *bona fide* creditor or purchaser for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act; and the assignee under the bankruptcy shall be entitled to claim, sue for, recover and receive the same as part of the assets of the bankruptcy.

When the creditor receives payment or security from his debtor, the transaction, as between them, is fair and lawful; it is when a third party intervenes, that transactions assume a different character; for then the creditor, if he is participant in the design of the debtor to give an unjust preference, at the expense of the other creditors, will be in pari delicto, and the transaction will be deemed fraudulent. Each case must depend upon its own circumstances; but still, some rules may be laid down to arrive at a just determination; of which the following are the principal.

1. When the conveyance is of all the goods of the debtor, to the exclusion of some creditors, it is fraudulent. 1 Burr. 467; 2 Burr. 827; Dig. 42, 8.

2. Payment of a debt before it is due, and immediate failure, is also fraudulent.

3. Giving security immediately before bankruptcy, particularly when unasked, is evidence of embarrassment. See Cowp. 629.

4. When the debtor, with the participation of the creditor, makes such arrangments as to enable the latter to obtain a preference, such preference will not be sustained.

5. When a circuitous course is taken to accomplish the object of giving a preference, and the creditor participates in the arrangement, the transaction will not be sustained.

6. Concealment of a security granted for a prior debt is a fraud.

7. But advancing money to a person who may become a bankrupt, and may then be insolvent, and taking a security for its repayment, is not fraudulent, unless it be done collusively, for the purpose of bestowing a preference. 2 Burr. 931.

And by the 8th section it is provided that no suit at law or in equity shall, in any case, be maintainable by or against such assignee, or by or against any person claiming an adverse interest touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued.

See for the details of the subject of this section, Owen, B. L. c. 7.

Sect. 2. *Of the property which does not pass to the assignee.*

[30] It will be proper to subdivide this section by considering, first, the property which will not pass to the assignee, although it may be in the hands or possession of the bankrupt; and secondly, the property of which he has parted with the possession within a limited time, or protected transactions.

1. *Of property which does not vest in the assignee.*

[31] Property which a bankrupt holds as trustee, or in *autre droit*. 1 P. Wms. 314; 1 Sch. & Lef. 328; 19 Ves. 491; 1 John. Ch. R. 450; 2 S. & S. 346; 3 Mad. R. 28; Owen, B. L. 125; 1 Leigh, N. P. 259; 4 B. & Ad. 393; 1 Mont. & Ayr. 689; 2 Mont. & Ayr. 349; 4 Dea. & Ch. 47; as executor, 4 T. R. 629; 3 Burr. 1369; 1 Atk. 101, 158; as factor, Cowp. 233; Willes, 400; 1 Salk. 160; 3 P. Wms. 187, note; Bull. N. P. 132; as broker, 1 Leigh, N. P. 261, does not pass to his assignee. Nor does the property of another of which a bankrupt is in possession with the consent of the owner, at the time of the bankruptcy, for a specific purpose, beyond which he has not the right of disposition or alteration. 3 T. R. 316; 7 T. R. 237; 1 T. R. 370; Dougl. 317; 1 B. & C. 5; 2 Madd. R. 192; 9 B. & Cr. 749.

When goods have been purchased by the bankrupt on credit and have not been delivered to him, but have been sent on, the seller may at any time before they have been delivered, stop them *in transitu*, and prevent such delivery; in this case the property will not pass to the assignee. 2 Vern. 203; 3 East, R. 397; 3 T. R. 466; Cooke, B. L. 418—442. Vide *Stoppage in transitu*.

The third section of the act, as already noticed, (§ 26,) provides for certain goods for the benefit of the bankrupt, which, if they pass to the assignee, do not vest in him for the benefit of the creditors of the bankrupt.

Rights of action arising *ex delicto*, do not pass to the assignee. 1 Yeates, 245; 2 Dall. 213.

2. *Of protected transactions.*

[32] By section 2, it is provided, that all dealings and transactions by and with any bankrupt, *bona fide* made and entered into more than two months before the petition made and filed against him, or by him, shall not be invalidated or affected by this act: provided that the other party to any such dealings or transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act. As to the manner of computing the two months, see 2 Bell's Com. 178, 5th ed.

By the same section it is provided that any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the states respectively, and

which are not inconsistent with the provisions of the second and fifth sections of this act, shall not be construed to be annulled, destroyed, or impaired by this act.

Sect. 3. *Of the disposition of the bankrupt's property.*

[33] By section 9, it is enacted, that all sales, transfers, or other conveyances of the assignee, of the bankrupt's property or rights of property, shall be made at such times and in such manner as shall be ordered and appointed by the court in bankruptcy.

Sect. 15, enacts, that a copy of any decree of bankruptcy and the appointment of assignees, as directed by the third section of this act, shall be recited in every deed of lands, belonging to the bankrupt, sold and conveyed by any assignees under and by virtue of this act; and that such recital, together with a certified copy of such order, shall be a full and complete evidence both of the bankruptcy and assignment therein recited, and supercede the necessity of any other proof of such bankruptcy and assignment to validate the said deed; and all deeds containing such recital, and supported by such proof, shall be as effectual to pass the title of the bankrupt of, in, and to the lands therein mentioned and described to the purchaser, as fully to all intents and purposes, as if made by such bankrupt himself immediately before such order.

Chap. 4. *Of the proceedings in bankruptcy before a decree.*

[34] This chapter will be divided into two parts; in the first will be considered the proceedings in case of voluntary bankruptcy; and, in the second, those in adverse proceedings.

Part 1. *Of proceedings in voluntary bankruptcy.*

This part will be examined by considering, first, when the petition is to be presented; secondly, the form of the petition; thirdly, of the notice.

Sect. 1. *When the petition must be presented.*

[35] The seventh section requires that all petitions by any bankrupt for the benefit of this act, and all petitions by a creditor against any bankrupt under this act, and all proceedings in the case to the close thereof, shall be had in the district court within and for the district in which the person supposed to be a bankrupt shall reside, or have his place of business, at the time when the petition is filed; except where otherwise provided in this act.

Sect. 2. *Of the form of the petition.*

[36] The form of the petition will be considered in a four-fold view; first, the requisites of the petition itself; secondly, of the form of the schedule of the bankrupt's creditors; thirdly, of the schedule of the bankrupt's property; and, fourthly, of the affidavit.

1. *Of the requisites of the petition itself.*

[37] The principal requisites are the following.

1. That it be addressed to the proper court having jurisdiction over the bankrupt.

2. That it contain a full description of the petitioner, his name, place of residence, profession or occupation. A mistake, in this respect, will greatly embarrass, if not defeat the applicant. See Cress. Ins. R. 157, 178, 254; 2 Glyn & J. 225, 243.

3. That the applicant is indebted in his private capacity, or otherwise, to sundry creditors, a list of whose names is contained, to the best of his knowledge, in a schedule thereunto annexed.

4. That another schedule, properly marked, contains an accurate inventory of his property, rights and credits, of every name, kind and descrip-

tion, and of the location and situation of each and every parcel and portion thereof.

5. That he prays to be decreed a bankrupt.

6. That he may be decreed to have a certificate of discharge from all his debts provable under the act, and be otherwise entitled to all the benefits thereof.

2. *Of the schedule of bankrupt's creditors.*

[38] The act requires that the voluntary bankrupt shall, by petition, set forth to the best of his knowledge and belief, a list of his creditors, their respective places of residence, and the amount due to each. Sect. 1. It is well to distinguish between *admitted* and *disputed* debts or claims.

3. *Of the schedule of the bankrupt's property.*

[39] The act requires that the petition shall contain an accurate inventory of the bankrupt's property, rights and credits of every name, kind and description, and the location and situation of each and every parcel and portion thereof. Sect. 1. When property is encumbered, a particular account of each encumbrance, showing the name of the encumbrancer and the nature of the encumbrance, the date when it was created, and other particulars which may enlighten the assignees, should be given.

This schedule should also contain a list of the persons against whom the bankrupt has claims which would pass to the assignee; and it would be proper to distinguish those which are admitted, from those which are disputed, and the good from the bad. This schedule should also exhibit upon what evidence these claims are founded, whether upon judgment, mortgage, bond, bill of exchange, promissory notice, book account, or otherwise.

4. *Of the oath or affirmation.*

[40] The last requisite of the act in relation to a voluntary petition is that it be verified by the bankrupt's oath, or, if conscienciously scrupulous of taking an oath, by solemn affirmation. Sect. 1.

Sect. 3. *Of the notice of petition.*

[41] The act, section 7, directs that upon every such petition, notice thereof shall be published in one or more public newspapers, printed in such district, to be designated by the court, at least twenty days before the hearing thereof.

Part 2. *Of adverse or involuntary bankruptcy before a decree.*

[42] We have already seen, [19] that to entitle a creditor to proceed against a debtor in order to procure a decree of bankruptcy against him, it is requisite that the debtor should

1. Be a merchant, or using the trade of merchandise; a retailer of merchandise; a banker, factor, broker, underwriter, or marine insurer.

2. Be owing debts to the amount of not less than two thousand dollars.

3. Have committed one of the acts of bankruptcy enumerated in [18].

This part will be divided by considering by whom the petition is to be presented; the form of the petition; and the notice to be given.

Sect. 1. *By whom the petition is to be presented.*

[43] The petition is to be presented by one or more of the bankrupt's creditors, to whom he owes debts amounting in the whole to not less than five hundred dollars. Sect. 1. It is proper to consider separately who is a petitioning creditor within the meaning of the act, and the nature of the debt.

1. *Who may be a petitioning creditor.*

1. [44] The creditors are either several or joint.

1. *Several creditors.* In general any person who has a legal debt against a person subject to the bankrupt laws may be a petitioning credi-

tor. A factor who has sold goods to the debtor in his own name, may be a petitioning creditor, unless prevented by the interference of his principal. 4 Campb. R. 195; 6 Esp. R. 191. One of several executors of a creditor may alone petition. 1 Selw. N. P. 255.

2. *Joint creditors.* When there is more than one joint obligee all must join; one of several partners cannot, therefore, be a petitioning creditor in respect of a partnership debt. 1 Taunt. R. 477; 1 Campb. R. 474. But a petition signed by one partner in the name of himself and partner, was holden to be sufficient legal ground for issuing a commission. 1 Dall. 399.

2. *Of the nature of petitioning creditor's debt.*

[45] It will be proper to consider the amount of the debt; its legality; when it was created; when it is payable.

1st. *The amount of the debt.*

[46] By the act of congress, on the petition of one or more of the bankrupts' creditors, to whom they owe debts amounting in the whole to not less than five hundred dollars, they may be declared bankrupts. Sect. 1.

In England the following cases have occurred in relation to the amount of the petitioning creditor's debt. A debt of a creditor amounting to a hundred pounds in notes, which he had bought at 10*s.* in the pound, was held a sufficient debt of 100*l.* 1 P. W. 782. A petitioning creditor's debt which did not amount to 100*l.* at the time of bankruptcy, but was increased to more than 100*l.* by a promissory note of the bankrupt, due at the time, being endorsed to him before he petitioned for the commission, it was holden that this debt was sufficient to support the commission. 7 T. R. 498. Interest accruing before an act of bankruptcy, cannot be added to the principal sum due on a bill of exchange, in order to make up the amount required by the act, unless interest be specially made payable on the face of the bill. Buck, Cas. 412; 8 Taunt. R. 660; 2 B. & A. 305; 2 Moore, R. 745.

2dly. *It must be a legal debt.*

[47] The debt must be a legal debt; no equitable debt will support the commission. 1 Atk. 147; 2 Ves. 407; 1 P. Wms. 782; Stra. 899. See 3 B. & A. 52; 16 Ves. 256.

3dly. *When it must have been created.*

[48] The petitioning creditor's debt should be created before the bankrupt ceases to be a trader, broker, factor, &c.; but if a debt be contracted while he is acting in one of these capacities, and a bond given for it afterwards, it will be sufficient. Peake, 64. The taking a security of a higher nature after the bankruptcy, for a debt of an inferior nature contracted before, does not so far extinguish the original debt as to prevent the creditor from suing out a commission upon it. Stra. 1042; Cas. Temp. Hard. 267. See also 1 Dougl. 293. The debt must be a subsisting debt at the time of the bankruptcy committed. 1 Campb. R. 489. It was decided under the bankrupt law of 1800, that a note dated after the passing of the bankrupt law, and written on the back of an account, the last item of which was prior to the date of the law, did not warrant a commission. 1 Yeates, R. 50; 2 Dall. 126.

4thly. *When it is payable.*

[49] It must be *debitum in presenti*, but a warrant of attorney given as a security against running acceptances is *debitum in presenti*, which will support a commission. 4 Esp. R. 194. A debt due upon an executory contract is not sufficient; 9 East, R. 498; 6 Esp. R. 55; therefore a contract for goods sold and delivered upon an agreement to be paid for by

a present bill, payable at a future day, does not create a present debt upon which a commission can be founded. Id. Sed vide Peake, 54. A promissory note, though in the form of a present debt, given in fact as a security for a contingent debt under a marriage settlement, was holden to be an insufficient debt. 1 Glyn & J. 100.

Sect. 2. *To what court the petition must be presented.*

[50] As in the case of a voluntary petition, (see 35) when the proceedings are adverse, the petition against any bankrupt under this act, and all proceedings in the case to the close thereof, shall be had in the district court within and for the district in which the person supposed to be a bankrupt shall reside, or have his place of business when the petition is filed, except where otherwise provided in this act. Sect. 7.

Sect. 3. *Form of the petition.*

[51] An adverse petition must

1. Be addressed to the proper court.

2. State the name, place of residence and business of the petitioner.

3. Represent that the bankrupt, (naming him, and stating the county, parish or district in which he resides, and his business,) owes to the petitioner a debt of $500 over and above the interest due thereon, (describing the security by which the same is secured,) and that the petitioner is informed, and verily believes, that the said debtor or bankrupt is now owing debts to the amount of not less than two thousand dollars.

4. Set forth, particularly, what act of bankruptcy has been committed.

5. Pray the court that the said debtor be declared a bankrupt.

6. Be dated, signed, and sworn to before the judge or a commissioner, or other competent officer.

The petition must be supported by an affidavit of the truth of the facts therein stated.

Sect. 4. *Of the notice of the petition.*

[52] It must be published according to the provisions of the seventh section of the act, as mentioned in [41].

Chap. 5. *Of the hearing and decree of bankruptcy.*

[53] This chapter will be divided by considering the hearing and decree in the case of a voluntary bankrupt; and the hearing and decree when adverse proceedings have been instituted.

Sect. 1. *Hearing and decree in voluntary bankruptcy.*

[54] At the time and place appointed for the hearing, all the formalities required by the law having been observed, all persons may appear and show cause, if any they have, why the prayer of the petitioner should not be granted, sect. 7; and should it appear to the court that the petitioner for a voluntary decree in bankruptcy has not brought himself within the provisions of the act, the decree will be refused. If, for example, the petitioner owes debts which have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity; or if the petitioner was incapable of filing a petition in consequence of some personal disability, as infancy, lunacy, coverture or the like. But unless some such legal objection be interposed, a decree declaring the applicant a bankrupt will be made.

Sect. 2. *Of the hearing and decree under adverse proceedings.*

[55] Under a petition by a creditor against a bankrupt, the formalities of the law having been observed, all persons interested may appear at the time and place when the hearing is to be had, and show cause, if any they have, why the prayer of the petitioner should not be granted. Sect. 7.

[56] All evidence by witnesses to be used in all hearings before such court, shall be under oath or solemn affirmation, when the party is conscienciously scrupulous of taking an oath, and may be oral or by deposition, taken before such court, or before any commissioner appointed by such court, or before any disinterested state judge of the state in which the deposition is taken. Sect. 7.

[57] If upon the hearing it appear to the court that the requisitions of the act have been complied with, a decree declaring the debtor a bankrupt will be made. But it will be refused and the proceedings dismissed, if it appear either

That the petitioner or petitioners are not creditor or creditors to the amount of at least five hundred dollars.

That the debtor sought to be made a bankrupt is not a merchant or using the trade of merchandise, a retailer of merchandise, a banker, factor, broker, underwriter or marine insurer.

That, being such, he does not owe two thousand dollars.

That he has not committed an act of bankruptcy. See 18.

[58] When the decree of bankruptcy is made against the debtor, it is provided by the first section of the act, that the person so declared a bankrupt at the instance of a creditor, may, at his election, by petition to such court within ten days after its decree, be entitled to a trial by jury before such court, to ascertain the fact of such bankruptcy; or if such person shall reside at a great distance from the place of holding such court, the said judge in his discretion may direct such trial by jury to be had in the county of such person's residence, in such manner and under such directions as the said court may prescribe and give; and all such decrees passed by such court, and not so re-examined, shall be deemed final and conclusive as to the subject-matter thereof.

Chap. 6. *Of the proof of debts.*

[59] The subject of this chapter will be divided by considering by whom debts are to be proved; the nature of the claims to be proved; when and how the proof is to be made; effect of proof; the consequences of proving a debt; and the fee allowed for proving a debt.

Sect. 1. *By whom debts are to be proved.*

[60] In general all persons who have a legal right may prove a debt against the bankrupt. Trustees, joined by the *cestuis que trust*, Cox, R. 310; Green, B. L. 147; guardians, 1 Atk. 251; committees of lunatics, 1 Rose, Rep. 387; executors and administrators, may also prove debts. When one of several executors becomes a bankrupt, the others may prove a debt against his estate. 3 Bro. 197; and an executor may prove a debt, which he has as such, against his own estate. Glyn & J. 127; 2 Ves. & B. 414; and corporations to whom any debts are due, may make proof thereof by their president, cashier, treasurer, or other officer, who may be specially appointed for that purpose. Act of Cong., sect. 5.

Sect. 2. *Nature of debts to be proved.*

[61] The debts which may be proved, are either absolute; conditional or contingent; not due; joint or several; mutual; debts of persons who have become surety for the bankrupt; interest; unliquidated damages: verdicts and judgments.

1. *Of absolute debts.*

[62] All debts are provable under the decree in bankruptcy, for which, if payable at the time they are offered to be proved, the creditor might have his remedy against the bankrupt, either in law or equity,

or otherwise, either in his own name or the name of another; but the claim must be liquidated, for unliquidated damages, as we shall see below, [68] cannot be proved. See Dougl. R. 167; 1 East, R. 120; 15 Ves. 289; 2 Rose, R. 416; 1 Atk. 116; 1 T. R. 17. But a debt founded upon an illegal consideration, cannot be proved under the bankruptcy. See Cowp. R. 39; 2 Marsh. R. 542; Fonb. Eq. B. 1, c. 4, s. 4, note (y); 3 Ves. 373; 13 Ves. 314.

2. *Of conditional or contingent debts.*

[63] The fifth section of the act of Congress, provides that all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, endorsers, bail, or other persons having uncertain or contingent demands against the bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts or claims become absolute, to have the same allowed them. See 6 John. Ch. R. 266; 2 Sim. R. 165; 4 Sim. R. 37.

3. *Of debts not due.*

[64] The act provides, sect. 5, that all creditors whose debts are not due and payable until a future day, all annuitants, &c. (see 63,) shall have a right to come in and prove such debts or claims under this act, and such annuitants and holders of debts payable in future, may have the present value thereof ascertained, under the direction of the court, and allowed them accordingly as debts *in presenti*. See 3 John. Ch. R. 435; 6 John. Ch. R. 266.

4. *Of mutual debts.*

[65] In all cases, says sect. 5, where there are mutual debts or mutual credits between the parties, the balance only shall be deemed the true debt or claim between them, and the residue shall be deemed adjusted by the set-off.

There is a distinction between *mutual debts* and *mutual credits*, the former term being more limited than the latter in its signification. Where, for example, a person was indebted to the bankrupt in a sum payable at a future day, and the bankrupt owed him a small sum which was then due, this though in strictness not a mutual debt, was holden to be a mutual credit. 1 Atk. 228, 230; 7 T. R. 378; 8 Taunt. 22; Mont. on Set-off, 48. A mutual credit may be constituted even without the knowledge of the parties. For examples of this kind, see 3 T. R. 507, n.; 4 T. R. 211; Co. B. L. 542; 13 Ves. 65; 1 Holt, N. P. C. 408; 1 Wash. C. C. R. 178.

5. *Of claims of sureties, bail, &c.*

[66] Sureties, endorsers and bail, may by virtue of section 5, prove their debts or claims, and shall have a right, when their debts and claims become absolute, to have the same allowed them. According to the English practice, it seems that when costs and expenses have been necessarily incurred by such securties, endorsers or bail, such expenses and costs may be added to the debt. 1 Atk. 261.

6. *Of interest.*

[67] In England, interest on a bill or note cannot be proved, unless it appear by the express terms of the bill or note to be payable, such interest being considered as damages to be recovered. 15 Wend. R. 70; 3 Bro. C. C. 436; 2 Ves. Jun. 295; 5 Cowen, 587.

7. *Unliquidated damages.*

[68] Claims for unliquidated damages sounding in tort cannot be proved. See 8 Ves. 335; 2 Dougl. R. 583; 1 H. Bl. 29; 6 T. R. 695.

8. *Verdicts and judgments.*

[69] A *bona fide* debt is provable, when legal proceedings have been instituted for its recovery, although no final judgment has been

rendered upon it. 7 Dow. & R. 436; 1 Mon. & Mac. 70; 4 B. & Cr. 880. When the claim is for damages only, which are not provable, and there has been a verdict but no judgment before the decree in bankruptcy, it is not such claim as can be proved. 1 H. Bl. 29; 2 Str. 1194; 1 Wils. 41; Cowp. R. 138; 14 East, R. 197; 11 Ves. 646; 16 Ves. 256; 3 M. & S. 326; 2 M. & S. 70; 2 B. & B. 8; 1 Glyn & J. 385. 2 N. R. 190, 191, n.

Judgments, when entered up before the decree, whether by confession or on a verdict, when such judgments are *bona fide*, for a sum certain, may be proved. See 2 Taunt. 68.

Sect. 3. *When and how the proof is to be made.*

[70] When the proceedings are ready, proof is to be taken before a commissioner, sect. 5; or before some state judge of the state where the creditor lives, in such form as may be prescribed by the rules and regulations authorized to be made and established by the courts having jurisdiction in bankruptcy, sect. 7; or before the court as may be ordered. The proof must be under oath or affirmation, sect. 7; and the creditor should produce all documents necessary to support his claim.

The claim may be contested either by the assignee or by a creditor, and an issue may be directed by the court to ascertain the validity and amount of such claim; and the result, unless a new trial shall be granted, if in favour of the claims, is to be evidence of the validity and amount of such debts or claims. Sect. 7.

Sect. 4. *Consequences of proving a debt.*

[71] By the 5th section it is enacted that no creditor or other person, coming in and proving his debt or other claim, shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed to have waived all right of action and suit against such bankrupt, and all proceedings already commenced, shall be deemed to be surrendered thereby, See 1 Glyn & J. 271; 13 Ves. 183; Id. 192; 2 Ves. & B. 253; 1 Rose, 394.

Sect. 5. *Of the fees allowed for proving a debt.*

[72] No officer of the court, or commissioner, shall be allowed by the court more than one dollar for taking the proof of any debt or claim of any creditor or other person against the estate of the bankrupt; but he shall be allowed in addition his actual travelling expenses for that purpose. Sect. 13.

Chap. 8. *Of dividends.*

[73] The 10th section of the act requires that all proceedings in bankruptcy in each case shall, if practicable, be finally adjusted, settled, and brought to a close by the court, within two years after the decree declaring the bankruptcy.

In order to insure a speedy settlement and close of the proceedings in bankruptcy, it is, by the same section, made the duty of the court to order and direct a collection of the assets, and a reduction of the same to money, and a distribution thereof at as early periods as practicable, consistently with a due regard to the creditors; and a dividend and distribution of such assets as shall be collected and reduced to money, or so much thereof as can be safely so disposed of, consistently with the rights and interests of third persons having adverse claims thereto, shall be made among the creditors who have proved their debts, as often as once in six months from the time of the decree declaring the bankruptcy. Sect. 10. And the pendency of any suit at law or in equity, by or against such third persons, shall not postpone such division and distribution,

except so far as the assets may be necessary to satisfy the same. Ib.

It will be proper here to consider the notice; the preferences; the debts to be paid without preference; and how second or future dividends shall be made.

1. *Of the notice of a dividend.*

[74] Notice of such dividend and distribution is required to be given in some newspaper or newspapers, in the district, designated by the court, ten days at least before the order thereof is passed. Sect. 10.

2. *Of preferred debts.*

[75] Debts due by the bankrupt to the United States, and all debts due by him to persons who, by the laws of the United States, have a preference, in consequence of having paid moneys as his sureties, shall be first paid out of the assets. Sect. 5.

[76] Any person who shall have performed any labour as an operative in the service of any bankrupt, shall be entitled to receive the amount of the wages due to him for such labour, not exceeding twenty-five dollars; provided that such labour shall have been performed within six months next before the bankruptcy of his employer. Sect. 5.

3. *Of the debts to be paid without preference.*

[77] All creditors coming in and proving their debts under such bankruptcy, in the manner prescribed by law, the same being *bona fide* debts, shall be entitled to share in the bankrupt's property and effects, *pro rata*, without any priority or preference whatsoever, sect. 5, except as is mentioned in [75] and [76].

4. *Of a second, or other future dividend.*

[78] Where any creditor shall not have proved his debt until a dividend or distribution shall have been made and declared, he shall be entitled to be paid the same *pro rata*, out of the remaining dividends or distributions thereafter made, as other creditors have already received; but before the latter shall be entitled to any portion thereof. Sect. 10.

Chap. 9. *Of bankrupt partners.*

[79] The 14th section of the act provides, "That where two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any of them, or on the petition of any creditor of the partners; upon which order all the joint stock and property of the company, and also all the separate estate of each of the partners shall be taken, excepting such parts thereof as are herein excepted; and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts; and the assignees shall also keep separate accounts of the joint stock or property of the company, and of the separate estate of each member thereof; and after deducting out of the whole amount received by such assignees the whole of the expenses and disbursements paid by them, the net proceeds of the joint stock shall be appropriated to pay the creditors of the company, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock, for the payment of the joint creditors; and if there shall be any balance of the joint stock, after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners, according to their respective rights and interests therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated

to the separate estate of each partner shall be applied to the payment of his separate debts; and the certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone under this act; and in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone.

Chap. 10. *Of the crimes committed by the bankrupt or other persons in the course of the proceedings.*

[80] By the 4th section it is provided, that if on the examination of the bankrupt he shall wilfully and corruptly swear or affirm falsely, he shall be deemed guilty of perjury, and shall be punishable therefor in like manner as the crime of perjury is now punishable by the laws of the United States.

[81] And by the 7th section it is enacted that if any person or persons shall falsely and corruptly answer, swear, or affirm, in any hearing or on trial of any matter, or in any proceeding in such court in bankruptcy, or before any commissioner, he or she shall be deemed guilty of perjury, and punishable therefor in the manner and to the extent provided by law in other cases.

Chap. 11. *Of the record.*

[82] Section 13, directs that the proceedings in all cases in bankruptcy shall be deemed matters of record; but the same shall not be required to be recorded at large, but shall be carefully filed, kept and numbered in the office of the court, and a docket only, or short memorandum thereof, with the numbers, kept in a book by the clerk of the court.

See, generally, Cooke's B. L.; Coop. B. L.; Green's B. L.; Whitm. B. L.; Eden's B. L.; Cull. B. L.; Owen's B. L.; Bell's Com. B. 6; Bac. Ab. h. t.; Vin. Ab. h. t.; Com. Dig. h. t.; Mont. B. L.

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BANKRUPTCY, the state of a man unable to pursue his business and meet his engagements, in consequence of the derangement of his affairs. The constitution of the United States, art. 1, s. 8, authorises Congress "to establish an uniform rule of naturalization, and uniform laws

on the subject of bankruptcies throughout the United States." With the exception of a short interval during which bankrupt laws existed in this country, this salutary power has laid dormant till the passage of the act of 1841. Any one of the states may pass a bankrupt law, but no state bankrupt or insolvent law can be permitted to impair the obligation of contracts; nor can the several states pass laws conflicting with an act of congress on this subject; 4 Wheat. 122; and the bankrupt laws of a state cannot affect the rights of citizens of another state. 12 Wheat. R. 213. Vide 3 Story on the Const. § 1100 to 1110; 2 Kent, Com. 321; Serg. on Const. Law, 322; Rawle on the Const. c. 9; 6 Pet. R. 348. Vide *Bankrupt*.

BANKS OF RIVERS, *estates*. By this term is understood what contains the river in its natural channel, when there is the greatest flow of water. The owner of the bank has a right to the middle of the stream. Vide *Riperian Proprietor*. When by imperceptible increase the banks on one side become more extended and enroach upon the river, this addition is called alluvion (q. v.); when the increase is sudden and can be perceived it is then called avulsion, (q. v.)

BANNITUS. One outlawed or banished. This word is obsolete.

BANS OF MATRIMONY, is the giving public notice or making proclamation of a matrimorial contract, and the intended celebration of the marriage of the parties in pursuance of such contract, to the end that persons objecting to the same may have an opportunity to declare such objections before the marriage is solemnized. Poth. Du Mariage, partie 2, c. 2. Vide *Ban*.

BAR, *in actions*, is a perpetual destruction or temporary taking away of the action of the plaintiff. In ancient authors it is called *exceptio peremptoria*. Co. Litt. 303 b; Steph. Pl. Appx. xxviii. When a person is bound in any action real or personal, by judgment on demurrer, confession or verdict, he is barred as to that or any other action, of the like nature or degree for the same thing, forever; for *expedit reipublicæ ut sit finis litium*. But there is a difference between real and personal actions. In *personal actions*, as debt or account, the bar is perpetual, inasmuch as the plaintiff cannot have an action of a higher nature, and therefore in such actions he has generally no remedy but by bringing a writ of error. Doct. Plac. 65; 6 Co. 7, 8; 4 East, 507, 508. But, if the defendant be barred in a *real* action, by judgment on a verdict, demurrer or confession, &c. he may still have an action of a higher nature and try the same right again. Ib. Lawes, Pl. 39, 40. See generally, Bac. Ab. Abatement, N; *Plea in bar*.

BAR, *practice*, a place in a court where the counsellors and advocates stand to make their addresses to the court and jury; it is so called because formerly it was closed with a bar. Figuratively the counsellors and attorneys at law are called the bar; the bar of Philadelphia, the New York bar. A place in a court having criminal jurisdiction, to which prisoners are called to plead to the indictment, is also called the bar. Vide Merl. Répert. mot Barreau, and Dupin, Profession d'Avocat, tom. i. p. 451, for some eloquent advice to gentlemen of the bar.

BAR, *contracts*, is an obstacle or opposition. Some bars arise from circumstances and others from persons. Kindred within the prohibited degree, for example, is a bar to a marriage between the persons related; but the fact that A is married, and cannot therefore marry B, is a circumstance which operates as a bar as

long as it subsists; for without it the parties might marry.

BARBICAN, an ancient word to signify a watch-tower. Barbicanage was money given for the support of a barbican.

BARGAIN AND SALE, *conveyancing, contracts*, is a contract by which a person conveys his lands to another, for a pecuniary consideration. In consequence of this conveyance a use arises to a bargainee, and the statute 27 Henry VIII. immediately transfers the legal estate and possession to him. A bargain and sale may be in fee, for life, or for years. The proper and technical words of this conveyance are *bargain and sale*, but any other words that would have been sufficient to raise a use, upon a valuable consideration, before the statute, are now sufficient to constitute a good bargain and sale. Proper words of limitation must, however, be inserted. Cruise Dig. tit. 32, ch. 9; Bac. Ab. h. t.; Com. Dig. h. t.; and the cases there cited; Nels. Ab. h. t.; 2 Bl. Com. 338. This is the most common mode of conveyance in the United States. 4 Kent, Com. 483; 3 Pick. R. 529; 3 N. H. Rep. 260; 6 Harr. & John. 465; 3 Wash. C. C. Rep. 376; 4 Mass. R. 66; 4 Yeates, R. 295; 1 Yeates, R. 328; 3 John. R. 388; 4 Cowen's R. 325; 10 John. R. 456, 505; 3 N. H. Rep. 261; 14 John. R. 126; 2 Harr. & John. 230.

BARLEYCORN, a lineal measure containing one-third of an inch. Dane's Ab. c. 211, a. 13, s. 9. The barleycorn was the first measure, with its divisions and multiples, of all our measures of length, superficies, and capacity. Ib. c. 211, a. 12, s. 2.

BARN, *estates*, a building on a farm used to receive the crop, the stabling of animals and other purposes. The grant or demise of a barn without words superadded to extend its meaning, would pass no more than the barn itself and as much land as would be necessary for its complete enjoyment. 4 Serg. & Rawle, 342.

BARON. This word has but one signification in American law, namely, husband: we use baron and feme, for husband and wife. And in this sense it is going out of use. In England, and perhaps some other countries, baron is a title of honour; it is the first degree of nobility below a viscount. Vide Com. Dig. Baron and Feme. Bac. Ab. Baron and Feme; and the articles *Husband; Marriage; Wife*.

BARRACK. By this term, as used in Pennsylvania, is understood an erection of upright posts supporting a sliding roof, usually of thatch. 5 Whart. R. 429.

BARRATOR, *crimes*, one who has been guilty of the offence of barratry.

BARRATRY, *crimes*, is the habitual moving, exciting, and maintaining suits and quarrels either at law or otherwise. A man cannot be indicted as a common barrator in respect of any number of false and groundless actions brought in his own right, nor for a *single* act in right of another, for that would not make him a common barrator. Barratry, in this sense, is different from maintainance (q. v.) and champerty, (q. v.) An attorney cannot be indicted for this crime, merely for maintaining another in a groundless action. Vide 15 Mass. R. 229; 1 Bailey's R. 379; 11 Pick. R. 432; 13 Pick. R. 362; 9 Cowen, R. 587; Bac. Ab. h. t.; Hawk. P. C. B. 1, c. 21; Roll. Ab. 335; Co. Litt. 368; 3 Inst. 175.

BARRATRY, *maratime law, crimes*, is a fraudulent act of the master or mariners, committed contrary to their duty as such, to the prejudice of the owners of the ship. Emer. tom. 1, p. 366; Merlin, Répert, h. t.; Roccus, h. t.; 2 Marsh.

Insur. 515; 8 East, R. 138, 139; as to what will amount to barratry, see Abbott on Shipp. 167, n. (1); 2 Wash. C. C. R. 61; 9 East, R. 126; 1 Str. R. 581; 2 Ld. Raym. 1349; 1 Term R. 127; 6 Id. 379; 8 Id. 230; 2 Cain. R. 67, 222; 3 Cain. R. 1; 1 John. R. 229; 8 John. R. 209, n. 2d edit.; 5 Day R. 1; 11 John. R. 40; 13 John. R. 451; 2 Binn. R. 274; 2 Dall. R. 137; 8 Cran. R. 39; 3 Wheat. R. 168; 4 Dall. R. 294; 1 Yeates, 114. The act of Congress of 30th April, 1790, s. 8, 1 Story's Laws U. S. 84, punishes with a death as piracy "any captain or mariner of any ship or other vessel who shall piratically and feloniously run away with such ship or vessel, or any goods or merchandize to the value of fifty dollars; or yield up such ship or vessel to any pirate; or if any such seaman shall lay violent hands upon his commander, thereby to hinder or prevent his fighting in defence of his ship, or goods, committed to his trust, or shall make a revolt in the said ship."

BARREL. A measure of capacity, equal to thirty-six gallons.

BARRISTER, *English law*. A counsellor admitted to plead at the bar.—*Ouster barrister*, is one who pleads ouster or without the bar.—*Inner barrister*, a serjeant or king's counsel who pleads within the bar.—*Vacation barrister*, a counsellor newly called to the bar, who is to attend for several long vacations the exercise of the house. Barristers are called *apprentices*, *apprentitii ad legem*, being looked upon as learners, and not qualified until they obtain the degree of serjeant.

BARTER, *in contracts*, is an exchange, between two or more persons of goods for goods. If an insurance be made upon returns from a country where trade is carried on by barter, the valuation of goods in return shall be made on the cost of those given in barter, adding all charges. Wesk. Ins. 42. See *Price*. Barter differs from sale in this, that in the latter, the exchange of goods is for money. Vide 3 Campb. R. 351; Cowp. 818; 1 Dougl. 24, n.; 1 N. R. 151; and *Exchange*.

BARTON, *old English law*. The demesne land of a manor; a farm distinct from the mansion.

BASE COURT. An inferior court, one not of record. Not used.

BASE ESTATE, *English law*, was the estate which base tenants had in their lands. Base tenants were a degree above villeins, the latter being compelled to perform all the commands of their lords, the former did not hold their lands by the performance of such commands. See Kitch. 41.

BASE FEE, *English law*. A tenure in fee at the will of the lord; this was distinguished from socage free tenure. See Co. Litt. 1, 18.

BASILICA, *civil law*. This is derived from a Greek word which signifies *imperial constitutions*. The emperor Basilius finding the corpus juris civilis of Justinian, too long and obscure, resolved to abridge it, and under his auspices the work proceeded to the fortieth book, which at his death, remained unfinished. His son and successor, Leo, the philosopher, continued the work, and published it in sixty books about the year 880. Constantine Porphyro-geneta, younger brother of Leo, revised the work, re-arranged it, and republished it, anno domini, 910. From that time the laws of Justinian ceased to have any force in the eastern empire, and the Basilica were the foundation of the law observed there till Constantine XIII., the last of the Greek emperors, under whom in 1453, Constantinople was taken by Mahomet the Turkish emperor, who put an end to the empire and its laws. Histoire de la Jurisprudence; Etienne, Intr.

a l'étude du Droit Romain § LIII. The Basilica were written in Greek.

BASTARD. A bastard, according to Sir William Blackstone, 1 Comm. 454, is one that is not only begotten, but born out of lawful matrimony: this definition does not appear to be complete, inasmuch as it does not embrace the case of a person who is the issue of an illicit connexion, during the coverture of his mother. A bastard may be perhaps defined to be one who is born of an illicit union, and before the lawful marriage of his parents. A man is a bastard if born, *first*, *before* the marriage of his parents; but although he may have been begotten while his parents were single, yet if they afterwards marry, and he is born during the coverture, he is legitimate, 1. Bl. Com. 455, 6. *Secondly*, if born *during the coverture*, under circumstances which render it impossible that the husband of his mother can be his father, 6 Binn. 283; 1 Browne's R. Appx. xlvii; 4 T. R. 356; Str. 940; Ib. 51; 8 East, 193; Hardin's R. 479; it seems by the Gardner peerage case, reported by Denis Le Marchant, esquire, that strong moral improbability that the husband is not the father, is sufficient to bastardize the issue. Bac. Ab. tit. Bastardy, A. last ed.; *thirdly*, if born beyond a competent time *after* the coverture has determined. Stark. Ev. part 4, p. 221. n. a; Co. Litt. 123, b, by Hargrave & Butler in the note. See *Gestation*.

The principal right which bastard children have is that of maintenance from their parents. 1 Bl. Com. 458; Code Civ. of Lo. 254 to 262. To protect the public from their support the law compels the putative father to maintain his bastard children. See *Bastardy*, *Putative father*.

Considered as nullus filius, a bastard has no inheritable blood in him, and therefore no estate can descend to him, but he may take by testament, if properly described, after he has obtained a name by reputation. 1 Rop. Leg. 76, 266; Com. Dig. Descent, C 12; Ib. Bastard, E; Co. Lit. 123, a; Ib. 3, a; 1 T. R. 96; Doug. 548; 3 Dana, R. 233; 4 Pick. R. 93; 4 Desaus. 434. But this hard rule has been somewhat mitigated in some of the states, where by statute, various inheritable qualities have been conferred upon bastards. See 5 Conn. 228; 1 Dev. Eq. R. 345; 2 Root, 280; 5 Wheat. 207; 3 H. & M. 229, n; 5 Call, 143; 3 Dana, 233.

Bastards can acquire the rights of legitimate children only by an act of the legislature. 1 Bl. Com. 460; 4 Inst. 36.

By the laws of Louisiana, a bastard is one who is born of an illicit union. Civ. Code of Lo. art. 27, 199. There are two sorts of illegitimate children; first, those who are born of two persons, who, at the moment such children were conceived might have legally contracted marriage with each other; and, secondly, those who are born from persons, to whose marriage there existed at the time, some legal impediment. Ib. art. 200. An adulterous bastard is one produced by an unlawful connexion between two persons, who, at the time he was conceived, were, either of them, or both, connected by marriage with some other person. Ib. art. 201. Incestuous bastards are those who are produced by the illegal connexion of two persons who are relations within the degrees prohibited by law. Ib. art. 202.

Bastards, generally speaking, belong to no family, and have no relations; accordingly they are not submitted to the paternal authority, even when they have been acknowledged. See 11 East, 7, n. Nevertheless fathers and mothers owe alimony to their children when they are in need.

Ib. art. 254, 256. Alimony is due to bastards, though they be adulterous and incestuous, by the mother and her ascendants. Ib. art. 262.

Children born out of marriage, except those who are born from an incestuous or adulterous connexion, may be legitimated by the subsequent marriage of their father and mother, whenever the latter have legally acknowledged them for their children, either before the marriage or by the contract of marriage itself. Every other mode of legitimatising children is abolished. Ib. art. 217. Legitimation may even be extended to deceased children who have left issue, and in that case, it inures to the benefit of that issue. Ib. art. 218. Children legitimated by a subsequent marriage have the same rights as if born during the marriage. Ib. art. 219.

See generally, Vin. Abr. Bastards; Bac. Abr. Bastard; Com. Dig. Bastard; Metc. & Perk. Dig. h. t.; the various other American Digests, h. t.; Harr. Dig. h. t.; 1 Bl. Com. 454 to 460; Co. Litt. 3, b. And *Access; Bastardy; Gestation; Natural children.*

BASTARD EIGNE, *Eng. law*, is a son born before the marriage of his parents, when the latter afterwards marry and have issue; in this case the first child, or, the one before marriage, is called *bastard eignè*, and the first born after marriage is called *malier puisnè*. 2 Bl. Com. 248. Vide *Eignè; Mulier.*

BASTARDY, *crim. law.* The offence of begetting a bastard child; as, such a man is guilty of fornication and bastardy.

BASTARDY, *persons*, the state or condition of a bastard. The law presumes every child legitimate, when born of a woman in a state of wedlock, and casts the *onus probandi* (q. v.) on the party who affirms the bastardy. Stark. Ev. h. t.

BASTON, ancient French word which signifies a staff, or club. In some old English statutes the servants or officers of the wardens of the Fleet are so called, because they attended the king's courts with a red staff. Vide *Tipstaff.*

BATTEL, in French *Bataille; Old English law.* An ancient and barbarous mode of trial, by single combat, called wager of battel, where, in appeals of felony, the appellee might fight with the appellant to prove his innocence. It was also used in affairs of chivalry or honour, and upon civil cases upon certain issues. Co. Litt. 294. Till lately it disgraced the English code. This mode of trial was abolished in England by stat. 59 Geo. 3, c. 46.

BATTERY. It is proposed to consider, 1, What is a battery; 2, When a battery may be justified.

§ 1. A battery is the unlawful touching the person of another by the aggressor himself, or any other substance put in motion by him. 1 Saund. 29, b. n. 1; Id: 13 & 14, n. 3. It must be either wilfully committed or proceed from want of due care. Str. 596; Hob. 134; Plowd. 19; 3 Wend. 391. Hence an injury, be it never so small, done to the person of another, in an angry, revengeful, 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; see 1 Selw. N. P. 33, 4. And any thing attached to the person, partakes of its inviolability; if, therefore, A strikes a cane in the hands of B, it is sufficient to justify B in beating A. 1 Dall. 114; 1 Ch. Pr. 37. 1 Penn. R. 380; 1 Hill's R. 46; 4 Wash. C. C. R. 534; 1 Baldw. R. 600.

§ 2. A battery may be justified, 1st, for the public good; 2ndly in the exercise of an office; 3dly, under process of a court of justice or other

legal tribunal; 4thly, in aid of an authority in law; and lastly, as a necessary means of defence.

First,—As a *salutary mode of correction*, the beating may be justified for the public good; namely, 1. A parent may correct his child, a master his servant, a schoolmaster his scholar, 24 Edw. 4; Easter, 17, page 6; and a superior officer, one under his command. Keilw. pl. 120, p. 136; Bull. N. P. 19; Bee, 161; 1 Bay, 3; 14 John. R. 119; 15 Mass. 365; and vide Cowp. 173; 15 Mass. 347. —2. As a means to *preserve the peace*, and therefore if the plaintiff assaults or is fighting with another, the defendant may lay hands upon him, and restrain him until his anger is cooled; but he cannot strike him in order to protect the party assailed, as he may in self-defence. 2 Roll. Abr. 359, (E.) pl. 3.—3. Watchmen may arrest and detain in prison for examination, persons walking in the streets by night, whom there is reasonable ground to suspect of felony, although there is no proof of a felony having been committed. 3 Taunt. 14. —4. Any person has a right to arrest another to prevent a felony, as to prevent him from murdering his wife.—5. Any one may arrest another upon suspicion of felony, provided a felony has actually been committed, that there is reasonable ground for suspecting the person arrested to be the criminal, and that the party making the arrest, himself entertained the suspicion.—6. Any private individual may arrest a felon. Hale's P. C. 89.—7. It is lawful for every man to lay hands on another to preserve public decorum; as to turn him out of church, and prevent him from disturbing the congregation or a funeral ceremony. 1 Mod. 168; and see 1 Lev. 196; 2 Keb. 124. But a request to desist should be first made, unless the urgent necessity of the case dispenses with it.

Secondly; a battery may be justified in the exercise of an office. 1. A constable may freshly arrest one who, in his view, has committed a breach of the peace, and carry him before a magistrate. But if an offence has been committed out of the constable's sight, he cannot arrest, unless it amounts to a felony. 1 Brownl. 198; or a felony is likely to ensue. Cro. Eliz. 375.—2. A justice of the peace may generally, do all acts which a constable has authority to perform; hence he may freshly arrest one, who in his view, has broken the peace; or he may order a constable at the moment to take him up. Keilw. 41.

Thirdly; A battery may be justified under the process of a court of justice or of a magistrate having competent jurisdiction. See 16 Mass. 450; 13 Mass. 342.

Fourthly; A battery may be justified in aid of an authority in law. Every person is empowered to restrain breaches of the peace, by virtue of the authority vested in him by the law.

Lastly; A battery may be justified as a necessary means of defence. 1. Against the plaintiff's assaults in the following instances: In defence of himself, his wife, 3 Salk. 46; his child, and his servant, Ow. 150; sed vide, 1 Salk. 407. So likewise the wife may justify a battery in defending her husband, Ld. Raym. 62; the child its parent, 3 Salk. 46, and the servant his master. In these situations, the party need not wait until a blow has been given, for then he might come too late, and be disabled warding off a second stroke from his own person, or effectually protecting that of the person assailed. Care, however, must be taken that the battery transgress not the bounds of necessary defence and protection, for it is only permitted as a means to avert an impending evil which

might otherwise overwhelm the party, and not as a punishment or retaliation for the injurious attempt. Str. 953. The degree of force necessary to repel an assault, will naturally depend upon, and be proportioned to, the violence of the assailant; but with this limitation, any degree is justifiable. Ld. Raym. 177. 2 Salk. 642. —2. A battery may likewise be justified in the necessary defence of one's property; if the plaintiff is in the act of entering peaceably upon the defendant's land, or having entered, is discovered not committing violence, a request to depart is necessary in the first instance, 2 Salk. 641; and if the plaintiff refuses, the defendant may then, and not till then, gently lay hands upon the plaintiff to remove him from the close; and for this purpose may use, if necessary, any degree of violence short of striking the plaintiff, as by thrusting him off; Skinn. 228. If the plaintiff resists, the defendant may oppose force to force. 8 T. R. 78. But if the plaintiff is in the act of forcibly entering upon the land, or having entered, is discovered subverting the soil, cutting down a tree or the like, 2 Salk. 641, a previous request is unnecessary, and the defendant may immediately lay hands upon the plaintiff. 8 T. R. 78. A man may justify a battery in defence of his *personal* property, without a previous request, if another forcibly attempt to take away such property. 2 Salk. 641. Vide *Rudeness; Wantonness.*

BATTURE, means an elevation of the bed of a river *under* the surface of the water; but it is sometimes used to signify the same elevation when it has risen *above* the surface. 6 M. R. 216. The term battures is applied, principally, to certain portions of the bed of the river Mississippi, which are left dry when the water is low, and are covered again, either in whole or in part, by the annual swells.

BAWDY HOUSE, *crim. law*, is a house of ill-fame, (q. v.) kept for the resort and unlawful commerce of lewd people of both sexes. Such a house is a common nuisance, as it endangers the public peace by drawing together dissolute and debauched persons; and it has also an apparent tendency to corrupt the manners of both sexes, by such an open profession of lewdness. 1 Russ. on Cr. 299; Bac. Ab. Nuisances, A; Hawk. B. 1, c. 74, § 1–5. The keeper of such a house may be indicted for the nuisance; and a married woman, because such houses are generally kept by the female sex, may be indicted with her husband for keeping such a house. 1 Salk. 383; vide Dane's Ab. Index, h. t.

BAY. Is an enclosure to keep in the water for the supply of a mill or other contrivance, so that the water may be able to drive the wheels of such mill. Stat. 27 Eliz. c. 19. A large open water or harbour where ships may ride, is also called a bay; as, the Chesapeake Bay, the Bay of New York.

BEACH, the sea shore, (q. v.)

BEACON. A signal erected as a sea mark for the use of mariners, and to give warning of the approach of an enemy. 1 Com. Dig. 259; 5 Com. Dig. 173. Since the invention of the telegraph, the beacon has been but little used.

BEARER, one who bears or carries a thing. If a bill or note be made payable to bearer, it will pass by delivery only, without endorsement; and whoever fairly acquires a right to it, may maintain an action against the drawer or acceptor. It has been decided that the bearer of a bank note, payable to bearer, is not an assignee of a chose in action within the 11th section of the judiciary act of 1789, ch. 20, limiting the jurisdiction of the circuit court. 3 Mason, R. 308. Bills payable to bearer are

contra-distinguished to those payable to order, which can be transferred only by endorsement and delivery. Bills payable to fictitious payees, are considered as bills payable to bearer.

BEARERS *Eng. crim. law*, are such as bear down or oppress others; maintainers. This word is nearly obsolete.

BEAU PLEADER, *Eng. law*. Fair pleading. This is the name of a writ upon the statute of Marlbridge, 52 H. 3, c. 11, which enacts, that neither in the circuit of justices, nor in counties, hundreds, courts-baron, any fines shall be taken for *fair pleading;* namely, for not pleading fairly or aptly to the purpose. Upon this statute this writ was ordained, directed to the sheriff, bailiff, or him who shall demand the fine; and it is a prohibition or command not to do it. New Nat. Br. 596; 2 Inst. 122.

BEDEL, *Eng. law*, is a cryer or messenger of a court, who cites men to appear and answer. There are also inferior officers of a parish or liberty who bear this name.

BEE. The name of a well known insect. Bees are considered *feræ naturæ* while unreclaimed; and they are not more subjects of property while in their natural state, than the birds which have their nests on the tree of an individual. 3 Binn. R. 546. This agrees with the Roman law. Inst. 2, 1, 14; Dig. 41, 1, 5, 2. In New York, it has been decided that bees in a tree belong to the owner of the soil, while unreclaimed; when they have been reclaimed, and the owner can identify them, they belong to him, and not to the owner of the soil. 15 Wend. R. 550. See 1 Cowen, R. 243.

BEHAVIOUR. Vide *Good Behaviour*.

BELIEF, is the conviction of the mind, arising from evidence received, or from information derived, not from actual perception by our senses, but from the relation or information of others who have had the means of acquiring actual knowledge of the facts, and whose qualifications for acquiring that knowledge, and retaining it, and afterwards in communicating it, we can place confidence. "Without recurring to the books of metaphysicians," says Chief Justice Tilghman, 4 Serg. & Rawle, 137, "let any man of plain common sense, examine the operations of his own mind, he will assuredly find that on different subjects his belief is different. I have a firm belief that the moon revolves round the earth. I may believe, too, that there are mountains and valleys in the moon; but this belief is not so strong, because the evidence is weaker." Vide 1 Stark. Ev. 41; 2 Pow. Mortg. 555; 1 Ves. 95; 12 Ves. 80; 1 P. A. Browne's R. 258; 1 Stark. Ev. 127; Dyer, 53; 2 Hawk. c. 46, s. 167; 3 Wills. 427; 2 Bl. R. 881; Leach, 270; 8 Watts, R. 406.

BELOW. Undermost. The court below is an inferior court, whose proceedings may be examined on error by a superior court, which is called the court above. Bail below is that given to the sheriff in bailable actions, which is so called to distinguish it from bail to the action, which is called bail above. See *Above; Bail above; Bail below.*

BENCH, a seat of justice. Figuratively, the office of a judge, as the bench and the bar. One of the superior courts in England is called the Court of the King's Bench. The King's Bench prison is a prison belonging and connected with that court.

BENCH WARRANT, *crim. law*. The name of a process sometimes given to an attachment issued by order of a criminal court, against an individual for some contempt, or for the purpose of arresting a person accused; the latter is seldom grant-

ed unless when a true bill has been found.

BENEFICE, *eccles. law*, is in its most extended sense, any ecclesiastical preferment or dignity; but in its more limited sense, it is applied only to rectories and vicarages.

BENEFICIARY. This term is frequently used as synonymous with the technical phrase *cestui que trust*, (q. v.)

BENEFICIO PRIMO ECCLESIASTICO HABENDO, *Eng. eccl. law*. A writ directed from the king to the chancellor, commanding him to bestow the benefice which shall first fall in the king's gift, above or under a certain value, upon a particular and certain person.

BENEFIT. This word is used in the same sense as gain (q. v.) and profits, (q. v.) 20 Toull. n. 199.

BENEFIT OF CESSION, *civil law*. The release of a debtor which the law operates in his favour, upon the surrender of his property for the benefit of his creditors, from future imprisonment for his debts. Poth. Procéd. Civ. 5eme part., c. 2, § 1. This was something like a discharge under the insolvent laws, which releases the person of the debtor, but not the goods he may acquire afterwards. See *Bankrupt; Cessio Bonorum; Insolvent.*

BENEFIT OF CLERGY, *English law*, is an exemption of the punishment of death which the laws impose on the commission of certain crimes, on the culprit demanding it; by modern statutes, benefit of clergy was rather a substitution of a more mild punishment for the punishment of death. It was lately granted not only to the clergy, as was formerly the case, but to all persons. The benefit of clergy seems never to have been extended to the crime of high treason, nor to have embraced misdemeanors inferior to felony. Vide 1 Chit. Cr. Law, 667 to 668; 4 Bl. Com. ch. 28. But this infamous privilege given originally to the clergy because they had more learning than others, is now abolished by stat. 7 Geo. 4, c. 28, s. 6. By the act of congress of April 30, 1790, it is provided, § 30, that the benefit of clergy shall not be used or allowed, upon conviction of any crime, for which, by any statute of the United States, the punishment is, or shall be declared to be, death.

BENEFIT OF INVENTORY, *civil law*. The benefit of inventory is the privilege which the heir obtains of being liable for the charges and debts of the succession, only to the value of the effects of the succession, in causing an inventory of these effects within the time and manner prescribed by law. Civil Code of Louis. art. 1025. Vide Poth. Traité des Successions, c. 3, s. 3, a. 2.

BENEVOLENCE, *English law*, was an aid given by the subjects to the king under a pretended gratuity, but in reality it was an extortion and imposition.

BEQUEST. A gift by last will or testament; a legacy, (q. v.) This word is sometimes, though improperly used, as synonymous with *devise*. There is however a distinction between them. A bequest is applied, more properly, to a gift by will of a legacy, that is, of personal property; devise is properly a gift by testament of real property. Vide *Devise*.

BESAILE or BESAYLE, *domestic relations*. The great grandfather, *proavus*. 1 Bl. Com. 186; vide *Aile*.

BETTER EQUITY. In England this term has lately been adopted. In the case of Foster v. Blackstone, the master of the rolls said, he could no where find in the authorities what in terms was a *better equity*, but on a reference to all the cases, he considered it might be thus defined: If a prior incumbrancer did

not take a security which effectually protected him against any subsequent dealing to his prejudice, by the party who had the legal estate, a second encumbrancer, taking a security which in its nature afforded him that protection, had what might properly be called a *better equity*. 1 Ch. Pr. 470, note. Vide 4 Rawle, R. 242; 5 Rawle, R. 144.

BETTERMENTS. Improvements made to an estate. It signifies such improvements as have been made to the estate which render it better than mere repairs.

BEYOND SEA. This phrase is used in the acts of limitations of several of the states, in imitation of the phraseology of the English statute of limitations. In Pennsylvania, the term has been construed to signify *out of the United States*, 9 S. & R. 288; 2 Dall. R. 217; 1 Yeates, R. 329. In Georgia, it is equivalent to *without the limits of the state*. 3 Wheat. R. 541; and the same construction prevails in Maryland, 1 Har. & John. 350; 1 Harr. & M'H. 89; in South Carolina, 2 McCord, Rep. 331; and in Massachusetts, 3 Mass. R. 271; 1 Pick. R. 263. Vide Kirby, R. 299; 3 Bibb, R. 510; 3 Litt. R. 48; 1 John. Cas. 76.

BIAS. A particular influential power which sways the judgment; the inclination of the mind towards a particular object. Justice requires that the judge should have no bias for or against any individual; and that his mind should be perfectly free to act as the law requires. There is, however, one kind of bias which the courts suffer to influence them in their judgments; it is a bias favourable to a class of cases, or persons, as distinquished from an individual case or person. A few examples will explain this. A bias is felt on account of convenience, 1 Ves. sen. 13, 14; 3 Atk. 524. It is also felt in favour of the heir at law, as when there is an heir on one side and a mere volunteer on the other. Willes, R. 570; 1 W. Bl. 256; Amb. R. 645; 1 Ball & B. 309; 1 Wils. R. 310; 3 Atk. 747; Ib. 222. On the other hand, the court leans against double portions for children, M'Clell. R. 356; 13 Price, R. 599; against double provisions, and double satisfactions. 3 Atk. R. 421; and against forfeitures. 3 T. R. 172. Vide, generally, 1 Burr. 419; 1 Bos. & Pull. 614; 3 Bos. & Pull. 456; 2 Ves. jr. 648; Jacob, Rep. 115; 1 Turn. & R. 350.

BID, *contracts*. A bid is an offer to pay a stipulated price for an article about to be sold at auction. The bidder has a right to withdraw his bid at any time before it is accepted, which acceptance is generally manifested by knocking down the hammer. 3 T. R. 148; Hardin's Rep. 181; Sugd. Vend. 29; Babington on Auct. 30, 42. Et vide, *Offer*.

BIDDER, *contracts*. One who makes an offer to pay a certain price for an article which is for sale. The term is applied more particularly to a person who offers a price for goods or other property, while being sold at an auction. The bidder is required to act in good faith, and any combination between him and others, to prevent a fair competition, would avoid the sale made to himself. Till the bid is accepted, the bidder may retract his bid. Vide articles, *Auction* and *Bid*.

BIENS, a French word, which signifies property. In law, it means property of every description, except estates of freehold and inheritance. Dane's Ab. c. 133, a, 3; Com. Dig. h. t.; Co. Litt. 118, b; Sugd. Vend. 495. In the French law, this term includes all kinds of property, real and personal. Biens are divided into biens meubles, movable or personal property; and biens immeubles, immovable property or real estate. This

distinction between movable and immovable property, is, however, recognized by them, and gives rise in the civil, as well as in the common law, to many important distinctions as to rights and remedies. Story, Confl. of Laws, § 13, note 1.

BIGAMUS. One guilty of bigamy. Obsolete.

BIGAMY, *crim. law*, *domestic relations*. The wilful contracting of a second marriage when the contracting party knows that the first is still subsisting; or it is the state of a man who has two wives, or of a woman who has two husbands living at the same time. When the man has more than two wives, or the woman more than two husbands living at the same time, then the party is said to have committed polygamy, but the name of bigamy is more frequently given to this offence in legal proceedings. 1 Russ. on Cr. 187. In England this crime is punishable by the stat. 1 Jac. 1, c. 1, which makes the offence felony, but it exempts from punishment the party whose husband or wife shall continue to remain absent for seven years before the second marriage, without being heard from, and persons who shall have been legally divorced. The statutory provisions in the U. S. against bigamy or polygamy, are generally similar to, and copied from the statute of 1 Jac. 1, c. 11, excepting as to the punishment. The several exceptions to this statute are also nearly the same in the American statutes, but the punishment of the offence is different in many of the states. 2 Kent, Com. 69; vide Bac. Ab. h. t.; Com. Dig. Justices, (S 5); Merlin Répert. mot Bigamie. Code lib. 9, tit. 9, l. 18; and lib. 5, tit. 5, l. 2. According to the canonists, bigamy consisted in marrying two virgins successively, one after the death of the other, or in once marrying a widow; persons who had so married were considered incapable of orders. Bac. Ab. h. t.; 6 Decret. l. 12.

BILATERAL CONTRACT, *civ. law*, is a contract in which both the contracting parties are bound to fulfil obligations respectively towards each other. Leç. Elem. § 781, as a contract of sale where one becomes bound to deliver the thing sold, and the other to pay the price of it. Vide *Contract; Synallagmatic contract.*

BILINGUIS. One who uses two tongues or languages. In the ancient law, this term signified a jury who were to give a verdict between an Englishman and a foreigner, part of whom were to be Englishmen and part foreigners. Vide *Medietas Linguæ.*

BILL, *legislation*, is an instrument drawn or presented by a member or committee to a legislative body for its approbation, so that it may become a law, or its rejection. After it has gone through both houses and received the constitutional sanction of the chief magistrate, where such approbation is requisite, it becomes a law. See Meigs, R. 237.

BILL, *chancery practice*, is a complaint in writing addressed to the chancellor, containing the names of the parties to the suit, both complainant and defendant, a statement of the facts on which the complainant relies, and the allegations which he makes, with an averment that the acts complained of are contrary to equity, and a prayer for relief and proper process. Its office in a chancery suit, is the same as a declaration is in action at law, a libel in a court of admiralty, or an allegation in the spiritual courts.

A bill usually consists of nine parts, 1st, The address, which must be to the chancellor. 2dly, The second part consists of the names of the plaintiffs and their descriptions; but the description of the parties in this part of the bill does not, it seems, con-

stitute a sufficient averment, so as to put that fact in issue; 2 Ves. & Bea. 327. 3dly, The third part is called the premises or stating part of the bill, and contains the plaintiff's case. 4thly, In the fourth place is a general charge of confederacy. 5thly, The fifth part consists of allegations of the defendant's pretences, and charges in evidence of them. 6thly, The sixth part contains the clause of jurisdiction, and an averment that the acts complained of are contrary to equity. 7thly, The seventh part consists of a prayer that the parties may answer the premises, which is usually termed the interrogatory part. 8thly, The prayer for relief sought forms the eighth part. And, 9thly, The ninth part is a prayer for process. 2 Madd. Ch. 166; Blake's Ch. Pr. 35; 1 Mitf. Pl. 41. The facts contained in the bill must, as far as known to the complainant, be sworn to be true; and such as are not known to him, he must swear he believes to be true. And it must be signed by counsel. 2 Madd. Ch. Pr. 167; Story, Eq. Pl. § 26 to 47.

Bills, with their several kinds and distinctions, may be divided into three clauses or heads; 1, Original bills; 2, Auxiliary bills; and, 3, Bills in the nature of original bills.

1. Original bills related to some matters not before litigated in the court by the same persons, standing under the same interests, under which the following may be ranged: bills praying the decree of the court, &c. —of interpleader—of certiorari—to perpetuate the testimony of witneses —of discovery of facts—of *quia timet* —of peace—and of information. See these several titles below.

2. Auxiliary bills which are filed in aid of original bills; under this class may be placed bills of revivor— and of revivor and supplement.

3. Bills in the nature of original bills, being sometimes auxiliary, and sometimes otherwise, and those which tend to oppose or seek the benefit of former bills, such as cross bills—bills of review—in the nature of bills of review—to impeach a decree on the ground of fraud—to carry a decree in a former suit into execution—in the nature of bills of revivor—in the nature of supplemental bills—to suspend the operation of decrees, and also bills filed by the direction of the court for the purpose of obtaining its decrees.

To the first class may be added, bills for dower or a partition—bills to marshal securities—bills to marshal assets—and bills of foreclosure.— Story's Eq. Pl. ch. 5.

BILL OF ADVENTURE, *com. law, contracts.* A writing signed by a merchant, to testify that the goods shipped on board a certain vessel belong to another person who is to take the hazard, the subscriber signing only to oblige himself to account to him for the produce.

BILL OF ATTAINDER, *legislation, punishment*, is an act of the legislature by which one or more persons are declared to be attainted, and their property confiscated. The constitution of the United States declares that no state shall pass any bill of attainder. During the revolutionary war, bills of attainder, and ex post facto acts of confiscation, were passed to a wide extent. The evils resulting from them, in times of more cool reflection, were discovered to have far outweighed any imagined good. Story on Const. § 1367. Vide *Attainder; Bill of pains and penalties.*

BILL-BOOK, *commerce, accounts*, is one in which an account is kept of promissory notes, bills of exchange, and other bills payable or receivable, and ought to contain all that a man issues or receives. The book should show the date of the bill, the term it has to run before it becomes due, the names of all the

parties to it, and the time of its becoming due, together with the amount for which it was given.

BILL OF CERTIORARI, *in chancery practice.* A bill of *certiorari* is one praying the writ of *certiorari* to remove a cause from an inferior court of equity. Coop. Eq. Pl. 44. The requisites of this bill are that it state, 1st, the proceedings in the inferior court; 2d, the incompetency of such court, by suggesting that the cause is out of its jurisdiction; or that the witnesses live out of its jurisdiction; or are not able, by age or infirmity, or the distance of the place, to follow the suit there; or that for some other cause, justice is not likely to be done; 3d, the bill must pray a writ of certiorari, to certify and remove the record and the cause to the superior court. Wyatt, Pr. Reg. 82; Harr. Ch. Pr. 49; Story, Eq. Pl. § 298. This bill is but little used in the United States.

BILL OF COSTS, *practice*, a statement of the items which form the total amount of the costs of a suit or action. This is demandable as a matter of right before the payment of the costs.

BILLS OF CREDIT. It is provided by the constitution of the United States, art. 1. s. 10, that no state shall "emit bills of credit, or make any thing but gold and silver coin a tender in payment of debts." Such bills of credit are declared to mean promissory notes or bills issued exclusively on the credit of the state, and for the payment of which the faith of the state only is pledged. The prohibition, therefore does not apply to the notes of a state bank, drawn on the credit of a particular fund set apart for the purpose. 2 M'Cord's R. 12; 2 Pet. R. 318; 11 Pet. R. 257. Bills of credit may be defined to be paper issued and intended to circulate through the community for its ordinary purposes, as money redeemable at a future day. 4 Pet. U. S. R. 410; 1 Kent Com. 407; 4 Dall. R. xxiii.; Story, Const. §§ 1362 to 1364; 1 Scam. R. 87, 526. This phrase is used in another sense among merchants, it is a letter sent by an agent or other person to a merchant, desiring him to give credit to the bearer for goods or money. Com. Dig. Merchant, F 3.

BILL TO CARRY A DECREE INTO EXECUTION, *in chancery practice.* A bill to carry a decree into execution, is one which is filed when, from the neglect of parties, or some other cause, it may become impossible to carry a decree into execution without the further decree of the court. Hinde, 68; 1 Harr. Ch. 148.

BILL, CROSS, *in chancery practice.* A cross bill is one which is brought by a defendant in a suit against the plaintiff, respecting the matter in question in that bill. Coop. Eq. Pl. 85; Mitf. Pl. 75. A bill of this kind is usually brought to obtain, either a necessary discovery, or full relief to all the parties. It frequently happens, and particularly if any question arises between two defendants to a bill, that the court cannot make a complete decree without a cross bill or cross bills to bring every matter in dispute completely before the court, litigated by the proper parties, and upon proper proofs. In this case it becomes necessary for some one of the defendants to the original bill to file a bill against the plaintiff and other defendants in that bill, or some of them, and bring the litigated point properly before the court. A cross bill should state the original bill, and proceedings thereon, and the rights of the party 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.

A cross bill may be filed to answer the purpose of a plea *puis derrien continuance* at the common law. For example, where pending a suit, and after replication and issue joined, the defendant having obtained a release and attempted to prove it *viva voce* at the hearing, it was determined that the release not being in issue in the cause, the court could not try the facts, or direct a trial at law for that purpose, and that a new bill must be filed to put the release in issue. Mitf. Pl. 75, 76; Coop. Eq. Pl. 85; 1 Harr. Ch. Pr. 135.

A cross bill must be brought before publication is passed on the first bill, 1 Johns. Ch. R. 62, and not after, except the plaintiff in the cross bill go to the hearing on the depositions already published; because of the danger of perjury and subornation, if the parties should, after publication of the former depositions, examine witnesses *de novo*, to the same matter before examined into. 7 Johns. Ch. Pr. 250; Nels. Ch. R. 103.

BILL OF DEBT, or BILL OBLIGATORY, *in contracts*, is when a merchant by his writing acknowledges himself in debt to another, in a certain sum to be paid on a certain day, and subscribes it at a day and place certain. It may be under seal or not. Com. Dig. Merchant, F 2.

BILL OF DISCOVERY, *in chancery practice*. A bill of discovery emphatically so called, is one which prays for the discovery of facts resting within the knowledge of the person against whom the bill is exhibited, or of deeds, writings or other things in his custody or power. Hinde, 20; Blake's Ch. Pr. 37. Every bill, except the bill of certiorari, may in truth be considered a bill of discovery, for every bill seeks a disclosure of circumstances relative to the plaintiff's case; but that usually and emphatically distinguished by this appellation is a bill for the discovery of facts, resting in the knowledge of the defendant, or of deeds or writings or other things in his custody or power, and seeking no relief in consequence of the discovery. This bill is commonly used in aid of the jurisdiction of some other court; as to enable the plaintiff to prosecute or defend an action at law. Mitf. Pl. 52. The plaintiff, in this species of bill, must be entitled to the discovery he seeks, and shall only have a discovery of what is necessary for his own title, as of deeds he claims under, and not to pry into that of the defendant. 2 Ves. 445. See Blake's Ch. Pr. 45; Mitf. Pl. 52; Coop. Eq. Pl. 58; 1 Madd. Ch. Pr. 196; Hare on Disc. *passim*; Wagr. on Disc. *passim*.

The action *ad exhibendum*, in the Roman law, was not unlike a bill of discovery. Its object was to force the party against whom it was instituted, to exhibit a thing or a title in his power. It was always preparatory to another, which was always a real action in the sense of the word in the Roman law. See *Action ad exhibendum*; Merlin, Questions de Droit, tome i. 84.

BILL OF EXCEPTION, *practice*, is the statement in writing, of the objection made by a party in a cause, to the decision of the court on a point of law, which, in confirmation of its accuracy, is signed and sealed by the judge or court who made the decision. The object of the bill of exceptions, is to put the question of law on record for the information of the court of error having cognizance of such cause. The bill of exception is authorised by the statute of Westminster 2, 13 Ed. 1, c. 31, the principles of which have been adopted in all the states of the Union. It is thereby enacted "when one impleaded before any of the justices, alleges an exception praying they will allow it, and if they will not, if he that alleges the

exception, writes the same, and requires that the justices will put their seals, the justices shall so do, and if one will not, another shall; and if, upon complaint made of the justice, the king cause the record to come before him, and the exception be not found in the roll, and the plaintiff show the written exception, with the seal of the justices thereto put, the justice shall be commanded to appear at a certain day, either to confess or deny his seal, and if he cannot deny his seal, they shall proceed to judgment according to the exception, as it ought to be allowed or disallowed." The statute extends to both plaintiff and defendant. Here will be considered, 1, the cases in which a bill of exceptions may be had; 2, the time of making the exception; 3, the form of the bill; 4, the effect of the bill.

1. In general a bill of exception can be had only in a *civil* case. When in the course of the trial of a cause the judge, either in his charge to the jury, or in deciding an interlocutory question, mistakes the law, or is supposed by the counsel on either side, to have mistaken the law, the counsel against whom the decision is made may tender an exception to his opinion, and require him to seal a bill of exceptions. 3 Bl. Com. 372. See Salk. 284, pl. 16; 7 Serg. & Rawle, 178; Whart. Dig. Error, D, E; 1 Cowen, 622; 2 Caines, 168; 2 Cowen, 479; 5 Cowen, 243; 3 Cranch, 298; 4 Cranch, 62; 6 Cranch, 226; 17 Johns. R. 218; 3 Wend. 418; 9 Wend. 674. In *criminal* cases, the judges, it seems, are not required to seal a bill of exceptions, 1 Chit. Cr. Law, 622; 13 John. R. 90; 1 Virg. Cas. 264; 2 Watts, R. 285; 2 Sumn. R. 19. In New York, it is provided by statute that on the trial of any indictment, exceptions to any decision of the court may be made by the defendant, in the same cases and manner provided by law in civil cases; and a bill thereof shall be settled, signed and sealed, and filed with the clerk of the court. But such bill of exception shall not stay or delay the rendering of judgment, except in some specified cases. Grah. Pr. 768, note. Statutory provisions have been made in several other states authorising the taking of exceptions in criminal cases. 2 Virg. Cas. 60 and note; 14 Pick. R. 370; 4 Ham. R. 348; 6 Ham. R. 16; 7 Ham. R. 214; 1 Leigh, R. 598; 14 Wend. 546. See also 1 Halst. R. 405; 2 Penn. R. 637.

2. The bill of exceptions must be tendered at the time the decision complained of is made; or if the exception be to the charge of the court, it must be made before the jury have given their verdict. 8 S. & R. 216; 4 Dall. 249; S. C. 1 Binn. 38; 6 John. 279; 1 John. 312. 5 Watts, R. 69; 10 John. R. 312; 5 Monr. R. 177; 7 Wend. R. 34; 7 S. & R. 219; 11 S. & R. 267; 4 Pet. R. 102; Ala. R. 66; 1 Monr. 215; 11 Pet. R. 185; 6 Cowen, R. 189. In practice, however, the point is merely noted, at the time, and the bill is afterwards settled. 8 S. & R. 216. 11 S. & R. 270.

3. The bill of exception must be signed by the judge who tried the cause; which is to be done upon notice of the time and place, when and where it is to be done. 3 Cowen, 32; 8 Cowen, 766; Bull. N. P. 316; 3 Bl. Com. 372. When the bill of exception is sealed, both parties are concluded by it. 3 Dall. 38; Bull. N. P. 316.

4. The bill of exceptions, being part of the record, is evidence between the parties, as to the facts therein stated. No notice can be taken of objections or exceptions not appearing on the bill. 8 East, 280; 3 Dall. 38, 422, n,; 2 Binn. 168. Vide generally, Dunlap's Pr., Grah.

Pr., Tidd's Pr., Chit. Pr., Penna. Pr., Archbold's Pr., Sellon's Pr., in their several indexes, h. t.; Steph. Pl. 111; Bac. Ab. h. t.; 1 Phil. Ev. 214; 12 Vin. Ab. 262; Code of Pract. of Louisiana, art. 487, 8, 9.

BILL OF EXCHANGE, *contracts*. A bill of exchange is defined to be an open letter of request from, and order by, one person on another, to pay a sum of money therein mentioned to a third person, on demand or at a future time therein specified. 2 Bl. Com. 466; Bayl. on Bills, 1; Chit. Bills, 1; 1 H. Bl. 586; 1 B. & P. 291, 654; Selw. N. P. 285; Leigh's N. P. 335; Byles on Bills, 1. The subject will be considered with reference, 1, to the parties to a bill; 2, the form; 3, their different kinds; 4, the indorsement and transfer; 5, the acceptance; 6, the protest.

[2] § 1. The parties to a bill of exchange are the drawer, (q. v.) or he who makes the order; the drawee, (q. v.) or the person to whom it is addressed; the acceptor, (q. v.) or he who accepts the bill; the payee, (q. v.) or the party to whom, or in whose favour, the bill is made. The indorser, (q. v.) is he who writes his name on the back of a bill; the indorsee, (q. v.) is one to whom a bill is transferred by indorsement; and the holder, (q. v.) is in general any one of the parties who is in possession of the bill, and entitled to receive the money therein mentioned. Some of the parties are sometimes fictitious persons. When a bill is made payable to a fictitious person, and endorsed in the name of the fictitious payee, it is in effect a bill to bearer, and a bona fide holder, ignorant of that fact, may recover on it, against all prior parties, who were privy to the transaction. 2 H. Bl. 178–288; 3 T. R. 174, 182, 481; 1 Camp. 130; 19 Ves. 311. In case where the drawer and payee were fictitious persons, the acceptor was held liable to a bona fide holder. 10 B. & C. 468; S. C. 11 E. C. L. R. 116. Vide as to parties to a bill, Chit. Bills, 15 to 76, (ed. of 1836.)

[3] § 2. The form of the bill. 1. The general requisites of a bill of exchange, are 1st, that it be in writing. R. T. Hardw. 2; 2 Stra. 955; 1 Pardess. 344, 5.—2d, That it be for the payment of money, and not for the payment of merchandise; 5 T. R. 485; 3 Wils. 213; 2 Bla. Rep. 782; 1 Burr. 325; 1 Dowl. & Ry. N. P. C. 33; 1 Bibb's R. 502; 3 Marsh. (Kty.) R. 184; 6 Cowen, 108; 1 Caines's R. 381; 4 Mass. 245; 10 S. & R. 94; 14 Pet. R. 293. 1 M'Cord, 115; 2 Nott & M'Cord, 519; 9 Watts, R. 102. But see 9 John. R. 120; and 19 John. R. 144, where it was held that a note payable in bank bills was a good negotiable note.—3d. That the money be payable at all events, not depending on any contingency, either with regard to event, or with regard to the fund out of which payment is to be made, or the parties by or to whom payment is to be made. 8 Mod. 363; 4 Vin. Ab. 240, pl. 16; 1 Burr. 323; 4 Dougl. 9; 4 Ves. 372; Russ. & Ry. C. C. 193; 4 Wend. R. 575; 2 Barn. & Ald. 417.—2. The particular requisites of a bill of exchange. It is proper here to remark that no particular form or set of words is necessary to be adopted. An order "to deliver money," or a promise that "A B shall receive money," or a promise "to be accountable," or "responsible" for it, have been severally held to be sufficient for a bill or note. 2 Ld. Raym. 1396; 8 Mod. 364. The several parts of a bill of exchange are, 1st, that it be properly dated as to place.—2, That it be properly dated as to the time of making; as the time a bill becomes due is generally regulated by the time when it was made, the date of the instrument ought to be clearly expressed. Beawes, pl. 3; 1 B. & C. 398; 2

Pardess. n. 333.—3, The superscription of the sum for which the bill is payable is not indispensable, but if it be not mentioned in the bill, the superscription will aid the omission. 2 East, P. C. 951.—4th, The time of payment ought to be expressed in the bill; if no time be mentioned, it is considered as payable on demand. 7 T. R. 427; 2 Barn. & C. 157.—5th, Although it is proper for the drawer to name the place of payment, either in the body or subscription of the bill, it is not essential, and it is the common practice, for the drawer merely to write the address of the drawee, without pointing out any place of payment; in such case the bill is considered payable, and to be presented at the residence of the drawee, where the bill was made, or to him personally any where. 2 Pardess. n. 337; 10 B. & C. 4; Moody & M. 381; 4 Car. & Paine, 35. It is at the option of the drawer whether or not to prescribe a particular place of payment, and make the payment there part of the contract. Beawes, pl. 3. The drawee, unless restricted by the drawer, may also fix a place of payment by his acceptance. Chit. Bills, 172.—6th, There must be an order or request to pay, and that must be a matter of right, and not of favour; Mood. & M. 171; but it seems that civility in the terms of request cannot alter the legal effect of the instrument; "il vous *plaira* de payer," is in France the proper language of a bill. Pailliet, Manuel de Droit Français, 841. The word *pay* is not indispensable, for the word *deliver* is equally operative. Ld. Raym. 1397.—7th, Foreign bills of exchange consist, generally, of several parts; a party who has engaged to deliver a foreign bill, is bound to deliver as many parts as may be requested. 2 Pardess. n. 342. The several parts of a bill of exchange are called a set; each part should contain a condition that it shall be paid, provided the others remain unpaid. Ib. The whole set make but one bill.—8th, The bill ought to specify to whom it is to be paid; 2 Pardess. n. 338; 1 H. Bl. 608; Russ. & Ry. C. C. 195. When the name of the payee is in blank, and the bill has been negotiated by indorsement, the holder may fill the blank with his own name; 2 M. & S. 90; 4 Campb. 97; it may, however, be drawn payable to bearer, and then it is assignable by delivery. 3 Burr. 1526.—9th, To make a bill negotiable, it must be made payable to order, or bearer, or there must be other operative and equivalent words of transfer. Beawes, pl. 3; Selw. N. P. 303, n. 16; Salk. 133. If, however, it is not intended to make the bill negotiable, these words need not be inserted, and the instrument will nevertheless be valid as a bill of exchange. 6 T. R. 123; 6 Taunt. 328; Russ. & Ry. C. C. 300; 3 Caines's R. 137; 9 John. R. 217. In France a bill must be made payable to order; Code de Com. art. 110; 2 Pardess. n. 339.—10th, The sum for which the bill is drawn, must be clearly expressed in the body of it, in writing at length. The sum must be fixed and certain, and not contingent. 2 Stark. R. 375; and it may be in the money of any country.—11th, It is usual to insert the words, *value received*, but it is implied that every bill and indorsement has been made for value received, as much as if it had been expressed *in totidem verbis;* 3 M. & S. 352; Bayl. 40, n. 83.—12th, It is usual when the drawer of the bill is debtor to the drawee, to insert in the bill these words, "and put it to *my* account;" but when the drawee or the person to whom it is directed is debtor to the drawer, then he inserts these words, "and put it to

your account;" and sometimes where a third person is debtor to the drawee, it may be expressed thus, "and put it to the account of A B." Marius, 27; Com. Dig. Merchant, F 5; R. T. Hardw. 1, 2, 3; but it is altogether unnecessary to insert any of these words. 1 B. & C. 398; S. C. 8 E. C. L. R. 108.—13th, When the drawer is desirous to inform the drawee that he has drawn a bill, he inserts in it, the words, "*as per advice;*" but when he wishes the bill paid without any advice from him, he writes, "*without further advice.*" In the former case the drawee is not authorised to pay the bill till he has received the advice; in the latter, he may pay before he has received advice.—14th, The drawee must either subscribe the bill, or, it seems, his name may be simply inserted in the body of the instrument. Beawes, pl. 3; Ld. Raym. 1376; 1 Stra. 609.—15th, The bill being a letter of request from the maker to a third person, should be addressed to that person, by the Christian name and surname, or by the full style of their firm, 2 Pardess. n. 335; Beawes, pl. 3; Chit. Bills, 186, 7.—16, The place of payment should be stated in the bill.—17th, As a matter of precaution, the drawer of a foreign bill, may, in order to prevent expenses, require the holder to apply to a third person, named in the bill for that purpose, when the drawee refuses to accept the bill; this requisition is usually in these words, placed in a corner under the drawee's address; "*Au besoin chez* Messrs. —— at ——," in other words, "In case of need apply to Messrs. —— at ——."—18th, The drawer may also add a request or direction, that in case the bill should not be honoured by the drawee, it shall be returned without protest or without expense, by subscribing the words, "*retour sans protêt,*" or "*sans frais;*" in this case the omission of the holder to protest, having been induced by the drawer, he, and perhaps the indorsers, cannot resist the payment on that account, and thus the expense is avoided, Chit. Bills, 188.—19th, The drawer may also limit the amount of damages, by making a memorandum on the bill, that they shall be a definite sum, as, for example, "*In case* of non-acceptance or non-payment, re-exchange and expenses not to exceed —— dollars." Ib.

[4] § 3. Bills of exchange are either foreign or inland. *Foreign*, when drawn by a person out of, on another in, the United States, or *vice versâ;* or by a person in a foreign country; on another person in another foreign country; or by a person in one state on another in another of the United States. 2 Pet. R. 589; 10 Pet. R. 572; 12 Pick. 483; 15 Wend. 527; 3 Marsh. (Kty.) R. 488; 1 Rep. Const. Ct. 100; 4 Leigh's R. 37; 4 Wash. C. C. Rep. 148; 1 Whart. Dig. tit. Bills of Exchange, pl. 78. But see 5 John. R. 384, where it is said by Van Ness, Justice, that a bill drawn in the United States, upon any place within the United States, is an inland bill. An *inland* bill, is one drawn by a person in a state, on another in the same state. The principal difference between foreign and inland bills is, that the former must be protested, and the latter need not. 6 Mod. 29; 2 B. & A. 656; Chit. Bills, (ed. of 1836,) p. 14. "The English rule requiring protest and notice of non-acceptance of foreign bills, has been adopted and followed as the true rule of mercantile law in the states of Massachusetts, Connecticut, New York, Maryland, and South Carolina. 3 Mass. Rep. 557; 1 Day's R. 11; 3 John. Rep. 202; 4 John. R. 144; 1 Bay's Rep. 468; 1 Harr. & John. 187. But the

supreme court of the United States, in Brown v. Berry, 3 Dall. R. 365; and in Clark v. Russell, cited in 6 Serg. & Rawle, 358, held, that in an action on a protest for non-payment on a foreign bill, protest for non-acceptance, or notice of non-acceptance, need not be shown, inasmuch as they were not required by the custom of merchants in this country; and those decisions have been followed in Pennsylvania. 6 Serg. & Rawl. 356. It becomes a little difficult, therefore, to know what is the true rule of the law-merchant in the United States, on this point, after such contrary decisions." 3 Kent's Com. 95. As to what will be considered a foreign or an inland bill, when part of the bill is made in one place and part in another, see 1 M. & S. 87; Gow, R. 56; S. C. 5 E. C. L. R. 460; 8 Taunt. 679; 4 E. C. L. R. 245; 5 Taunt. 529; 1 E. C. L. R. 179.

[5] § 4. The indorsement. Vide articles, *Indorsement; Indorser; Indorsee.*

[6] § 5. The acceptance. Vide article *Acceptance.*

[7] § 6. The protest. Vide article *Protest.*

Vide, generally, Chitty on Bills; Bailey on Bills; Byles on Bills; Marius on Bills; Kyd on Bills; Cunningham on Bills; Pothier, h. t.; Pardess. Index, Lettre de change; 4 Vin. Ab. 238; Bac. Ab. Merchant and Merchandise, M; Com. Digest, Merchant; Dane's Ab. Index, h. t.; 1 Sup. to Ves. Jr. 86, 514; Smith on Mer. Law, Book 3, c. 1.

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BILL OF FORECLOSURE, *chancery practice.* A bill of foreclosure is one filed by a mortgagee against the mortgagor, for the purpose of having the estate sold, and thereby to obtain the sum mortgaged on the premises with interest and costs. 1 Madd. Ch. Pr. 528. As to the persons who are to be made parties to a bill of foreclosure, see Story, Eq. Pl. § 199—202.

BILL OF GROSS ADVENTURE, a phrase used in French maritime law; it comprehends every instrument of writing which contains a contract of bottomry, respondentia, and every species of maritime loan. We have no word of similar import. Hall on Mar. Loans, 182, n. See *Bottomry; Gross adventure; Respondentia.*

BILL OF HEALTH, *in commercial law*, is a certificate, properly authenticated, that a certain ship or vessel therein named, comes from a place where no contagious distempers prevail, and that none of the crew at the time of her departure were infected with any such distemper. It is generally found on board of ships coming from the Levant, or from the coast of Barbary, where the plague so frequently prevails. 1 Marsh. on Ins. 408. The bill of health is necessary whenever a ship sails from a suspected port; or when it is required at the port of destination. Holt's R. 167; 1 Bell's Com. 553, 5th ed. In Scotland the name of bill of health, has been given to an application made by an imprisoned debtor for relief under the Act of Sederunt. When the want of health of the prisoner requires it, the prisoner is indulged, under proper regulations, with such a degree of liberty as may be necessary to restore him. 2 Bell's Com. 549, 5th ed.

BILL OF INFORMATION, *chancery practice*. A bill of information is a bill instituted in behalf of the state, or those whose rights are the objects of its care and protection. It is commenced by information exhibited in the name of the attorney general, and differs from other bills little more than in name. If the suit immediately concerns the rights of the state, the information is generally exhibited without a relator. If it does not immediately concern those rights, it is conducted at the instance and under the immediate direction of some person whose name is inserted in the information, and is termed the relator; the officers of the state in such or the like cases, are no further concerned than as they are instructed and advised by those whose rights the state is called upon to protect and establish. Blake's Ch. Pl. 50; see Harr. Ch. Pr. 151.

BILL OF INDICTMENT. See *Indictment*.

BILL OF INTERPLEADER, *chancery practice*. A bill of interpleader, is one in which the person exhibiting it claims no right in opposition to the rights claimed by the person against whom the bill is exhibited, but prays the decree of the court touching the rights of those persons, for the safety of the person exhibiting the bill. Hinde, 20; Coop. Eq. Pl. 43; Mitf. Pl. 32. A bill of interpleader may be filed, though the party has not been sued at law, or has been sued by one only of the conflicting claimants, or though the claim of one of the defendants is actionable at law, and the other in equity. 6 Johns. Chan. R. 445. The requisites of a bill of this kind are, 1, it must admit the want of interest in the plaintiff in the subject-matter of dispute; 2, the plaintiff must annex an affidavit that there is no collusion between him and either of the parties; 3, the bill must contain an offer to bring the money into court, when there is any due; the want of which is a ground of demurrer, unless the money has actually been paid into court; Mitf. Eq. Pl. 49; Coop. Eq. Pl. 49; Barton, Suit in Eq. 47, note (1); 4, the plaintiff should state his own rights, and thereby negative any interest in the thing in controversy; and also should state the several claims of the opposite parties; a neglect on this subject is good cause of demurrer. Mitf. Eq. Pl. by Jeremy, 142; 2 Story on Eq. § 821; Story, Eq. Pl. § 292; 5, the bill should also show that there are persons in esse, capable of interpleading, and setting up opposite claims. Coop. Eq. Pl. 46; 1 Mont. Eq. Pl. 234; Story, Eq. Pl. § 295; Story on Eq. § 821; 1 Ves. 248; 6, the bill should pray that the defendants may set forth their several titles, and may interplead, settle, and adjust their demands be-

tween themselves. The bill also generally prays an injunction to restrain the proceedings of the claimants, or either of them, at law; and, in this case, the bill should offer to bring the money into court; and the court will not in general act upon this part of the prayer, unless the money be actually brought into court. 4 Paige's R. 384; 6 John. Ch. R. 445.

BILL OF LADING, *contracts*, and *commercial law*, is a memorandum or acknowledgment in writing, signed by the captain or master of a ship or other vessel, that he has received in good order, on board of his ship or vessel, therein named, at the place therein mentioned, certain goods therein specified, which he promises to deliver in like good order, (the dangers of the seas excepted,) at the place therein appointed for the delivery of the same, to the consignee therein named or to his assigns, he or they paying freight for the same. 1 T. R. 745; Bac. Abr. Merchant, (L); Com. Dig. Merchant, (E 8, b,); Abbott on Ship. 216; 1 Marsh. on Ins. 407; Code de Com. art. 281. Or it is the written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight. Per Lord Loughborough, 1 H. Bl. 359.

A bill of lading ought to contain the name of the consignor; the name of the consignee; the name of the master of the vessel; the name of the vessel; the place of departure and destination; the price of the freight; and in the margin, the marks and numbers of the things shipped. Code de Com. art. 281; Jacobsen's Sea Laws.

It is usually made in three originals, or parts. One of them is commonly sent to the consignee on board with the goods; another is sent to him by mail or some other conveyance; and the third is retained by the merchant or shipper. The master should also take care to have another part for his own use. Abbott on Ship. 217.

The bill of lading is assignable, and the assignee is entitled to the goods, subject, however, to the shipper's right, in some cases, of stoppage in transitu. See *In transitu*; Abbott on Shipping, 331; Bac. Ab. Merchant, (L); 1 Bell's Com. 542, 5th ed.

BILL TO MARSHAL ASSETS *chanc. practice.* A bill to marshal assets is one filed in favour of simple contract creditors, and of legatees, devisees and heirs, but not in favour of next of kin, to prevent specialty creditors from exhausting the personal estate. See *Marshalling of Assets.*

BILL TO MARSHAL SECURITIES, *chancery practice.* A bill to marshal securities is one which is filed against a party who has two funds by which his debt is secured, by a person having an interest in only one of those funds. As if A has two mortgages and B has but one, B has a right to throw A upon the security which B cannot touch. 2 Atk. 446; see 8 Ves. 388, 395. This last case contains a luminous exposition in all its bearings.

BILL FOR A NEW TRIAL, is a bill filed in a court of equity praying for an injunction after judgment at law, when there is any fact, which renders it against conscience to execute such judgment, and of which the injured party could not avail himself in a court of law; or, if he could have so availed himself, he was prevented by fraud or accident, unmixed with any fault or negligence of himself or his agents. Mitf. Pl. by Jeremy, 131; 2 Story, Eq. § 887. Of late years bills of this description are not countenanced. Id.; 1 John. Ch. R. 432; 6 John. Ch. R. 479.

BILL OBLIGATORY, *contracts.* It is a written obligation by which a

debtor acknowledges himself indebted in a certain sum, say one hundred dollars, and for the payment of the debt binds himself in a larger sum, say two hundred dollars. Cro. Car. 515; 2 Ventr. 106; Com. Dig. Obligations, D.

BILL ORIGINAL, *chancery practice.* An original bill is one, which prays the decree of the court, touching some right claimed by the person exhibiting the bill, in opposition to some right claimed by the person against whom the bill is exhibited. Hinde, 19; Coop. Eq. Pl. 43. Original bills always relate to some matter not before litigated in the court by the same persons and standing in the same interests. Mitf. Eq. Pl. by Jeremy, 34; Story, Eq. Pl. § 16. They may be divided into those which pray relief, and those which do not pray relief. Original bills *praying relief* are of three kinds: 1. Bills praying the decree or order of the court, touching some right claimed by the party exhibiting the bill, in opposition to some right, real or supposed, claimed by the party against whom the bill is exhibited, or touching some wrong done in violation of the plaintiff's right.—2. Bills of interpleader, (q. v.)—3. Bills of certiorari, (q. v.) Original bills *not praying relief* are of two kinds: 1. Bills to perpetuate testimony, (q. v.)—2. Bills of discovery, (q. v.)

BILL, AN ORIGINAL, *in the nature of a supplemental bill, chancery practice.* An original bill in the nature of a supplemental bill, is one filed when the interest of the plaintiff or defendant, suing or defending wholly determines, and the same property becomes vested in another person not claiming under him. Hinde, 71; Blake's Ch. Pr. 38. The principal difference between this and a supplemental bill, seems to be, that a supplemental bill is applicable to such cases only, where the same parties or the same interests remain before the court; whereas, an original bill in the nature of a supplemental bill, is properly applicable where new parties, with new interests, arising from events since the institution of the suit, are brought before the court. Coop. Eq. Pl. 75; Story, Eq. Pl. § 345.

BILL OF PAINS AND PENALTIES. It is a special act of the legislature which inflicts a punishment, less than death, upon persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. 2 Wood. Law Lect. 625. It differs from a bill of attainder in this, that the punishment inflicted by the latter is death. The constitution of the United States provides that "no bill of attainder shall be passed." It has been judicially said by the highest tribunal in the land, the supreme court of the United States, that "a bill of attainder may affect the life of an individual, or may confiscate his property, or both." 6 Cranch, R. 138. In the sense of the constitution, then, it seems, that bills of attainder include bills of pains and penalties. Story, Const. § 1338. Vide *Attainder; Bills of attainder.*

BILL OF PARCELS, *merc. law.* An account containing in detail the names of the items which compose a parcel or package of goods; it is usually transmitted with the goods to the purchaser, in order that if any mistake have been made, it may be corrected.

BILL OF PARTICULARS, *practice*, is a detailed statement of a plaintiff's cause of action, or of the defendant's set-off. In all actions in which the plaintiff declares generally, without specifying his cause of action, a judge upon application will order him to give the defendant a bill of the particulars, and in the meantime stay

proceedings. 3 John. R. 248. And when the defendant gives notice or pleads a set-off, he will be required to give a bill of the particulars of his set-off, on failure of which he will be precluded from giving any evidence in support of it at the trial. The object in both cases is to prevent surprise and procure a fair trial. 1 Phil. Ev. 152; 3 Stark. Ev. 1055. The bill of particulars is an account of the items of the demand, and states in what manner they arose. Metc. & Perk. Dig. h. t.

BILL TO PERPETUATE TESTIMONY, *chancery practice.* A bill to perpetuate the testimony of witnesses, is one which prays leave to examine them, and states that the witnesses are old, infirm or sick, or going beyond the jurisdiction of the court, whereby the party is in danger of losing the benefit of their testimony. Hinde, 20. It does not pray for relief. Coop. Eq. Pl. 44.

In order to maintain such a bill, it is requisite to state on its face all the material facts to support the jurisdiction. It must state, 1, the subject-matter touching which the plaintiff is desirous of giving evidence, Rep. Temp. Finch, 391; 4 Madd. R. 8, 10;—2, it must show that the plaintiff has some interest in the subject-matter, which may be endangered if the testimony in support of it be lost; and a mere expectancy, however strong, is not sufficient. 6 Ves. 260; 1 Vern. 105; 15 Ves. 136; Mitf. Eq. Pl. by Jeremy, 51; Coop. Eq. Pl. 52;—3, it must state that the defendant has, or pretends to have, or that he claims an interest to contest the title of the plaintiff in the subject-matter of the proposed testimony, Coop. Pl. 56; Story, Eq. Pl. § 302;—4, it must exhibit some ground of necessity for perpetuating the evidence. Story, Eq. Pl. § 303; Mitf. Eq. Pl. by Jeremy, 52, 148 and note (y); Coop. Eq. Pl. 53;—5, the right of which the bill is brought to perpetuate the testimony, should be described with reasonable certainty in the bill, so as to point the proper interrogations on both sides to the true merits of the controversy, 1 Vern. 312; Coop. Eq. Pl. 56;—6, it should pray leave to examine the witnesses touching the matter stated, to the end that their testimony may be preserved and perpetuated, Mitf. Pl. 52. A bill to perpetuate testimony differs from a bill to take testimony de bene esse, in this, that the latter is sustainable only when there is a suit already depending, while the former can be maintained only when no present suit can be brought at law by the party seeking the aid of a court to try his right. Story, Eq. Pl. § 307. The canonists had a similar rule. According to the canon law, witnesses could be examined before any action was commenced, for fear that their evidence might be lost. X, cap. 5; Boehmer, n, 5; 8 Toull. n. 23.

BILL OF PEACE, *chancery practice.* A bill of peace is one which is filed when a person has a right which may be controverted by various persons, at different times, and by different actions. In such a case the court will prevent a multiplicity of suits, by directing an issue to determine the right, and ultimately an injunction. 1 Madd. Ch. Pr. 166; 1 Harr. Ch. Pr. 104; Blake's Ch. Pr. 48; 2 Story, Eq. Jur. § 852 to 860; Jeremy on Eq. Jurisd. 343; 2 John. Ch. R. 281; 8 Cranch, R. 426.

There is another class of cases in which a bill of peace is now ordinarily applied; namely, when the plaintiff, after repeated and satisfactory trials, has established his right at law; and still he is in danger of new attempts to controvert it. In order to quiet the possession of the plaintiff, and to suppress future litigation of the right, courts of equity, under such circumstances, will inter-

fere, and grant a perpetual injunction. 3 John. R. 529; 8 Cranch, R. 462; Mit. Pl. by Jeremy, 143; 2 John. Ch. R. 281; Ed. on Inj. 356.

BILL OF PROOF. In the mayor's court, London, the claim made by a third person to the subject-matter in dispute between two others in a suit there, is called *bill of proof*. It is somewhat similar to an intervention, (q. v.) 3 Chit. Comm. Law, 633; 2 Chit. Pr. 492; 1 Marsh. R. 233.

BILL QUIA TIMET, *chancery practice*. A bill *quia timet*, is one which is filed when a person is entitled to property of a personal nature after another's death, and has reason to apprehend it may be destroyed by the present possessor; or when he is apprehensive of being subjected to a future inconvenience, probable or even possible to happen or be occasioned by the neglect, inadvertence, or culpability of another. Upon a proper case being made out, the court will, in the one case, secure for the use of the party the property, to secure which is the object of the bill, by compelling the person in the possession of it, to guaranty the same by a proper security, entered into for that purpose, against any subsequent disposition or wilful destruction, and in the other, they will quiet the party's apprehension of future inconvenience, by removing the causes which may lead to it. 1 Harr. Ch. Pr. 107; 1 Madd. Ch. Pr. 218; Blake's Ch. Pr. 37, 47; 2 Story, Eq. Jur. § 825 to 851.

BILL OF REVIEW, *chancery practice*. Bills of review are in the nature of writs of error. They are brought to have decrees of the court reviewed, altered or reversed, and there are two sorts of this species of bill. The first is brought where the decree has been signed and enrolled; and the second, where the decree has not been signed and enrolled. 1 Ch. Cas. 54; 3 P. Wms. 371. The first of these is called by way of pre-eminence, a bill of review; while the other is distinguished by the appellation of a bill in the nature of a bill of review, or a supplemental bill in the nature of a bill of review. Coop. Eq. Pl. 88; 2 Madd. Ch. Pr. 537. A bill of review must be either for error in point of law, 2 Johns. C. R. 488; Coop. Eq. Pl. 89; or for some new matter of fact, relevant to the case, discovered since publication passed in the cause, and which could not, with reasonable diligence, have been discovered before. 2 Johns. Ch. R. 488; Coop. Eq. Pl. 91. See 3 Johns. Ch. R. 124.

BILL OF REVIVOR, *chancery practice*. A bill of revivor is a continuance of the original bill, when by death some party to it has become incapable of prosecuting or defending a suit, or a female plaintiff has by marriage incapacitated herself from suing alone. Mitf. Pl. 33, 70; 2 Madd. Ch. Pr. 526. See 3 Johns. Ch. R. 60; Story, Eq. Pl. § 354, et seq.

BILL OF REVIVOR AND SUPPLEMENT, *chancery practice*. A bill of revivor and supplement is a compound of a supplemental bill and bill of revivor, and not only continues the suit, which has abated by the death of the plaintiff, or the like, but supplies 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, 5 Johns. Ch. R. 334; Mitf. Pl. 32, 74.

BILL IN THE NATURE OF A BILL OF REVIEW, *chancery practice*. A bill in the nature of a bill of review, is one brought by a person not bound by a decree, praying that the same may be examined and reversed; as where a decree is made against a person who has no interest at all in the matter in dispute, or had not such an interest as is sufficient to render the decree against him binding after some per-

son claiming after him. Relief may be obtained against error in the decree, by a bill in the nature of a bill of review. This bill in its frame resembles a bill of review, except that praying that the former decree may be reviewed and reversed, it prays 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; and that the plaintiff may have such relief as the nature of the case made by the supplemental bill may require. 1 Harr. Ch. Pr. 145.

BILL IN THE NATURE OF A BILL OF REVIVOR, *chancery practice.* A bill in the nature of a bill of revivor, is one which is filed when the death of a party whose interest is not determined by his death, is attended with such a transmission of his interest, that the title to it, as well as the person entitled, may be litigated in the court of chancery, as in the case of a devise of real estate, the suit is not permitted to be continued by bill of revivor. 1 Ch. Cas. 123; Ib. 174; 3 Ch. Rep. 39; Mosely, R. 44. An original bill upon which the title may be litigated, must be filed, and this bill will have so far the effect of a bill of revivor, that if the title of the representative by the act of the deceased party is established, the same benefit may be had of the proceedings upon the former bill, as if the suit had been continued by bill of revivor. 1 Vern. 427; 2 Vern. 548; Ib. 672; 2 Bro. P. C. 529; 1 Eq. Cas. Ab. 83; Mitf. Pl. 66, 67.

BILL OF RIGHTS, *English law.* A statute passed in the reign of William and Mary, so called because it declared the true rights of British subjects. W. & M. stat. 2, c. 2.

BILL OF SALE, *contracts*, is an ag reement in writing, under seal, by which a man passes the right or interest he has in goods and chattels. As the law imports a consideration when an agreement is made by deed, a bill of sale alters the property. Yelv. 196; Cro. Jac. 270; 6 Co. 18. The act of Congress of January 14, 1793, 1 Story, L. U. S. 276, provides that when any ship or vessel which shall have been registered pursuant to that act, or the act thereby partially repealed, shall in whole or in part be sold or transferred to a citizen of the United States, in every such sale or transfer, there shall be some instrument or writing in the nature of a bill of sale, which shall recite at length the certificate of registry; otherwise the said ship or vessel shall be incapable to be registered anew.

BILL OF SIGHT, *English commercial law.* When a merchant is ignorant of the real quantities or qualities of any goods consigned to him, so that he is unable to make a perfect entry of them, he is required to acquaint the collector or comptroller of the circumstance; and such officer is authorised, 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 a warrant that the same be landed and examined by the importer in presence of the officer; and within three days after the goods have been so landed, the importer is required to make a perfect entry. See stat. 3 & 4 Will. 4, c. 52, § 24.

BILL, SINGLE, *contracts*, is a writing by which one person or more, promise to another or others, to pay him or them a sum of money at a time therein specified, without any condition. It is usually under seal. It differs from a promissory note in this, that the latter is always payable to order; and from a bond, because

that instrument has always a condition attached to it, on the performance of which it is satisfied. 5 Com. Dig. 194; 7 Com. Dig. 357.

BILL OF STORE. *English commercial law.* A license granted by custom house officers to merchants, to carry such stores and provisions as are necessary for a voyage, free of duty. See stat. 3 & 4 Will. 4, c. 52.

BILL, SUPPLEMENTAL, *chancery practice.* A supplemental bill is occasioned by some defect in a suit already instituted, whereby the parties cannot obtain complete justice, to which otherwise the case by their bill would have entitled them. It is used for the purpose of supplying some irregularity discovered in the formation of the original bill, or some of the proceedings threupon; or some defect in a suit, arising from events happening since the points in the original were at issue, and which gives an interest to persons not parties to the suit. Blake's Ch. Pr. 50. See 3 Johns. Ch. R. 423. It is proper to consider more minutely, 1, in what cases such a bill may be filed; 2, its particular requisites.

1. A supplemental bill may be filed, 1st, whenever the imperfection in the original bill arises from the omission of some material fact, which existed before the filing of the bill, but the time has passed, in which it can be introduced into the bill by amendment, Mitf. Eq. Pl. 55, 61, 325; but leave of court must be obtained, before a bill which seeks to change the original structure of the bill, and to introduce a new and different case, can be filed; 2d, when a party necessary to the proceedings has been omitted, and cannot be admitted by an amendment. Mitf. Eq. Pl. 61; 6 Madd. R. 369; 4 John. Ch. R. 605. 3d, When after the court has decided upon the suit as framed, it appears necessary to bring some other matter before the court to obtain the full effect of the decision; or, before a decision has been obtained, but after the parties are at issue upon the points in the original bill, and witnesses have been examined, (in which case, an amendment is not in general permitted,) some other point appears necessary to be made, or some additional discovery is found requisite. Mitf. Eq. Pl. by Jeremy, 55; Coop. Eq. Pl. 73; 3 Atk. R. 110; 1 Paige, R. 200. 4th, When new events, or new matters have occurred since the filing of the bill, Coop. Eq. Pl. 74; these events or matters, however, are confined to such as refer to and support the rights and interests already mentioned in the bill. Story, Eq. Pl. § 336.

2. The supplemental bill must state the original bill, and the proceedings thereon, and when it is occasioned by an event which has occured subsequently to the original bill, it must state that event, and the consequent alteration with regard to the parties. In general, the supplemental bill must pray that all defendants may appear and answer to the charges it contains. Mitf. Eq. Pl. by Jeremy, 75; Story, Eq. Pl. § 343.

BILL TO TAKE TESTIMONY DE BENE ESSE. This bill, whose name is sufficiently descriptive of its object, is frequently confounded with a bill to perpetuate testimony, but although it bears a close analogy to it, it is very different. Bills to perpetuate testimony can be maintained only, when no present suit can be brought at law by the party seeking the aid of the court to try his right, whereas bills to take testimony de bene esse, are sustainable only in aid of a suit already depending. 1 Sim. & Stu. 83. The latter may be brought by a person who is in possession, or out of possession; and whether he is plaintiff or defendant in the action at law. Story, Eq. Pl. § 307 and 303, note; Story on Eq-

§ 1813, note (3). In many respects the rules which regulate the framing of bills to perpetuate testimony, are applicable to bills to take testimony de bene esse.

BILL, TRUE, vide *True Bill.*

BILLS PAYABLE, *commerce*, are engagements which a merchant has entered into in writing and which he is to pay on their becoming due. Pard. n. 85.

BILLS RECEIVABLE, *commerce*, are promissory notes, bills of exchange, bonds, and other evidences or securities which a merchant or trader holds, and which are payable to him. Pard. n. 85.

BILLA VERA, *practice.* When the proceedings of the courts were recorded in Latin, and the grand jury found a bill of indictment to be supported by the evidence, they endorsed on it *billa vera;* now they endorse in plain English "a true bill."

BILLINGUIS, a man of double tongue, in a legal sense is the name of a jury who pass in any case between a citizen and an alien; a jury *de medietate linguæ.* Cunn. Dict. This kind of jury is abolished in Pennsylvania, and probably in most of the United States.

TO BIND, BINDING, *contracts.* These words are applied to the contract entered into between a master and an apprentice; the latter is said to be bound. In order to make a good binding, the consent of the apprentice must be had, together with that of his father, next friend, or some one standing in loco parentis. Bac. Ab. Master and Servant, (A.); 8 John. 328; 2 Pen. 977; 2 Yerg. 546; 1 Ashmead, 123; 10 Sergeant & Rawle, 416; 1 Massachusetts, 172; 1 Vermont, 69; whether a father has, by the common law, a right to bind out his child, during his minority without his consent, seems not to be settled. 2 Dall. 199; 7 Mass. 147; 1 Mason, 78; 1 Ashm. 267. Vide *Apprentice; Father; Mother; Parent.*

BIRRETUM or BIRRETUS. A cap or coif used formerly in England by judges and serjeants at law. Spelm. h. t.; Cunn. Dict. Vide *Coif.*

BIRTH, is the act of being wholly brought into the world. The whole body must be detached from that of the mother, in order to make the birth complete. 5 C. & P. 329; S. C. 24 E. C. L. R. 344; 6 C. & P. 349; S. C. 25 E. C. L. R. 433; 5 C. & P. 539; 24 E. C. L. R. 446. But if a child be killed after it has wholly come forth from the body of the mother, but is still connected with her by means of the umbilical cord, it seems that such killing will be murder. 9 C. & P. 25; S. C. 38 E. C. L. R. 21; 7 C. & P. 814. Vide articles *Breath; Dead Born; Gestation; Life;* and 1 Beck's Med. Jur. 478, et seq.; 1 Chit. Med. Jur. 438; 7 C. & P. 814; 9 C. & P. 25. It seems that unless it be born alive, it is not properly a birth, but a miscarriage. 1 Chit. Pr. 35, note [z]. But see Russ. & Ry. C. C. 336.

BISAILE, *domestic relations.* A corruption of the French word *bisaïeul*, the father of the grandfather or grandmother. In Latin he is called *proavus.* Inst. 3, 6, 3; Dig. 38, 10, 1, 5. Vide *Aile.*

BISHOP. An ecclesiastical officer who is the chief of the clergy of his diocese, and is the archbishop's assistant. Happily for this country these officers are not recognised by law. They derive all their authority from the churches over which they preside.

BISSEXTILE, is the day which is added every fourth year to the month of February, in order to make the year agree with the course of the sun. It is called *bissextile* because in the Roman calendar it was fixed on the *sixth* day before the calends of

March (which answers to the 24th day of February,) and this day was counted *twice*; the first was called *bissextus prior*, and the other *bissextus posterior*, but the latter was properly called bissextile or intercalary day. Now the day is not repeated, but a day, the 29th, is added to the month of February every fourth year; and the year when it is added is called leap year.

BLACK ACT, *English law*, is an act of parliament made in the 9 Geo. 2, which bears this name, to punish certain marauders who committed great outrages, in disguise, and with black faces.

BLACK BOOK OF THE ADMIRALTY, is an ancient book compiled in the reign of Edw. III. It has always been deemed of the highest authority in matters concerning the admiralty. It contains the laws of Oleron, at large; a view of the crimes and offences cognisable in the admiralty; ordinances and commentaries on matters of prize and maritime torts, injuries and contracts. 2 Gall. R. 404.

BLACK MAIL. Vide *Alba firma*.

BLANCH FIRMES. The same as white rent, (q. v.)

BLANK. A space left in a writing which ought to have been filled up with one or more words in order to make sense. 1. In what cases the ambiguity occasioned by blanks may be explained; 2, in what cases it cannot be explained. 1. When a blank is left in a written agreement which need not have been reduced to writing, and would have been equally binding whether written or unwritten, it is presumed, in an action for the non-performance of the contract, parol evidence might be admitted to explain the blank. And where a written instrument, which was made professedly to record a fact, is produced as evidence of that fact which it purports to record, and a blank appears in a material part, the omission may be supplied by other proof. 1 Phil. Ev. 475; 1 Wils. 215; 7 Verm. R. 522; 6 Verm. R. 411. Hence a blank left in an award for a name, was allowed to be supplied by parol proof. 2 Dall. 180. But where a creditor signs a deed of composition leaving the amount of his debt in blank, he binds himself to all existing debts. 1 B. & A. 101; S. C. 2 Stark. R. 195.

2. If a blank is left in a policy of insurance for the name of the place of destination of a ship, it will avoid the policy. Molloy, b. 2, c. 7, s. 14. Park Ins. 22. Wesk. Ins. 42. A paper signed and sealed in blank, with verbal authority to fill it up, which is afterwards done, is void, unless afterwards delivered or acknowledged and adopted. 1 Yerg. 69, 149; 1 Hill, 267; 2 N. & M. 125; 2 Brock. 64; 2 Dev. 379; 1 Ham. 368; 6 Gill & John. 250; but see *contra*, 17 S. & R. 438. Lines ought to be drawn wherever there are blanks to prevent any thing from being inserted afterwards. 2 Valin's Comm. 151.

When the filling up blanks after the execution of deeds and other writings will vitiate them or not, see 4 Vin. Abr. 268; Moore, 547; Cro. Eliz. 626; 1 Vent. 185; 2 Lev. 35; 2 Ch. R. 187; 1 Anst. 228; 5 Mass. 538; 4 Binn. 1; 9 Cranch, 28; Yelv. 96; 2 Show. 161; 1 Saund. Pl. & Ev. 77; 4 B. & A. 672; Com. Dig. Fait, F 1; 4 Bing. 123; 2 Hill. Ab. c. 25, § 80; c. 33, § 54 and 72; 1 Ohio, R. 368; 4 Binn. R. 1; 6 Cowen, 118; Wright, 176.

BLANK BAR, *pleading*, is the same with what is called a common bar, which in an action of trespass, is put in to oblige the plaintiff to assign the certain place where the trespass was committed. Cro. Jac. 594, pl. 16.

BLANK INDORSEMENT, *contract*, is an indorsement which does not mention the name of the person in whose favour it is made; it is usually made by writing the name of the indorser on the back of the bill. Chit. Bills. 170.

BLASPHEMY, *crim. law*, is to attribute to God that which is contrary to his nature, and does not belong to him, and to deny what does. This offence has been enlarged in Pennsylvania, and perhaps most of the states by statutory provision. Vide *Christianity;* 11 Serg. & Rawle, 394. In England all blasphemies against God, the Christian religion, the holy Scriptures, and malicious revilings of the established church are punishable by indictment, 1 East, P. C. 3; 1 Russ. on Cr. 217; and in France before the 25th of September, 1791, it was a blasphemy also to speak against the holy virgin and the saints, to deny one's faith, to speak with impiety of holy things, and to swear by things sacred. Merl. Rép. h. t. The law relating to blasphemy in that country was totally repealed by the code of 25th of September, 1791, and its present penal code, art. 262, enacts that any person who, by words or gestures, shall commit any outrage upon objects of public worship, in the places designed or actually employed, for the performance of its rites, or shall assault or insult ministers of such worship in the exercise of their functions, shall be fined from sixteen to five hundred francs, and be imprisoned for a period not less than fifteen days nor more than six months. The civil law forbad the crime of blasphemy, such, for example, as to swear by the hair or the head of God; and it punished its violation with death. *Si enim contra homines* factæ blasphemiæ *impunitæ* non *relinquuntur; multo magis qui ipsum Deum blasphemant, digni sunt suplicia sustinere.* Nov. 77, ch. 1, § 1. In Spain it is blasphemy not only to speak against God and his government, but to utter injuries against the Virgin Mary and the saints. Senen Villanova Y Mañes, Materia Criminal, forensé, Observ. 11, cap. 3, n. 1.

BLIND, one who is deprived of the faculty of seeing. Persons who are blind may enter into contracts and make wills like others. Carth. 53; Barn. 19, 23; 3 Leigh, R. 32. When an attesting witness becomes blind, his handwriting may be proved as if he were dead. 1 Stark. Ev. 341.

BLOCKADE, *international law*, is an interception by one belligerent of communication, by any persons whatever, with a place occupied by another. It will be proper here to consider, 1, by what authority the blockade must be established; 2, what will be considered a sufficient blockade, 3, the consequences of a violation of the blockade.—1. Natural sovereignty confers the right of declaring war, and the right which nations at war have of destroying or capturing each other's citizens, subjects or goods, imposes on neutral nations the obligation not to interfere with the exercise of this right within the rules prescribed by the law of nations. A declaration of a siege or blockade is an act of sovereignty, 1 Rob. Rep. 146, but a direct declaration by the sovereign authority of the besieging belligerent is not always requisite; particularly when the blockade is on a distant station, for its officers may have power, either expressly or by implication, to institute such siege or blockade. 6 Rob. R. 367.—2. To be sufficient, the blockade must be effective, and made known. By the convention of the Baltic powers of 1780, and again in 1801, and by the ordinance of congress of 1781, it is required there should be a number of vessels sta-

tioned near enough to the port to make the entry apparently dangerous. The government of the United States have uniformly insisted, that the blockade should be effective by the presence of a competent force, stationed and present, at or near the entrance of the port; 1 Kent, Com. 145, and the authorities by him cited; and see 1 Rob. R. 80; 4 Rob. R. 66; 1 Acton's R. 64, 5; and Lord Erskine's speech, 8th March, 1808, on the orders in council, 10 Cobbett's Parl. Debates, 949, 950. But "it is not an accidental absence of the blockading force, nor the circumstance of being blown off by wind, (if the suspension and the reason of the suspension are known,) that will be sufficient in law to remove a blockade." But negligence or remissness on the part of the cruizers stationed to maintain the blockade, may excuse persons, under circumstances, for violating the blockade, 3 Rob. R. 156; 1 Acton's R. 59. To involve a neutral in the consequences of violating a blockade, it is indispensable he should have due notice of it: this information may be communicated to him in two ways; either actually, by a formal notice from the blockading power, or constructively by notice to his government, or by the notoriety of the fact. 6 Rob. R. 367; 2 Rob. R. 110; Ib. 111, note; Ib. 128; 1 Acton's R. 61.—3. In considering the consequences of the violation of a blockade, it will be proper to take a view of what will amount to such a violation, and, then, of its effects. As all criminal acts require an intention to commit them, the party must intend to violate the blockade, or his acts will be perfectly innocent; but this intention will be judged of by the circumstances. This violation may be, either, by going into the place blockaded, or by coming out of it with a cargo laden after the commencement of the blockade; and by placing himself so near a blockaded port as to be in a condition to slip in without observation, is a violation of the blockade, and raises the presumption of a criminal intent. 6 Rob. R. 30, 101, 182; 7 John. R. 47; 1 Edw. R. 202; 4 Cranch, 185. The sailing for a blockaded port, knowing it to be blockaded, is, it seems, such an act as to charge the party with a breach of the blockade. 5 Cranch, 335; 9 Cranch, 440, 446; 1 Kent, Com. 150. When the ship has contracted guilt by a breach of the blockade, she may be taken at any time before the end of her voyage, but the penalty travels no further than the end of her return voyage. 2 Rob. R. 128; 3 Rob. R. 147. When taken, the ship is confiscated, and the cargo is always, *prima facie*, implicated in the guilt of the owner or master of the ship; and the burden of rebutting the presumption that the vessel was going in for the benefit of the cargo, and with the direction of the owners, rests with them. 1 Rob. R. 67, 130; 3 Rob. R. 173; 4 Rob. R. 93; 1 Edw. R. 39. Vide, generally, 2 Bro. Civ. & Adm. Law, 314; Chit. Comm. Law, Index, h. t.; Chit. Law of Nations, 128 to 147; 1 Kent's Com. 143 to 151; Marsh. Ins. Index, h. t.; Dane's Ab. Index, h. t.; Mann. Comm. B. 3, c. 9.

BLOOD, *kindred*, a red fluid flowing through the veins and arteries of men and most animals. It is taken in law figuratively for *stock* or family. 1 Roper on Leg. 103; 1 Supp. to Ves. jr. 365. In a more extended sense it means kindred generally. Bac. Max. Reg. 18. Blood is either *whole blood*, when the parties are related through both the father and mother, or *half blood* (q. v.) when they are related only through one of them. 5 Wharton, R. 477.

BOARD OF CIVIL AUTHORITY. A term used in Vermont.

This board is composed of the selectmen and justices of the peace of their respective towns. They are authorised to abate taxes, and the like.

BODY POLITIC, *government, corporations*, when applied to the government, this phrase signifies the *state*, when it is passive; *sovereign*, when it is active; *power* when compared to its equal. As to the persons who compose the body politic or associate themselves, they take collectively the name of *people*, or *nation*; and individually they are *citizens*, when considered in relation to their political rights, and *subjects* as being admitted to the laws of the state. When it refers to corporations the term *body politic* means that the members of such corporation shall be considered as an artificial person.

BOILARY. A term used to denote the water which arises from a salt well, belonging to one who has no right to the soil. Ejectment may be maintained for it. 2 Hill. Ab. c. 14, § 5; Co. Litt. 4 b.

BONA, goods and chattels. In the Roman law, it signified every kind of property, real, personal and mixed, but chiefly it applied to *real estates*, chattels being chiefly distinguished by the words *effects, movables*, &c. Bona were, however, divided into *bona mobilia*, and *bona immobilia*. It is taken in the civil law in nearly the same sense that *biens* (q. v.) means in the French law.

BONA FIDE, in good faith. The law requires all persons in their transactions to act with good faith; and a contract where the parties have not acted *bona fide* is void at the pleasure of the innocent party. 8 John. R. 446; 12 John. R. 320; 2 John. Ch. R. 35. Good faith at the time of the contract and fraudulent acts subsequently to it, will not vitiate it, but such subsequent acts of fraud raise a presumption, and become a means of proof, of a want of good faith at the time. Vide Rob. Fraud. Conv. 33, 34; Inst. 2, 6; Dig. 41, 3, 10 and 44; Ib. 41, 1, 48; Code, 7, 31; 9 Co. 11; Wingate's Maxims, max. 37; Lane, 47; Plowd. 473; 9 Pick. R. 265; 12 Pick. R. 545; 8 Conn. R. 336; 10 Conn. R. 30; 3 Watts, R. 25; 5 Wend. R. 20, 566.

BONA NOTABILIA, *Engl. ecclesiastical law*, notable goods. When a person dies having at the time of his death goods in any other diocese, besides the goods in the diocese where he dies, amounting to the value of five pounds in the whole, he is said to have *bona notabilia*, in which case proof of his will, or granting letters of administration belongs to the archbishop of the province. 1 Roll. Ab. 908; Toll. Ex. 51; Williams on Ex. Index, h. t.

BONA PERITURA, perishable goods. An executor, administrator or trustee, is bound to use due diligence in disposing of perishable goods, such as fattened cattle, grain, fruit, or any other article which may be worse for keeping. Bac. Ab. Executors, &c. (D); 11 Vin. Ab. 102; 1 Roll. Ab. 910; 5 Co. 9; Cro. Eliz. 518; Godb. 104; 3 Munf. R. 288; 1 Beat. R. 5, 14; Dane's Ab. Index, h. t. In Pennsylvania, when goods are attached, they may be sold by order of court, when they are of a perishable nature. Vide Wesk. on Ins. 390; Serg. on Attachm. Index.

BOND, *contract*. An obligation or bond is a deed whereby the obligor obliges himself, his heirs, executors and administrators, to pay a certain sum of money to another at a day appointed. If this be all, the bond is called a single one, *simplex obligatio*; but there is generally a condition added, and if the obligor does some particular act the obligation shall be void, or else shall remain in

full force. 2 Bl. Com. 340. The word bond *ex vi termini* imports a sealed instrument. 2 S. & R. 502; 1 Bald. R. 129; 2 Porter, R. 19; 1 Blackf. R. 241; Harp. R. 434; 6 Verm. R. 40. See *Condition; Interest of money; Penalty.* It is proposed to consider, 1. Of the form of a bond, namely, the words by which it may be made; the ceremonies required. 2. The condition. 3. Of the performance or discharge.

I. 1. There must be parties to a bond, an obligor and an obligee; no particular set of words are essential to create an obligation, but any words which declare the intention of the parties, and denote that one is bound to the other, will be sufficient, provided the ceremonies mentioned below have been observed. Shep. Touch. 367, 8; Bac. Abr. Obligations, B; Com. Dig. Obligations, B 1.—2. It must be in writing, on paper or parchment, and if it be made on other materials it is void. Bac. Abr. Obligations, A.—3. It must be sealed, though it is not necessary that it should be mentioned in the writing that it is sealed. As to what is a sufficient sealing, see the above case, and the word, *Seal.*—4. It must be delivered by the party whose bond it is, to the other. Bac. Abr. Obligations, C. But the delivery and acceptance may be by attorney. The date is not considered of the substance of a deed, and therefore a bond which either has no date or an impossible one is still good, provided the real day of its being dated or given, that is, delivered, can be proved. 2 Bl. Comm. 304; Com. Dig. Fait, B. 3; 3 Call, 309. See *Date.*

II. The condition is either for the payment of money, or for the performance of something else. In the latter case, if the condition be against some rule of law merely, positively impossible at the time of making it, uncertain or insensible, the condition alone is void, and the bond shall stand single and unconditional, for it is the folly of the obligor to enter into such an obligation from which he can never be released. If it be to do a thing *malum in se*, the obligation itself is void, the whole contract being unlawful. 2 Bl. Com. 340; Bac. Abr. Conditions, K, L; Com. Dig. Conditions, D 1, D 2, D 3, D 7, D 8.

III. 1. When, by the condition of an obligation, the act to be done to the obligee, is of its own nature transitory, as payment of money, delivery of charters, or the like, and no time is limited, it ought to be performed in convenient time. 6 Co. 31; Co. Lit. 208; Roll. Abr. 436.—2. A payment before the day is good. Co. Lit. 212, a; or before action brought, 10 Mass. 419; 11 Mass. 217.—3. If the condition be to do a thing within a certain time, it may be performed the last day of the time appointed. Bac. Abr. Conditions, P 3.—4. If the condition be to do an act, without limiting any time, he who has the benefit may do it at what time he pleases. Com. Dig. Conditions, G 3.—5. When the place where the act to be performed is agreed upon, the party who is to perform it is not obliged to seek the opposite party elsewhere; nor is he to whom it is to be performed bound to accept of the performance in another place. Roll. 445, 446; Com. Dig. Conditions, G 9; Bac. Abr. Conditions, P 4. See *Performance.*—6. For what amounts to a breach of a condition in a bond, see Bac. Abr. Conditions, O; Com. Dig. Conditions, M; and this Dict., tit. *Breach.*

BONUS, *contracts.* A premium paid to a grantor or vendor, as, the bank paid a bonus to the state for its charter; a consideration given for what is received.

BOOK. It is a work of the mind, written or printed, so large in extent

as to form a volume. The copy-right (q. v.) or exclusive right to print and publish a book, may be secured to the author or his assigns for the term of twenty-eight years; and if the author be living, and a citizen of the United States, or resident therein, the same right shall be continued to him for the further term of fourteen years, by complying with the conditions of the act of Congress; one of which is, that he shall within three months after publication, deliver, or cause to be delivered, a copy of the same to the clerk of the said district. Act of February 3, 1831. 4 Sharsw. cont. of Story's L. U. S. 2223.

BOOKS, *commerce, accounts.* Merchants, traders and other persons, who are desirous of understanding their affairs, and of explaining them when necessary, keep, 1, a day book; 2, a journal; 3, a ledger; 4, a letter book; 5, an invoice book; 6, a cash book; 7, a bill book; 8, a bank book; 9, a check book. The reader is referred to these several articles. Commercial books are kept by single or by double entry.

BOOTY, *war*, is the capture of personal property by a public enemy on land, in contradistinction to prize, which is a capture of such property by such an enemy on the sea. After booty has been in complete possession of the enemy for twenty-four hours, it becomes absolutely his, without any right of postliminy in favour of the original owner, particularly when it has passed, *bona fide*, into the hands of a neutral. 1 Kent, Com. 110. The right to the booty, Pothier says, belongs to the sovereign, but sometimes the right of the sovereign or the public is transferred to the soldiers to encourage them. Tr. du Droit de Propriété, part 1, c. 2, art, 1, § 2; Burl. Nat. and Pol. Law, vol. ii. part 4, c. 7, n. 12.

BOROUGH, an incorporated town; so called in the charter; it is less than a city. 1 Mann. & Gran. 1; 39 E. C. L. R. 323.

BOROUGH ENGLISH, *Eng. law.* This, as the name imports, relates exclusively to the English law. It is a custom in many ancient boroughs, by which the youngest son succeeds to the burgage tenement on the death of the father. 2 Bl. Com. 83; in some parts of France, there was a custom by which the youngest son was entitled to an advantage over the other children in the estate of their father. Merl. Rép. mot Maineté.

BORROWER, *contracts*, is he to whom a thing is lent at his request. The contract of loan confers rights and imposes duties on the borrower.

1. In general, he has the right to use the thing borrowed, during the time and for the purpose intended between the parties; the right of using the thing bailed, is strictly confined to the use, expressed or implied, in the particular transaction, and by any excess, the borrower will make himself responsible. Jones's Bailment, 68; 5 Mass. R. 104; Cro. Jac. 244; 2 Ld. Raym. 909; Ayl. Pand. B. 4, t. 16, p. 517; Domat, B. 1, t. 5, § 2, n. 10, 11, 12; Dig. 13, 6, 18; Poth. Prêt à Usage, ch. 2, § 1, n. 22; 2 Bulst. 306; Ersk. Pr. Laws of Scotl. B. 3, t. 1, § 9; 1 Const. Rep. So. Car. 121; Bracton, lib. 3, ch. 2, § 1, p. 99. The loan is considered strictly personal, unless from other circumstances a different intention may be presumed. 1 Mod. Rep. 210; S. C. 3 Salk. 271.

2. The borrower is bound to take extraordinary care of the thing borrowed; to use it according to the intention of the lender; to restore it in proper time; to restore it in a proper condition. Of these in their order. 1. The loan being gratuitous, the borrower is bound to extraordinary diligence, and is responsible for slight neglect in relation to the thing

loaned. 2 Ld. Raym. 909, 916; Jones on Bailm. 65; 1 Dane's Abr. ch. 17, art. 12; Dig. 44, 7, 1, 4; Poth. Prêt à Usage, ch. 2, § 2, art. 21, n. 48.—2. The use is to be according to the condition of the loan; if there is any excess in the nature, time, manner, or quantity of the use, beyond what may be inferred to be within the intention of the parties, the borrower will be responsible, not only for any damages occasioned by the excess, but even for losses by accidents, which could not be foreseen or guarded against. 2 Ld. Raym. 909; Jones on Bailm. 68, 69. —3. The borrower is bound to make a return of the thing loaned, at the time, in the place, and in the manner contemplated by the contract. Domat, Liv. 1, t. 5, § 1, n. 11; Dig. 13, 6, 5, 17. If the borrower does not return the thing at the proper time, he is deemed to be in default, and is generally responsible for all injuries, even for accidents. Jones on Bailm. 70; Pothier, Prêt à Usage, ch. 2, § 3, art. 2, n. 60; Civil Code of Louis. art. 2870; Code Civil, art. 1881; Ersk. Inst. B. 3, t. 1, § 22; Ersk. Pr. Laws of Scotl. B. 3, t, 1, § 9.—4. As to the condition in which the thing is to be restored. The borrower not being liable for any loss or deterioration of the thing, unless caused by his own neglect of duty, it follows, that it is sufficient if he returns it in the proper manner and at the proper time, however much it may be deteriorated from accidental or other causes, not connected with any such neglect. Story on Bailm. ch. 4, § 268. See generally, Story on Bailm. ch. 4; Poth. Prêt à Usage; 2 Kent, Com. 446–449; Vin. Abr. Bailment, B 6; Bac. Abr. Bailment; Civil Code of Louis. art. 2869–2876. Vide *Lender*.

BOTE, *contracts*, a recompense, satisfaction, amends, profit or advantage: hence came the word *man-bote*, denoting a compensation for a man slain; house-bote, cart-bote, plough-bote, signify that the tenant is privileged to cut wood for these uses. 2 Bl. Com. 35; Woodf. L. & T. 232.

BOTELESS, or bootless, without recompense, reward or satisfaction made; unprofitable or without success.

BOTTOMRY, *maritime law*, is a contract in nature of a mortgage of a ship, on which the owner borrows money to enable him to fit out the ship, or to purchase a cargo for a voyage proposed; and he pledges the keel or bottom of the ship, *pars pro toto*, as a security for the repayment: and it is stipulated that if the ship should be lost in the course of the voyage, by any of the perils enumerated in the contract, the lender also shall lose his money; but if the ship should arrive in safety, then he shall receive back his principal, and also the interest agreed upon, which is generally called marine interest, however this may exceed the legal rate of interest. Not only the ship and tackle if they arrive safe, but also the person of the borrower is liable for the money lent and the marine interest. See 2 Bl. Com. 458 Marsh. Ins. B. 2, c. 1; Ord. Louis XIV. B. 3, tit. 5; Laws of Wisbuy, art. 45; Code de Com. B. 2, tit. 9.

The contract of bottomry should specify the principal lent, and the rate of marine interest agreed upon; the subject on which the loan is effected; the names of the vessel and of the master; those of the lender and borrower; whether the loan be for an entire voyage; for what voyage; and for what space of time; and the period of repayment. Code de Com. art. 311; Marsh. Ins. B. 2.

Bottomry differs materially from a simple loan. In a loan, the money is at the risk of the borrower, and

must be paid at all events. But in bottomry, the money is at the risk of the lender during the voyage. Upon a loan only legal interest can be received; but upon bottomry, any interest may be legally reserved which the parties agree upon.

See generally, Metc. & Perk. Dig. h. t.; Marsh. Inst. B. 2; Bac. Abr. Merchant, K; Com. Dig. Merchant, E 4; 3 Mass. 443; 8 Mass. 340: 4 Binn. 244: 4 Cranch, 328; 3 Johns. R. 352; 2 Johns. Cas. 250; 1 Binn. 405; 8 Cranch, 418; 1 Wheat. 96; 2 Dall. 194. See also this Dict. tit. *Respondentia;* Vin. Abr. Bottomry Bonds.

BOUGHT NOTE, *contracts*, is an instrument in writing, given by a broker to the seller of merchandize, in which is stated that the goods therein mentioned have been sold for him. This note is signed in the broker's name, as agent of the buyer and seller; and, if he has not exceeded his authority, the parties are thereby respectively bound. 1 Bell's Com. (5th ed.) 435; Holt's C. 170; Story on Agency, § 28; 9 B. & Cr. 78; 17 E. C. L. R. 335; 5 B. & Ad. 521; 1 N. R. 252; 1 Moo. & R. 368; Moo. & M. 43; 22 E. C. L. R. 243; 2 M. & W. 440; Moo. & M. 43; 6 A. & T. 486; 33 E. C. L. R. 122; 16 East, 62; Gow, R. 74; 1 Camp. R. 385; 4 Taunt. 209; 7 Ves. 265. Vide *Sold Note.*

BOUNDARY, *estates.* By this term is understood, in general, every separation natural or artificial, which marks the confines or line of division of two contiguous estates. Boundary also signifies stones or other materials inserted in the earth on the confines of two estates. Boundaries are either natural or artificial. A river or other stream is a natural boundary, and in that case the centre of the stream is the line; 20 John. R. 91; 12 John. R. 252; 1 Rand. R. 417; 1 Halst. R. 1; 2 N. H. Rep. 369; 6 Cowen R. 579; 4 Pick. 268; 3 Randolph's R. 33; 4 Mason's R. 349–397. An artificial boundary is one made by man. The description of land, in a deed, by specific boundaries, is conclusive as to the quantity; and if the quantity be expressed as a part of the description it will be inoperative, and it is immaterial whether the quantity contained within the specific boundaries, be greater or less than that expressed. 5 Mass. 357; 1 Caines's R. 493; 2 John. R. 27; 15 John. 471; 17 John. R. 146; Id. 29; 6 Cranch, 237; 4 Hen. & Munf. 125; 2 Bay R. 515; and the same rule is applicable, although neither the courses and distances, nor the estimated contents correspond with such specific boundaries. 6 Mass. 131; 11 Mass. 193; 2 Mass. 380; 5 Mass. 497; but these rules do not apply in cases where adherence to them would be plainly absurd. 17 Mass. 207. Vide 17 S. & R. 104; 2 Mer. R. 507; 1 Swanst. 9; 4 Ves. 180; 1 Stark. Ev. 169; 1 Phil. Ev. Index, h. t.; Chit. Pr. Index, h. t.; 1 Supp. to Ves. jr. 276; 2 Hill. Ab. c. 24, § 209, and index, h. t. When a boundary, fixed and by mutual consent has been been permitted to stand for twenty-one years, it cannot afterwards be disturbed. In accordance with this rule, it has been decided, that where town lots have been occupied up to a line fence between them for more than twenty-one years, each party gained an incontrovertible right to the line thus established, and this whether either party knew of the adverse claim or not; and whether either party has more or less ground than was originally in the lot he owns. 9 Watts, R. 565. See Hov. Fr. c. 8, p. 239 to 234; 3 Sumn. R. 170; Poth. Contr. de Société, prém. app. n. 231.

BOUNTY, is a sum of money or

other thing, given, generally by the government, to certain persons, for some good they have done or are about to do to the public. As bounty upon the culture of silk; the bounty given to an enlisted soldier; and the like. It differs from a reward, which is generally applied to particular cases; and from a payment, as their is no contract on the part of the receiver of the bounty.

BOVATA TERRÆ. As much land as one ox can plough.

BRANCH. This is a metaphorical expression, which designates, in the genealogy of a numerous family, a portion of that family which has sprung from the same root or stock; these latter expressions, like the first are also metaphorical. The whole of a genealogy is often called the *genealogical tree;* and sometimes it is made to take the form of a tree, which is in the first place divided into as many branches as there are children, afterwards into as many branches as there are grandchildren, then of great-grandchildren, &c. If, for example, it be desired to form the genealogical tree of Peter's family, Peter will be made the trunk of the tree; if he has had two children, John and James, their names will be written on the first two branches; which will themselves shoot out as many twigs as John and James have children; these will produce others, till the whole family shall be represented on the tree; thus the origin, the application, and the use of the word branch in genealogy will be at once perceived.

BREACH, *contracts, torts,* the violation of an obligation or duty; as a breach of a covenant is the non-performance of a covenant, the breach of a duty, is the refusal or neglect to execute an office, trust or the like, according to law; breach of the peace is the disturbance of the public peace. Vide article *Peace.* Breach of prison, is the act of escaping from prison. 1 Russ. Cr. 378; 4 Bl. Com. 129; 2 Hawk. P. C. c. 18, s. 1; 7 Conn. R. 752; and articles *False Imprisonment; Imprisonment; Regular and Irregular process; Prison.* A breach of promise, is the non-performance of a promise or engagement. For breaches of contracts, the remedy is by an action on such contracts; for the breach of those duties which amount to quasi contracts, the remedy is also a civil action; and for breaches of peace or violations of the public law, the offender may be indicted for a misdemeanor.

TO BRAND. An ancient mode of punishment, which was to inflict a mark on an offender with a hot iron. This barbarous punishment has been generally disused.

BRANDY. A spirituous liquor made of wine by distillation. See Stat. 22 Car. 2, c. 4.

BREACH, *pleading,* is that part of the declaration in which the violation of the defendant's contract is stated. It is usual in assumpsit to introduce the statement of the particular breach, with the allegation that the defendant contriving and fraudulently intending craftily and subtilely to deceive and defraud the plaintiff, neglected and refused to perform, or performed the particular act, contrary to the previous stipulation. In debt the breach or cause of action complained of must proceed only for the non-payment of money previously alleged to be payable; and such breach is nearly similar, whether the action be in debt on simple contract, specialty, record or statute, and is usually of the following form: "Yet the said defendant, although often requested so to do, hath not as yet paid the said sum of —— dollars, above demanded, nor any part thereof to the said plaintiff, but hath hitherto wholly neglected and refused so to

do, to the damage of the said plaintiff —— dollars, and therefore he brings suit, &c. The breach must obviously be governed by the nature of the stipulation; it ought to be assigned in the contract, either negatively or affirmatively, or in words which are co-extensive with its import and effect. Com. Dig. Pleader, C 45 to 49; 2 Saund. 181, b, c; 6 Cranch, 127; and see 5 John. R. 168; 8 John. R. 111; 7 John. R. 376; 4 Dall. 436; 2 Hen. & Munf. 446. When the contract is in the disjunctive, as, on a promise to deliver a horse by a particular day, or pay a sum of money, the breach ought to be assigned that the defendant did not do the one act nor the other. 1 Sid. 440; Hardr. 320; Com. Dig. Pleader, C.

BREACH OF THE PEACE, *criminal law*. Any offence against public tranquillity, or against person or property, when accompanied by violence; any act of public indecorum. Vide article *Peace*.

BREACH OF TRUST, is the wilful misappropriation, by a trustee, of a thing which had been lawfully delivered to him in confidence. The distinction between larceny and a breach of trust is to be found chiefly in the terms or way in which the thing was taken originally into the party's possession; and the rule seems to be, that whenever the article is obtained upon a fair contract, not for a mere temporary purpose, or by one who is in the employment of the deliverer, then the subsequent misappropriation is to be considered as an act of breach of trust. This rule is, however, subject to many nice distinctions. 15 S. & R. 93, 97. It has been adjudged that when the owner of goods parts with the *possession* for a particular purpose, and the person who receives them avowedly for that purpose, has at the time a fraudulent intention to make use of the possession as the means of converting the goods to his own use, and does so convert them, it is larceny; but if the owner part with the *property*, although fraudulent means have been used to obtain it, the act of convertion is not larceny. Ib. Alis. Princ. c. 12, p. 354.

BREAK DOWN. This phrase is applied to a witness who has made a statement of what he will swear to, and who, afterwards, when under the influence of his oath, contradicts or materially qualifies such previous statement. He is then said to break down. 3 Chit. Pr. 840.

BREAKING. Forcibly tearing asunder. In cases of burglary and house-breaking, the removal of any part of the house or of the fastenings provided to secure it, with violence and a felonious intent, is called a breaking. The breaking is actual, as in the above case, or constructive, as when the burglar or house-breaker, gains an entry by fraud, conspiracy or threats. 2 Russ. on Cr. 2; 2 Chit. Cr. Law, 1092, 1 Hale, P. C. 553; Alis. Prin. 282, 291; in England it has been decided that if the sash of a window be partly open, but not sufficiently so to admit a person, the raising of it so as to admit a person is not a breaking of the house. 1 Moody, Cr. Cas. 178. No reasons are assigned. It is difficult to conceive how a window made in the usual way, can be otherwise than *partially* open, and what will amount to a sufficient opening to render a further opening not a breaking? But see 1 Moody, Cr. Cas. 327, 377; and *Burglary*.

BREAKING DOORS, is the act of forcibly removing the fastenings of a house, so that a person may enter. It is a maxim that every man's house is his castle, and it is protected from every unlawful invasion. An officer having a lawful process of a criminal nature, authorising him to do so,

may break an outer door, if upon making a demand of admittance it is refused. The house may also be broken open for the purpose of executing a writ of habere facias. 5 Co. 93; Bac. Ab. Sheriff, N 3. The house protects the owner from the service of all civil process in the first instance, but not if he is once lawfully arrested, and he takes refuge in his own house; in that case the officer may pursue him, and break open any door for the purpose. Foster, 320; 1 Rolle's R. 138; Cro. Jac. 555. V. *Door; House.*

BREATH, *med. juris.* The air expelled from the chest at each expiration. Breathing though a usual sign of life, is not conclusive that a child was *wholly* born alive, as breathing may take place before the whole delivery of the mother is complete. Until the child is *wholly born* it being killed maliciously is not murder or *infanticide*, (q. v.) 5 Carr. & Payn. 329; S. C. 24 Engl. C. L. R. 344. Vide *Birth; Life.*

BREPHOTROPHI, *civil law.* Persons appointed to take care of houses destined to receive foundlings. Clef Lois Rom. mot Administrateurs.

BREVE, *practice*, is a writ in which the cause of action is *briefly* stated, hence its name. It is issued to summon or attach a defendant requiring him to answer to an action, or any thing commanded to be done by the same.

BREVE DE RECTO. A writ of right, (q. v.)

BREVIA FORMATA, *English law*, is the appellation given to the collection in the book styled, *The Register of Writs*, (q. v.) when other forms were invented. The *brevia formata* were adapted to those causes of complaint that most frequently occurred.

BREVIBUS ET ROLULIS LIBERANDIS. *Eng. law.* A writ or mandate directed to a sheriff commanding him to deliver to his successor the county and the appurtenances, with all the briefs, rolls, remembrancers, and all other things belonging to his office.

BRIBE, *crim. law.* The gift or promise, which is accepted, of some advantage, as the inducement for some illegal act or omission; or of some illegal emolument, as a consideration, for preferring one person to another, in the performance of a legal act.

BRIBERY, *crim. law*, is the receiving or offering any undue reward by or to any person whomsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behaviour in office, and to incline him to act contrary to his duty and the known rules of honesty and integrity. 3 Inst. 149; 1 Hawk. P. C. c. 67, s. 2; 4 Bl. Com. 139; 1 Russ. Cr. 156. The term bribery extends now further and includes the offence of giving a bribe to many other officers. The offence of the giver and of the receiver of the bribe has the same name. For the sake of distinction that of the former might be properly denominated positive, while that of the latter might be called negative bribery.

An attempt to bribe, though unsuccessful, has been holden to be criminal, and the offender may be indicted. 2 Dall. 384; 4 Burr. 2500; 3 Inst. 147; 2 Campb. R. 229; 2 Wash. 88; 1 Virg. Cas. 138; 2 Virg. Cas. 460.

BRIBOUR. One that pilfers other men's goods; a thief. See 28 E. 2, c. 1.

BRIDGE, is a building constructed over a river, creek, or other stream, or over a ditch or other place, in order to facilitate the passage over the same. Bridges are of several kinds, public and private. *Public* bridges

may be divided into, 1st, those which belong to the public, as state, county or township bridges, over which all the people have a right to pass, with or without paying toll; these are built by public authority at the public expense, either of the state itself, or a district or part of the state. 2dly, those which have been built by companies, or at the expense of private individuals, and over which all the people have a right to pass, on the payment of a toll fixed by law; 3dly, those which have been built by private individuals, and which have been dedicated to public uses. 2 East, R. 356; 5 Burr. R. 2594; 2 Bl. R. 685; 1 Camp. R. 262, n.; 2 M. & S. 262. A *private* bridge is one erected for the use of one or more private persons; such bridge will not be considered a public bridge although it may be occasionally used by the public. 12 East, R. 203, 4. Vide 7 Pick. R. 344; 11 Pet. R. 539; 7 N. H. Rep. 59; 1 Pick. R. 432; 4 John. Ch. R. 150.

BRIEF, *Eccl. law*. The name of a kind of papal rescript. Briefs are writings sealed with wax, and differ in this respect from *bulls*, (q. v.) which are sealed with lead. They are so called, because they usually are comprised in short compendious writings. Ayl. Parerg. 132.

BRIEF, *practice*, is a detailed and abridged statement of a party's case. It should contain, 1st. A statement of the names of the parties, and of their residence and occupation, the character in which they sue and are sued, and wherefore they prosecute or resist the action. 2d. An abridgment of all the pleadings. 3d. A regular, chronological and methodical statement of the facts in plain common language. 4th. A summary of the points or questions in issue, and of the proof which is to support such issues, mentioning specially the names of the witnesses by which the facts are to be proved, or if there be written evidence, an abstract of such evidence. 5th. The personal character of the witnesses should be mentioned; whether the moral character is good or bad, whether they are naturally timid or over-zealous, whether firm or wavering. 6th. If known, the evidence of the opposite party, and such facts as are calculated to oppose, confute, or repel it. Perspicuity and conciseness are the most desirable qualities of a brief, but when the facts are material they cannot be too numerous, when the argument is pertinent and weighty, it cannot be too extended. Brief is also used in the sense of *breve*, (q. v.)

BRIEF OF TITLE, *practice, conveyancing*, is an abridgment of all the patents, deeds, indentures, agreements, records and papers relating to certain real estate. In making a brief of title, the practitioner should be careful to place every deed and other paper in chronological order. The date of each deed; the names of the parties; the consideration; the description of the property; should be particularly noted, and all covenants should also be particularly inserted.

BROCAGE, *contracts*, the wages or commissions of a broker; his occupation is also sometimes called brocage. This word is also spelled brokerage.

BROKERAGE, *contracts*, the trade or occupation of a broker; the commissions paid to a broker for his services.

BROKERS, *commerce*, are those who are engaged for others, in the negotiation of contracts, relative to property, with the custody of which they have no concern. Paley on Agency, 13; see Com. Dig. Merchant, C. A broker is, for some purposes, treated as the agent of both parties; but in the first place, he is deemed the agent only of the person

by whom he is originally employed; and does not become the agent of the other until the bargain or contract has been definitely settled, as to its terms, between the principals. Paley, Ag. by Lloyd, 171, note (p); 1 Y. & J. 387. There are several kinds of brokers, as, *Exchange Brokers*, such as negotiate in all matters of exchange with foreign countries. *Ship Brokers*, those who transact business between the owners of vessels, and the merchants who send cargoes. *Insurance Brokers*, those who manage the concerns both of the insurer and the insured. *Pawn Brokers*, those who lend money upon goods to necessitous people at interest. Vide Story on Ag. § 28 to 32; T. L. h. t.; Maly. Lex Mer. 143; 2 H. Bl. 555; 4 Burr. R. 2103; 4 Kent, Com. 622, note (d), 3d ed.; Liv. on Ag. Index, h. t.; Chit. Com. L. Index, h. t., and articles *Agency; Agent; Bought note; Factor; Sold note.*

BROTHELS, *crim. law.* Bawdy houses, the common habitations of prostitutes; such places have always been common nuisances in the United States, and the keepers of them may be fined and imprisoned. Till the time of Henry VIII., they were licensed in England, when that lascivious prince suppressed them. Vide 3 Inst. 205, 6; for the history of these pernicious places, see Merl. Répert. mot Bordel; Parent Duchatellet, De la Prostitution dans la ville de Paris, c. 5, § 1.

BROTHER, *domest. relat.* He who is born from the same father and mother with another, or of one of them only. Brothers are of the whole blood when they are born from the same father and mother, and of the half blood, when they are the issue of one of them only. In the civil law when they are the children of the same father and mother, they are called *brothers germain;* when they descend from the same father, but not the same mother, they are *consanguine brothers;* when they are the issue of the same mother, but not the same father, they are *uterine brothers.* A *half brother*, is one who is born of the same father or mother, but not of both. One born of the same parents before they were married, a *left-sided brother;* and a bastard born of the same father or mother, is called a *natural brother.* Vide *Blood; Half blood; Line;* and Merl. Répert. mot Frère; Dict. de Jurisp. mot Frère; Code, 3, 28, 27; Nov. 84, præf; Dane's Ab. Index, h. t.

BROTHER-IN-LAW, *domest. relat.* The brother of a man's wife, or the husband of a person's sister. There is no relationship between these parties, there is a mere affinity.

BRUISE, *med. jurisp.*, is an injury done with violence to the person, without breaking the skin; it is nearly synonymous with *contusion*, (q. v.) 1 Ch. Pr. 38. Vide 4 Car. & P. 381, 487, 558, 565; Eng. C. L. Rep. 430, 526. 529. Vide *Wound.*

BUBBLE ACT, *Eng. law.* The name given to the statute 6 Geo. 1, c. 18, which was passed in 1719, and was intended "for restraining several extravagant and unwarrantable practices therein mentioned." See 2 P. Wms. 219.

BUGGERY, *crim. law*, is the detestable crime of having commerce contrary to the order of nature by mankind with mankind, or with brute beasts, or by womankind with brute beasts. 3 Inst. 58; 12 Co. 36; Dane's Ab. Index, h. t.; Merl. Répert, mot Bestialité. This is a highly penal offence.

BUILDING, *estates*, is an edifice erected by art and fixed upon or on the soil, composed of different pieces of stone, brick, marble, wood or other proper substance, connected together, and designed for permanent use in the

position in which it is so fixed. Every building is an accessory to the soil, and is therefore real estate: it belongs to the owner of the soil. Cruise, tit. 1, s. 46. Vide 1 Chit. Pr. 148, 171; Salk. 459; Hob. 131.

BULK, *contracts*, is said to be merchandise which is neither counted, weighed nor measured. A sale by bulk, is a sale of a quantity of goods such as they are, without measuring, counting or weighing. Civ. Code of Louis. a. 3522, n. 6.

BULL, *eccles. law*. A letter from the pope of Rome, written on parchment, to which is attached a leaden seal, impressed with the images of Saint Peter and Saint Paul. There are three kinds of apostolical rescripts, the *brief*, the *signature*, and the *bull*, which is most commonly used in legal matters. Bulls may be compared to the edicts and letters-patent of secular princes: when the bull grants a favour, the seal is attached by means of silken strings, and when to direct execution to be performed, with flax cords. They are written in Latin, in a round and gothic hand. Ayl. Par. 132; Ayl. Pand. 21; Mer. Rép. h. t.

BULLION, in its usual acceptation, is uncoined gold or silver, in bars, plates, or other masses. 1 East, P. C. 188. In the acts of Congress, the term is also applied to copper properly manufactured for the purpose of being coined into money. For the acts of Congress authorising the coinage of bullion for private individuals, see Act of April, 2, 1792, s. 14, 1 Story, 230; Act of May 19, 1828, 4 Sharsw. cont. of Story's Laws U. S. 2120; Act of June 28, 1834, Id. 2376; Act of January 18, 1837, Id. 2522 to 2529. See for the English law on the subject of crimes against bullion, 1 Hawk. P. C. 32 to 41.

BUOY, a piece of wood, or an empty barrel, floating on the water, to show the place where it is shallow, to indicate the danger there is to navigation.

BUREAU, a French word which literally means a large writing table. It is used figuratively for the place where business is transacted; it has been borrowed by us, and used in nearly the same sense; as, the bureau of the secretary of state. Vide Merl. Réper. h. t.

BURGAGE, *Eng. law*. It is a species of tenure in socage; it is where the king or other person is lord of an ancient borough, in which the tenements are held by a rent certain. 2 Bl. Com. 82.

BURGESS, a magistrate of a borough; generally, the chief officer of the corporation, who performs, within the borough, the same kind of duties which a mayor does in a city. In England the word is sometimes applied to all the inhabitants of a borough, who are called burgesses; sometimes it signifies the representatives of a borough in parliament.

BURGLARIOUSLY, *pleadings*; this is a technical word which must necessarily be introduced into an indictment in cases of burglary; the offence must be charged to have been committed burglariously, no other word will answer the same purpose, nor will any circumlocution be sufficient. 4 Co. 39; 5 Co. 121; Cro. Eliz. 920; Bac. Ab. Indictment, G 1; Com. Dig. Indictment, G 6; 1 Chit. Cr. Law, *242.

BURGLARY, *crim. law*, is the breaking and entering the house of another in the night time with intent to commit a felony therein, whether the felony be actually committed or not. 3 Inst. 63; 1 Hale, 549; 1 Hawk. c. 38, s. 1; 4 Bl. Com. 224; 2 East, P. C. c. 15, s. 1, p. 484; 2 Russell on Cr. 2; Roscoe, Cr. Ev. 252; Coxe, R. 441; 7 Mass. Rep. 247. The circumstances essential to be considered are, 1, in what place

the offence must be committed; 2, at what time; 3, by what means; 4, with what intention. 1st. *In what place the burglary must be committed.* It must, in general, be committed in a mansion house, actually occupied as a dwelling; but if it be left by the owner, *animo revertandi*, though no person resides in it in his absence, it is still his mansion. Fost. 77; 3 Rawle, 207; the principal question at the present day, is what is to be deemed a dwelling-house. 1 Leach, 185; 2 Leach, 771; Ib. 876; 3 Inst. 64; 1 Leach, 305; 1 Hale, 558; Hawk. c. 38, s. 18; 1 Russ. on Cr. 16; 3 Serg. & Rawle, 199; 4 John. R. 424; 1 Nott & M'Cord, 583; 1 Hayw. 102, 242; Com. Dig. Justices, (P 5); 2 East, P. C. 504. 2. *At what time it must be committed.* The offence must be committed in the night, for in the day time there can be no burglary. 4 Bl. Com. 224. For this purpose it is night only when by the light of the sun a person cannot reasonably discern the face or countenance of another. 1 Hale, 550; 3 Inst. 63. This rule it is evident does not apply to moonlight, 4 Bl. Com. 224; 2 Russ. on Cr. 32. The breaking and entering need not be done the same night. 1 Russ. & Ry. 417; but it is necessary the breaking and entering should be in the night time, for if the breaking be in day light and the entry in the night, or *vice versa*, it will not be burglary. 1 Hale, 551; 2 Russ. on Cr. 32. Vide Com. Dig. Justices, (P 2); 2 Chit. Cr. Law, 1092. 3. *The means used.* There must be both a *breaking* and an *entry*. First, of the breaking which may be actual or constructive. An *actual breaking* takes place when the burglar breaks or removes any part of the house or the fastenings provided for it, with violence. Breaking a window, taking a pane of glass out by breaking or bending the nails or other fastenings, raising a latch where the door is not otherwise fastened, picking open a lock with a false key, putting back the lock of a door or the fastening of a window, with an instrument, turning the key when the door is locked in the inside, or unloosening any other fastening which the owner has provided, are several instances of actual breaking. According to the Scotch law, entering a house by means of the true key, while in the door, or when it had been stolen, is a breaking. Alis. Pr. Cr. Law, 284. *Constructive breakings* are such when the burglar gains an entry by fraud, conspiracy or threats. 2 Russ. on Cr. 2; 2 Chit. Cr. Law, 1093. The breaking of an inner door of the house will be sufficient to constitute a burglary. 1 Hale, 553. Any, 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, will be sufficient to constitute the offence. 3 Inst. 64; 4 Bl. Com. 227; Bac. Ab. Burglary, B; Com. Dig. Justices, (P 4). But the introduction of an instrument, in the act of breaking the house, will not be a sufficient entry unless it be introduced for the purpose of committing a felony. 4. *The intention.* The intent of the breaking and entry must be felonious; if a felony however be committed, the act will be *prima facie* pregnant evidence of an intent to commit it. If the breaking and entry be with an intention to commit a bare trespass, and nothing further is done, the offence will not be a burglary. 1 Hale, 560; East, P. C. 509, 514, 515; 2 Russ. on Cr. 33.

BURNING, vide *Accident; Arson; Fire, accidental.*

BURYING GROUND, a place appropriated for depositing the dead; a cemetery. In Massachusetts burying grounds cannot be appropriated to roads without the consent of the

owners. Massachusetts Revised St. 239.

BUSHEL, *measure.* The Winchester bushel, established by the 13 W. III. c. 5, A. D. 1701, was made the standard of grain; a cylindrical vessel, eighteen and a half inches in diameter, and eight inches deep inside, contains a bushel; the capacity is 2145.42 cubic inches. By law or usage it is established in most of the United States. The exceptions, as far as known, are Connecticut, where the bushel holds 2198 cubic inches; Kentucky, 2150⅔; Indiana, Ohio, Mississippi and Missouri, where it contains 2150$\frac{4}{10}$ cubic inches. Dane's Ab. c. 211, a. 12, s. 4.

BUTT. A measure of capacity, equal to one hundred and eight gallons. See *Measure.*

BUYER, *contracts.* A purchaser; (q. v.) a vendee.

BUYING OF TITLES. The purchase of the rights of a person to a piece of land when the seller is disseised. When a deed is made by one who, though having a legal right to land, is at the time of the conveyance disseised, as a general rule, the sale is void; the law will not permit any person to sell a quarrel, or as it is commonly termed, a pretended title. Such a conveyance is an offence at common law, and by a statute of Hen. VIII. This rule has been generally adopted in the United States, and is affirmed by express statute. In some of the states, it has been modified or abolished. It has been recognized in Massachusetts and Indiana. 1 Ind. R. 127. In Massachusetts, there is no statute on the subject, but the act has always been unlawful. 5 Pick. R. 356. In Connecticut the seller and the buyer forfeit, each one half the value of the land. 4 Conn. 575. In New York, a person disseised cannot convey, except by way of mortgage. But the statute does not apply to judicial sales. 6 Wend. 224; see 4 Wend. 474; 2 John. Cas. 58; 3 Cow. 89; 5 Wend. 532; 5 Cow. 74; 13 John. 466; 8 Wend. 629; 7 Wend. 53, 152; 11 Wend. 442; 13 John. 289. In North Carolina and South Carolina, a conveyance by a disseisee is illegal; the seller forfeits the land, and the buyer its value. In Kentucky such sale is void. 1 Dana, R. 566. But when the deeds were made since the passage of the statute of 1798, the grantee might, under that act, sue for land conveyed to him, which was adversely possessed by another, as the grantor might have done before. The statute rendered transfers valid to pass the title. 2 Litt. 393; 1 Wheat. 292; 2 Litt. 225; 3 Dana, 309. The statute of 1824, "to revive and amend the champerty and maintenance law," forbids the buying of titles where there is an adverse possession. See 3 J. J. Marsh. 549; 2 Dana, 374; 6 J. J. Marsh. 490, 584. In Ohio, the purchase of land from one against whom a suit is pending for it, is void, except against himself, if he prevails. Walk. Intr. 297, 351, 352. In Pennsylvania, 2 Watts, R. 272; Illinois, Ill. Rev. L. 130; Missouri, Misso. St. 119, a deed is valid, though there be an adverse possession. 2 Hill. Ab. c. 33, § 42 to 52. The Roman law forbade the sale of a right or thing in litigation. Code, 8, 37, 2.

BY ESTIMATION, *contracts.* In sales of land it not unfrequently occurs that the property is said to contain a certain number of acres, *by estimation*, or so many acres, *more or less.* When these expressions are used, if the land fall short by a small quantity, the purchaser will receive no relief. In one case of this kind, the land fell short two-fifths, and the purchaser received no relief. 2 Freem. 106, vide 1 Finch, 109; 1 Call, R. 301; 6 Binn. Rep. 106; 1 Serg. & Rawle, R. 166; 1 Yeates, R. 322; 2 John. R. 37; 5

John. R. 508; 15 John. R. 471; 1 Caines, R. 493; 3 Mass. Rep. 380; 5 Mass. R. 355; 1 Root, R. 528; 4 Hen. & Munf. 184; the meaning of these words has never been precisely ascertained by judicial decision. See Sugd. Vend. 231 to 236, and the cases cited under the article *Construction; More or less; Subdivision.*

BY-LAWS, are rules and ordinances made by a corporation for its own government. The power to make by-laws is usually conferred by express terms of the charter creating the corporation, though, when not expressly granted, it is given by implication, and it is incident to the very existence of a corporation. When there is an express grant, limited to certain cases and for certain purposes, the corporate power of legislation is confined to the objects specified, all others being excluded by implication. 2 Kyd on Corp. 102; 2 P. Wms. 207; Ang. on Corp. 177. The power of making by-laws, is to be exercised by those persons in whom it is vested by the charter; but if that instrument is silent on that subject, it resides in the members of the corporation at large. Harris & Gill's R. 324; 4 Burr. 2515, 2521; 6 Bro. P. C. 519. The constitution of the United States, and acts of congress made in conformity to it; the constitution of the state in which a corporation is located, and acts of the legislature, constitutionally made, together with the common law as there accepted, are of superior force to any by-law; and such by-law, when contrary to either of them, is therefore void, whether the charter authorizes the making of such by-law or not; because no legislature can grant power larger than they themselves possess. 7 Cowen's R. 585; Id. 604; 5 Cowen's R. 538. Vide, generally, Ang. on Corp. ch. 9; Willc. on Corp. ch. 2, s. 3; Bac. Ab. h. t.; 4 Vin. Ab. 301; Dane's Ab. Index, h. t.; Com. Dig, h. t.; and Id. vol. viii. h. t.

C.

CADASTRE. A term derived from the French, which has been adopted in Louisiana, and which signifies the official statement of the quantity and value of real property in any district, made for the purpose of justly apportioning the taxes payable on such property. 3 Amer. St. Papers, 679; 12 Pet. 428, n.

CALENDAR. See *Almanac.*

CALENDAR, *crim. law*, is a list of prisoners, containing their names, the time when they were committed, and by whom, and the cause of their commitments.

CALLING THE PLAINTIFF, *practice.* When a plaintiff perceives that he has not given evidence to maintain his issue, and intends to become nonsuited, he withdraws himself, when the cryer is ordered to call the plaintiff, and on his failing to appear, he becomes nonsuited. 3 Bl. Com. 376.

CALUMNIATORS, *civil law*, are persons who accuse others of having committed crimes, whom they know to be innocent. Code, 9, 46, 9.

CAMPARTUM. A part or portion of a larger field or ground, which would otherwise be in gross or common. Vide *Champerty.*

CANCELLATION, in its general acceptation, is the act of crossing a writing; it is used sometimes to signify the manual operation of tear-

ing or destroying the instrument itself. Hyde v. Hyde, 1 Eq. Cas. Abr. 409; Rob. on Wills, 367, n. Cancelling a will, *animo revocandi*, is a revocation of it, and it is unnecessary to show a complete destruction or obliteration. 2 B. & B. 650; 3 B. & A. 489; 2 Bl. R. 1043; 2 Nott & M'Cord, 272; Whart. Dig. Wills, c.; 4 Mass. 462. But the mere act of cancelling a will is nothing, unless it be done *animo revocandi*, and evidence is admissible to show, *quo animo* the testator cancelled it. 7 Johns. 394; 2 Dall. 266; S. C. 2 Yeates, 170; 4 Serg. & Rawle, 297; cited 2 Dall. 267, n.; 3 Hen. & Munf. 502; Rob. on Wills, 365; Lovel. 178; Toll. on Ex'rs, Index, h. t.; 3 Stark. Ev. 1714; 1 Addams's Rep. 52; 2 Eccl. Rep. 23. As to the effect of cancelling a deed, which has not been recorded, see 1 Addams's Rep. 1; Palm. 403; Latch. 226; Gilb. Law Ev. 109, 110; 2 H. Bl. 263; 2 Johns. 87; 1 Greenl. R. 78; 10 Mass. 403; 9 Pick. 105; 4 N. H. Rep. 191; Greenl. Ev. § 265.

CANON, *eccl. law*. This word is taken from the Greek, and signifies a rule or law. In the ecclesiastical law, it is also applied to designate an order of religious persons.

CANON LAW, see *Law*, *Canon*.

CANNON SHOT, *war*, is the distance which a cannon will throw a ball. The whole space of the sea, within cannon shot of the coast, is considered as making a part of the territory; and, for that reason, a vessel taken under the cannon of a neutral fortress, is not a lawful prize. Vatt. b. 1, c. 23, s. 289, in finem; Chitt. Law of Nat. 113; Mart. Law of Nat. b. 8, c. 6, s. 6; 3 Rob. Adm. Rep. 102, 336; 5 Ib. 373; 3 Hagg. Adm. R. 257. This part of the sea being considered as part of the adjacent territory, it follows that magistrates can cause the orders of their governments to be executed there. Three miles is considered as the greatest distance that the force of gun-powder can carry a bomb or a ball. Azun. Mar. Law, part 2, c. 2, art. 2, § 15; Bouch. Inst. n. 1848. The anonymous author of the poem, del della Natura, lib. 5, expresses this idea in the following lines:

Tanta s'avanza in mar questo dominio,
Quant' esser può d'antemurale e guardia,
Findove può da terra in mar vibrandosi
Corer di cavo bronzo accesso fulmine.

Far as the sovereign can defend his sway,
Extends his empire o'er the wat'ry way;
The shot sent thundering to the liquid plain,
Assigns the limits of his just domain.

Vide *League*.

CAPACITY. This word is taken in various senses. 1. It is that aptitude which good order requires a man should possess for the employment to which he is destined. The constitution requires that the president, senators and representatives should have attained certain ages, and in the case of the senators and representatives that they should have local qualifications; without these they have no capacity to serve in these offices. 2. Capacity is more particularly applied to the legal ability in a party to contract, to devise or bequeath, to grant lands or receive such grants, to give or to receive, to inherit, to marry, and the like. 2 Com. Dig. 294; Dane's Ab. Index, h. t.

CAPAX DOLI. Capable of committing crime. This is said of one who has sufficient mind and understanding to be made responsible for his actions, and who possesses legal discretion, (q. v.)

CAPE, *English law*, is a judicial writ touching a plea of land and tenements. The writs which bear this name are of two kinds, namely, cape magnum, or grand cape; and cape parvum, or petit cape.

CAPIAS, *practice*. This word,

the signification of which is "that you take," is applicable to many heads of practice. Several writs and processes commanding the sheriff to take the person of the defendant are known by the name of capias. The writ in ordinary use bearing this name is the *capias ad respondendum*, simply so called. See 3 Bl. Com. 281.

CAPIAS AD AUDIENDUM JUDICIUM, *practice*, is a writ issued in a case of misdemeanor, after the defendant has appeared and is found guilty, and is not present when called. This writ is to bring him to judgment. 4 Bl. Com. 368.

CAPIAS AD RESPONDENDUM, *in practice*, is a writ commanding the sheriff, or other proper officer, "to take the body of the defendant, and to keep the same to answer, *ad respondendum*, the plaintiff in a plea," &c. The amount of bail, demanded is endorsed on the writ. Under this writ the defendant is to be arrested, and he gives a bail bond to the officer, or it is the duty of the latter to imprison him. Sometimes, when it is too late to issue a summons, or a capias is preferred for any reason, it is the practice in some places, as lately in Pennsylvania, to endorse on the capias, "no bail required;" in which case after the defendant has been arrested he is required to endorse on the writ, "I authorise the prothonotary to enter my appearance to the action," and subscribe his name. He is then discharged. If the writ has been served and the defendant have not given bail, but remains in custody, it is returned C. C. *cepi corpus*; if he have given bail, it is returned C. C. B. B. *cepi corpus*, Bail Bond; if the defendant's appearance have been accepted, the return is "C. C. and defendant's appearance accepted." This, like other writs, bears teste a general teste day, and is returnable on a regular return day. 1 Penns. Pr. 36; 1 Arch. Pr. 68.

CAPIAS AD SATISFACIENDUM, *practice*, is a writ issuing out of a court, in a case where a judgment has been rendered, directed to the proper officer of the court, commanding him to take the defendant, and him safely keep, so that he may have his body in court on the return day, to satisfy, *ad satisfaciendum*, the plaintiff. This writ is tested on a general teste day and returnable on a regular return-day.

It lies after judgment in most instances in which the defendant was subject to a capias ad respondendum before, and plaintiffs are subject to it, when judgment has been given against them for costs. Members of congress and of the legislature *eundo*, *morando*, *et dedeundo*, to, at, and from the places of sitting of congress, or of the legislature, are not liable, on account of their public capacity, to this process; nor are ambassadors, (q. v.) and other public ministers and their servants. Act of Congress of April 30, 1790, s. 25 and 26, Story's Laws United States, 88; 1 Dunl. Pr. 95, 96; Com. Dig. Ambassador, B; 4 Dall. 321. In Pennsylvania women are not subject to this writ except in actions founded upon tort, or claims arising otherwise than *ex contractu*. 7 Reed's Laws of Pa. 150. See *Arrest*.

It is executed by arresting the body of the defendant, and keeping him in custody; discharging him upon his giving security for the payment of the debt, or that he will return in custody again before the return day, is an escape, although he do return; 13 Johns. R. 366; 8 Johns. R. 98; and the sheriff is liable for the debt. In England a payment to the sheriff or other officer having the ca. sa. is no payment to the plaintiff. Freem. 842; Lutw. 587; 2 Lev. 203; 1 Arch. Pr. 278;

the law is different in Pennsylvania; 3 Serg. & Rawle, 467. The return made by the officer is either C. C. & C., cepi corpus et commititur, if the defendant have been arrested and held in custody; or N. E. I., *non est inventus*, if the officer has not been able to find him. This writ is in common language called a *ca. sa.*

CAPIAS PRO FINE, *practice, crim. law*, is the name of a writ which issues against a defendant, who has been fined for some offence against a statute, and who does not discharge it according to the judgment; this writ commands the sheriff to arrest the defendant and commit him to prison, there to remain till he shall pay the said fine, or be otherwise discharged according to law.

CAPIAS UTLUGATUM, *in English practice;* the capias utlugatum is general or special; the former against the person only, the latter against the person, lands and goods. This writ issues upon the judgment of outlawry being returned by the sheriff upon the *exigent*, and it takes its name from the words of the mandatory part of the writ, which states the defendant being outlawed *utlugatum*, or *ut.*

The *general* writ of *capias utlugatum* commands the sheriff to take the defendant, so that he have him before the king on a general return day, wheresoever, &c., to do and receive what the court shall consider of him.

The *special capias utlugatum*, like the general writ, commands the sheriff to take the defendant; and thus far it is executed, and the defendant is discharged upon an attorney's undertaking, or upon giving bond to the sheriff, in the same manner as when the writ is general. But the special writ also commands the sheriff to inquire by a jury of the defendant's goods and lands, to extend and appraise the same, and to take them in the king's hands and safely keep them, so that he may answer to the king for the value and issues of the same. 2 Arch. Pr. 161.

CAPIAS IN WITHERNAM, *practice*, is a writ issued after a return of *elongata* or *eloined* has been made to a writ of *retorno habendo*, commanding the sheriff to take so many of the distrainer's goods by way of reprisal, as will equal the goods mentioned in the *retorno habendo*. 2 Inst. 140; F. N. B. 68; and see form in 2 Sell. Pr. 169.

CAPIATUR. The name of a writ which was issued to levy a fine due to the king, imposed upon an offender for a grave offence. Bac. Ab. Fines and Amercements, *in prin.*

CAPITAL, *political economy, commerce.* In political economy, it is that portion of the produce of a country, which may be made directly available either to support the human species or to the facilitating of production. In commerce, as applied to individuals, it is those objects, whether consisting of money or other property, which a merchant, trader, or other person adventures in an undertaking, or which he contributes to the common stock of a partnership. It signifies money put out at interest. The fund of a trading company or corporation is also called capital, but in this sense the word *stock* is generally added to it; thus we say the *capital stock* of the Bank of North America.

CAPITAL CRIME, is one for the punishment of which death is inflicted, which punishment is called *capital punishment.* Dane's Ab. Index, h. t.

The subject of capital punishment has occupied the attention of the most enlightened men for a long time, particularly since the middle of the last century; and none deserves to be more carefully investigated. The right of punishing its members by

society cannot be denied; but how far that right is to extend seems not to be agreed upon. Baccaria in his celebrated Treatise of crimes and punishments, contends with zeal, that the punishment of death ought not to be inflicted in times of peace; and only when it is necessary to support the laws, and they can be supported in no other manner, at other times, § 28.

It is not within the plan of this work to examine the question, whether the punishment is allowed by the natural law. The principal arguments for and against it are here given.

1. The arguments used in favour of the abolition of capital punishment, are,

1st. That existence is a right which men hold from God, and which society in a body can no more deprive them of, than a member of that society can do so, because society is governed by the immutable laws of humanity.

2d. That, even should the right be admitted, this is a restraint badly selected, which does not attain its end, death being less dreaded, than either solitary confinement for life, or the performance of hard labour and disgrace for life.

3d. That the infliction of the punishment does not prevent crimes, any more than other less severe but longer punishments.

4th. That as a public example, this punishment is only a barbarous show, better calculated to accustom mankind to the contemplation of bloodshed, than to restrain them.

5th. That the law by taking life, when it is unnecessary for the safety of society, must act by some other motive; this can be no other than revenge. To the extent the law punishes an individual beyond what is requisite for the preservation of society, and the restoration of the offender, is cruel and barbarous. The law to prevent a barbarous act, commits one of the same kind; it kills one of the members of society, to convince the others that killing is unlawful.

6th. That by depriving a man of life, society is deprived of the benefits which he is able to confer upon it; for, according to the vulgar phrase, a man hanged is good for nothing.

7th. That experience has proved that offences which were formerly punished with death, have not increased since the punishment has been changed to a milder one.

2. The arguments which have been urged on the other side, are,

1st. That all that humanity commands to legislators is that they should inflict only *necessary* and *useful* punishments; and that if they keep within these bounds, the law may permit an extreme remedy, even the punishment of death, when it is requisite for the safety of society.

2d. That, whatever be said to the contrary, this punishment is more repulsive than any other, as life is esteemed above all things, and death is considered as the greatest of evils, particularly when it is accompanied by infamy.

3d. That restrained, as this punishment ought to be, to the greatest crimes, it can never lose its efficacy as an example, nor harden the multitude by the frequency of executions.

4th. That unless this punishment be placed at the top of the scale of punishment, criminals will always kill, when they can, while committing an inferior crime, as the punishment will be increased only by a more protracted imprisonment, where they still will hope for a pardon or an escape.

5th. The essays which have been made by two countries at least, (Russia, under the reign of Elizabeth, and Tuscany, under the reign of Leopold, where the punishment of death was abolished,) have proved unsuccessful,

as that punishment has been restored in both.

Arguments on theological grounds have also been advanced on both sides.

Vide Baccaria on Crimes and Punishments; Voltaire, h. t.; Livingston's excellent arguments in his Report on a plan of a penal code. Liv. Syst. Pen. Law, 22; Bentham on Legislation, part 3, ch. 9; Report to the N. Y. Legislature.

CAPITATION. A poll-tax; an imposition which is yearly laid on each person according to his estate and ability. The constitution of the United States provides that "no capitation, or other direct tax, shall be laid, unless in proportion to the census, or enumeration thereinbefore directed to be taken." Art. 1, s. 9, n. 4. See 3 Dall. 171; 5 Wheat. 317.

CAPITE, *descents*, by the head. Distribution or succession per capite is said to take place when every one of the kindred in equal degree, and not *jure representationis*, receive an equal part of an estate.

CAPITULARIES. The Capitularia or Capitularies, was a code of laws promulgated by Childebert, Clotaire, Carloman, Pepin, Charlemagne and other kings. It was so called from the small chapters or heads into which they were divided. The edition by Baluze, published in 1677, is said to be the best.

CAPITULATION, *war*, is the treaty which determines the conditions under which a fortified place is abandoned to the commanding officer of the army which besieges it. On surrender by capitulation, all the property of the inhabitants protected by the articles, is considered by the law of nations as neutral, and not subject to capture on the high seas, by the belligerent or its ally. 2 Dall. 1.

CAPTAIN or SEA CAPTAIN, *mar. law*. The name given to the master or commander of a vessel. He is known in this country very generally by the name of master, (q. v.) He is also frequently denominated patron in foreign laws and books. There are captains in the navy of the United States, who are officers appointed by government, and those who are employed in the service of merchants. It is proposed to consider the duty of the latter. Towards the owner of the vessel he is bound by his personal attention and care, to take all necessary precautions for her safety; to proceed on the voyage in which such vessel may be engaged, and to obey faithfully his instructions; and by all means in his power to promote the interest of his owner. But he is not required to violate good faith, nor employ fraud, even with an enemy. 3 Cranch, 242. Towards others it is the policy of the law to hold him responsible for all losses or damages that may happen to the goods committed to his charge, whether they arise from negligence, ignorance, or wilful misconduct of himself or his mariners or any other on board the ship. As soon, therefore, as goods are put on board, they are in the master's charge, and he is bound to deliver them again in the same state in which they were shipped, and he is answerable for all losses or damages they may sustain, unless it proceed from an inherent defect in the article, or from some accident or misfortune which could not be prevented. It may be laid down as a general rule that the captain is responsible when any loss occurs in consequence of his doing what he ought not to do, unless he was forced by the act of God, the enemies of the United States, or the perils of the sea. 1 Marsh. Ins. 241; Pard. n. 658.

The rights of the captain are, to choose his crew; as he is responsible for their acts, this seems but just, but a reasonable deference to the rights

of the owner require that he should be consulted, as he, as well as the captain is responsible for the acts of the crew. On board, the captain is invested with almost arbitrary power over the crew, being responsible for the abuse of his authority. Abb. on Shipp. 162. He may repair the ship, and, if he is not in funds to pay the expenses of such repairs, he may borrow money, when aboard, on the credit of his owners or of the ship. Abb. on Sh. 127, 8. In such cases, although contracting within the ordinary scope of his powers and duties, he is generally responsible as well as the owner. This is the established rule of the maritime law, introduced in favour of commerce; it has been recognized and adopted by the commercial nations of Europe, and is derived from the civil or Roman law. Abbott, Ship. 90; Story, Ag. § 116 to 123, § 294; Paley, Ag. by Lloyd, 244; 1 Liverm. Ag. 70; Poth. Ob. n. 82; Ersk. Inst. 3, 3, 43; Dig. 4, 9, 1; Poth. Pand. lib. 14, tit. 1; 3 Sumn. R. 228. See Bell's Com. 505, 5th ed.

CAPTATOR, *French law.* The name which is sometimes given to him who by flattery and artifice endeavours to surprise testators and induce them to give legacies or devises, or to make him some other gift. Dict. de Jur.

CAPTION, *practice*, is that part of a legal instrument, as a commission, indictment, &c. which shows where, when, and by what authority it was *taken*, found or executed. In the English practice when an inferior court, in obedience to the writ of certiorari, returns an indictment in the K. B. it is annexed to the caption, then called a schedule. 1 Saund. 309, n. 2. Vide Dane's Ab. Index, h. t. Caption is another name for arrest.

CAPTIVE. By this term is understood one who has been *taken*; it is usually applied to prisoners of war, (q. v.)

CAPTOR, *war*, is one who has taken property from an enemy; this term is also employed to designate one who has taken an enemy. Formerly goods taken in war were adjudged to belong to the captor, they are now considered to vest primarily in the state or sovereign, and belong to the individual captors only to the extent that the municipal laws provide. Captors are responsible to the owners of the property for all losses and damages, when the capture is tortious and without reasonable cause in the exercise of belligerent rights. But if the capture is originally justifiable, the captors will not be responsible, unless by subsequent misconduct they become trespassers *ab initio*. 1 Rob. R. 93, 96. See 2 Gall. 374; 1 Gall. 274; 1 Pet. Adm. Dec. 116; 1 Mason, R. 14.

CAPTURE, *war*, is the taking of property by one belligerent from another. To make a good capture of a ship, it must be subdued and taken by an enemy in open war, or by way of reprisals, or by a pirate, and with intent to deprive the owner of it. 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. B. 1, c. 12, s. 4.

See generally, Lee on Captures, passim; 1 Chitty's Com. Law, 377 to 512; 2 Wooddes. 435 to 457; 2 Caines's C. Err. 158; 7 Johns. R. 449; 3 Caines's R. 155; 11 Johns.

R. 241; 13 Johns. R. 161; 14 Johns. R. 227; 3 Wheat. 183; 4 Cranch, 43; 6 Mass. 197.

CAPUT LUPINUM, *Eng. law*, having the head of a wolf. An outlawed felon was said to have the head of a wolf, and might have been killed by any one legally. Now, such killing would be murder. 1 Hale, Pl. C. 497.

CARCAN, *punishment;* this is a French word which signifies pillory, and is sometimes used in that sense; as is *carcannum* for a prison.

CARDINAL, *eccl. law*, is the title of an ecclesiastical prince, who has an active or passive voice in the conclave when a pope is elected.

CARDS, *crim. law*. Small square paste boards, generally of a fine quality on which are painted figures of various colours, and used for playing different games. The playing of cards for amusement is not forbidden, but gaming for money is unlawful; vide *Faro bank*, and *Gaming*.

CARGO, *mar. law*. The entire load of a ship or other vessel. Abb. on Sh. Index. h. t.; Merl. Rép. h. t. 2 Gill & John. 136.

CARNAL KNOWLEDGE, *crim. law*. This phrase is used to signify a sexual connexion; as, rape is the carnal knowledge of a woman, &c.

CARNALLY KNEW, *pleadings*. This is a technical phrase essential in an indictment to charge the defendant with the crime of rape: no other word or circumlocution will answer the same purpose as these words. Vide *Ravished*, and Bac. Ab. Indictment, G 1; Com. Dig. Indictment, G 6; 1 Hale, 632; 3 Inst. 60; Co. Litt. 137; 1 Chit. Cr. Law, *243. It has been doubted whether these words were indispensable, 1 East, P. C. 448, but it would be unsafe to omit them.

CARRAT, *weights*. A carrat is a weight equal to four grains, in diamonds and the like. Jac. L. Dict.

CARRIERS, *contracts*. There are two kinds of carriers, namely *common carriers*, (q. v.) who have been considered under another head; and private carriers. These latter are persons who, although they do not undertake to transport the goods of such as choose to employ them, yet agree to carry the goods of some particular person for hire, from one place to another. In such case the carrier incurs no responsibility beyond that of any ordinary bailee for hire, that is to say, the responsibility of ordinary diligence. 2 Bos. & Pull. 417; 4 Taunt. 787; Selw. N. P. 382, n.; 1 Wend. R. 272; 1 Hayw. R. 14; 2 Dana, R. 430; 6 Taunt. 577; Jones, Bailm. 121; Story on Bailm. § 495. But in Gordon v. Hutchinson, 1 Watts & Serg. 285, it was holden that a wagoner who carries goods for hire, contracts the responsibility of a common carrier, whether transportation be his principal and direct business, or only an occasional and incidental employment. To bring a person within the description of a common carrier, he must exercise his business as a public employment; he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire, as a business; not as a casual occupation *pro hac vice*. 1 Salk. 249; 1 Bell's Com. 467. 1 Hayw. R. 14; 1 Wend. 272; 2 Dana, R. 430.

CARRYING AWAY, *crim. law*. To complete the crime of larceny, the thief must not only feloniously take the thing stolen, but carry it away. The slightest carrying away will be sufficient; thus to snatch a diamond from a lady's ear, which is instantly dropped among the curls of her hair; 1 Leach, 320; to remove sheets from a bed and carry them into an adjoining room, 1 Leach,

222, n; to take plate from a trunk, and lay it on the floor with intent to carry it away, Ib.; and to remove a package from one part of a wagon to to another, with a view to steal it, 1 Leach, 236, have respectively been holden to be felonies. 2 Chit. Cr. Law, 919. Vide 3 Inst. 108, 109; 1 Hale, 507; Kel. 31; Ry. & Moody, 14; Bac. Ab. Felony, (D); 4 Bl. Com. 231; Hawk. c. 32, s. 25. Where, however, there has not been a complete severance of the possession, it is not a complete carrying away. 2 East, P. C. 556; 1 Hale, 508; 2 Russ. on Cr. 96. Vide *Invito Domino; Larceny; Robbery: Taking.*

CART BOTE, an allowance to the tenant of wood, sufficient for carts and other instruments of husbandry.

CARTE BLANCHE. The signature of an individual or more, on a white paper, with a sufficient space left above it to write a note or other writing. In the course of business, it not unfrequently occurs that for the sake of convenience, signatures in blank are given, with authority to fill them up. These are binding upon the parties. Vide Ch. on Bills, 70. Vide *Blank.*

CARTEL, *war.* An agreement between two belligerent powers for the delivery of prisoners or deserters, and also a written challenge to a duel. *Cartel ship*, is a ship, commissioned in time of war to exchange prisoners, or to carry any proposals between hostile powers; she must carry no cargo, ammunitions, nor implements of war, except a single gun for signals. The conduct of ships of this description cannot be too narrowly watched. The service on which they are sent is so highly important to the interests of humanity, that it is peculiarly incumbent on all parties to take care that it should be conducted in such a manner as not to become a subject of jealousy and distrust between the two nations. 4 Rob. R. 357, vide Merl. Rép. h. t.; Dane's Ab. c. 40, a, 6, § 7; Pet. C. C. R. 106.

CASE, *practice*, is a contested question before a court of justice; a suit or action; a cause. 9 Wheat. 738.

CASE, *remedies*, this is the name of an action, in very general use, which lies where a party sues for damages for any wrong or cause of complaint to which covenant or trespass will not lie. Steph. Pl. 15; 3 Woodd. 167; Ham. N. P. 1. Vide *Writ of trespass on the case.* In its most comprehensive signification, *case*, includes assumpsit as well as an action in form *ex delicto;* but when simply mentioned, it is usually understood to mean an action in form *ex delicto.* 7 T. R. 36. An action on the case lies 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 where the injury was not immediate but consequential; 11 Mass. 59, 137; 1 Yeates, 586; 6 S. & R. 348; 12 S. & R. 210; 18 John. 257; 19 John. 381; 6 Call, 44; 2 Dana, 378; 1 Marsh. 194; 2 H. & M. 423; Harper, 113; Coxe, 339; or where the interest in the property was only in reversion. 8 Pick. 235; 7 Conn. 328; 2 Green, 8; 1 John. 511; 3 Hawks, 246; 2 Murph. 61; 2 N. H. Rep. 430. In these several cases trespass cannot be sustained. 4 T. R. 489; 7 T. R. 9. Case is also the proper remedy for a wrongful act done under legal process regularly issuing from a court of competent jurisdiction. 2 Conn. 700; 11 Mass. 500; 6 Greenl. 421; 1 Bailey, 441, 457; 9 Conn. 141; 2 Litt. 234; 3 Conn. 537; 3 Gill & John. 377. Vide *Regular and irregular process.* It will be proper to consider, 1, in what case this action lies; 2, the pleadings; 3, the evidence; 4, the judgment.

§ 1. This action lies for injuries, 1, to the absolute rights of persons; 2, to the relative rights of persons; 3, to personal property; 4, to real property.

1. When the injury has been done to the absolute rights of persons by an act not immediate but consequential, as in the case of special damages arising from a public nuisance, Willes, 71 to 74; or where an encumbrance had been placed in a public street, and the plaintiff passing there received an injury; or for a malicious prosecution. See *Malicious prosecution.*

2. For injuries to the relative rights, as for enticing away an infant child, *per quod servitium amisit*, 4 Litt. 25; for criminal conversation, seducing or harbouring wives; debauching daughters, but in this case the daughter must live with her father as his servant, see *Seduction;* or enticing away or harbouring apprentices or servants. 1 Chit. Pl. 137; 2 Chit. Plead. 313, 319; when the seduction takes place in the husband or father's house, he may, at his election, have trespass or case. 6 Munf. 587; Gilmer, 33; but when the injury is done in the house of another, case is the proper remedy. 5 Greenl. 546.

3. When the injury to personal property is without force and not immediate, but consequential, or when the plaintiff's right to it is in reversion, as, where property is injured by a third person while in the hands of a hirer, 3 Camp. 187; 2 Murph. 62; 3 Hawks, 246, case is the proper remedy. 3 East, 593; Ld. Raym. 1399; Str. 634; 1 Chit. Pl. 138.

4. When the real property which has been injured is *corporeal*, where the injury is not immediate but consequential, as for example, putting a spout so near the plaintiff's land, as that the water runs upon it; 1 Chit. Pl. 126, 141; Str. 634; or where the plaintiff's property is only in reversion. When the injury has been done to *incorporeal* rights, as for obstructing a private way, or disturbing a party in the use of a pew, or for injury to a franchise, as a ferry, and the like, case is the proper remedy. 1 Chit. Pl. 143.

§ 2. The declaration in case, technically so called, differs from a declaration in trespass, chiefly in this, that in case it must not in general state the injury to have been committed *vi et armis*, 3 Conn. 64; see 2 Ham. 169; 11 Mass. 57; Coxe, 339; after verdict, the words "with force and arms" will be rejected as surplusage. Harp. 122; and it ought not to conclude *contra pacem.* Com. Dig. Action on the case, C 3; the plea is usually the general issue, not guilty.

§ 3. Any matter may, in general, be given in evidence, under the plea of not guilty, except the statute of limitations. In cases of slander and a few other instances, however, this cannot be done. 1 Saund. 130, n. 1; Willes, 20. When the plaintiff declares in case, with averments appropriate to that form of action, and the evidence shows that the injury was trespass; or when he declares in trespass, and the evidence proves an injury for which case will lie, and not trespass, the defendant should be acquitted by the jury, or the plaintiff should be nonsuited. 5 Mass. 560; 16 Mass. 451; Coxe, 339; 3 John. 468.

§ 4. The judgment is, that the plaintiff recover a sum of money, ascertained by a jury, for his damages sustained by the committing of the grievances complained of in the declaration, and costs.

CASE STATED, *practice*, is an agreement in writing, between a plaintiff and defendant, that the facts in dispute between them, are as there agreed upon and mentioned. The facts being thus ascertained, it is left for the court to decide for which

party is the law. As no writ of error lies on a judgment rendered on a case stated, Dane's Ab. c. 137, art. 4, n. § 7, it is usual in the agreement to insert a clause that the case stated shall be considered in the nature of special verdict. In that case, a writ of error lies on the judgment which may be rendered upon it. And a writ of error will also lie on a judgment on a case stated, when the parties have agreed to it. 8 Serg. & Rawle, 529. In another sense by a case stated is understood a statement of all the facts of a case, together with the names of the witnesses, and a detail of the documents which are to support them. In other words, a brief, (q. v.)

CASH, *commerce*, money on hand which a merchant, trader or other person has to do business with. ***Cash price***, in contracts, is the price of articles paid for in cash, in contradistinction of credit price, which is to be paid for some time after the sale. Pard. n. 85; Chipm. Contr. 110. In common parlance, bank notes are considered as cash; but bills receivable are not.

CASH BOOK, *commerce, accounts*, is one in which a merchant or trader enters an account of all the money, or paper moneys he receives or pays. An entry of the same thing ought to be made under the proper dates, in the journal. The object of the cash book is to afford a constant facility to ascertain the true state of a man's cash. Pard. n. 87.

CASHIER. An officer of a monied institution who is entitled by virtue of his office to take care of the cash or money of such institution. The cashier of a bank is usually entrusted with all the funds of the bank, its notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives directly, or through the subordinate officers, all moneys and notes of the bank; delivers up all discounted notes and other securities, when they have been paid; draws checks to withdraw the funds of the bank where they have been deposited; and as the executive officer of the bank, transacts much of the business of the institution. In general the bank is bound by the acts of the cashier within the scope of his authority, expressed or implied. 1 Pet. R. 46, 70; 8 Wheat. R. 300, 361; 5 Wheat. R. 326; 3 Mason's R. 505; 1 Breese, R. 45; 1 Monr. Rep. 179. But the bank is not bound by the declaration of the cashier, not within the scope of his authority; as when a note is about to be discounted by the bank, he tells a person that he will incur no risk nor responsibility by becoming an indorser upon such note. 6 Pet. R. 51; 8 Pet. R. 12. Vide 17 Mass. R. 1; Story on Ag. § 114, 115; 3 Halst. R. 1; 12 Wheat. R. 183; 1 Watts & Serg. 101.

TO CASHIER, *punishment*. To break; to deprive a military man of his office: example, every officer who shall be convicted before a general court martial, of having signed a false certificate relating to the absence of either officer or private soldier, or relative to his daily pay, shall be cashiered. Articles of war, art. 14.

CASSATION, *French law*, is a decision which emanates from the sovereign authority, and by which a sentence or judgment in the last resort is annulled. Merl. Rép. h. t; this jurisdiction is now given to the cour de cassation. This court is composed of fifty-two judges, including four presidents, an attorney-general, and six substitutes, bearing the title of advocates general, a chief clerk, four subordinate clerks, and eight huissiers. Its jurisdiction extends to the examination and superintendence of the judgments and decrees of the inferior court, as a court of errors, both in civil and criminal

cases. It is divided into three sections, namely, the *section des requêtes*, the *section civille*, and the *section criminelle*. Merl. Rép. mot Cour de Cassation.

CASSETUR BREVE, *practice*. That the writ be quashed. This is the name of a judgment which is entered by the plaintiff when he cannot prosecute his writ with effect against the defendant in consequence of some allegation on his, the defendant's part, which puts an end to the proceeding, without paying costs to the defendant, and after which the plaintiff is enabled to commence new process. When a bill has been filed, he may enter a judgment of *cassetur billa*. 3 Bl. Com. 340; and vide 5 T. R; 634; Gould's Plead. c. 5, § 139. Vide *To quash*.

CASTIGATORY, *punishments*, is an engine used to punish women who have been convicted of being common scolds; it is sometimes called the trebucket, tumbrel, ducking stool, or cucking stool. This barbarous punishment has perhaps never been inflicted in the United States. Vide *Common Scold*.

CASTING VOTE, *legislation*, is the vote given by the president or speaker of a deliberative assembly, when the votes of the other members are equal on both sides; the casting vote then decides the question. Dane's Ab. h. t.

CASTRATION, *crim. law*. The act of maliciously depriving a man of one or both his testes; though it usually indicates the deprivation of both. This is a mayhem, and punishable as such, though the patient consented to it. By the ancient law of England this crime was punished by retaliation, *membrum pro membro*, 3 Inst. 118. It is punished in the United States generally by fine and imprisonment. The civil law punished it with death. Dig. 48, 8, 4, 2. For the French law, vide Code Pénal, art. 316. The consequences of castration, when both testes have been removed, are impotence and sterility. 1 Beck's Med. Jur. 72.

CASU CONSIMILI, *practice*, is a writ of entry, granted when the tenant by the curtesy, or tenant for life, aliens in fee, or in tail, or for another's life. It may be brought by the reversioner, against the alienee, in the tenant's lifetime. The clerks in chancery framed this writ in *likeness* to the writ called *in casu proviso*, by authority of the statute Westm. 2, c. 24, hence its name, *casu consimili*, in a like case. Vide 3 Bl. Com. 51; 7 Co. 4; F. N. B. 206.

CASU PROVISO, *practice*, is a writ of entry given by the statute of Gloucester, c. 7, when a tenant in dower aliens in fee or for life. It might have been brought by the reversioner against the alienee. This is perhaps an obsolete remedy, having yielded to the writ of ejectment. F. N. B. 205; Dane's Ab. Index, h. t.

CASUAL EJECTOR, *practice, torts*. Formerly in the trial of right to lands by ejectment, was a person supposed casually or by accident to come upon the land, and turn out the lawful possessor; he was called the casual ejector. Originally in order to try the right by ejectment, several things were necessary to be made out before the court; first a title to the land in question, upon which the owner was to make a formal entry; and being so in possession he executed a lease to some third person or lessee, leaving him in possession; then the prior tenant or some other person, called the casual ejector, either by accident or by agreement beforehand, came upon the land and turned him out, and for this ouster or turning out, the action was brought. But these formalities are now dispensed with, and the trial relates merely to the title, the defendant being bound to acknowledge the lease,

entry, and ouster. 3 Bl. Com. 202; Dane's Ab. Index, h. t.

CASUS OMISSUS, an omitted case. When a statute or an instrument of writing undertakes to foresee and to provide for certain contingencies, and through mistake, or on account of some other cause, a case remains to be provided for, it is said to be a *casus omissus*. For example, when a statute provided for the descent of intestates' estates, and omits a case, the estate descends as it did before the statute. 2 Binn. R. 279. Vide Dig. 38, 1, 44 and 55; Ib. 38, 2, 10; Code, 6, 52, 21 and 30.

CATCHING BARGAIN, *contracts, fraud*, is an agreement made with an heir expectant, for the purchase of his expectancy, at an inadequate price. In such case, the heir is, in general, entitled to relief in equity, and may have the contract rescinded upon terms of redemption. 1 Vern. 167; 2 Cox, 80; 2 Ch. Ca. 136; 2 Vern. 121; 2 Freem. 111; 2 Vent. 359; 2 Rep. in Ch. 396; 1 P. Wms. 312; 3 P. Wms. 290, 293, n.; 1 Cro. C. C. 7; 2 Atk. 133; 2 Swanst. 147, and the cases cited in the note; 1 Fonb. 140; 1 Supp. to Ves. Jr. 66; 2 Ib. 361; 1 Vern. 320, n. It has been said that all persons dealing for a reversionary interest are subject to this rule, but it may be doubted whether the course of decisions authorises so extensive a conclusion, and whether, in order to constitute a title to relief, the reversioner must not combine the character of heir. 2 Swanst. 148, n. Vide 1 Ch. Pr. 112, 113, n., 458, 826, 838, 839. A mere hard bargain is not sufficient ground for relief. The French law is in unison with these principles, an agreement which has for its object the succession of a man yet alive, is generally void. Merl. Rép. mots Succession Future. Vide also Dig. 14, 6, and *Lesion*.

CATCHPOLE, *officer*. This is a nickname given to a sheriff's deputy, or to a constable, or other officer whose duty it is to arrest persons. He is so called because he catches by the poll or head, the party arrested.

CAUSA MATRIMONII PRÆLOCUTI, *Engl. law*, is an obsolete writ which lies when a woman gives land to a man in fee simple, or for a less estate, to the intent that he should marry her and he refuses upon request. New Nat. Bre. 455.

CAUSE, *civ. law*. This word has two meanings. 1. It signifies the delivery of the thing, or the accomplishment of the act which is the object of the convention. *Datio vel factum, quibus ab unâ parte conventio impleri cœpta est*. 6 Toull. n. 13, 166.—2. It is the consideration or motive for making a contract. An obligation without a cause, or with a false or unlawful cause, has no effect; but an engagement is not the less valid, though the cause be not expressed. The cause is illicit, when it is forbidden by law, when it is *contra bonos mores*, or to public order. Dig. 2, 14, 7, 4; Civ. Code of Lo. a. 1887-1894; Code Civil, liv. 3, tit. 3, c. 2, s. 4, art. 1131-1133; Toull. liv. 3, tit. 3, c. 2, s. 4.

CAUSE, *contr. torts, crim*. That which produces an effect. In considering a contract, an injury, or a crime, the law generally looks to the immediate, and not to any remote cause. Bac. Max. Reg. 1; Bac. Ab. Damages, E; Sid. 433; 2 Taunt. 314. If the cause is lawful, the party will be justified, if unlawful, he will be condemned. The following is an example of an immediate and remote cause. If Peter of malice prepense should discharge a pistol at Paul, and miss him, and then cast away the pistol and fly; and, being pursued by Paul, he turn round, and kill him with a dagger, the law considers the first as the impulsive cause, and Peter

would be guilty of murder. But if Peter, with his dagger drawn, had fallen down, and Paul in his haste had fallen upon it and killed himself, the cause of Paul's death would have been too remote to charge Peter as the murderer. Ib. In cases of insurance the general rule is that the immediate and not the remote cause of the loss is to be considered; *causa proximo non remota spectatur*. This rule may in some cases apply to carriers. Story, Bailm. § 515. See also Domat. liv. 3, t. 5, s. 2, n. 4; Toull. liv. 3, n. 286; 6 Bing. R. 716; 6 Ves. 496; Pal. Ag. by Lloyd, 10; Story, Ag. § 200; 3 Sumn. R. 38.

CAUSE, *pleading*. The reason; the motive. In a replication *de injuria*, for example, the plaintiff alleges that the defendant of his own wrong, and *without the cause* by him in his plea alleged, did, &c. The word *cause* here means without the matter of excuse alleged, and though in the singular number, it puts in issue all the facts in the plea, which constitute but one cause. 8 Co. 67; 11 East, 451; 1 Chit. Pl. 585.

CAUSE, *practice*, is a contested question before a court of justice; it is a suit or action. Causes are civil or criminal. Wood's Civ. Law, 302; Code 2, 4, 16.

CAUTION, a term used in the civil law. It nearly corresponds with bail when given in the prosecution of suits or actions. The plaintiff is required to find caution to prosecute his suit; to pay costs, if the judgment be against him, and to confirm the acts of his attorney. Coop. Just. 647. The securities or cautions judicially required of the defendant, are, *judicio sisti*, to attend and appear during the pendency of the suit; *de rato*, to confirm the acts of his attorney or proctor; *judicium solvi*, to pay the sum adjudged against him. Coop. Just. 647; Hall's Admiralty Practice, 12; 2 Brown, Civ. Law, 356.

CAUTION, JURATORY, *in the Scotch law*. Juratory caution is that which a suspender swears is the best he can offer in order to obtain a suspension. Where the suspender cannot, from his low or suspected circumstances, procure unquestionable security, juratory-caution is admitted. Ersk. Pr. L. Scot. 4, 3, 6.

CAUTIONER, *Scotch law*, *contracts*, one who becomes bound as caution or surety for another for the performance of any obligation, or contract contained in a deed.

CAVEAT, *practice*, that he beware. Caveat is the name of a notice given by a party having an interest in the same, to some officer not to do an act, till the party giving the notice shall have been heard; as, a caveat to the register of wills, or judge of probate, not to permit a will to be proved, or not to grant letters of administration until the party shall have been heard. A caveat is also frequently made to prevent a patent for inventions being issued. Ayl. Parer. 145; Nelson's Ab. h. t.; Dane's Ab. c. 223, a. 15, § 2, and a. 8, § 22. See 2 Chit. Pr. 502, note (*b*) for a form.

CAVEAT EMPTOR. Let the purchaser beware. It is a rule of the common law, in which respect it is directly opposed to the civil law, that the purchaser is bound to examine and ascertain the defects in the thing sold, and unless there be some misrepresentation or artifice to disguise it, or some warranty as to its qualities or character, the vendee is bound by the contract, notwithstanding there may be intrinsic defects and vices in it, known to the vendor and unknown to the vendee, materially affecting its value. 2 Kent, Com. Lect. 39, p. 478; 2 Bl. Com. 451; 1 Story, Eq. § 212; 6 Ves. 678; 10 Ves. 505; 3 Cranch, 270; 2 Day, R. 128;

Sugd. Vend. 221. This rule has been severely assailed, not without some appearance of justice, as being the instrument of falsehood and fraud; but although its policy has been frequently questioned, it is too well established to be disregarded. Coop. Just. 611, n.

CAVIL. Sophism, subtlety. Cavil is a captious argument, by which a conclusion evidently false, is drawn from a principle evidently true: *Ea est natura cavillationis ut ab evidentur veris, per brevissimas mutationes disputatio, ad ea quæ evidentur falsa sunt perducatur.* Dig. 50, 16, 177 et 233; Ib. 17, 65; Ib. 33, 2, 88.

CÆSARIAN OPERATION,—*med. jurisp.* An incision made through the pærieties of the abdomen and uterus to extract the fœtus. It is said, that Julius Cæsar was born in this manner. When the child is cut out after the death of the mother, his birth alive confers no rights on other persons than himself, to which they would have been entitled if he had been born during her life; for example, his father would not be tenant by the curtesy, for to create that title, it ought to begin by the birth of issue alive, and be consummated by the death of the wife. 8 Co. Rep. 35; 2 Bl. Com. 128; Co. Litt. 29 b.; 1 Beck's Med. Jur. 264; Coop. Med. Jur. 7. The rules of the civil law on this subject will be found in Dig. lib. 50, t. 16, l. 132 et 141; lib. 5, t. 2, l. 6; lib. 28, t. 2, l. 12.

CEDENT, *Scotch law.* An assignor. The term is usually applied to the assignor of a chose in action. Kames on Eq. 43.

CELEBRATION, *contracts.* This word is usually applied in law to the celebration of marriage, which is the solemn act by which a man and woman take each other for husband and wife, conformably to the rules prescribed by law. Dict. de Juris. h. t.

CENSUS. An enumeration of the inhabitants of a country. For the purpose of keeping the representation of the several states in congress equal, the constitution provides, that "representatives and direct taxes shall be apportioned among the several states, which may be included in this Union, according to their respective numbers; which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such a manner as they shall by law direct." Art. 1, s. 2; vide 1 Story L. U. S., 73, 722, 751; 2 Id. 1134, 1139, 1169, 1194; 3 Id. 1766; 4 Sharsw. continuation, 2179.

CENT, *money*, is a copper coin of the United States of the value of ten mills; ten of them are equal to a dime, and one hundred, to one dollar. Each cent is required to contain one hundred and sixty-eight grains. Act of January 18th, 1837, 4 Sharsw. cont. of Story's L. U. S. 2524.

CENTURY, *civil law.* One hundred. The Roman people were divided into centuries. In England they were divided into hundreds. Vide *Hundred.* Century also means one hundred years.

CEPI, a Latin word signifying I have taken. *Cepi corpus*, I have taken the body; *cepi corpus and B. B.*, I have taken the body and discharged him on bail bond; *cepi corpus et est in custodia*, I have taken the body and it is in custody; *cepi corpus, et est languidus*, I have taken the body and it is sick. These are various returns made by the sheriff to a writ of capias, or process of like nature.

CEPI CORPUS, *in practice*, is

the return which the sheriff, or other proper officer, makes when he has arrested a defendant by virtue of a capias. See *Capias*. F. N. B. 26.

CEPIT IN ALIO LOCO, *pleadings*. He took in another place. This is a plea in replevin, by which the defendant alleges that he took the thing replevied in another place than that mentioned in the plaintiff's declaration. 1 Chit. Pl. 490; 2 Chit. Pl. 558; Rast. Entr. 554, 555; Clift. 636; Willes, R. 475; Tidd's App. 666.

CERTAINTY, UNCERTAINTY, *contracts*; in matters of obligation, a thing is certain, when its essence, quality and quantity, are sufficiently described, such as one hundred dollars, such a house, or such a horse. It is uncertain, when the description is not that of one individual object, but designates only the kind, such as some corn, some wine, a horse. Louis. Code, art. 3522, No. 8; 5 Co. 121. If a contract be so vague in its terms, that its meaning cannot be certainly collected, and the statute of frauds preclude the admissibility of parol evidence to clear up the difficulty, 5 Barn. & Cr. 583; S. C. 12 Eng. Com. L. R. 327; or the parol evidence will not supply the defect, then neither at law, nor in equity, can effect be given to it. 1 Russ. & M. 116; 1 Ch. Pr. 123. It is a maxim of law that that is certain which may be made certain; certum est quod certum reddi potest, Co. Litt. 43; for example, when a man sells the oil he has in his store at so much a gallon, although there is uncertainty as to the quantity of oil, yet inasmuch as it can be ascertained, the maxim applies, and the sale is good. Vide, generally, Story, Eq. Pl. § 240 to 256; Mitf. Eq. Pl. by Jeremy, 41; Coop. Eq. Pl. 5; Wigr. on Disc. 77.

CERTAINTY, *pleading*. By certainty is understood a clear and distinct statement of the facts which constitute the cause of action, or ground of defence, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give the judgment. Cowp. 682; Co. Litt. 303; 2 Bos. & Pull. 267; 13 East, R. 107; Com. Dig. Pleader, C. 17; Hob. 295. Certainty has been stated by Lord Coke, Co. Litt. 303, a, to be of three sorts; namely, 1, certainty to a common intent; 2, to a certain intent in general; and, 3, to a certain intent in every particular. In the case of Dovaston v. Paine, Buller, J. said he remembered to have heard Mr. Justice Aston treat these distinctions as a jargon of words without meaning, 2 H. Bl. 530; they have, however, long been made, and ought not altogether to be departed from.

1. By certainty to a *common intent*, is to be understood, that when words are used which will bear a natural sense, and also an artificial one, or one to be made out by argument or inference, the natural sense shall prevail; it is simply a rule of construction and not of addition; common intent cannot add to a sentence words which were omitted. 2 H. Bl. 530.

2. Certainty to a *certain intent in general*, is a greater degree of certainty than the last, and means what upon a fair and reasonable construction may be called certain, without recurring to possible facts which do not appear, 9 Johns. R. 317; and is what is required in declarations, replications and indictments, in the charge or accusation, and in returns to writs of mandamus. See 1 Saund. 49, n. 1; 1 Dougl. 159; 2 Johns. Cas. 339; Cowp. 682; 2 Mass. R. 363; by some of which authorities, it would seem, certainty to a common intent is sufficient in a declaration.

3. The third degree of certainty,

is that which precludes all argument, inference, or presumption against the party pleading, and is that technical accuracy which is not liable to the most subtle and scrupulous objections, so that it is not merely a rule of construction but of addition; for where this certainty is necessary, the party must not only state the facts of his case in the most precise way, but add to them such as show that they are not to be controverted, and as it were anticipate the case of his adversary. Lawes on Pl. 54, 55. See 1 Chitty on Pl. 235 to 241.

CERTIFICATE, *practice*, is a writing made in any court, and properly authenticated, to give notice to another court of any thing done therein; or it is a writing by which an officer or other person bears testimony that a fact has or has not taken place. There are two kinds of certificates; those required by the law, and those which are merely voluntary: of the first kind are certificates given to an insolvent of his discharge, and those given to aliens that they have been naturalized. Voluntary certificates are those which are not required by law, but which are given of the mere motion of the party. The former are evidence of the facts therein mentioned, while the latter, which are not unfrequently extorted from weakness or ignorance, are not entitled to any credit, because the facts certified may be proved in the usual way under the solemnity of an oath or affirmation. 2 Com. Dig. 306; Ayl. Parerg. 157. Greenl. Ev. § 498.

CERTIFICATE, JUDGE'S, *English practice*. The judge who tries the cause is authorised by several statutes in certain cases to certify, so as to decide when the party or parties shall or shall not be entitled to costs. It is of great importance, in many cases, that these certificates should be obtained at the time of trial. See 3 Camp. R. 316; 5 B. & A. 796; Tidd's Pr. 879; 3 Ch. Pr. 458, 486.

The Lord Chancellor often requires the opinion of the judges upon a question of law; to obtain this a case is framed, containing the admissions on both sides, and upon these the dry legal question is stated; the case is then submitted to the judges, who, after hearing counsel, transmit to the chancellor their opinion. This opinion, signed by judges of the court, is called their *certificate*. See 3 Bl. Comm. 453.

CERTIFICATE, ATTORNEY'S, *in practice. In the English law*. By statute 37 Geo. 3, c. 90, s. 26, 28, attorneys are required to deliver to the commisioners of stamp duties a paper or note in writing, containing the name and usual place of residence of such person, and thereupon, on paying certain duties, such person is entitled to a certificate denoting the payment of such duties, which must be renewed yearly. And by the 30th section, an attorney is liable to the penalty of fifty pounds for practising without.

CERTIFICATION or CERTIFICATE OF ASSISE, a term used in the old English law, applicable to a writ granted for the re-examination or re-trial of a matter passed by assise before justices. F. N. B. 181; 3 Bl. Com. 389. The summary motion for a new trial has entirely superseded the use of this writ, which was one of the means devised by the judges to prevent a resort to the remedy by attaint for a wrong verdict.

CERTIORARI, *practice*. To be certified of; to be informed of. This is the name of a writ issued from a superior court directed to one of inferior jurisdiction, commanding the latter to certify to the former, the record in the particular case. Bac. Ab. h. t.; 4 Vin. Ab. 330; Nels. Ab. h. t.; Dane's Ab. Index, h. t.; 3

Penna. R. 24. A certiorari differs from a writ of error. By the common law, a supreme court has power to review the proceedings of all inferior tribunals, and to pass upon their jurisdiction and decisions on questions of law. But in general the determination of such inferior courts on questions of fact are conclusive, and cannot be reversed on certiorari, unless some statute confers the power on such supreme court. 6 Wend. 564; 10 Pick. 358; 4 Halst. 209. When any error has occurred in the proceedings of the court below, different from the course of the common law, in any stage of the cause, either civil or criminal cases, the writ of certiorari is the only remedy to correct such error, unless some other statutory remedy has been given. 5 Binn. 27; 1 Gill & John. 196; 2 Mass. R. 245; 11 Mass. R. 466; 2 Virg. Cas. 270; 3 Halst. 123; 3 Pick. 194; 4 Hayw. 100; 2 Greenl. 165; 8 Greenl. 293. A certiorari, for example, is the correct process to remove the proceeding of a court of sessions, or of county commissioners in laying out highways. 2 Binn. 250; 2 Mass. 249; 7 Mass. 158; 8 Pick. 440; 13 Pick. 195; 1 Overt. 131; 2 Overt. 109; 2 Pen. 1038; 8 Verm. 271; 3 Ham. 383; 2 Caines, 179; Sometimes the writ of *certiorari* is used as auxiliary process in order to obtain a full return to some other process. When, for example, the record of an inferior court is brought before a superior court by appeal, writ of error, or other lawful mode, and there is a manifest defect, or a suggestion of diminution, a *certiorari* is awarded requiring a perfect transcript and all papers. 3 Dall. R. 413; 3 John. R. 23; 7 Cranch, R. 288; 2 South. R. 270, 551; 1 Blackf. R. 32; 9 Wheat. R. 526; 7 Halst. R. 85; 3 Dev. R. 117; 1 Dev. & Bat. 382; 11 Mass. 414; 2 Munf. R. 229; 2 Cowen, R. 38.

CESSET EXECUTIO, is the staying of an execution. When a judgment has been entered, there is sometimes by the agreement of the parties, a *cesset executio* for a period of time fixed upon; and when the defendant enters security for the amount of the judgment, there is a *cesset executio* until the time allowed by law has expired.

CESSAVIT, *Eng. law*, is an obsolete writ which could formerly have been sued out when the defendant had for two years *ceased* or neglected to perform such service or to pay such rent as he was bound to do by his tenure, and had not upon his lands sufficient goods or chattels to be distrained. F. N. B. 208.

CESSIO BONORUM, *civil law*. The relinquishment which a debtor made of his property for the benefit of his creditors. This exempted the debtor from imprisonment, not, however, without leaving an ignominious stain on his reputation. Dig. 2, 4, 25; Ib. 48, 19, 1; Nov. 4, c. 3, and Nov. 135. By the latter Novel, an honest unfortunate debtor might be discharged by simply affirming that he was insolvent, without having recourse to the benefit of cession. By the cession the creditors acquired title to all the property of the insolvent debtor. Vide, for the law of Louisiana, Code art. 2166, et seq. 2 M. R. 112; 2 L. R. 354; 11 L. R. 531; 5 N. S. 299; 2 L. R. 39; 2 N. S. 108; 3 M. R. 232; and *Abandonment*.

CESSION, *contracts*, yielding up; release. France ceded Louisiana to the United States by the treaty of Paris, of April 30, 1803; Spain made a cession of East and West Florida, by the treaty of February 22, 1819. Cessions have been severally made of a part of their territory, by New York, Virginia, Massachusetts, Connecticut, South Carolina, North Carolina, and Georgia. Vide Gord. Dig. art. 2236 to 2250.

CESSION, *eccl. law.* When an ecclesiastic is created bishop, or a parson of a parsonage takes another benefice, without dispensation, the first benefice becomes void by a legal cession, or surrender. Cowel, h. t.

CESTUI QUE TRUST, a barbarous phrase to signify the beneficiary of an estate held in trust. He for whose benefit another person is enfeoffed or seised of land or tenements. The *cestui que trust* is entitled to receive the rents and profits of the land; he may direct such conveyances, consistent with the trust deed or will, as he shall choose, and the trustee (q. v.) is bound to execute them; he may defend his title in the name of the trustee. 1 Cruise, Dig. tit. 12, c. 4, s. 4; vide Vin. Ab. Trust, U, W, X, and Y; 1 Vern. 14; Dane's Ab. Index, h. t.

CESTUI QUE VIE, he for whose life land is holden by another person; the latter is called *tenant per auter vie*, or tenant for another's life. Vide Dane's Ab. Index, h. t.

CESTUI QUE USE, he to whose use land is granted to another person; the latter is called the terre-tenant, having in himself the legal property and possession; yet not to his own use, but to dispose of it according to the directions of the cestui que use, and to suffer him to take the profits. Vide Bac. Read. on Stat. of Uses, 303, 309, 310, 335, 349; 7 Com. Dig. 593.

CHAFEWAX, *Eng. law.* An officer in chancery who fits the wax for sealing to the writs, commissions and other instruments then made to be issued out. He is probably so called because he warms (chaufe), the wax.

CHAFFERS, anciently signified wares and merchandise; hence the word *chaffering*, which is yet used for buying and selling, or beating down the price of an article. The word is used in stat. 3 Ed. 3, c. 4.

CHAIRMAN, is the presiding officer of a committee; as, chairman of the committee of ways and means. The person selected to preside over a popular meeting is also called a chairman or moderator.

CHALDRON. A measure of capacity, equal to fifty-eight and two-third cubic feet nearly. Vide *Measure*.

CHALLENGE. This word has several significations. 1. It is an objection to a person or thing; as, I challenge such a juror. 2. A call by one person of another to single combat, which is said to be a challenge to fight.

CHALLENGE, *criminal law*, is a request by one person to another to fight a duel. It is a high offence at common law, and indictable as tending to a breach of the peace. It may be in writing or verbally. Vide Hawk. P. C. b. 1, c. 63, s. 3; 6 East, R. 464; 3 East, R. 581; 1 Dana, R. 524; 1 South. R. 40; 3 Wheel. Cr. C. 245; 3 Rogers's Rec. 133; 2 M'Cord, R. 334; 1 Hawks, R. 487; 1 Const. R. 107. He who carries a challenge is also punishable by indictment. In most of the states, this barbarous practice is punishable by special laws.

In most of the civilized nations challenging another to fight is a crime, as calculated to destroy the public peace, and those who partake in the offence are generally liable to punishment. It is punished by loss of offices, rents, and honours received from the king, in Spain, and the delinquent is incapable to hold them in future. Aso. & Man. Inst. B. 2, t. 19, c. 2, § 6. See, generally, 6 J. J. Marsh. 120; 1 Munf. 468; 1 Russ. on Cr. 275.

CHALLENGE, *practice*, is an exception made to jurors who are to pass on a trial. It will be proper here to consider, 1, the several kinds of challenges; 2, by whom they are

to be made; 3, the time and manner of making them.

§ 1. The several kinds of challenges may be divided into those which are peremptory, and those which are for cause.

1. Peremptory challenges are those which are made without assigning any reason, and which the court must allow. The number of these which the prisoner was allowed at common law, in all cases of felony, was thirty-five, or one under three full juries. This is regulated by the local statutes of the different states, and the number, except in capital cases, has been probably reduced.

2. Challenges for cause are to the array or to the polls.—1. A challenge to the array is made on account of some defect in making the return to the venire, and is at once an objection to all the jurors in the panel. It is either a principal challenge, that is, one founded on some manifest partiality, or error committed in selecting, depositing, drawing or summoning the jurors, by not pursuing the directions of the acts of the legislature; or a challenge for favour.—2. A challenge to the polls is an objection made separately to each juryman as he is about to be sworn. Challenges to the polls like those to the array, are either principal or to the favour. *First*, principal challenges may be made on various grounds, 1st, *propter defectum*, on account of some personal objection, as alienage, infancy, old age, or the want of those qualifications required by legislative enactment. 2d. *Propter affectum*, because of some presumed or actual partiality in the juryman who is made the subject of the objection; on this ground a juror may be objected to, if he is related to either within the ninth degree, or is so connected by affinity; this is supposed to bias the juror's mind, and is only a presumption of partiality. Much stronger is the reason for this challenge, where the juryman has expressed his wishes as to the result of the trial, or his opinion of the guilt or innocence of the defendant. 4 Harg. St. Tr. 748; Hawk. b. 2, c. 43, s. 28; Bac. Ab. Juries, E 5.—3. The third ground of principal challenge to the polls, is *propter delictum*, or the legal incompetency of the juror on the ground of infamy. The court when satisfied from their own examination, decide as to the principal challenges to the polls, without any further investigation; and there is no occasion for the appointment of triers. Co. Litt. 157, b; Bac. Ab. Juries, E 12; 8 Watts, R. 304. *Secondly*. Challenges to the poll for favour may be made, when although the juror is not so evidently partial that his supposed bias will be sufficient to authorise a principal challenge, yet there are reasonable grounds to suspect that he will act under some undue influence or prejudice. The causes for such challenge are manifestly very numerous, and depend on a variety of circumstances. The fact to be ascertained is, whether the juryman is altogether indifferent as he stands unsworn, because, even unconsciously to himself, he may be swayed to one side. The line which separates the causes for principal challenges, and for challenge to the favour, is not very distinctly marked. That the juror has acted as godfather to the child of the prosecutor or defendant, is cause for a principal challenge, Co. Litt. 157, a; while the fact that the party and the juryman are fellow servants, and that the latter has been entertained at the house of the former, is only cause for challenge to the favour. Co. Litt. 147; Bac. Ab. Juries, E 5. Challenges to the favour are not decided upon by the court, but are settled by triers, (q. v.)

§ 2. The challenges may be made

by the government, or those who represent it, or by the defendant, in criminal cases; or they may be made by either party in civil cases.

§ 3. As to the time of making the challenge, it is to be observed that it is a general rule, that no challenge can be made either to the array or to the polls, until a full jury have made their appearance, because if that should be the case, the issue will remain pro defectu juratorem; and on this account, the party who intends to challenge the array, may, under such a contingency, pray a tales to complete the number, and then object to the panel. The proper time of challenging, is between the appearance and the swearing of the jurors. The order of making challenges is to the array first, and should not that be supported, then to the polls; challenging any one juror waives the right of challenging the array. Co. Litt. 158, a; Bac. Ab. Juries, E 11. The proper manner of making the challenge, is to state all the objections against the juror at one time; and the party will not be allowed to make a second objection to the same juror, when the first has been overruled. But when a juror has been challenged on one side, and found indifferent, he may still be challenged on the other. When the juror has been challenged for cause and been pronounced impartial, he may still be challenged peremptorily. 6 T. R. 531; 4 Bl. Com. 356; Hawk. b. 2, c. 46, s. 10.

As to the mode of making the challenge, the rule is, that a challenge to the array must be in writing, but when it is only to a single individual, the words "I challenge him," are sufficient in a civil case, or on the part of the defendant, in a criminal case; when the challenge is made for the prosecution, the attorney-general says, "we challenge him." 4 Harg. St. Tr. 740; Tr. per Pais, 172; and see Cro. C. C. 105; 2 Lil. Entr. 472; 10 Wentw. 474; 1 Chit. Cr. Law, 533 to 551.

CHAMBER. A room in a house. It was formerly held that no freehold estate could be had in a chamber, but it was afterwards ruled otherwise. When a chamber belongs to one person, and the rest of the house with the land is owned by another, the two estates are considered as two separate but adjoining dwelling houses. Co. Litt. 48, b; Bro. Ab. Demand, 20; 4 Mass. 575; 6 N. H. Rep. 555; 9 Pick. R. 297; vide 3 Leon. 210; 3 Watts, R. 243.

CHAMBER OF COMMERCE. A society of the principal merchants and traders of a city, who meet to promote the general trade and commerce of the place. Some of these are incorporated, as in Philadelphia.

CHAMBERS, *practice*. When a judge decides some interlocutory matter, which has arisen in the course of the cause, out of court, he is said to make such decision at his chambers. The most usual applications at chambers take place in relation to taking bail, and staying proceedings on process.

CHAMPART, *French law*. By this name was formerly understood the grant of a piece of land by the owner to another, on condition that the latter would deliver to him a portion of the crops. 18 Toull. n. 182.

CHAMPERTOR, *crim. law*, one who moves pleas or suits, or causes them to be moved, either directly or indirectly, and sues them at his proper costs, upon condition of having a part of the gain.

CHAMPERTY, *crimes*, is a bargain with a plaintiff or defendant, *campum partire*, to divide the land or other matter sued for, between them, if they prevail at law, the champertor undertaking to carry on the suit at his own expense. 1 Pick. 416; 1 Ham. 132; 5 Monr. 416; 4

Litt. 117; 5 John. Ch. R. 44. This offence differs from maintenance, in this, that in the latter the person assisting the suitor receives no benefit, while in the former he receives one half, or other portion, of the thing sued for. Punishment, fine and imprisonment. 4 Bl. Com. 135. This was an offence in the civil law. Poth. Pand. lib. 3, t. 1. App. n. 1, tom. 3, p. 104; 15 Ves. 139; 7 Bligh's R. 369; S. C. 20 E. C. L. R. 165; 5 Moore & P. 193; 6 Carr. & P. 749, S. C. 25 E. C. L. R. 631; 1 Russ. Cr. 179; Hawk. P. C. b. 1, c. 84, s. 5. To maintain a defendant may be champerty. Hawk. P. C. b. 1, c. 84, s. 8; 3 Ham. 541; 6 Monr. 392; 8 Yerg. 484; 8 John. 479; 1 John. Ch. R. 444; 7 Wend. 152; 3 Cowen, 624; 6 Cowen, 90.

CHAMPION, he who fights for another, or takes his place in a quarrel; it also includes him who fights his own battles. Bract. lib. 4, t. 2, c. 12.

CHANCE, *accident.* As the law punishes a crime only when there is an intention to commit it, it follows that when those acts are done in the performance of a lawful act by mere chance or accident, which would have amounted to a crime if there had been an intention express or implied to commit them, there is no crime. For example, if workmen were employed in blasting rocks in a retired field, and a person not knowing of the circumstance should enter the field, and be killed by a piece of the rock, there would be no guilt in the workmen. 1 East, P. C. 262; Foster, 262; 1 Hale's P. C. 472; 4 Bl. Com. 192. Vide *Accident.*

CHANCE-MEDLEY, *criminal law*, is a sudden affray; this word is sometimes applied to any manner of homicide by misadventure, but in strictness it is applicable to such killing only as happens *se defendendo*, (q. v.) 4 Bl. Com. 184.

CHANCELLOR, is an officer appointed to preside over a court of chancery, invested with various powers, in the several states. The office of chancellor is of Roman origin. He appears at first to have been a chief scribe or secretary, but he was afterwards invested with judicial power, and had the superintendence over the other officers of the empire. From the Romans, the title and office passed to the church, and therefore every bishop of the catholic church has to this day, his chancellor, the principal judge of his consistory. When the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities, according to their different constitutions. In all he seems to have had a supervision of all charters, letters and such other public instruments of the crown, as were authenticated in the most solemn manner, and when seals came into use, he had the custody of the public seal. An officer bearing this title is to be found in most countries of Europe, and is generally invested with extensive authority. The title and office of chancellor came to us from England. Many of our state constitutions provide for the appointment of this officer, who is by them, and by the laws of the several states, invested with power as they provide. Vide Encyclopédie, h. t.; Encycl. Amer. h. t.; Dict. de Jur. h. t.; Merl. Rép. h. t.; 4 Vin. Ab. 374; Blake's Ch. Index, h. t.; Wooddes. Lect. 95.

CHANCERY. The name of a court exercising jurisdiction at law, but mainly in equity. It is not easy to determine how courts of equity originally obtained the jurisdiction they now exercise. Their authority and the extent of it have been subjects of much question, but time has firmly established them; and the limits of their jurisdiction seem to be

in a great degree fixed and ascertained. 1 Story on Eq. ch. 2; Mitf. Pl. Introd.; Coop. Eq. Pl. Introd.

The judge of the court of chancery, often called a court of equity, bears the title of chancellor. The equity jurisdiction in England is vested, principally, in the high court of chancery. This court is distinct from courts of law. "American courts of equity are, in some instances, distinct from those of law; in others, the same tribunals exercise the jurisdiction both of courts of law and equity, though their forms of proceeding are different in their two capacities. The supreme court of the United States, and the circuit courts, are invested with general equity powers, and act either as courts of law or equity, according to the form of the process and the subject of adjudication. In some of the states, as New York, Virginia and South Carolina, the equity court is a distinct tribunal, having its appropriate judge, or chancellor, and officers. In most of the states, the two jurisdictions centre in the same judicial officers, as in the courts of the United States; and the extent of equity jurisdiction and proceedings is very various in the different states, being very ample in Connecticut, New York, New Jersey, Maryland, Virginia and South Carolina, and more restricted in Maine, Massachusetts, Rhode Island and Pennsylvania. But the salutary influence of these powers on the judicial administration generally, by the adaptation of chancery forms and modes of proceeding to many cases in which a court of law affords but an imperfect remedy, or no remedy at all, is producing a gradual extension of them in those states where they have been heretofore very limited."

The jurisdiction of a court of equity differs essentially from that of a court of law. The remedies for wrongs or for the enforcement of right, may be distinguished into two classes; "those which are administered in courts of law, and those which are administered in courts of equity. The rights secured by the former are called *legal*; those secured by the latter are called *equitable*. The former are said to be rights and remedies at common law, because recognised and enforced in courts of common law. The latter are said to be rights and remedies in *equity*, because they are administered in courts of equity or chancery, or by proceedings in other courts analogous to those in courts of equity or chancery. Now, in England and America, courts of common law proceed by certain prescribed forms, and give a *general* judgment for or against the defendant. They entertain jurisdiction only in certain actions, and give remedies according to the particular exigency of such actions. But there are many cases in which a simple judgment for either party, without qualifications and conditions, and particular arrangements, will not do entire justice, *ex æquo et bono*, to either party. Some modification of the rights of both parties are required; some restraints on one side or the other; and some peculiar adjustments, either present or future, temporary or perpetual. Now, in all these cases, courts of common law have no methods of proceeding, which can accomplish such objects. Their forms of actions and judgment are not adapted to them. The proper remedy cannot be found, or cannot be administered to the full extent of the relative rights of all parties. Such prescribed forms of actions are not confined to our law. They were known in the civil law; and the party could apply them only to their original purposes. In other cases, he had a special remedy. In such cases, where the courts of common law cannot grant the proper

remedy or relief, the law of England and of the United States (in those states where equity is administered) authorises an application to the courts of equity or chancery, which are not confined or limited in their modes of relief by such narrow regulations, but which grant relief to all parties, in cases where they have rights, *ex æquo et bono*, and modify and fashion that relief according to circumstances. The most general description of a court of equity is, that it has jurisdiction in cases where a plain, adequate and complete remedy cannot be had at law; that is, in the common law courts. The remedy must be ***plain;*** for, if it be doubtful and obscure at law, equity, will assert a jurisdiction. So it must be ***adequate*** at law; for, if it fall short of what the party is entitled to, that founds a jurisdiction in equity. And it must be ***complete;*** that is, it must attain its full end at law; it must reach the whole mischief and secure the whole right of the party, now and for the future; otherwise equity will interpose, and give relief. The jurisdiction of a court of equity is sometimes concurrent with that of courts of law; and sometimes it is exclusive. It exercises concurrent jurisdiction in cases where the rights are purely of a ***legal*** nature, but where other and more efficient aid is required than a court of law can afford, to meet the difficulties of the case, and ensure full redress. In some of these cases courts of law formerly refused all redress; but now will grant it. But the jurisdiction having been once justly acquired at a time when there was no such redress at law, it is not now relinquished. The most common exercise of concurrent jurisdiction is in cases of account, accident, dower, fraud, mistake, partnership and partition. The remedy is here often more complete and effectual than it can be at law. In many cases falling under these heads, and especially in some cases of fraud, mistake and accident, courts of law cannot and do not afford any redress; in others they do, but not always in so perfect a manner. A court of equity also is assistant to the jurisdiction of courts of law, in many cases, where the latter have no like authority. It will remove legal impediments to the fair decision of a question depending at law. It will prevent a party from improperly setting up, at a trial, some title or claim, which would be inequitable. It will compel him to discover, on his own oath, facts which he knows are material to the right of the other party, but which a court of law cannot compel the party to discover. It will perpetuate the testimony of witnesses to rights and titles, which are in danger of being lost before the matter can be tried. It will provide for the safety of property in dispute pending litigation. It will counteract and control, or set aside, fraudulent judgments. It will exercise, in many cases, an ***exclusive*** jurisdiction. This it does in all cases of merely ***equitable rights***, that is, such rights as are not recognised in courts of law. Most cases of trust and confidence fall under this head. Its exclusive jurisdiction is also extensively exercised in granting special relief beyond the reach of the common law. It will grant injunctions to prevent waste, or irreparable injury, or to secure a settled right, or to prevent vexatious litigations, or to compel the restitution of title deeds; it will appoint receivers of property, where it is in danger of misapplication; it will compel the surrender of securities improperly obtained; it will prohibit a party from leaving the country in order to avoid a suit; it will restrain any undue exercise of a legal right, against conscience and equity; it will decree a specific per-

formance of contracts respecting real estates; it will, in many cases, supply the imperfect execution of instruments, and reform and alter them according to the real intention of the parties; it will grant relief in cases of lost deeds or securities; and, in all cases in which its interference is asked, its general rule is, that he who asks equity must do equity. If a party, therefore, should ask to have a bond for a usurious debt given up, equity could not decree it unless he could bring into court the money honestly due without usury. This is a very general and imperfect outline of the jurisdiction of a court of equity; in respect to which it has been justly remarked, that, in matters within its exclusive jurisdiction, where substantial justice entitles the party to relief, but the positive law is silent, it is impossible to define the boundaries of that jurisdiction, or to enumerate, with precision, its various principles." Ency. Am. art. Equity.

Vide Fonb. Eq.; Story on Eq.; Smith on Eq.; Madd. Ch. Pr.; 10 Amer. Jur. 227; Coop. Eq. Pl.; Redesd. Pl.; Newl. Ch. Practice; Beames's Pl. Eq.; Jeremy on Eq.; Encycl. Amer. article Equity.

CHANGE. The exchange of money for money. The giving, for example, dollars for eagles, dimes for dollars, cents for dimes. This is a contract which always takes place in the same place. By change is also understood small money. Poth. Contr. de Change, n. 1.

CHANGE TICKET. The name given in Arkansas to a species of promissory notes issued for the purpose of making change in small transactions. Ark. Rev. Stat. ch. 24.

CHAPLAIN. A clergyman appointed to say prayers and perform divine service. Each house of congress usually appoints its own chaplain.

CHAPMAN. One whose business is to buy and sell goods or other things. 2 Bl. Com. 476.

CHAPTER, *eccl. law.* A congregation of clergymen. Such an assembly is termed capitulum, which signifies a little head; it being a kind of head, not only to govern the diocese in the vacation of the bishopric, but also for other purposes. Co. Litt. 103.

CHARACTER, *evidence*, is the opinion generally entertained of a person, derived from the common report of the people who are acquainted with him. 3 Serg. & R. 336; 3 Mass. 192; 3 Esp. C. 236. There are three classes of cases on which the moral character and conduct of a person in society may be used in proof before a jury, each resting upon particular and distinct grounds. Such evidence is admissible, 1st, To afford a presumption that a particular party has not been guilty of a criminal act; 2dly, To affect the damages in particular cases, where their amount depends on the character and conduct of any individual; and, 3dly, To impeach or confirm the veracity of a witness.

1. Where the guilt of an accused party is doubtful, and the character of the supposed agent is involved in the question, a presumption of innocence arises from his former conduct in society, as evidenced by his general character, since it is not probable that a person of known probity and humanity, would commit a dishonest or outrageous act in the particular instance. Such presumptions, however, are so remote from fact, and it is frequently so difficult to estimate a person's real character, that they are entitled to little weight, except in doubtful cases. Since the law considers a presumption of this nature to be admissible, it is in principle admissible whenever a reasonable presumption arises from it, as to the fact in question; in practice

it is admitted whenever the character of the party is involved in the issue. See 2 St. Tr. 1038; 1 Coxe's Rep. 424; 5 Serg. & R. 352; 3 Bibb, R. 195; 2 Bibb, R. 286; 5 Day, R. 260; 5 Esp. C. 13; 3 Camp. C. 519; 1 Camp. C. 460; Str. R. 925.

2. In some instances evidence in disparagement of character is admissible, not in order to prove or disprove the commission of a particular fact, but with a view to damages. In actions for criminal conversation with the plaintiff's wife, evidence may be given of the wife's general bad character, for want of chastity, and even of particular acts of adultery committed by her, previous to her intercourse with the defendant. B. N. P. 27, 296; 12 Mod. 232; 3 Esp. C. 236. See 5 Munf. 10. In actions for slander and libel, when the defendant has not justified, evidence of the plaintiff's bad character has also been admitted. 3 Camp. C. 251; 1 M. & S. 284; 2 Esp. C. 720; 2 Nott & M'Cord, 511; 1 Nott & M'Cord, 268; and see 11 Johns. R. 38; 1 Root, R. 449; 1 Johns. R. 46. The ground of admitting such evidence is, that a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished. When, however, the defendant justifies the slander, it seems to be doubtful whether the evidence of reports as to the conduct and character of the plaintiff can be received. See 1 M. & S. 286, n. (a); 3 Mass. R. 553; 1 Pick. R. 19.

3. The party against whom a witness is called, may disprove the facts stated by him, or may examine other witnesses as to his general character; but they will not be allowed to speak of particular facts or parts of his conduct. B. N. P. 296. For example, evidence of the general character of a prosecutrix for a rape may be given, as that she was a street walker; but evidence of specific acts of criminality cannot be admitted. 3 Carr. & P. 589. The regular mode is to inquire whether the witness under examination has the means of knowing the former witness's general character, and whether from such knowledge he would believe him on his oath. 4 St. Tr. 693; 4 Esp. C. 102. In answer to such evidence against character, the other party may cross-examine the witness as to his means of knowledge, and the grounds of his opinion; or he may attack such witness's general character, and by fresh evidence support the character of his own. 2 Stark. C. 151; Ib. 241; St. Ev. pt. 4, 1753 to 1758; 1 Phil. Ev. 229. A party cannot give evidence to confirm the good character of a witness, unless his general character has been impugned by his antagonist. 9 Watts, R. 124.

See in general as to character, Phil. Ev. Index, tit. Character; Stark. Ev. pl. 4, 364; Swift's Ev. 140 to 144; 5 Ohio R. 227; Greenl. Ev. § 54.

CHARGE, *practice*, is the opinion expressed by the court to the jury on the law arising out of a case before them. It should contain a clear and explicit exposition of the law, when the points of the law in dispute arise out of the facts proved on the trial of the cause, 10 Pet. 657; but the court ought at no time to undertake to decide the facts, for these are to be decided by the jury. 4 Rawle's R. 195; 2 Penna. R. 27; 4 Rawle's 356; Ib. 100; 2 Serg. & Rawle, 464; 1 Serg. & Rawle, 515; 8 Serg. & Rawle, 150. See 3 Cranch, 298; 6 Pet. 622; 1 Gall. R. 53; 5 Cranch, 187; 2 Pet. 625; 9 Pet. 541.

CHARGE, *contracts*, is an obligation entered into by the owner of an estate which makes the estate responsible for its performance. Vide

2 Ball & Beatty, 223; 8 Com. Dig. *306, Appendix, h. t. Any obligation binding upon him who enters into it, which may be removed or taken away by a discharge. T. de la Ley, h. t.

CHARGE, *wills, devises*, is an obligation which a testator imposes on his devisee; as, if the testator give Peter, Blackacre, and directs that he shall pay to John during his life an annuity of one hundred dollars which is to be a charge on said land; or if a legacy be given and directed to be paid out of the real property. 1 Rop. Leg. 446. Vide 4 Vin. Ab. 449; 1 Supp. to Ves. jr. 309; 2 Ib. 31; 1 Vern. 45, 411; 1 Swanst. 28; 4 East, R. 501; 4 Ves. jr. 815; Domat, Loix Civ. liv. 3, t. 1, s. 8, n. 2.

CHARGE' DES AFFAIRES or CHARGE' D'AFFAIRES, *international law*. These phrases, the first of which is used in the acts of congress, are synonymous. The officer who bears this title is a diplomatic representative or minister of an inferior grade, to whose care are confided the affairs of his nation. He has not the title of minister, and is generally introduced and admitted through a verbal presentation of the minister, at his departure, or through letters of credence addressed to the minister of state of the court to which they are sent. He has the essential rights of a minister. Mart. Law of Nat. 206; 1 Kent, Com. 39, n.; 4 Dall. 321. The president is authorised to allow to any chargé des affaires a sum not greater than at the rate of four thousand five hundred dollars per annum, as a compensation for his personal services and expenses. Act of May 1, 1810, 2 Story's Laws U. S. 1171.

CHARGER, *Scotch law*, is he in whose favour a decree suspended is pronounced; yet a decree may be suspended before a charge is given on it. Ersk. Pr. L. Scot. 4, 3, 7.

CHARITY, in its widest sense, denotes all the good affections which men ought to bear towards each other, 1 Epistle to Cor. c. xiii.; in its most restricted and usual sense, it signifies relief of the poor. This species of charity is a mere moral duty, which cannot be enforced by the law. Kames on Eq. 17. But it is not employed in either of these senses in law; its signification is derived chiefly from the statute of 43 Eliz. c. 4. Those purposes are considered charitable which are enumerated in that act, or which by analogy are deemed within its spirit and intendment. 9 Ves. 405; 10 Ves. 541; 2 Vern. 387; Shelf. Mortm. 59. Lord Chancellor Camden describes a charity to be a gift to a general public use, which extends to the rich as well as to the poor, Ambl. 651; Boyle on Charities, 51; 2 Ves. sen. 52; Ambl. 713; 2 Ves. jr. 272; 6 Ves. 404; 3 Rawle, 170; 1 Penna. R. 49; 2 Dana, 170; 2 Pet. 584; 3 Pet. 99, 498; 9 Cow. 481; 1 Hawks, 96; 12 Mass. 537; 17 S. & R. 88; 7 Verm. 241; 5 Harr. & John. 392; 6 Harr. & John. 1; 9 Pet. 566; 6 Pet. 435; 9 Cranch, 331; 4 Wheat. 1; 9 Wend. 394; 2 N. H. Rep. 21, 510; 9 Cow. 437; 7 John. Ch. R. 292; 3 Leigh, 450; 1 Dev. Eq. Rep. 276.

CHARRE OF LEAD, *Eng. law, in commerce*, is a quantity of lead consisting of thirty pigs, each pig containing six stones wanting two pounds, and every stone being twelve pounds. Jacob.

CHARTA, an ancient word which signified not only a charter or deed in writing, but any signal or token by which an estate was held.

CHARTER, is a grant made by the sovereign either to the whole people or to a portion of them, securing to them the enjoyment of certain rights. Of the former kind is the present charter of France, which extends to the whole country; the charters which were granted to the dif-

ferent American colonies by the British government were charters of the latter species. 1 Story, Const. L. § 161; 1 Bl. Com. 108; Encycl. Amer. Charte Constitutionelle. A charter differs from a constitution in this, that the former is granted by the sovereign while the latter is established by the people themselves: both are the fundamental law of the land. This term is susceptible of another signification. During the middle ages almost every document was called *carta*, *charta* or *chartula*. In this sense the term is nearly synonymous with deed. Co. Litt. 6; 1 Co. 1; Moor. Cas. 687. The act of the legislature creating a corporation, is called its charter. Vide 2 Bro. Civ. and Adm. Law, 188; Dane's Ab. h. t.

CHARTER, *mar. contr.*, is an agreement by which a vessel is hired by the owner to another; as, A B chartered the ship Benjamin Franklin to C D.

CHARTER-PARTY, *contracts*, is a contract of affreightment in writing, by which the owner of a ship or other vessel lets the whole, or a part of her, to a merchant or other person for the conveyance of goods, on a particular voyage, in consideration of the payment of freight. This instrument ought to contain, 1, the name and tonnage of the vessel; 2, the name of the captain; 3, the names of the letter to freight and the freighter; 4, the place and time agreed upon for the loading and discharge; 5, the price of the freight; 6, the demurrage or indemnity in case of delay; 7, such other conditions as the parties may agree upon. Abbott on Ship. pt. 3, c. 1, s. 1 to 6; Poth. h. t. n. 4; Pardessus, Dr. Com. pt. 4, t. 4, c. 1, n. 708. When a ship is chartered this instrument serves to authenticate many of the facts on which the proof of her neutrality must rest, and should therefore be always found on board chartered ships. 1 Marsh. Ins. 407. When the goods of several merchants unconnected with each other, are laden on board without any particular contract of affreightment with any individual for the entire ship, the vessel is called a *general ship*, (q. v.) because open to all merchants; but where one or more merchants, contract for the ship exclusively, it is said to be a *chartered* ship. 3 Kent, Com. 158; Abbott, Ship. pt. 2, c. 2, s. 1; Harr. Dig. Ship and Shipping, IV.

CHARTERED SHIP. When a ship is hired or freighted by one or more merchants for a particular voyage or on time, it is called a chartered ship. It is freighted by a special contract of affreightment, executed between the owners, ship's husband, or master on the one hand, and the merchants on the other. It differs from a *General ship*, (q. v.)

CHARTIS REDDENDIS, *Eng. law*, an ancient writ, now obsolete, which lays against one who had charters of feoffment entrusted to his keeping, and who refused to deliver them. Reg. Orig. 159.

CHASE, *Eng. law*, is the liberty of keeping beasts of chase, or royal game, on another man's ground as well as on one's own ground, protected even from the owner of the land, with a power of hunting them thereon. It differs from a park, because it may be on another's ground, and because it is not enclosed. 2 Bl. Com. 38.

CHASE, *property*, is the act of acquiring possession of animals *feræ naturæ* by force, cunning or address. The hunter acquires a right to such animals by occupancy, and they become his property. 4 Toull. n. 7. No man has a right to enter on the lands of another for the purpose of hunting without his consent. Vide 14 East, R. 249; Poth. Tr. du Dr. de Propriété, part. 1, c. 2, art. 2.

CHATTELS, *property*, is a term

which includes all kinds of property except the freehold or things which are parcel of it. It is a more extensive term than *goods* or *effects*. Chattels are personal or real. *Personal* are such as belong immediately to the person of a man; chattels *real* are such as either appertain not immediately to the person, but to something by way of dependency, as a box with the title deeds of lands; or such as are issuing out of some real estate, as a lease of lands, or term of years, which pass like personalty to the executor of the owner. Co. Litt. 118; 1 Chit. Pr. 90; 8 Vin. Ab. 296; 11 Vin. Ab. 166; 14 Vin. Ab. 109; Bac. Ab. Baron, &c. (C 2); 2 Kent, Com. 278; Dane's Ab. Index, h. t.; Com. Dig, Biens, A.

CHEAT, *criminal law*, *torts*. A cheat is a deceitful practice, of a public nature, in defrauding another of a known right, by some artful device, contrary to the plain rules of common honesty. 1 Hawk. 343. To constitute a cheat, the offence must be, 1st, of a public nature; for every species of fraud and dishonesty in transactions between individuals is not the subject-matter of a criminal charge at common law, it must be such as is calculated to defraud numbers, and to deceive the people in general. 2 East, P. C. 816; 7 John. R. 201; 14 John R. 371; 1 Greenl. R. 387; 6 Mass. R. 72; 9 Cowen, R. 588; 9 Wend. R. 187; 1 Yerg. R. 76; 1 Mass. 137.—2. The cheating must be done by false weights, false measures, false tokens, or the like, calculated to deceive numbers, 2 Burr. 1125; 1 W. Bl. R. 273; Holt, R. 354.—3. That the object of the defendant in defrading the prosecutor was successful. If unsuccessful it is a mere attempt, (q. v.) 2 Mass. 139. When two or more enter into an agreement to cheat, the offence is a conspiracy, (q. v.) To call a man a cheat is slanderous. Hetl. 167; 1 Roll's Ab. 53; 2 Lev. 62. Vide *Illiterate; Token.*

CHECK, *contracts*, is a written order or request, addressed to a bank, or persons carrying on the banking business, and drawn upon them by a party having money in their hands, requesting them to pay on presentment to a person therein named or to bearer, a named sum of money. It is said that checks are uniformly payable to bearer, Chit. on Bills, 411, but that is not so in practice in the United States: they are generally payable to bearer, but sometimes they are payable to order. Checks are negociable instruments as bills of exchange, though, strictly speaking, they are not due before payment has been demanded, in which respect they differ from promissory notes and bills of exchange payable on a particular day. 7 T. R. 430. Vide 4 John. R. 304; 7 John. R. 26; 2 Ves. jr. 111; Yelv. 4, b, note; 7 Serg. & Rawle, 116; 3 John. Cas. 5, 259; 6 Wend. R. 445; 2 N. & M. 251; 1 Blackf. R. 104; 1 Litt. R. 194; 2 Litt. R. 299; 6 Cowen, R. 484; 4 Har. & J. 276; 13 Wend. R. 133; 10 Wend. R. 304; 7 Harr. & J. 381; 1 Hall, R. 78; 15 Mass. R. 74; 4 Yerg. R. 210; 9 S. & R. 125.

CHECK BOOK, *commerce*, is one kept by persons who have accounts in bank, in which are printed blank forms of checks, or orders upon the bank to pay money.

CHEMISTRY, *med. jur.*, is the science which teaches the nature and property of all bodies by their analysis and combination. In considering cases of poison the lawyer will find a knowledge of chemistry, even very limited in degree, to be greatly useful. 2 Chit. Pr. 42, n.

CHEVISANCE, *contracts*, *torts*; this is a French word which signifies in that language accord, agreement, compact. In the English statutes it its used to denote a bargain or con-

tract in general. In a legal sense it is taken for an unlawful bargain or contract.

CHIEF CLERK IN THE DEPARTMENT OF STATE. This officer is appointed by the secretary of state; his duties are to attend to the business of the office under the superintendence of the secretary; and when the secretary shall be removed from office, by the president, or in any other case of vacancy, shall, during such vacancy, have the charge and custody of all records, books, and papers appertaining to such department. Act 27th July, 1789, s. 2, 1 Story's Laws, 6. His compensation for his services shall not exceed two thousand dollars per annum. Gordon's Dig. art. 211.

CHIEF JUSTICE, *officer*, is the president of a supreme court; as, the chief justice of the United States, the chief justice of Pennsylvania, and the like. Vide 15 Vin. Ab. 3.

CHIEF JUSTICIARY. An officer among the English, established soon after the conquest. He had judicial power, and sat as a judge in the *Curia Regis*, (q. v.) In the absence of the king, he governed the kingdom. In the course of time, the power and distinction of this officer gradually diminished, until the reign of Henry III., when the office was abolished.

CHILD, CHILDREN, *domestic relations*. A child is the son or daughter in relation to the father or mother. We will here consider the law, in general terms, as it relates to the condition, duties and rights of children; and, afterwards, the extent which has been given to the word child or children by dispositions in wills and testaments.

1. Children born in lawful wedlock, or within a competent time afterwards, are presumed to be the issue of the father, and follow his condition; those born out of lawful wedlock, follow the condition of the mother. The father is bound to maintain his children and to educate them, and to protect them from injuries. Children are, on their part, bound to maintain their fathers and mothers, when in need, and they are of ability so to do. Poth. Du Mariage, n. 384, 389. The father in general is entitled to the custody of minor children, but, under certain circumstances, the mother will be entitled to them, when the father and mother have separated. 5 Binn. 520. Children are liable to the reasonable correction of their parents. Vide *Correction*.

2. The term children does not ordinarily and properly speaking comprehend grandchildren, or issue generally; yet sometimes that meaning is affixed to it, in cases of necessity, 6 Co. 16; and it has been held to signify the same as issue, in cases where the testator by using the terms children and issue indiscriminately, showed his intention to use the former term in the sense of issue, so as to entitle grandchildren, &c. to take under it. 1 Ves. sen. 196; Ambl. 555; 3 Ves. 258; Ambl. 661; 3 Ves. & Bea. 69. When legally construed, the term children, is confined to legitimate children. 7 Ves. 458. The civil code of Louisiana, art. 2522, n. 14, enacts that "under the name of children are comprehended, not only children of the first degree, but the grandchildren, great-grandchildren, and all other descendants in the direct line."

Children are divided into legitimate children, or those born in lawful wedlock; and natural or illegitimate children, who are born bastards, (q. v.) Vide *Natural children*. Illegitimate children are incestuous bastards, or those which are not incestuous.

Vide, generally, 8 Vin. Ab. 318; 8 Com. Dig. 470; 2 Kent, Com. 172; 4 Kent, Com. 408, 9; 1 Rop.

on Leg. 45 to 76; 1 Supp. to Ves. jr. 44; 2 Ib. 158. *Natural children.*

CHILDREN, POSTHUMOUS, are those who are born after the death of their fathers, Domat, Lois Civ. liv. prel. t. 2, s. 1, § 7; L. 3, § 1, ff de inj. rupt. In Pennsylvania the will of their fathers in which no provision is made for them is revoked as far as regards them, by operation of law. 3 Binn. R. 498; see as to the law of Virginia on this subject, 3 Munf. 20; and article *In Ventre sa mere.*

CHIMIN, this is a corruption of the French word *Chemin*, a highway. It is used by old writers. Com. Dig. Chimin.

CHIROGRAPH, *conveyancing*, signifies a deed or public instrument in writing; chirographs were anciently attested by the subscription and crosses of withesses; afterwards, to prevent frauds and concealments, deeds of mutual covenant were made in a *script* and *rescript*, or in a part and counterpart; and in the middle, between the two copies, they drew the capital letters of the alphabet, and then tallied, or cut asunder in an indented manner, the sheet or skin of parchment, one of which parts being delivered to each of the parties, were proved authentic by matching with and answering to one another. Deeds thus made were denominated *syngrapha*, by the canonists, because that word, instead of the letters of the alphabet, or the word *chirographum*, was used. 2 Bl. Com. 296. This method of preventing conterfeiting, or of detecting counterfeits, is now used by having some ornament or some word engraved or printed at one end of certificates of stocks, checks, and a variety of other instruments, which are bound up in a book, and after they are executed, are cut asunder through such ornament or word.

Chirograph is also the last part of a fine of land, commonly called the foot of the fine. It is an instrument of writing beginning with these words; "This is the final agreement," &c. It includes the whole matter, reciting the parties, day, year and place, and before whom the fine was acknowledged and levied. Cruise, Dig. tit. 35, c. 2, s. 52. Vide Chambers's Dict. h. t; Encyclopedia Americana, Charter; Encyclopédie de D'Alembert, h. t; Pothier, Pand. tom. xxii. p. 73.

CHIROGRAPHER, is a word derived from the Greek, which signifies, "a writing with a man's hand;" a chirographer is an officer of the English court of C. P. who engrosses the fines, and delivers the indentures of them to the parties, &c.

CHIVALRY, *ancient Eng. law.* This word is derived from the French *chevelier*, a horseman. It is the name of a tenure of land by knight's service. Chivalry was of two kinds; the first, which was *regal*, or held only of the king; or *common*, which was held of a common person. Co. Litt. h. t.

CHOICE. Preference either of a person or thing, to one or several other persons or things. *Election*, (q. v.)

CHOSE, *property*, this is a French word, signifying *thing*. In law, it is applied to personal property, as *choses in possession*, are such personal things of which one has possession; *choses in action*, are such as the owner has not the possession, but merely a right of action for their possession. 2 Bl. Com. 389, 397; 1 Chit. Pract. 99; 1 Supp. to Ves. Jr. 26, 59. Chitty defines choses in actions to be rights to receive or recover a debt, or money, or damages, for breach of contract, or for a tort connected with contract, but which cannot be enforced without action, and therefore termed choses, or things in action. Com. Dig. Biens; Harr. Dig.

Chose in Action; Chitty's Eq. Dig. h. t. Vide 1 Ch. Pr. 140. It is one of the qualities of a chose in action, that, at common law, it is not assignable. 2 John. 1; 15 Mass. 388; 1 Cranch, 367. But bills of exchange and promissory notes, though choses in action, may be assigned by indorsement, when payable to order, or by delivery, when payable to bearer. See *Bills of Exchange*. Bonds are assignable in Pennsylvania and perhaps some other states, by virtue of statutory provisions. In equity, however, all choses in action are assignable, and the assignee has an equitable right to enforce the fulfilment of the obligation in the name of the assignor. 4 Mass. 511; 3 Day, 364; 1 Wheat. 236; 6 Pick. 316; 9 Cow. 34; 10 Mass. 316; 11 Mass. 157, n.; 9 S. & R. 244; 3 Yeates, 327; 1 Binn. 429; 5 Stew. & Port. 60; 4 Rand. 266; 7 Conn. 399; 2 Green, 510; Harp. 17.

CHRISTIANITY, the religion established by Jesus Christ. Christianity has been judicially declared to be a part of the common law of Pennsylvania, 11 Serg. & Rawle, 394; 5 Binn. R. 555; New York, 8 Johns. R. 291; Connecticut, 2 Swift's System, 321; Massachusetts, Dane's Ab. vol. 7, c. 219, a. 2, 19. To write or speak contemptuously and maliciously against it, is an indictable offence. Vide Cooper on the Law of Libel, 59 and 114, et seq. where he contends that the decisions which have been made, declaring Christianity to be a part of the law, are the result of ignorance or falsehood. See also Mr. Jefferson's letter to Major Cartwright, Appx. No. III. to Coop. Law of Libel, on the same subject. Vide generally, 1 Russ. on Cr. 217; 1 Hawk, c. 5; 1 Vent. 293; 3 Keb. 607; 1 Barn. & Cress. 26, S. C. 8 Eng. Com. Law R. 14; Barnard. 162; Fitzgib. 66; Roscoe, Cr. Ev. 524; 2 Str. 834; 3 Barn. & Ald. 161; S. C. 5 Eng. Com. Law R. 249; Jeff. Rep. Appx.

CHURCH. In a moral or spiritual sense this word signifies a society of persons who profess religion; and in a physical or material sense, the place where such persons assemble. The term church is *nomen collectivum;* it comprehends the chancel, aisles, and body of the church. Ham. N. P. 204. It is not within the plan of this work to give an account of the different local regulations in the United States respecting churches. References are here given to enable the inquirer to ascertain what they are, where such regulations are known to exist. 2 Mass. 500; 3 Mass. 166; 8 Mass. 96; 9 Mass. 277; Ib. 254; 10 Mass. 323; 15 Mass. 296; 16 Mass. 488; 6 Mass. 401; 10 Pick. 172; 4 Day, C. 361; 1 Root § 3, 440; Kirby, 45; 2 Caines's Cas. 336; 10 John. 217; 6 John. 85; 7 John. 112; 8 John. 464; 9 John. 147; 4 Dessaus. 578; 5 Serg. & Rawle, 510; 11 Serg. & Rawle, 35; Metc. & Perk. Dig. h. t.

CHURCH-WARDEN. An officer whose duties are, as the name implies, to take care of or guard the church. These officers are created in some ecclesiastical corporations by the charter, and their rights and duties are definitely explained. In England, it is said, their principal duties are to take care of, 1, The church or building; 2, the utensils and furniture; 3, the church yard; 4, certain matters of good order concerning the church and church yard; 5, the endowments of the church. Bac. Ab. h. t. By the common law the capacity of church-wardens to hold property for the church is limited to personal property. 9 Cranch, 43.

CIPHER. An arithmetical character, by which some number is noted; a figure, for example, 1776. Ciphers ought not to be used to express the sums mentioned in a con-

tract; but it is usual to date all simple contracts with ciphers; deeds and writs should be dated by words at length. Vide *Figures*, and 13 Vin. Ab. 210; 18 Eng. C. L. R. 95; 1 Ch. Cr. Law, 176.

CIRCUIT COURT. Vide *Courts of the United States.*

CIRCUITY OF ACTION, *practice, remedies*, is where a party by bringing an action, gives an action to the defendant against him. As supposing the obligee of a bond covenanted that he would not sue on it, if he were to sue he would give an action against himself to the defendant for a breach of his covenant. The courts prevent such circuitous actions, for it is a maxim of law so to judge of contracts, as to prevent a multiplicity of actions; and in the case just put, they would hold that the covenant not to sue, operated as a release. 1 T. R. 441. It is a favourite object of courts of equity to prevent a multiplicity of actions. 4 Cowen, 682.

CIRCUITS, are certain divisions of the country, appointed for particular judges to visit for the trial of causes, or for the administration of justice. See 3 Bl. Com. 58.

CIRCUMDUCTION, *Scotch law*, is a term applied to the time allowed for bringing proof of allegiance, which being elapsed, if either party sue for circumduction of the time of proving, it has the effect that no proof can afterwards be brought; and the cause must be determined as it stood when circumduction was obtained. Tech. Dict.

CIRCUMSTANCES, *evidence*, the particulars which accompany a fact. The facts proved are either possible or impossible, ordinary and probable, or extraordinary and improbable, recent or ancient; they may have happened near us, or afar off, they are public or private, permanent or transitory, clear and simple, or complicated; they are always accompanied by circumstances which more or less influence the mind in forming a judgment. These points ought to be carefully examined, in order to form a correct opinion. The first question ought to be, is the fact possible? if so, are there any circumstances which render it impossible? If the facts are impossible the witness ought not to be credited, if, for example, a man should swear that he saw the deceased shoot himself with his own pistol, and upon an examination of the ball which killed him, it should be found too large to enter into the pistol, the witness ought not to be credited. 1 Stark. Ev. 505; or if one should swear that another had been guilty of the impossible crime of witchcraft. Toullier mentions a case, which were it not for the ingenuity of the counsel, would require an apology for its introduction here, on account of its length. The case was this, La Veuve Veron brought an action against M. de Morangiès on some notes, which the defendant alleged were fraudulently obtained, for the purpose of recovering 300,000 francs, and the question was, whether the defendant had received the money. Dujonquai, the grandson of the plaintiff pretended he had himself, alone and on foot, carried this sum in gold to the defendant, at his hotel at the upper end of the rue Saint Jacques, in thirteen trips, between half-past seven and about one o'clock, that is, in about five hours and a half, or at most, six hours. The fact was improbable; Linquet, the counsel of the defendant, proved it was impossible; and this is his argument.

Dujonquai said that he had divided the sum in thirteen bags, each containing six hundred louis d'ors, and in twenty-three other bags, each containing two hundred. There remained twenty-five louis to complete the

whole sum, which Dujonquai said he received from the defendant as a gratuity. At each of these trips, he says he put a bag, containing two hundred louis, that is, about three pounds four ounces, in each of his coat pockets, which being made in the fashion of those times, hung about the thighs, and in walking must have incommoded him and obstructed his speed, he took besides, a bag containing six hundred louis in his arms, by this means his movements were impeded by a weight of near ten pounds.

The measured distance between the house where Dujonquai took the bags to the foot of the stairs of the defendant, was five hundred and sixteen toises, which multiplied by twenty-six, the thirteen trips going and returning, make thirteen thousand four hundred and sixteen toises, that is, more than five leagues, and a half (near seventeen miles) of two thousand four hundred toises, which latter distance is considered sufficient for an hour's walk, of a good walker. Thus, if Dujonquai had been unimpeded by any obstacle, he would barely have had time to perform the task in five or six hours, even without taking any rest or refreshment. However strikingly improbable this may have been, it was not physically impossible. But

1. Dujonquai in going to the defendant's had to descend sixty-three steps from his grandmother's, the plaintiff's, chamber, and to ascend twenty-seven to that of the defendant, in the whole, ninety steps. In returning, the ascent and descent were changed, but the steps were the same; so that by multiplying by twenty-six, the number of trips going and returning, it would be seen there were two thousand three hundred and forty steps. Experience had proved that in ascending to the top of the tower of Notre Dame, (a church in Paris,) where there are three hundred and eighty-nine steps, it occupied from eight to nine minutes of time. It must then have taken an hour out of the five or six which had been employed in making the thirteen trips.

2. Dujonquai had to go up the rue Saint Jacques, which is very steep, its ascent would necessarily decrease the speed of a man burdened and encumbered with the bags which he carried in his pockets and in his arms.

3. This street, which is very public, is usually, particularly in the morning, encumbered by a multitude of persons going in every direction, so that a person going along must make an infinite number of deviations from a direct line; each, by itself, is almost imperceptible, but at the end of five or six hours, they make a considerable sum, which may be estimated at a tenth part of the whole course in a straight line, this would make about half a league, to be added to the five and a half leagues, which is the distance in a direct line.

4. On the morning that Dujonquai made these trips, the daily and usual incumbrances of this street were increased by sixty or eighty workmen, who were employed in removing by hand and with machine, an enormous stone, intended for the church of Sainte Geneviève, now the pantheon, and by the immense crowd which this attracted; this was a remarkable circumstance, which, supposing that Dujonquai had not yielded to the temptation of stopping a a few moments to see what was doing, it must necessarily have impeded his way, and made him lose seven or eight minutes each trip, which multiplied by twenty-six, would make about two hours and a half.

5. The witness was obliged to open and shut the doors at the defendant's house; it required time to

take up the bags and place them in his pockets, to take them out and put them on the defendant's table, who, by an improbable supposition, counted the money in the intervals between the trips, and not in the presence of the witness. Dujonquai, too, must have taken receipts or acknowledgments at each trip, he must read them, and on arriving at home, deposited them in some place of safety; all these distractions would necessarily occasion the loss of a few minutes. By adding these with scrupulous nicety, and by further adding the time employed in taking and depositing the bags, the opening and shutting of the doors, the reception of the receipts, the time occupied in reading and putting them away, the time consumed in several conversations, which he admitted he had with persons in the street; all these joined to the obstacles above mentioned, made it evident that it was physically impossible that Dujonquai should have carried the 300,000 francs to the house of the defendant, as he affirmed he had done. Toull. tom. 9, n. 241, p. 384. Vide, generally, 1 Stark. Ev. 502; 1 Phil. Ev. 116. See some curious cases of circumstantial evidence in Alis. Pr. Cr. Law, 313, 314; and 2 Théorie des Lois criminelles, 147, n. *Presumption.*

CIRCUMSTANTIBUS, *persons, practice*, are bystanders, from whom jurors are to be selected when the panel has been exhausted. Vide *Tales de circumstantibus.*

CIRCUMVENTION, *torts,—Scotch law*, any act of fraud whereby a person is reduced to a deed by decreet. Tech. Dict. It has the same sense in the civil law. Dig. 50, 17, 49 et 155; Id. 12, 6, 6, 2; Id. 41, 2, 34. Vide *Parphrasis.*

CITATION, *practice*, is a writ issued out of a court of competent jurisdiction commanding a person therein named to appear and do something therein mentioned, or to show cause why he should not, on a day named. Proct. Pr. h. t. In the ecclesiastical law, the citation is the beginning and foundation of the whole cause; it is said to have six requisites, namely, the insertion of the name of the judge—of the promovert—of the impugnant—of the cause of suit—of the place—and of the time of appearance; to which may be added the affixing the seal of the court, and the name of the register or his deputy. 1 Bro. Civ. Law, 453, 4; Ayl. Parer. xliii. 175; Hall's Adm. Pr. 5; Merl. Rép. h. t. By citation is also understood the act by which a person is summoned, or cited.

CITATION OF AUTHORITIES, are the text of acts of legislatures and of treatises, and decided cases, which are indicated in order to support what is advanced. Works are sometimes surcharged with useless and misplaced citations; when they are judiciously made they assist the reader in his researches. Citations ought not to be made to prove what is not doubted; but when a controverted point is mooted, it is highly proper to cite the laws and cases, or other authorities in support of the controverted proposition. The mode of citing statutes varies in the United States; the laws of the United States are generally cited by their date, as the act of Sept. 24, 1789, s. 35; or Act of 1819, ch. 170, 3 Story's U. S. Laws, 1722; in Pennsylvania acts of assembly are cited as follows, act of 14th of April, 1834; in Massachusetts, stat. of 1808, c. 92. Treatises and books of reports, are generally cited by the volume and page, as, 2 Powell on Mortg. 600; 3 Binn. R. 60. Judge Story and some others, following the examples of the civilians, have written their works and numbered the paragraphs, these are

cited as follows, Story's Bailm. § 494; Gould on Pl. c. 5, § 30. For other citations the reader is referred to the article *Abbreviations*.

It is usual among the civilians on the continent of Europe, in imitation of those of the darker ages, in their references to the Institutes, the Code and the Pandects or Digest, to mention the number, not of the book, but of the law, and the first word of the title to which it belongs; and as there are more than a thousand of these, it is no easy task for one not thoroughly acquainted with those collections, to find the place to which reference is made. The American writers generally follow the natural mode of reference, by putting down the name of the collection, and then the number of the book, title, law, and section. For example, Inst. 4, 15, 2, signifies Institutes, book four, title fifteen, and section two. Dig. 41, 9, 1, 3, means Digest, book 41, title 9, law 1, section 3. Dig. pro dote; or ff pro dote; that is, section 3, law 1, of the book and title of the Digest or Pandects, entitled *pro dote*. It is proper to remark that Dig. and ff are equivalent; the former signifies Digest, and the latter, which is a careless mode of writing the Greek letter π, the first letter of the word πανδίκται, Pandects, and the Digest and Pandects are different names for one and the same thing. The Code is cited in the same way. The Novels are cited by their number, with that of the chapter and paragraph; for example, Nov. 185, 2, 4; for Novella Justiniani 185, capite 2, paragrapho 4. Novels are also quoted by the Collation, the title, chapter and paragraph, as follows; in Authentico, Collatione 1, titulo 1, cap. 281. The Authentics are quoted by their first words, after which is set down the title of the Code under which they are placed; for example, Authentica cum testator, Codice ad legem fascidiam.

CITIZEN, *persons*. One who, under the constitution and laws of the United States, has a right to vote for representatives in congress, and other public officers, and who is qualified to fill offices in the gift of the people. Citizens are either native born or naturalized. Native citizens may fill any office; naturalized citizens may be elected or appointed to any office under the constitution of the United States, except the office of president. The constitution provides, that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." Art. 4, s. 2. All natives are not citizens of the United States, the descendants of the aborigines, and those of African origin are not entitled to the rights of citizens. Anterior to the adoption of the constitution of the United States, each state had the right to make citizens of such persons as it pleased. That constitution does not authorise any but white persons to become citizens of the United States; and it must therefore be presumed that no one is a citizen who is not white. 1 Litt. R. 334; 10 Conn. R. 340; 1 Meigs, R. 331. A citizen of the United States, residing in any state of the Union, is a citizen of that state. 6 Pet. 761; Paine, 594; 1 Brock. 391; 1 Paige, 183; Metc. & Perk. Dig. h. t.; vide 3 Story's Const. § 1687; 2 Kent, Com. 258; 4 Johns. Ch. R. 430; Vatt. B. 1, c. 19, § 212; Poth. Des Personnes, tit. 2, s. 1. Vide *Body Politic*.

CITY, *government*, is a town incorporated by that name. Originally this word did not signify a town, but a portion of mankind who lived under the same government: what the Romans called *civitas* and the Greeks *polis*; whence the word *politeia*, *civitas seu reipublicæ status et ad-*

ministratio. Toull. Dr. Civ. Fr. l. 1, t. 1, n. 202.

CIVIL. This word has various significations. 1. It is used in contradistinction to *barbarous* or *savage*, to indicate a state of society reduced to order and regular government; thus we speak of civil life, civil society, civil government and civil liberty. 2. It is sometimes used in contradistinction to *criminal*, to indicate the private rights and remedies of men, as members of the community, in contrast to those, which are public and relate to the government; thus we speak of civil process and criminal process, civil jurisdiction and criminal jurisdiction. 3. It is also used in contradistinction to *military* or *ecclesiastical*, to *natural* or *foreign;* thus we speak of a civil station, as opposed to a military or ecclesiastical station; a civil death, as opposed to a natural death; a civil war as opposed to a foreign war. Story on the Const. § 789; 1 Bl. Com. 6, 125, 251; Montesq. Sp. of Laws, B. 1, c. 3; Ruth. Inst. B. 2, c. 2, Id. ch. 3, Id. ch. 8. p. 359; Hein. Elem. Jurisp. Nat. B. 2, ch. 6.

CIVIL COMMOTION. In the printed proposals which are considered as making a part of the contract of insurance against fire, it is declared that the insurance company will not make good any loss happening by any civil commotion. Lord Mansfield defines a civil commotion to be "an insurrection of the people for general purposes, though it may not amount to rebellion where there is an usurped power." 2 Marsh. Inst. 793.

CIVIL DEATH, *persons*, is the change of the state (q. v.) of a person who is declared civilly dead by judgment of a competent tribunal. In such case the person against whom such a sentence is pronounced is considered as dead. 2 John. R. 248. Vide *Death, civil.*

CIVIL LAW. See *Law, civil.*

CIVIL LIST, is the sum which is yearly paid by the state to its monarch, and the domains of which he is suffered to have the enjoyment.

CIVIL OBLIGATION, *civil law*, is one which binds in law, *vinculum juris*, and which may be enforced in a court of justice. Poth. Obl. 173, and 191. See *Obligation.*

CIVIL OFFICER. The constitution of the United States, art. 2, s. 4, provides, that the president, vice president, and all *civil officers* of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. By this term are included all officers of the United States who hold their appointments under the national government, whether their duties are executive or judicial, in the highest or the lowest departments of the government, with the exception of officers of the army and navy. Rawle on Const. 213; 2 Story, Const. § 790; a senator of the United States, it was decided, was not a civil officer, within the meaning of this clause in the constitution. Senate Journals, 10 January, 1799; 4 Tuck. Bl. Com. Appx. 57, 58; Rawle, Const. 213; Serg. on Const. Law, 376; Story, Const. § 791.

CIVIL REMEDY, *practice;* this term is used in opposition to the remedy given by indictment in a criminal case, and signifies the remedy which the law gives to the party against the offender. In cases of treason and felony, the law, for wise purposes, *suspends* this remedy in order to promote the public interest, until the wrongdoer shall have been prosecuted for the public wrong. 12 East, 409; R. T. H. 359; 1 Hale's P. C. 546; 2 T. R. 751, 756; 17 Ves. 329; 4 Bl. Com. 363; Bac. Ab. Trespass, E 2; and Trover, D. This is the principle of the common

law; it has been adopted in New Hampshire, N. H. R. 239; changed in New York by statutory provision, 2 Rev. Stat. 292, § 2, and by decisions in Massachusetts, except perhaps in felonies punishable with death, 15 Mass. R. 333; in Ohio, 4 Ohio R. 377; in North Carolina, 1 Tayl. R. 58. By the common law, in cases of homicide, the civil remedy is *merged* in the felony. 1 Chit. Pr. 10. Vide art. *Injuries; Merger.*

CIVIL STATE, is the union of individual strength in a common direction; the establishment of a public authority to cause the execution of the laws in a nation or state; the fundamental of which laws is, that none of the members of the community shall do himself justice, but that he shall appeal to the depositaries of the public power, or the united forces for the security of all, in those cases which admit of possibility to have recourse to it; hence the citizens are justly considered as being under the safeguard, of the law. 1 Toull. n. 201. Vide *Self defence.*

CIVILIAN, a doctor, professor or student of the civil law.

CLAIM. A claim is a challenge of the ownership of a thing which a man has not in possession, and is wrongfully withheld by another. Plowd. 359; see 1 Dall. 444; 12 S. & R. 179. In Pennsylvania the entry of the lien of a mechanic or materialman for work done or material furnished in the erection of a building in those counties to which the lien laws extend, is called a claim.

CLAIM, CONTINUAL. Vide *Continual claim.*

CLAIM OF CONUSANCE, *Eng. law*, is defined to be an intervention by a third person, demanding judicature in the cause against the plaintiff, who has chosen to commence his action out of the claimant's court. 2 Wils. 409; 1 Chit. Pl. 403; Vin. Ab. Conusance; Com. Dig. Courts, P; Bac. Ab. Courts, D 3; 3 Bl. Com. 298.

CLAIMANT. In the courts of admiralty, when the suit is *in rem*, the cause is entitled in the name of the libellant against the thing libelled, as A B v. Ten cases of calico; and it preserves that title through the whole progress of the suit. When a person is authorised and admitted to defend the libel, he is called the claimant. The United States v. 1960 bags of coffee, 8 Cranch, R. 398; The United States v. The Mars, 8 Cranch, R. 417; 30 hhds. of sugar, (Bentzon, claimant,) v. Boyle, 9 Cranch, R. 191.

CLANDESTINE. That which is done in secret and contrary to law. Generally a clandestine act in cases of the limitation of actions will prevent the act from running. A clandestine marriage is one which has been contracted without the form which the law has prescribed for this important contract. Alis. Princ. 543.

CLARENDON. The constitutions of Clarendon were certain statutes made in the reign of Henry the Second, of England, in a parliament holden at Clarendon, by which the king checked the power of the pope and his clergy. 4 Bl. Com. 415.

CLAUSE, *contracts.* A particular disposition which makes part of a treaty; an act of the legislature; a deed, written agreement, or other written contract or will. When a clause is obscurely written, it ought to be construed in such a way as to agree with what precedes and what follows, if possible. Vide Dig. 50, 17, 77. *Construction; Interpretation.*

CLAUSUM FREGIT, *torts, remedies;* he broke the close. These words are used in a writ for an action of trespass to real estate, the defendant being summoned to an-

swer and show cause *quare clausum fregit*, that is, why he broke the close of the plaintiff. 3 Bl. Com. 209.

CLEARANCE, *comm. law.* The name of a certificate given by the collector of a port in which is stated the master or commander (naming him) of a ship or vessel named and described, bound for a port named, and having on board goods described, has entered and cleared his ship or vessel according to law. The act of congress, of 2d March, 1790, section 93, directs, that the master of any vessel bound to a foreign place, shall deliver to the collector of the district from which such vessel shall be about to depart, a manifest of all the cargo on board, and the value thereof, by him subscribed, and shall swear or affirm to the truth thereof; whereupon the collector shall grant a clearance for such vessel and her cargo; but without specifying the particulars thereof in such clearance unless required by the master so to do. And if any vessel bound to any foreign place shall depart on her voyage to such foreign place, without delivering such a manifest and obtaining a clearance, the master shall forfeit and pay the sum of five hundred dollars for every such offence. Provided, anything to the contrary notwithstanding, the collectors and other officers of the customs shall pay due regard to the inspection laws of the states in which they respectively act, in such manner that no vessel having on board goods liable to inspection, shall be cleared out until the master or other person shall have produced such certificate, that all such goods have been duly inspected, as the laws of the respective states do or may require, to be produced to the collector or other officer of the customs. And provided, that receipts for the payment of all legal fees which shall have accrued on any vessel, shall before any clearance is granted, be produced to the collector or other officer aforesaid.

According to Boulay-Paty, Dr. Com. tome 2, p. 19, the clearance is imperiously demanded for the safety of the vessel, for if a vessel should be found without it at sea, it may be legally taken and brought into some port for adjudication, on a charge of piracy. Vide *Ship's papers.*

CLEARING HOUSE, *comm. law.* Among the English bankers, the clearing house is a place in Lombard street, in London, where the bankers of that city daily settle with each other the balances which they owe, or to which they are entitled. Desks are placed around the room, one of which is appropriated to each banking house, and they are occupied in alphabetical order. Each clerk has a box or drawer along side of him, and the name of the house he represents is inscribed over his head. A clerk of each house comes in about half-past three o'clock in the afternoon, and brings the drafts or checks on the other bankers, which have been paid by his house that day, and deposits them in their proper drawers. The clerk at the desk credits their accounts separately which they have against him, as found in the drawer. Balances are thus struck from all the accounts, and the claims transferred from one to another, until they are so wound up and cancelled, that each clerk has only to settle with two or three others, and the balances are immediately paid. When drafts are paid at so late an hour that they cannot be cleared that day, they are sent to the houses on which they are drawn, to be *marked*, that is, a memorandum is made on them, and they are to be cleared the next day. See Gilbart's Practical Treatise on Banking, pp. 16–20; Babbage on the Economy of Machines, n. 173, 174;

Kelly's Cambist; Byles on Bills, 106, 110.

CLERK, *commerce, contract*, is a person in the employ of a merchant, who attends only to a part of his business, while the merchant himself superintends the whole. He differs from a factor in this, that the latter wholly supplies the place of his principal. Pard. Dr. Com. n. 38; 1 Chit. Pract. 80.

CLERK, *officer*, is a person appointed to an office generally to write or register what has been done therein; as, clerk of the court. Some clerks, however, have little or no writing to do in their offices, as, the clerk of the market, whose duties are confined chiefly to superintending the markets. In the English law, clerk also signifies a clergyman.

CLEMENTINES, *eccl. law*, is the name usually given to the collection of decretals or constitutions of Pope Clement V., which was made by order of John XXII. his successor, who published it in 1317. The death of Clement V., which happened in 1314, prevented him from publishing this collection, which is properly a compilation, as well of the epistles and constitutions of this pope, as of the decrees of the council of Vienna, over which he presided. The Clementines are divided in five books, in which the matter is distributed nearly upon the same plan as the Decretals of Gregory IX. Vide La Bibliothèque des auteurs ecclésiastiques, par Dupin.

CLIENT, *practice*, is one who employs and retains an attorney or counsellor to manage or defend a suit or action in which he is a party, or to advise him about some legal matters. The duties of the client towards his counsel are, 1st, to give him a written authority, 1 Ch. Pr. 19; 2, to disclose his case with perfect candour; 3, to offer, spontaneously, advances of money to his attorney, 2 Ch. Pr. 27; 4, he should at the end of the suit promptly pay his attorney his fees. Ib.—His rights are, 1, to be diligently served in the management of his business; 2, to be informed of its progress; and, 3, that his counsel will not disclose what has been professionally confided to him. See *Attorney at law; Confidential communication.*

CLOSE, signifies the interest in the soil, and not merely a close or enclosure in the common acceptation of the term. Doct. & Stud. 30; 7 East, 207; 2 Stra. 1004; 6 East, 154; 1 Burr. 133; 1 Ch. R. 160. In every case where one man has a right to exclude another from his real immovable property, the law encircles his estate, if it is not already enclosed, with an imaginary fence, reaching in extent upwards *a superficie terræ usque ad cœlum* where he is the owner of the surface, and downwards as far as his property descends; and entitles him to a compensation in damages for the injury he sustains by the act of another passing through his boundary, denominating the injurious act a breach of the enclosure. Hamm. N. P. 151.

An ejectment will not lie for a close. 11 Rep. 55; 1 Rolle's R. 55; Salk. 254; Cro. Eliz. 235; Adams on Eject. 24.

CLOSE ROLLS, or *close writs, Engl. law*, are writs containing grants from the crown, to particular persons, and for particular purposes, and, not being intended for public inspection, are closed up and sealed on the outside, and for that reason called close writs, in contradistinction from grants relating to the public in general, which are left open and not sealed up, and are called letters-patent, (q. v.) 2 Bl. Com. 346.

CLUB. An association of persons. It differs from a partnership in this, that the members of a club have no

authority to bind each other further than they are authorised, either expressly or by implication as each other's agent in the particular transaction; whereas in trading associations, or common partnerships, one partner may bind his co-partners, as he has the right of property for the whole. 2 Mees. & Welsb. 172; Colly. Partn. 31; Story, Partn. 144; Wordsworth on Joint Stock Companies, 154, et seq.

COADJUTATOR *eccls. law.* A fellow helper or assistant; particularly applied to the assistant of a bishop.

COALITION, *French law.* By this word is understood an unlawful agreement among several persons, not to do a thing except on some condition agreed upon. The most usual coalitions, are, 1st, those which take place among master workmen, to reduce, diminish or fix at a low rate the wages of journeymen and other workmen; 2d, those among workmen or journeymen, not to work except at a certain price. These offences are punished by fine and imprisonment. Dict. de Police, h. t. In our law this offence is known by the name of conspiracy, (q. v.)

COAST. The margin of a country bounded by the sea. This term includes the natural appendages of the territory which rise out of the water, although they are not of sufficient firmness to be inhabited or fortified. Shoals perpetually covered with water are not, however, comprehended in the name of coast. The small islands, situate at the mouth of the Mississippi, composed of earth and trees drifted down by the river, which are not of consistency enough to support the purposes of life, and are uninhabited, and resorted to for shooting birds, were held to form a part of the coast. 5 Rob. Adm. R. 385, (c).

COCKET, *commerce.* In England the office at the custom house, where the goods to be exported are entered, is so called; also the custom house seal, or the parchment sealed and delivered by the officers of customs to merchants, as a warrant that their goods are customed. Crabbe's Tech. Dict.

COCKETTUM, *commerce.* In the English law this word signifies, 1, the custom-house seal; 2, the office at the custom where cockets are to be procured. Crabbe's Tech. Dict.

CODE, *legislation*, signifies in general a collection of laws; it is a name given by way of eminence to a collection of such laws made by the legislature. Among the most noted may be mentioned the following:

CODES, *Les Cinq, French law*, the five codes. These codes are, 1st, *Code Civil*, which is divided into three books; book 1, treats of persons, and of the enjoyment and privation of civil rights; book 2, of property and its different modifications; book 3, of the different ways of acquiring property. One of the most perspicuous and intelligent commentators on this code, is Toullier, frequently cited in this work.—2d. *Code de procédure civille*, which is divided into two parts; part 1, is divided into five books, 1, of justices of the peace; 2, of inferior tribunals; 3, of royal courts; 4, of extraordinary means of proceeding; 5, of execution and judgment. Part 2, is divided into three books; 1, of tender and consignation; 2, process in relation to the opening of a succession; 3, of arbitration.—3d. *Code de Commerce*, in four books; 1, of commerce in general; 2, of maritime commerce; 3, of failures and bankruptcy; 4, of commercial jurisdiction. Pardessus is one of the ablest commentators on this code.—4th. *Code d'Instructions Criminelle*, in two books; 1, of judiciary police,

and its officers; 2, of the administration of justice.—5. *Code Penal*, in four books; 1, of punishment in criminal and correctional cases, and their effects; 2, of the persons punishable, excusable or responsible, for their crimes or misdemeanors; 3, of crimes, misdemeanors, (délits) and their punishment; 4, of contraventions of police, and their punishment. For the history of these codes, vide Merl. Rép. h. t.; Motifs, Rapports, Opinions et Discours sur les codes; Encyclop. Amer. h. t.

CODE HENRI. A digest of the laws of Hayti enacted by Henri, king of Hayti. It is based upon the Code Napoléon, but not servilely copied. It is said to be judiciously adapted to the situation of Hayti. A collection of laws made by order of Henry III. of France is also known by the name of *Code Henri*.

CODE JUSTINIAN, *civil law*, is a collection of the constitutions of the emperors from Adrian to Justinian; the greater part of those from Adrian to Constantine are mere rescripts; those from Constantine to Justinian are edicts or laws properly speaking. The code is divided in twelve books, which are subdivided in titles, under which are placed the constitutions, under proper heads. They are placed in chronological order, but often disjointed. At the head of each constitution is placed the name of the emperor who is the author, and that of the person to whom it is addressed. The date is at the end. Several of these constitutions which were formerly in the code, were lost, it is supposed by the neglect of copyists. Some of them have been restored by some modern authors, among whom may be mentioned Charondas, Cugas, and Contius, who translated them from Greek versions.

CODE OF LOUISIANA. In 1822, Peter Derbigny, Edward Livingston and Moreau Lislet were selected by the legislature to revise and amend the civil code, and to add to it such laws still in force as were not included therein. They were authorised to add a system of commercial law, and a code of practice. The code they prepared having been adopted, was promulgated in 1824, under the title of the "Civil Code of the State of Louisiana." The code is based on the Code Napoléon, with proper and judicious modifications suitable for the state of Louisiana. It is composed of three books; 1, the first treats of persons; 2, the second of things, and of the different modifications of property; 3, and the third of the different modes of acquiring the property of things. It contains 3522 articles, numbered from the beginning for the convenience of reference. This code was prepared by lawyers, who, it is said, mixed with positive legislation, definitions seldom accurate and points of doctrine always unnecessary. The legislature modified and changed many of the provisions relating to the positive legislation, but adopted the definitions and abstract doctrine without material alterations; from this circumstance, as well as from the inherent difficulty of the subject, the positive provisions of the code are often at variance with the theoretical part, which was intended to elucidate them. 13 L. R. 237. This code went into operation on the 20th day of May, 1825. 11 L. R. 60. It is in both the French and English languages; and in construing it, it is a rule that when the expressions used in the French text of the code are more comprehensive than those used in English, or *vice versa*, the more enlarged sense will be taken, as thus full effect will be given to both clauses. 2 N. S. 582.

CODE NAPOLEON. The *Code Civil* of France, enacted into law during the reign of Napoleon, bore

his name until the restoration of the Bourbons, when it was deprived of that name and is now cited Code Civil.

CODE PAPIRIAN. The name of a collection of the Roman laws which had been promulgated by Romulus, Numa, and other kings who governed Rome till the time of Tarquin, the proud. It was so called in honour of Sextus Paperius, the compiler. Dig. 1, 2, 2.

CODE PRUSSIAN. Allgemeines Landrecht. This code is also known by the name of *Codex Fredericianus*, or Frederician code. This code was compiled by order of Frederic II., by the minister of justice Samuel V. Cocceji, who completed a part of it before his death, in 1755. In 1780, the work was renewed under the superintendence of the minister Von Carmer, and prosecuted with unceasing activity, and it was published from 1784 to 1788, in six parts. The opinions of those who understood the subject were requested, and prizes offered on the best commentaries on it; and the whole was completed in June, 1791, under the title "General Prussian Code."

CODE THEODOSIAN. This code which originated in the eastern empire, was adopted in the western empire towards its decline. It is a collection of the legislation of the Christian emperors from and including Constantine to Theodosian, the younger; it is composed of sixteen books, the edicts, acts, rescripts, and ordinances of the two empires, that of the east and that of the west.

CODEX, literally, a volume or roll; it is particularly applied to the volume of the civil law, collected by the emperor Justinian from all pleas and answers of the ancient lawyers, which were in loose scrolls or sheets of parchment; these he compiled into a book which goes by the name of Codex.

CODICIL, *devises*, is an addition or supplement to a will; it must be executed with the same solemnities. A codicil is a part of the will, the two instruments making but one will. 4 Bro. C. C. 55; 2 Ves. sen. 242; 4 Ves. 610; 2 Ridgw. Irish P. C. 11, 43. There may be several codicils to one will and the whole will be taken as one: the codicil does not consequently revoke the will further than it is in opposition to some of its particular dispositions, unless there be express words of revocation, 8 Cowen, Rep. 56. Formerly the difference between a will and a codicil consisted in this, that in the former an executor was named, while in the latter none was appointed. Swinb. part 1, s. 5, pl. 2; Godolph. Leg. part 1, c. 6, s. 2. This is the distinction of the civil law, and adopted by the canon law. Vide Williams on Wills, ch. 2; Rob. on Wills, 154, n. 388, 476; Lovelass on Wills, 185, 289; 4 Kent, Com. 516; 1 Ves. jr. R. 407, 497; 3 Ves. jr. 110; 4 Ves. jr. 610; 1 Supp. to Ves. jr. 116, 140. The *form* of devising by codicil is abolished in Louisiana, Code, 1563, and whether the disposition of the property be made by testament, under this title, or under that of institution of heir, of legacy, codicil, donation mortis causa, or under any other name indicating the last will, provided it be clothed with the forms required for the validity of a testament, it is, as far as form is concerned, to be considered a testament. Ib. Vide 1 Brown's Civil Law, 292; Domat, Lois Civ. liv. 4, t. 1, s. 1; Leçons Elément. du Dr. Civ. Rom. tit. 25.

COERCION, *criminal law*, *contracts*. The forcible inducement to do an act. It is positive or presumed. 1. Positive or direct coercion takes place when a man is by physical force compelled to do an act contrary to his will; for example, when

a man falls into the hands of the enemies of his country, and they compel him by a just fear of death to fight against it. 2. It is presumed where a person is legally under subjection to another, and is induced, in consequence of such subjection, to do an act contrary to his will. A married woman, for example, is legally under the subjection of her husband, and if in his company, she commit a crime or offence, not *malum in se*, except the offence of keeping a bawdy-house, in which case she is considered by the policy of the law as a principal, and as not acting by force, she is presumed to act under his coercion. As will (q. v.) is necessary to the commission of a crime, or the making of a contract, a person coerced into either has no will on the subject, and is not responsible. Vide Roscoe's Cr. Ev. 785, and the cases there cited; and 2 Stark. Ev. 705, as to what will amount to coercion in criminal cases.

COGNATION, *civil law*, signifies generally the kindred which exists between two persons who, are united by ties of blood or family, or both. Cognation is of three kinds; natural, civil, or mixed. Natural cognation is that which is alone formed by ties of blood; such is the kindred of those who owe their origin to an illicit connexion, either in relation to their ascendants or collaterals. Civil cognation is that which proceeds alone from the ties of families, as the kindred between the adopted father and the adopted child. Mixed cognation is that which unites at the same time the ties of blood and family, as that which exists between brothers, the issue of the same lawful marriage. Inst. 3, 6; Dig. 38, 10.

COGNATES. A term used in the civil law to signify those persons who are connected together by the ties of kindred; but sometimes it means those who are related to others on the side of women.

COGNIZANCE, *pleading*, is where the defendant in an action of replevin, (not being entitled to the distress or goods which are the subject of the replevin,) acknowledges the taking of the distress, and insists that such taking was legal, not because he himself had a right to distrain on his own account, but because he made the distress by the command of another who had a right to distrain on the goods which are the subject of the suit. Lawes on Pl. 35, 36.

COGNIZANCE, *practice*, signifies the hearing of a thing judicially; also the acknowledgment of a fine.

COGNIZANCE OF PLEAS, *Eng. law*, is a privilege granted by the king to a city or town, to hold pleas within the same; and when any one is impleaded in the courts at Westminster, the owner of the franchise may demand cognizance of the plea. T. de la Ley.

COGNISOR, *English law*, is one who passes or acknowledges a fine of lands or tenements to another, in distinction from the *cognisee* to whom the fine of the lands, &c. is acknowledged.

COGNITIONIBUS ADMITTENDIS, *English law*, *practice*, is a writ to a justice or other person, who has power to take a fine, and having taken the acknowledgment of a fine, delays to certify it in the court of common pleas, requiring him to do it. Crabbe's Tech. Dict.

COGNOVIT, *contr. pleading*, is a written confession of an action by a defendant, subscribed but not sealed, and authorising the plaintiff to sign judgment and issue execution, usually for a sum named. It is given after the action is brought to save expense. It differs from a warrant of attorney which is given before the commencement of any ac-

tion, and is under seal. A *cognovit actionem* is an acknowledgment and confession of the plaintiff's cause of action against the defendant to be just and true. Vide 3 Ch. Pr. 664.

COHABITATION, living together. The law presumes that husband and wife cohabit together, even after a voluntary separation has taken place between them; but where there has been a divorce *a mensa et thoro*, or a sentence of separation, the presumption then arises that they have obeyed the sentence or decree and do not live together. A criminal cohabitation will not be presumed by the proof of a single act of criminal intercourse between a man and woman not married. 10 Mass. R. 153. When a woman is proved to cohabit with a man and to assume his name with his consent, he will generally be responsible for her debts as if she had been his wife, 2 Esp. R. 637; 1 Campb. R. 245; this being presumptive evidence of marriage, B. N. P. 114; but this liability will continue only while they live together, unless she were actually his wife, 4 Campb. R. 215. In civil actions for criminal conversation with the plaintiff's wife, when the husband and wife had separated, the plaintiff will not in general be entitled to recover. 1 Esp. R. 16; S. C. 5 T. R. 357; Peake's Cas. 7, 39; sed vide 6 East, 248; 4 Esp. 39.

COIF, a head-dress. In England there are certain serjeants at law, who are called serjeants of the coif, from the lawn coif they wear on their heads under their thin caps when they are created.

COIN, *commerce*, *contracts*. A piece of gold, silver or other metal stamped by authority of the government, in order to determine its value, commonly called money. Co. Litt. 207; Rutherf. Inst. 123. For the different kinds of coins of the United States, see article *Money*. As to the value of foreign coins see article *Foreign Coins*.

COLLATERAL, *collateralis*, from *latus*, a side; that which is sideways and not direct.

COLLATERAL ASSURANCE, *contracts*, is that which is made over and above the deed itself.

COLLATERAL FACTS, *evidence*, are facts unconnected with the issue or matter in dispute. As no fair and reasonable inference can be drawn from such facts they are inadmissible in evidence, for at best they are useless, and may be mischievous, because they tend to distract the attention of the jury, and to mislead them. Stark. Ev. h. t.; 2 Bl. Rep. 1169; 1 Stark. Ev. 40. It is frequently difficult to ascertain *a priori*, whether a particular fact offered in evidence will or will not become material, and in such cases it is usual in practice for the court to give credit to assertion of counsel who tenders such evidence, that the facts will turn out to be material, but this is always within the sound discretion of the court. When a witness is cross-examined as to collateral facts, the party cross-examining will be bound by the answer, and he cannot, in general, contradict him by another witness. Rosc. Ev. 139.

COLLATERAL ISSUE, *practice*, *pleading*, is where a criminal convict pleads any matter, allowed by law, in bar of execution, as pregnancy, a pardon, and the like.

COLLATERAL KINSMEN, *descent*, *distribution*, are those who descend from one and the same common ancester, but not from one another; thus brothers and sisters are collateral to each other; the uncle and the nephew are collateral kinsmen, and cousins are the same. The term collateral is used in opposition to the phrase *lineal kinsmen*, (q. v.)

COLLATERAL SECURITY, *contracts*, is a separate obligation which is attached to another contract, and is to guaranty its performance. By this term is also meant the transfer of property or of other contracts to insure the performance of a principal engagement. The property or securities thus conveyed are also called collateral securities. 1 Pow. Mortg. 393; 2 Ib. 666, n. 871; 3 Ib. 944, 1001.

COLLATERAL WARRANTY, *contracts*, *descent*, is where the heir's title to the land neither was nor could have been derived from the warranting ancestor; and yet barred the heir from ever claiming the land, and also imposed upon him the same obligation of giving the warrantee other lands, in case of eviction, as if the warranty were lineal, provided the heir had assets. 4 Cruise, Real Prop. 436. The doctrine of collateral warranty, is, according to Justice Story, one of the most unjust, oppressive, and indefensible in the whole range of the common law. 1 Sumn. R. 262. By the statute of 4 & 5 Anne, c. 16, § 21, all collateral warranties of any land to be made after a certain day, by any ancestor who has no estate of inheritance in possession in the same, were made void against the heir. This statute has been re-enacted in New York, 4 Kent, Com. 469, 3d ed.; and in New Jersey, 3 Halst. R. 106. It has been adopted and is in force in Rhode Island, 1 Sumn. R. 235; and in Delaware, Harring. R. 50. In Kentucky and Virginia, it seems that collateral warranty binds the heir to the extent of assets descended. 1 Dana, R. 59. In Pennsylvania, collateral warranty of the ancestor, with sufficient real assets descending to the heirs, bars them from recovering the lands warranted. 4 Dall. R. 168; 2 Yeates, R. 509; 9 S. & R. 275. See 1 Sumn. 262; 3 Halst. 106; Harring. 50; 3 Rand. 549; 9 S. & R. 275; 4 Dall. 168; 2 Yeates, 509; 1 Dana, 59.

COLLATIO BONORUM, *descent*, *distribution*, is where a portion or money advanced to a son or daughter, is brought into hotchpot, in order to have an equal distributive share of the ancestor's personal estate. The same rule obtains in the civil law. Civil Code of Louis. 1305; Dict. de Jur. mot Collation; Merlin Rép. mot Collation.

COLLATION, a term used in the laws of Louisiana. Collation of goods is the supposed or real return to the mass of the succession, which an heir makes of property which he received in advance of his share or otherwise, in order that such property may be divided, together with the other effects of the succession. Civil Code of Lo. art. 1305. See Ib. art. 1305 to 1367; and *Hotchpot*.

COLLATION OF SEALS.—Where on the same label, one seal was set on the back or reverse of the other, this was said to be a collation of seals. Jacob, L. D. h. t.

COLLECTOR, *officer*, one appointed to receive taxes or other impositions; as collector of taxes; collector of militia fines, &c. A collector is also a person appointed by a private person to collect the credits due him. Metc. & Perk. Dig. h. t.

COLLECTORS OF THE CUSTOMS, are officers of the United States, appointed for the term of four years, but removable at the pleasure of the president. Act of May 15, 1820, sect. 1, 3 Story's U. S. Laws, 1790. The general duty of a collector, is "to receive all reports, manifests and documents, to be made or exhibited on the entry of any ship or vessel, according to the regulations of this act; shall record in books to be kept for the purpose, all manifests; shall receive the entries of all ships or vessels, and of the goods, wares

and merchandize imported in them; shall, together with the naval officer, where there is one, or alone, where there is none, estimate the amount of duties payable thereupon, endorsing the said amounts upon the respective entries; shall receive all moneys paid for duties, and shall take bonds for securing the payment thereof; shall grant all permits for the unlading and delivery of goods; shall, with the approbation of the principal officer of the treasury department, employ proper persons as weighers, guagers, measurers and inspectors, at the several ports within his district; and also, with the like approbation, provide, at the public expense, storehouses for the safe keeping of goods, and such scales, weights, and measures, as may be necessary." Act of March 2, 1799, s. 21; 1 Story U. S. Laws, 590. Vide, for other duties of collectors, 1 Story U. S. Laws, 592, 612, 620, 632, 659, and vol. 3, 1650, 1697, 1759, 1761, 1791, 1811, 1848, 1854; 10 Wheat. 246.

COLLISION, *maritime law*, takes place when two ships or other vessels run foul of each other, or when one runs foul of the other. In such cases there is almost always a loss or damage incurred. There are four possibilities under which an accident of this sort may occur. 1. It may happen without blame being imputable to either party, as when the loss is occasioned by a storm, or any other *vis major*; in that case the loss must be borne by the party on whom it happens to light, the other not being responsible to him in any degree.—2. Both parties may be to blame, as when there has been a want of due diligence or of skill on both sides; in such cases, the loss must be apportioned between them, as having been occasioned by the fault of both of them. 6 Whart. R. 311.—3. The suffering party may have been the cause of the injury, then he must bear the loss.—4. It may have been the fault of the ship which ran down the other; in this case, the injured party would be entitled to an entire compensation from the other. 2 Dobson's Rep. 83, 85; 3 Hagg. Adm. R. 320; the same rule is applied to steamers; Ib. 414. —5. Another case has been put, namely, when there has been some fault or neglect, but on which side the blame lies is inscrutable, or the evidence leaves it in a state of uncertainty. In this case, it does not appear to be settled whether the loss shall be apportioned or borne by the suffering party; opinions on this subject are divided. Vide generally, Story, Bailm. § 607 to 612; Marsh. Ins. B. 1, c. 12, s. 2; Wesk. Ins. art. Running Foul; Jacobsen's Sea Laws, B. 4, c. 1; 4 Taunt. 126; 2 Chit. Pr. 513, 535; Code de Comm. art. 407; Boulay-Paty, Cours de Dr. Commercial, tit. 12, s. 6; Pard. n. 652 to 654; Pothier, Avaries, n. 155; 1 Emerig. Assur. ch. 12, § 14.

COLLISTRIGIUM. The pillory.

COLLOCATION, *French law*. The act by which the creditors of an estate are arranged in the order in which they are to be paid according to law. The order in which the creditors are placed, is also called collocation. Merl. Rép. h. t. Vide *Marshalling Assets*.

COLLOQUIUM, *pleading*, a discourse, a conversation or conference. In actions of slander it is generally true that an action does not lie for words, on account of their being merely disgraceful to a person in his office, profession or trade; unless it be averred, that at the time of publishing the words, there was a colloquium concerning the office, profession or trade of the plaintiff. In its technical sense, the term colloquium signifies an averment in a declaration that there was a conversation or

discourse on the part of the defendant, which connects the slander with the office, profession or trade of the plaintiff, and this colloquium ought to extend to the whole of the prefatory matter necessarily to render the words actionable. 3 Bulst. 83; vide Bac. Ab. Slander, S, n. 3; Dane's Ab. Index, h. t.; Com. Dig. Action upon the case for Defamation, G 7, 8, &c.; Stark. on Sland. 290, et seq.

COLLUSION, *fraud*, is an agreement between two or more persons, unlawfully to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law; as, for example, where the husband and wife collude to obtain a divorce for a cause not authorised by law. 4 Eccl. R. 310. It is nearly synonymous with *covin*, (q. v.) Collusion and fraud of every kind vitiate all acts which are infected with them, and render them void. Vide Shelf. on Mar. & Div. 415, 450; 3 Hagg. Eccl. R. 130, 133.

COLONY, a union of citizens or subjects who have left their country to people another, and remain subject to the mother country. 3 W. C. C. R. 287. The country occupied by the colonists is also called a colony. A colony differs from a possession, or a dependency, (q. v.) For a history of the American colonies, the reader is referred to Story on the Constitution, book I.; 1 Kent, Com. 77 to 80; 1 Dane's Ab. Index, h. t.

COLOUR, *pleading*, is of several kinds, namely, express colour, and implied colour.

COLOUR, EXPRESS, *pleading*, is defined to be a feigned matter, pleaded by the defendant, in an action of trespass, from which the plaintiff seems to have a good cause of action, whereas he has in truth only an appearance or colour of cause. Bac. Ab. Trespass, I 4. It is a general rule in pleading that no man shall be allowed to plead specially such plea as amounts to the general issue, or a total denial of the charges contained in the declaration, and must in such cases plead the general issue in terms, by which the whole question is referred to the jury; yet, if the defendant in an action of trespass, be desirous to refer the validity of his title to the court, rather than to the jury, he may in his plea state his title specially, by expressly giving colour of title to the plaintiff, or supposing him to have an appearance of title, bad indeed in point of law, but of which the jury are not competent judges. 3 Bl. Com. 309. Suppose, for example, that the plaintiff was in wrongful possession of the close, without any further appearance of title than the possession itself, at the time of the trespass alleged, and that the defendants entered upon him in assertion of their title; but being unable to set forth this title in the pleading, in consequence of the objection that would arise for want of colour, are driven to plead the general issue of not guilty. By this plea an issue is produced whether the defendants are guilty or not of the trespass; but upon the trial of the issue, it will be found that the question turns entirely upon construction of law. The defendants say they are not guilty of the trespasses, because they are not guilty of breaking the *close of the plaintiff*, as alleged in the declaration; and that they are not guilty of breaking the close of the plaintiff, because they themselves had the property in that close; and their title is this, that the father of one of the defendants being seised of the close in fee, gave it in tail to his eldest son, remainder in tail to one of the defendants; the eldest son was disseised, but made continual claim till the death of the disseisor; after whose death, the descent being cast upon the heir, the disseisee entered upon the heir, and

afterwards died, when the remainder took effect in the said defendant who demised to the other defendant. Now, this title involves a legal question, namely, whether continual claim will not preserve the right of entry in the disseisee, notwithstanding a descent cast on the heir of the disseisor. (See as to this point, *Continual Claim.*) The issue however is merely not guilty, and this is triable by jury; and the effect, therefore, would be, that a jury would have to decide this question of law, subject to the direction upon it, which they would receive from the court. But, let it be supposed that the defendants, in a view to the more satisfactory decision of the question, wish to bring it under the consideration of the court in bank, rather than have it referred to a jury. If they have any means of setting forth their title specially in their plea, the object will be attained; for then the plaintiff, if disposed to question the sufficiency of the title, may demur to the plea, and thus refer the question to the decision of the judges. But such plea if pleaded simply, according to the state of fact, would be informal for want of colour; and hence arises a difficulty. The pleaders of former days, contrived to overcome this difficulty in the following singular manner. In such case as that supposed, the plea wanting *implied* colour, they gave in lieu of it an *express* one, by inserting a fictitious allegation of some colourable title in the plaintiff, which they, at the same time *avoided* by the preferable title of the defendant. See Steph. Pl. 225; Brown's Entr. 343, for a form of the plea. Formerly various suggestions of apparent right, might be adopted according to the fancy of the pleader; and though the same latitude is, perhaps, still available, yet, in practice, it is unusual to resort to any except certain known fictions, which long usage has applied to the particular case; for example, in trespass to land, the colour universally given is that of a defective charter of the demise.

See, in general, 2 Saund. 410; 10 Co. 88; Cro. Eliz. 76; 1 East, 215; Doct. Pl. 17; Doct. & Stud. lib. 2, c. 53; Bac. Abr. Pleas, I 8; Trespass, I 4; 1 Chit. Pl. 500; Steph. on Pl. 220.

COLOUR, IMPLIED, *pleading.* Colour is a term of the ancient rhetoricians; and was adopted, at an early period, in the language of pleading. See Year Books, 38 E. 3, 28; 40 E. 3, 23. It signifies an apparent or prima facie right. It is a rule that every pleading by way of confession and avoidance, must give colour; that is, it must admit an apparent right in the opposite party, and rely, therefore, on some new matter by which that apparent right is defeated. For example, where the the defendant pleads a release to an action for breach of covenant, the tendency of the plea is to admit an apparent right in the plaintiff, namely, that the defendant did, as alleged in the declaration, execute the deed, and break the covenant therein contained, and would therefore, prima facie be liable on that ground; but shows new matter not before disclosed, by which that apparent right is done away, namely, that the plaintiff executed to him a release. Again, if the plaintiff reply that such release was obtained by duress. In his replication he impliedly admits, that the defendant has, prima facie, a good defence, namely, that such release was executed as alleged in the plea; and that the defendant therefore would be discharged; but relies on new matter by which the plea is avoided, namely, that the release was obtained by duress. The plea in this case, therefore, gives colour to the declaration, and the replica-

tion, to the plea. But let it be supposed that the plaintiff has replied, that the release was executed by him, but to another person, and not to the defendant; this would be an informal replication *wanting colour;* because, if the release were not to the defendant, there would not exist even an apparent defence, requiring the allegation of new matter to avoid it, and the plea might be sufficiently answered by a traverse, denying that the deed stated in the plea, is the deed of the plaintiff. See Steph. Pl. 220; 1 Chit. Pl. 498; Lawes Civ. Pl. 126; Arch. Pl. 211; Doct. Pl. 17; 4 Vin. Abr. 552; Bac. Abr. Pleas, &c. I 8; Com. Dig. Pleader, 3 M 40, 3 M 41. See an example of giving colour in pleadings in the Roman law, Inst. lib. 4, tit. 14, De replicationibus.

COLOUR OF OFFICE, *criminal law*, is a wrong committed by an officer under the pretended authority of his office. In some cases the act amounts to a misdemeanor, and the party may then be indicted; in other cases the remedy to redress the wrong is by an action.

COLT. An animal of the horse species, whether male or female, not more than four years old. Russ. & Ry. 416.

COMBINATION. A union of different things. A patent may be taken out for a new combination of existing machinery or machines. See 2 Mason, 112; and *Composition of matter*.

COMBUSTIO DOMORUM, burning of houses; *arson*. Vide 4 Bl. Com. 372.

COMES, *pleading*. In a plea the defendant says, "And the said C D, by E F, his attorney *comes*, and defends, &c. The word comes, *venit*, expresses the appearance of the defendant in court. It is taken from the style of the entry of the proceedings on the record and formed no part of the *viva voce* pleading. It is, accordingly not considered, as in strictness, constituting a part of the plea. 1 Chit. Pl. 411; Steph. Pl. 432.

COMITATUS, a county. Most of the states are divided into counties; some, as Louisiana, are divided into parishes.

COMMAND. This word has several meanings. 1. It signifies an order; an apprentice is bound to obey the lawful command of his master; a constable may command rioters to keep the peace.—2. A request or suggestion; he who commands another to do an unlawful act, is accessary to it. 3 Inst. 51, 57; 2 Inst. 182.—3. Command is also equivalent to deputation or voluntary substitution; as, when a master employs one to do a thing, he is said to have commanded him to do it; and he is responsible accordingly. Story, Ag. § 454, note.

COMMENCEMENT OF A SUIT OR ACTION. The suit is considered as commenced from the issuing of the writ, 3 Bl. Com. 273, 285; 7 T. R. 4; 1 Wils. 147; 18 John. 14; Dunl. Pr. 120; 2 Phil. Ev. 95; 7 Verm. R. 426; 6 Monr. R. 560; Peck's R. 276; 1 Pick. R. 202; Ib. 227; 2 N. H. Rep. 36; 4 Cowen, R. 158; 8 Cowen, 203; 3 John. Cas. 133; 2 John. R. 342; 3 John. R. 42; 15 John. R. 42; 17 John. R. 65; 11 John. R. 473; and if the teste or date of the writ be fictitious, the true time of its issuing may be averred and proved, whenever the purposes of justice require it; as in cases of a plea of tender or of the statute of limitations. Bac. Ab. Tender D; 1 Stra. 638; Peake's Ev. 259; 2 Saund. 1, n. 1. In Connecticut the service of the writ is the comencement of the action. 1 Root, R. 487; 4 Conn. 149; 6 Conn. R. 30; 9 Conn. R. 530; 7 Conn. R. 558; 21 Pick. R. 241. Vide *Lis Pendens*.

COMMENDAM, *eccles. law.* When a benefice or church living is void or vacant, it is *commended* to the care of some sufficient clerk to be supplied, until it can be supplied with a pastor; he to whom the church is thus commended is said to hold *in commendam*, and he is entitled to the profits of the living. Hob. 144; Latch, 236. In Louisiana, there is a species of limited partnership called a partnership *in commendam*. It is formed by a contract, by which one person or partnership agrees to furnish another person or partnership a certain amount, either in property or money, to be employed by the person or partnership to whom it is furnished, in his or their own name or firm, on condition of receiving a share in the profits, in the proportion determined by the contract, and of being liable to losses and expenses, to the amount furnished, and no more. Civ. Code of Lo. art. 2810. A similar partnership exists in France. Code de Comm. 26, 33; Sirey, tom. 12, part 2, p. 25. He who makes this contract, is called in respect to those to whom he makes the advance of capital, a partner *in commendam*. Civ. Code of Lo. art. 2811.

COMMENDATARY. A person who holds a church living or presentment *in commendam*.

COMMENDATORS, *eccl. law*, are secular persons upon whom ecclesiastical benefices are bestowed, because they were commended and instructed to their oversight; they are merely trustees.

COMMERCE, *trade, contracts*, is the exchange of commodities for commodities; considered in a legal point of view, it consists in the various agreements which have for their object to facilitate the exchange of the products of the earth or industry of man, with an intent to realise a profit. Pard. Dr. Com. n. 1. In a narrower sense, commerce signifies any reciprocal agreements between two persons, by which one delivers to the other a thing, which the latter accepts, and for which he pays a consideration; if the consideration be money, it is called a sale; if any other thing than money, it is called exchange or barter. Domat, Dr. Pub. liv. 1, tit. 7, s. 1, n. 2; Congress have power by the constitution to regulate commerce with foreign nations and among the several states, and with the Indian tribes. 1 Kent, Com. 431; Story on Const. § 1052 et seq. The sense in which the word commerce is used in the constitution seems not only to include traffic but intercourse, and navigation. Story, § 1057; 9 Wheat. 190, 191, 215, 229; 1 Tuck. Bl. App. 249 to 252. Vide 17 John. R. 488; 4 John. Ch. R. 150; 5 John. Ch. R. 300; 1 Halst. R. 285; Id. 236; 3 Cowen, R. 713; 12 Wheat. R. 419; 1 Brock. R. 423; 11 Pet. R. 102; 6 Cowen, R. 169; 3 Dana, R. 274; 6 Pet. R. 515; 13 S. & R. 205.

COMMISSARY is an officer whose principal duties are to supply the army with provisions. The act of April 14, 1818, s. 6, requires that the president, by and with the consent of the senate, shall appoint a commissary general with the rank, pay, and emoluments of the colonel of ordnance, and as many assistants, to be taken from the subalterns of the line, as the service may require. The commissary general and his assistants shall perform such duties, in the purchasing and issuing of rations to the armies of the United States, as the president may direct. The duties of these officers are further detailed in the subsequent sections of this act, and in the act of March 2, 1821.

COMMISSION, *in contracts*, is when one undertakes without reward, to do something for another in respect to a thing bailed. This term is frequently used synonymously with

mandate, (q. v.) Ruth. Inst. 105; Halifax, Analysis of the Civil Law, 70. If the service the party undertakes to perform for another is the custody of his goods, this particular sort of commission is called a *charge*. In a commission, the obligation on his part who undertakes it, is to transact the business without wages, or any other reward, and to use the same care and diligence in it, as if it was his own.

COMMISSION, *office*. Persons authorised to act in a certain matter; as, such a matter was submitted to the commission; there were several meetings before the commission. 4 B. & Cr. 850; 10 E. C. L. R. 459.

COMMISSION, *crim. law*, is the perpetration of an offence; as there are crimes of commission and crimes of omission.

COMMISSION, *government*.—Letters-patent granted by the government, under the public seal, to a person appointed to an office, giving him authority to perform the duties of his office. The commission is not the appointment, but only evidence of it; and as soon as it is signed and sealed, vests the office in the appointee. 1 Cranch, 137; 2 N. & M. 357; see Pet. C. C. R. 194; 2 Sumn. 299; 8 Conn. 109; 1 Penn. 297; 2 Const. Rep. 696; 2 Tyler, 235.

COMMISSION, *practice*. An instrument issued by a court of justice, or other competent tribunal, to authorise a person to take depositions, or do any other act by authority of such court, or tribunal, is also called a commission. For a form of a commission to take depositions, see Gresley, Eq. Ev. 72.

COMMISSION OF REBELLION, *chan. prac.*, is the name of a writ issuing out of chancery generally directed to four special commissioners, named by the plaintiff, commanding them to attach the defendant wheresoever he may be found within the state, as a rebel and contemner of the law, so as to have him in chancery on a certain day therein named. This writ may be issued after an attachment with proclamation, and a return of *non est inventus*. Blake's Ch. Pr. 102; Newl. Ch. Pr. 14.

COMMISSIONER OF PATENTS. The name of an officer of the United States, whose duties are detailed in the act to promote the useful arts, &c., which will be found under the article *Patent*.

COMMISSIONER, *officer*. One who has a lawful commission to execute a public office; but in a more restricted sense it is one who is authorised to execute a particular duty, as, commissioner of the revenue, canal commissioner: the term when used in this latter sense is not applied, for example, to a judge. There are commissioners, too, who have no regular commissions, and derive their authority from the elections held by the people. County commissioners, in Pennsylvania, are officers of the latter kind.

COMMISSIONERS OF BAIL, *in practice*, are officers appointed by some courts to take recognizances of bail in civil cases.

COMMISSIONS, *in contracts, practice*, are an allowance or compensation to an agent, factor, executor, trustee or other person who manages the affairs of others, for his services in performing the same. The right of agents, factors or other contractors to a commission, may either be the subject of a special contract, or rest upon the *quantum meruit*. 9 C. & P. 559; 38 E. C. L. R. 227; 3 Smith's R. 440; 7 C. & P. 584; 32 E. C. L. R. 641; Sugd. Vend. Index, tit. Auctioneer. This compensation is usually the allowance of a certain per centage upon the actual amount or value of the business done,

When there is a usage of trade at the particular place, or in the particular business in which the agent is engaged, the amount of commissions allowed to auctioneers, brokers and factors, is regulated by such usage. 3 Chit. Com. Law, 221; Smith on Merc. Law, 54; Story, Ag. § 326; 3 Camp. R. 412; 4 Camp. R. 96; 2 Stark. R. 225, 294. The commission of an agent is either ordinary or *del credere*, (q. v.) The latter is an increase of the ordinary commission, in consideration of the responsibility which the agent undertakes, by making himself answerable for the solvency of those with whom he contracts. Liverm. Agency, 3, et seq.; Paley, Agency, 88, et seq. In Pennsylvania the amount of commissions allowed to executors and trustees is generally fixed at five per centum on the sum received and paid out, but this is varied according to circumstances. 9 S. & R. 209, 223; 4 Whart. 98; 1 Serg. & Rawle, 241. In England no commissions are allowed to executors or trustees. 1 Vern. R. 316, n. and the cases there cited; 4 Ves. 72, n.

COMMITMENT, *criminal law, practice.* The warrant or order by which a court or magistrate directs a ministerial officer to take a person to prison. The commitment is either for further hearing, (q. v.) or it is final. The formal requisites of the commitment are, 1st, that it be in writing under hand and seal, and show the authority of the magistrate, and the time and place of making it. 3 Har. & McHen. 113; Charlt. 280; 3 Cranch, R. 448; see Harp. R. 313, where it is said a seal is not indispensable. 2d. It must be made in the name of the United States, or of the commonwealth, or people, as required by the constitution of the United States or of the several states. 3d, It should be directed to the keeper of the prison, and not generally to carry the party to prison, 2 Str. 934; 1 Ld. Raym. 424. 4th, The prisoner should be described by his name and surname, or the name he gives as his. 5th, The commitment ought to state that the party has been charged on oath. 3 Cranch, R. 448. But see 2 Virg. Cas. 504; 2 Bail. R. 290. 6th, The particular species of crime charged against the prisoner should be mentioned with convenient certainty. 3 Cranch, R. 448; 11 St. Tr. 304, 318; Hawk. B. 2, c. 16, s. 16; 1 Chit. Cr. Law, 110. 7th, The commitment should point out the place of imprisonment, and not merely direct that the party be taken to prison. 2 Str. 934; 1 Ld. Ray. 424. 8th, In a final commitment, the authority to the keeper of the prison should be to keep the prisoner "until he shall be discharged by due course of law," when the offence is not bailable; when it is bailable the gaoler should be directed to keep the prisoner in his "said custody for want of sureties, or until he shall be discharged by due course of law." When the commitment is not final, it is usual to commit the prisoner "for further hearing." The commitment is also called a mittimus, (q. v.) The act of sending a person to prison charged with the commission of a crime by virtue of such a warrant is also called a commitment. Vide generally, 4 Vin. Ab. 576; Bac. Ab. h. t.; 4 Cranch, R. 129; 4 Dall. R. 412; 1 Ashm. R. 248; 1 Cowen, R. 144; 3 Conn. R. 502; Wright, R. 691; 2 Virg. Cas. 276; Hardin, R. 249; 4 Mass. R. 497; 14 John. R. 371; 2 Virg. Cas. 504; 1 Tyler, R. 444; U. S. Dig. h. t.

COMMITTEE, *practice.* When a person has been found non compos, the law requires that a guardian should be appointed to take care of his person and estate; this guardian is called the committee. It is usual to select the committee from the next

of kin, Shelf. on Lun. 137; and in case of the lunacy of the husband or wife, the one who is sound is entitled, unless under very special circumstances, to be the committee of the other, Ib. 140. This is the committee of the person. For committee of the estate the heir at law is most favoured; relations are preferred to strangers, but the latter may be appointed. Ib. 144. It is the duty of the committee of the person to take care of the lunatic; and the committee of the estate is bound to administer the estate faithfully, and to account for his administration. He cannot in general make contracts in relation to the estate of the lunatic, or bind it without a special order of the court or authority that appointed him. Ib. 179.

COMMITTEE, *legislation.* One or more members of a legislative body to whom is specially referred some matter before that body, in order that they may investigate and examine into it and report to those who delegated this authority to them.

COMMIXTION, *civil law.* This term is used to signify the act by which goods are mixed together. The matters which are mixed are dry or liquid. In the commixtion of the former, the matter retains its substance and individuality; in the latter the substances no longer remain distinct. The commixtion of liquids is called *confusion*, (q. v.) and that of the solids is a mixture. Leç. Elem. du Dr. Rom. § 370, 371; Story, Bailm. § 40.

COMMODATE, *contracts*, a term used in the Scotch law, which is synonymous to the Latin commodatum, or loan for use. Ersk. Inst. B. 3, t. 1, § 20; 1 Bell's Com. 225; Ersk. Pr. Laws of Scotl. B. 3, t. 1, § 9. Judge Story regrets this term has not been adopted and naturalized as mandate has been from mandatum. Story, Com. § 221. Ayliffe, in his Pandects, has gone further and terms the bailor the *commodant* and the bailee the *commodatory*, thus avoiding those circumlocutions, which, in the common phraseology of our law, have become almost indispensable. Ayl. Pand. B. 4, t. 16, p. 517. Browne, in his Civil Law, vol. 1, 352, calls the property loaned "*commodated* property." See *Borrower; Loan for use; Lender.*

COMMON, *or right of common, in the English law*, is an incorporeal hereditament which consists in a profit which a man has in the lands of another. 12 S. & R. 32; 10 Wend. R. 647; 11 John. R. 498. Common is of four sorts; of pasture, piscary, turbary and estovers. Finch's Law, 157; Co. Litt. 122; 2 Inst. 86; 2 Bl. Com. 32.

1. Common of pasture is a right of feeding one's beasts on another's land, and is either appendant, appurtenant or in gross. Common appendant is of common right, and it may be claimed in pleading as appendant without laying a prescription. Hargr. note to 2 Inst. 122, a, note. Rights of common appurtenant to the claimant's land are altogether independent of the tenure, and do not arise from any absolute necessity; but may be annexed to lands in other lordships, or extended to other beasts, besides such as are generally commonable. Common in gross, or at large is such as is neither appendant nor appurtenant to land, but is annexed to a man's person. All these species of pasturable common, may be and usually are limited as to number and time; but there are also commons without stint, and which last all the year. 2 Bl. Com. 34.

2. Common of piscary is a liberty of fishing in another man's water. Ib. See *Fishery.*

3. Common of turbary is a liberty of digging turf in another man's ground. Ib.

4. Common of estovers is a liberty of taking necessary wood for the use or furniture of a house or farm from another man's estate. Ib.; 10 Wend. R. 639. See *Estovers*.

The right of common is little known in the United States, yet there are some regulations to be found in relation to this subject. The constitution of Illinois provides for the continuance of certain commons in that state. Const. art. 8, s. 8. All unappropriated lands on the Chesapeake Bay, on the shore of the sea, or of any river or creek, and the bed of any river or creek, in the eastern parts of the commonwealth, ungranted and used as common, it is declared by statute in Virginia, shall remain so, and not be subject to grant. 1 Virg. Rev. C. 142. In most of the cities and towns in the United States, there are considerable tracts of land appropriated to public use. These commons were generally laid out with the cities or towns where they are found, either by the original proprietors or by the early inhabitants. Vide 2 Pick. Rep. 475; 12 S. & R. 32; 2 Dane's Ab. 610; 14 Mass. R. 440; 6 Verm. 355.

See, in general, Vin. Abr. Common; Bac. Abr. Common; Com. Dig. Common; Stark. Ev. part 4, p. 383; Cruise on Real Property, h. t.; Metc. & Perk. Dig. Common, and Common lands and General fields.

COMMON BENCH, *bancus communis*. The court of *common pleas* was anciently called *common bench*, because the pleas and controversies there determined were between common persons.

COMMON CARRIER, *contracts*, is one who undertakes for hire or reward to transport the goods of such as choose to employ him, from place to place. 1 Pick. 50, 53; 1 Salk. 249, 250; Story, Bailment, § 495. Common carriers are generally of two descriptions, namely, carriers by land and carriers by water. Of the former description are the proprietors of stage coaches, and stage wagons, which ply between different places, and carry goods for hire; and truckmen, teamsters, cartmen, and porters, who undertake to carry goods for hire, as a common employment, from one part of a town or city to another, are also considered as common carriers. Carriers by water are the masters and owners of ships and steam-boats engaged in the transportation of goods for persons generally, for hire; and lightermen, hoymen, barge-owners, ferrymen, canal boatmen, and others employed in like manner, are so considered.

By the common law, a common carrier is generally liable for all losses which may occur to property entrusted to his charge in the course of business, unless he can prove the loss happened in consequence of the act of God, or of the enemies of the United States, or by the act of the owner of the property. 8 S. & R. 533; 6 John. R. 160; 11 John R. 107; 4 N. H. Rep. 304; Harp. R. 469; Peck. R. 270; 7 Yerg. R. 340; 3 Munf. R. 239; 1 Conn. R. 487; 1 Dev. & Bat. 273; 2 Bail. Rep. 157. It has been attempted to relax the rigor of the common law in relation to carriers by water, 6 Cowen, 266; but that case seems to be at variance with other decisions, 2 Kent, Com. 471, 472; 10 Johns. 1; 11 Johns. 107. In respect to carriers by land, the rule of the common law seems every where admitted in its full rigour in the states governed by the jurisprudence of the common law. Louisiana follows the doctrine of the civil law in her code. Proprietors of stage coaches or wagons whose employment is solely to carry passengers, as hackney coachmen, are not deemed common carriers; but if the proprietors of such vehicles for passengers, also carry goods for hire, they are, in

respect of such goods, to be deemed common carriers. Bac. Ab. Carriers, A; 2 Show. Rep. 128; 1 Salk. 282; Com. Rep. 25; 1 Pick. 50. The like reasoning applies to packet ships and steam-boats, which ply between different ports, and are accustomed to carry merchandise as well as passengers 2 Watts, R. 443; 5 Day's Rep. 415; 1 Conn. R. 54; 4 Greenl. R. 411; 5 Yerg. R. 427; 4 Har. & J. 291; 2 Verm. R. 92; 2 Binn. Rep. 74; 1 Bay, Rep. 99; 10 John. R. 1; 11 Pick. R. 41; 3 Stew. & Port. 135; 4 Stew. & Port. 382; 3 Misso. R. 264; 2 Nott & M. 88. But see 6 Cowen, R. 266. The rule which makes a common carrier responsible for losses of goods, does not extend to the carriage of intelligent beings; a carrier of slaves, is, therefore, answerable only for want of care and skill. 2 Pet. S. C. R. 150; 4 M'Cord, R. 223; 4 Port. R. 238.

A common carrier of goods is in all cases entitled to demand the price of carriage before he receives the goods, and, if not paid, he may refuse to take charge of them; if, however, he take charge of them without the hire being paid he may afterwards recover it. The compensation which becomes due for the carriage of goods by sea, is commonly called *freight*, (q. v.); and see also Abb. on Sh. part 3, c. 7. The carrier is also entitled to a lien on the goods for his hire, which, however, he may waive, but if once waived, the right cannot be resumed. 2 Kent, Com. 497. The consignor or shipper is commonly bound to the carrier for the hire or freight of goods, 1 T. R. 659. But whenever the consignee engages to pay it, he also may become responsible. It is usual in bills of lading to state, that the goods are to be delivered to the consignee or to his assigns he or they paying freight, in which case the consignee and his assigns by accepting the goods by implication become bound to pay the freight; and the fact that the consignor is also liable to pay it, will not in such case make any difference. Abbott on Sh. part 3, c. 7, § 4.

What is said above relates to common carriers of goods. The duties, liabilities, and rights of carriers of passengers are now to be considered. These are divided into carriers of passengers on land, and carriers of passengers on water. First, of carriers of passengers on land. The *duties* of such carriers are, 1st, those which arise on the commencement of the journey; that is, 1. To carry passengers whenever they offer themselves and are ready to pay for their transportation; they have no more right to refuse a passenger if they have sufficient room and accommodation, than an innkeeper has a guest. 3 Brod. & Bing. 54; 9 Price's R. 408; 6 Moore, R. 141; 2 Chit. R. 1; 4 Esp. R. 460; 1 Bell's Com. 462; Story, Bailm. § 591.—2. To provide coaches reasonably strong and sufficient for the journey, with suitable horses, trappings and equipments.—3. To provide careful drivers of reasonable skill and good habits for the journey; and to employ horses which are steady and not vicious, or likely to endanger the safety of the passengers.—4. Not to overload the coach either with passengers or luggage.—5. To receive and take care of the usual luggage allowed to every passenger on the journey.—2dly, Their duties on the progress of the journey.—1. To stop at the usual places, and allow the usual intervals for the refreshment of the passengers, 5 Petersd. Ab. Carriers, p. 48, note.—2. To use all the ordinary precautions for the safety of passengers on the road.—3dly, Their duties on the termination of the journey.—1. To carry the passengers to the end

of the journey.—2. To put them down at the usual place of stopping, unless there has been a special contract to the contrary, and then to put them down at the place agreed upon. 1 Esp. R. 27. The *liabilities* of such carriers. They are bound to use extraordinary care and diligence to carry safely those whom they take in their coaches. 2 Esp. R. 533; 2 Camp. R. 79; Peake's R. 80. But, not being insurers, they are not responsible for accidents when all reasonable skill and diligence have been used. The *rights* of such carriers are: 1, to demand and receive their fare at the time the passenger takes his seat.—2. They have a lien on the baggage of the passenger for his fare or passage money, but not on the person of the passenger, nor the clothes he has on. Abb. on Sh. part 3, c. 3, § 11; 2 Campb. R. 631. Second; Carriers of passengers by water. By the act of Congress of 2d of March, 1819, 3 Story's Laws U. S. 1722, it is enacted, 1, that no masters of a vessel bound to or from the United States shall take more than two passengers for every five tons of the ship's custom-house measurement; 2, that the quantity of water and provisions, which shall be taken on board and secured under deck, by every ship bound from the United States to any port on the continent of Europe, shall be sixty gallons of water, one hundred pounds of salted provisions, one gallon of vinegar, and one hundred pounds of wholesome ship bread, for each passenger, besides the stores of the crew. The tonnage here mentioned, is the measurement of the custom house; and in estimating the number of passengers in a vessel, no deduction is to be made for children or persons not paying, but the crew is not to be included. Gilp. R. 334. In New York, statutory regulations have been made in relation to their canal navigation. Vide 6 Cowen's R. 698. As to the conduct of carrier vessels on the ocean, vide Story, Bailm. § 607 et seq.; Marsh. Ins. B. 1, c. 12, s. 2. And see generally 1 Vin. Ab. 219; Bac. Ab. h. t.; 1 Com. Dig. 423; Petersd. Ab. h. t.; Dane's Ab. Index, h. t; 2 Kent, Com. 464; 16 East, 247, note.

In Louisiana carriers and watermen are subject, with respect to the safe keeping and preservation of the things entrusted to them, to the same obligations and duties, which are imposed on tavern keepers, Civ. Code, art. 2722, that is, they are responsible for the effects which are brought though they were not delivered into their personal care, provided, however, they were delivered to a servant or person in their employment, art. 2937; they are responsible if any of the effects be stolen or damaged, either by their servants or agents, or by strangers, art. 2938; but they are not responsible for what is stolen by force of arms or with exterior breaking open of doors, or by any other extraordinary violence, art. 2939. For the authorities on the subject of common carriers in the civil law, the reader is referred to Dig. 4, 9, 1 to 7; Poth. Pand. lib. 4, t. 9; Domat, liv. 1. t. 16, s. 1 and 2; Pard. art. 537 to 555; Code Civil, art. 1782, 1786, 1952; Moreau & Carlton, Partidas 5, t. 8, l. 26; Ersk. Inst. B. 3, t. 1, § 28; 1 Bell's Com. 465; Abb. on Sh. part 3, c. 3, § 3, note (l); 1 Voet, ad Pand. lib. 4, t. 9; Merl. Rép. mots Voiture, Voiturier; Dict. de Police, Voiture.

COMMON INTENT, *construction*. The natural sense given to words. It is a rule that when words are used which will bear a natural sense and an artificial one, or one to be made out by argument and inference, the natural sense shall prevail; it is simply a rule of construction and not

of addition; common intent cannot add to a sentence words which have been omitted. 2 H. Black. 530. In pleading, certainty is required, but certainty to a common intent is sufficient, that is, what upon a reasonable construction may be called certain, without recurring to *possible* facts. Co. Litt. 203, a; Dougl. 163. See *Certainty*.

COMMON LAW. See *Law, common*.

COMMON, TENANTS IN, vide *Tenant in common; Estate in common*.

COMMON PLEAS. The name of a court having jurisdiction generally of civil actions. Vide *Common Bench*.

COMMON RECOVERY. Vide *Recovery*.

COMMON SCOLD, *crim. law, communis rixatrix*, is a woman who in consequence of her scolding, is a public nuisance to the neighbourhood. Such a woman may be indicted, and on conviction punished. At common law, the punishment was by being placed in a certain engine of correction called the trebucket or cucking stool. This barbarous punishment has been abolished in Pennsylvania, where the offence may be punished by fine and imprisonment. 12 Serg. & Rawle, 220; vide 1 Russ. on Cr. 302; Hawk. B. 2, c. 25, s. 59; 1 T. R. 756; 4 Rogers's Rec. 174; 6 Rogers's Rec. 90; Roscoe on Cr. Ev. 665.

COMMON SENSE, *med. jur.* When a person possesses those perceptions, associations and judgments in relation to persons and things which agree with those of the generality of mankind, he is said to possess common sense; and, on the contrary, when a particular individual differs from all others in these respects, he is said not to have common sense, or not to be in his senses. 1 Chit. Med. Jur. 334.

COMMONWEALTH, *government*, is that form of government in which the administration of public affairs is open, or common to all persons, without any special regard to rank or property, as distinguished from monarchy or aristocracy. A republic. The United States of America are so many commonwealths.

COMMORANCY, *persons*, an abiding dwelling, or continuing as an inhabitant in any place. It consists properly in sleeping usually in any place.

COMMUNICATION, *contracts*. Information; consultation; conference. In order to make a contract, it is essential there should be an agreement; a bare communication or conference will not, therefore, amount to a contract, nor can evidence of such communication be received in order to add to, take from, contradict or alter a written agreement. 1 Dall. 426; 4 Dall. 340; 3 Serg. & Rawle, 609. Vide *Pourparler*; Wharton's Dig. Evid. R.

COMMUNINGS, *Scotch law*.—This term is used to express the negociations which have taken place before making a contract, in relation to such proposed contract; the same as *pourparler* (q. v.) It is a general rule that such communings or conversations, and the propositions then made, are no part of the contract; for no parol evidence will be allowed to be given to contradict, alter or vary a written instrument. 1 Serg. & R. 464; Id. 27; Add. R. 361; 2 Dall. R. 172; 1 Binn. 616; 1 Yeates, R. 140; 12 John. R. 77; 20 John. R. 49; 3 Conn. R. 9; 11 Mass. R. 30; 13 Mass. R. 443; 1 Bibb's R. 271; 4 Bibb's R. 473; 3 Marsh. (Kty.) R. 333; Bunb. 175; 1 M. & S. 21; 1 Esp. C. 53; 3 Campb. R. 57.

COMMUNITY. This word has several meanings, when used in common parlance it signifies the body of

the people, as such acts cannot be tolerated in a moral community. In the civil law, by community is understood corporations, or bodies politic. Dig. 3, 4. In the French law, which has been adopted in this respect in Louisiana, Civ. Code, art. 2371, community is a species of partnership, which a man and a woman contract when they are lawfully married to each other. It consists of 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 labour of both husband and wife, and of the estates which they may acquire during the marriage, either by donations made jointly to them, or by purchase, or in any other similar way, even although the purchase be made 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. 10 L. R. 146; Id. 172, 181; 1 N. S. 325; 4 N. S. 212. The debts contracted during the marriage enter into the community, and must be acquitted out the common fund; but not the debts contracted before the marriage.

The community is either, first, conventional, or that which is formed by an express agreement in the contract of marriage itself; by this contract the legal community may be modified, as to the proportions which each shall take, or as to the things which shall compose it, Civ. Code of L. art. 2393; second, legal, which takes place when the parties make no agreement on this subject in the contract of marriage; when it is regulated by the law of the domicil they had at the time of marriage.

The effects which compose the community of gains, are divided into two equal portions between their heirs, at the dissolution of the marriage. Civ. Code of L. art. 2375. See Poth. h. t.; Toull. h. t.; Civ. Code of Lo. tit. 6, c. 2, s. 4.

COMMUTATION, *punishments*, is the change of a punishment to which a person has been condemned for a less rigorous one. This can be granted only by the executive authority in which the pardoning power resides.

COMMUTATIVE CONTRACT, *civil law*, is one in which the contracting parties give and receive an equivalent for what they give; the contract of sale is one of kind, the seller gives the thing sold, and receives the price, which is the equivalent; the buyer gives the price and receives the thing sold which is the equivalent. These contracts are usually distributed into four classes, namely; Do ut des, Facio ut facias, Facio ut des, Do ut facias. Poth. Obl. n. 13. See Civ. Code of Lo. art. 1761.

TO COMMUTE, to substitute one punishment in the place of another. For example, if a man be sentenced to be hung, the executive may, in some instances, commute his punishment to that of imprisonment.

COMPACT, *contracts;* in its more general sense, it signifies an agreement; in its strictest sense, it imports a contract between parties, which creates obligations and rights capable of being enforced, and contemplated as such between the parties, in their distinct and independent characters. Story, Const. B. 3, c. 3; Rutherf. Inst. B. 2, c. 6, § 1. The constitution of the United States declares that "no state shall, without the consent of congress, enter into agreement or compact with another state, or with a foreign power." See 11 Pet. 1; 8 Wheat. 1; Bald. R. 60; 11 Pet. 185.

COMPANIONS, *French law.*— This is a general term, comprehending all persons who compose the crew

of a ship or vessel. Poth. Mar. Contr. n. 163.

COMPANY. An association of a number of individuals for the purpose of carrying on some legitimate business. This term is not synonymous with partnership, though every such unincorporated company is a partnership. Usage has reserved this term to associations whose members are in greater number, their capital more considerable, and their enterprises greater, either on account of their risk or importance. When these companies are authorised by the government, they are known by the name of corporations, (q. v.) Sometimes the word is used to represent those members of a partnership whose names do not appear in the name of the firm; as A B & Company. Vide 12 Toull. n. 97; Mortimer on Commerce, 128. Vide *Club; Corporation; Firm; Parties to actions; Partnership.*

COMPARISON OF HANDWRITING, *evidence.* It is a general rule that comparison of hands is not admissible. But to this there are some exceptions; in some instances when the antiquity of the writing makes it impossible for any living witness to swear that he ever saw the party write, comparison of handwriting, with documents known to be in his handwriting, has been admitted. 7 East, R. 282; B. N. P. 236; Anthon's N. P. 98, n.; 8 Price, 653; 11 Mass. R. 309; 2 Greenl. R. 33; 2 Johns. Cas. 211; 1 Esp. Cas. 351; 1 Root, 307; Swift's Ev. 29; 1 Whart. Dig. 245; 5 Binn. R. 349; Addison's R. 38; 2 M'Cord, 518; 1 Tyler, R. 4; 6 Whart. R. 284. Vide *Diploma.*

COMPATIBILITY. In speaking of public offices, it is meant by this term to convey the idea that two of them may be held by the same person at the same time. It is the reverse of *incompatibility*, (q. v.)

COMPENSATION, *chancery practice*, is the performance of that which a court of chancery order to be done on relieving a party who has broken a condition, which is to place the opposite party in no worse situation than if the condition had not been broken. Courts of equity will not relieve from the consequences of a broken condition unless compensation can be made to the opposite party. Fonb. c. 6, s. 5, n. (k.); Newl. Contr. 251 et seq.

COMPENSATION, *contracts*, a reward for services rendered.

COMPENSATION, *contracts, in the civil law.* When two persons are equally indebted to each other, there takes place a compensation between them, which extinguishes both debts. Compensation takes place of course by the mere operation of law, even unknown to the debtors; the two debts are reciprocally extinguished, as soon as they exist simultaneously, to the amount of their respective sums. Compensation takes place only between two debts, having equally for their object, a sum of money, or a certain quantity of consumable things of one and the same kind, and which are equally liquidated and demandable. Compensation takes place, whatever be the cause of either of the debts, except in case, 1st, of a demand of restitution of a thing of which the owner has been unjustly deprived; 2dly, of a demand of restitution of a deposit and a loan for use; 3dly, of a debt which has for its cause, of aliments declared not liable to seizure. Civil Code of Louis. 2203 to 2208. Compensation is of three kinds: 1, legal or by operation of law; 2, compensation by way of exception; and, 3, by re-convention. 8. L. R. 158; Dig. lib. 16, t. 2; Code, lib. 4, t. 31; Inst. lib. 4, t. 6, s. 30; Poth. Obl partie 3eme, ch. 4eme, n. 623. Compensation very nearly resembles the set-off (q. v.) of the common law.

COMPENSATION, *crim. law; eccl. law.* Compensatio criminum, or recrimination, (q. v.) In cases of suits for divorce on the ground of adultery, a compensation of the crime hinders its being granted; that is, if the defendant proves that the party has also committed adultery, the defendant is absolved as to the matters charged in the libel of the plaintiff. Ought. tit. 214, pl. 1; Clarke's Prax. tit. 115; Shelf. on Mar. & Div. 439; 1 Hagg. Cons. R. 148. See *Condonation; Divorce.*

COMPERUIT AD DIEM, *pleading.* He appeared at the day. This is the name of a plea in bar to an action of debt on a bail bond. For forms of this plea, vide 5 Wentw. 470; Lil. Entr. 114; 2 Chit. Pl. 527. When the issue is joined on this plea, the trial is by the record. Vide 1 Taunt. 23; Tidd, 239. And see generally, Com. Dig. Pleader, 2 W 31.; 7 B. & C. 478.

COMPETENCY, *evidence*, is the legal ability of a witness to be heard on the trial of a cause. This term is also applied to written or other evidence which may be legally given on such trial, as, depositions, letters, account books, and the like. Prima facie every person offered is a competent witness, and must be received unless his incompetency (q. v.) appears. 9 State Tr. 652. There is a difference between competency and credibility. A witness may be competent, and, on examination, his story may be so contradictory and improbable that he may not be believed; on the contrary he may be incompetent, for example, on account of interest, and be perfectly credible if he were examined. The court are the sole judges of the competency of a witness, and may, for the purpose of deciding whether the witness is or is not competent, ascertain all the facts necessary to form a judgment. Vide 8 Watts, R. 227, and articles *Credibility; Incompetency; Interest; Witness.*

COMPLAINT, *crim. law*, is the allegation made to a proper officer, that some person, whether known or unknown, has been guilty of a designated offence, with an offer to prove the fact, and a request that the offender may be punished. To have a legal effect, the complaint must be supported by such evidence as shows that an act which constitutes an offence has been committed, and renders it certain or probable that it was committed by some person named or described in the complaint.

COMPOS MENTIS, of sound mind. These words are seldom used, they are the opposite to the words *non compos mentis*, (q. v.)

COMPOSITE STATE. A name sometimes given to sovereign states permanently united together by a federal compact, with a supreme federal government. According to this definition the United States of America are a composite state.

COMPOSITION, *contracts.* An agreement, made upon a sufficient consideration, between a debtor and creditor, by which the creditor accepts part of the debt due to him in satisfaction of the whole. Montagu on Compos. 1; 3 Co. 118; Co. Litt. 212, b; 4 Mod. 88; 1 Str. 426; 2 T. R. 24, 26; 2 Chit. R. 541, 564; 5 D. & R. 56; 3 B. & C. 242; 1 R. & M. 138; 1 B. & A. 103, 440; 3 Moore's R. 11; 6 T. R. 263; 1 D. & R. 493; 2 Campb. R. 283; 2 M. & S. 120; 1 N. R. 124; Harr. Dig. Deed VIII. In England compositions were formerly allowed for crimes and misdemeanors, even for murder.

COMPOSITION OF MATTER. In describing the subjects of patents, the act of congress of July 4, 1836, sect. 6, uses the words "*composition of matter;*" these words are usually applied to mixtures and chemical

compositions, and in these cases it is enough that the compound is new. Both the composition and the mode of compounding may be considered to be included in the invention, when the compound is new.

COMPOUNDER, *in Louisiana.* He who makes a composition. An amicable compounder is one who has undertaken by the agreement of the parties to compound or settle differences between them. Code of Pract. of Lo. art. 444.

COMPOUNDING A FELONY, *crimes*, is the act of a party immediately aggrieved, who agrees with a thief or other felon, that he will not prosecute him on condition that he return to him the goods stolen, or who takes a reward not to prosecute. This is an offence punishable by fine and imprisonment. The mere retaking by the owner of stolen goods, is no offence unless the offender is not to be prosecuted. Hale, P. C. 546; 1 Chit. Cr. Law, 4.

COMPROMISE, *contracts*, is an agreement between two or more persons, who, to avoid a lawsuit amicably settle their differences, on such terms as they can agree upon; vide Com. Dig. App. tit. Compromise. In the civil law, a compromise is an agreement between two or more persons, who, wishing to settle their disputes, refer the matter in controversy to arbitrators, who are so called because those who choose them, give them full powers to arbitrate and decide what shall appear just and reasonable, to put an end to the differences of which they are made the judges. 1 Domat, Lois Civ. liv. 1, t. 14; vide *Submission;* Ch. Pr. Index, h. t.

COMPTROLLERS, are officers who bear this name, in the treasury department of the United States. There are two comptrollers. It is the duty of the *first* to examine all accounts settled by the first and fifth auditors, and certify the balances arising thereon to the register; to countersign all warrants drawn by the secretary of the treasury, other than those drawn on the requisitions of the secretaries of the war and navy departments, which shall be warranted by law; to report to the secretary the official forms to be issued in the different offices for collecting the public revenues, and the manner and form of stating the accounts of the several pesons employed therein; and to superintend the preservation of the public accounts, subject to his revision; and to provide for the payment of all moneys which may be collected. Act of March, 3, 1817, sect. 8; Act of Sept. 2, 1789, s. 2; Act of March 7, 1822. To superintend the recovery of all debts due to the United States; to direct suits and legal proceeding, and to take such measures as may be authorised by the laws, to enforce prompt payment of all such debts. Act of March 3, 1817, sect. 10; Acts of Sept. 2, 1789, s. 2; to lay before congress annually, during the first week of their session, a list of such officers as shall have failed in that year, to make the settlement required by law; and a statement of the accounts in the treasury, war, and navy departments, which may have remained more than three years unsettled, or on which balances appear to have been due more than three years prior to the thirtieth day of September, then last past; together with a statement of the causes which have prevented a settlement of the accounts, or the recovery of the balances due to the United States. Act of March 3, 1809, sect. 2. Besides these, this officer is required to perform minor duties, which the plan of this work forbids to be enumerated here. His salary is three thousand five hundred dollars per annum. Act

of Feb. 20, 1804, s. 1. The duties of the *second* comptroller are to examine all accounts settled by the second, third and fourth auditors, and certify the balances arising thereon to the secretary of the department in which the expenditure has been incurred; to countersign all the warrants drawn by the secretary of the treasury upon the requisition of the secretaries of the war and navy departments, which shall be warranted by law; to report to the said secretaries the official forms to be issued in the different offices for disbursing public money in those departments, and the manner and form of keeping and stating the accounts of the persons employed therein, and to superintend the preservation of public accounts subject to his revision. His salary is three thousand dollars per annum. Act of March 3, 1817, s. 9 and 15; Act of May 7, 1822.

COMPULSION. The forcible inducement to do an act. *Coercion*, (q. v.)

COMPURGATOR. Formerly when a person was accused of a crime, or sued in a civil action, he might purge himself upon oath of the accusation made against him, whenever the proof was not the most clear and positive; and if upon his oath de declared himself innocent, he was absolved. This usage so eminently calculated to create fraud, and encourage perjury by impunity, was soon found to be dangerous to the public safety. To remove this evil the laws were changed by requiring that the oath should be administered with the greatest solemnity; but the form was soon disregarded, for the mind became easily familiarized to those ceremonies which at first imposed on the imagination, and those who cared not to violate the truth, did not hesitate to treat the form with contempt; in order to give a greater weight to the oath of the accused the law was again altered so as to require that the accused should appear before the judge with a certain number of his neighbours, relations or friends; who should swear that they believed that the accused had sworn truly. This new species of witnesses were called compurgators. The number of compurgators varied according to the nature of the charge and other circumstances. Encycloyédie, h. t. Vide Du Cange, Gloss. voc. Juramentum; Spelman's Gloss. voc. Assarth; Merl. Rép. mot Conjurateurs. By the English law when a party was sued in debt on simple contract, detinue, and perhaps some other forms of action, the defendant might wage his law, by producing eleven compurgators who would swear they believed him on his oath, by which he discharged himself from the action in certain cases. Vide 3 Bl. Com. 341–348; Barr. on the Stat. 344.

COMPUTATION, *counting*, *calculation*. It is a reckoning or ascertaining the number of any thing. It is used in the common law for the true and indifferent account and construction of time. For the computation of a year, see Com. Dig. Ann; of a month, Com. Dig. Temps A; 1 John. Cas. 100; 15 John. R. 120; 2 Mass. 170, n.; 4 Mass. 460; 4 Dall. 144; 3 S. & R. 169; of a day, vide *Day;* and 3 Burr. 1434; 11 Mass. 204; 2 Browne, 18; Dig. 3, 4, 5; Salk. 625; 3 Wils. 274. It is a general rule that when an act is to be done within a certain time, one day is to be taken inclusively, and one exclusively. Vide Lofft, 276; Dougl. 463; 2 Chit. Pr. 69; 3 Id. 108, 9; 3 T. R. 623; 2 Campb. R. 294; 4 Man. & Ryl. 300, n. (*b*); 5 Bingh. R. 339; S. C. 15 E. C. L. R. 462; 3 East, R. 407; Hob. 139; 4 Moore, R. 465; Harr. Dig. Time, computation of; 3 T. R. 623; 5 T.

R. 283; 2 Marsh. R. 41; 22 E. C. L. R. 270; 13 E. C. L. R. 238; 24 E. C. L. R. 53; 4 Wash. C. C. R. 232; 1 Mason, 176; 1 Pet. 60; 4 Pet. 349; 9 Cranch, 104; 9 Wheat. 581. Vide *Day; Hour; Month; Year.*

CONCEALMENT, *contracts*, is the unlawful suppression of any fact or circumstance, by one of the parties to a contract, from the other, and which in justice ought to be made known. 2 Bro. Ch. R. 420; 1 Fonbl. Eq. B. 1, c. 3, § 4, note (*n*); 1 Story, Eq. Jur. § 207.

Fraud clearly occurs when one person substantially misrepresents or conceals a material fact peculiarly within his own knowledge, in consequence of which a delusion exists; or uses a device naturally calculated to lull the suspicions of a careful man, and induce him to forgego inquiry into a matter upon which the other party has information although such information be not exclusively within his reach. 2 Bl. Com. 451; 3 Ib. 166; Sugd. Vend. 1 to 10; 1 Com. Contr. 38; 3 B. & C. 623; 5 D. & R. 490; 2 Wheat. 183; 11 Ib. 59; 1 Pet. Sup. C. R. 15, 16. The party is not bound however to disclose *patent* defects. Sugd. Vend. 2.

In insurances, where fairness is so essential to the contract, a concealment which is only the effect of accident, negligence, inadvertence, or mistake, if material, is equally fatal to the contract as if it were intentional and fraudulent. 1 Bl. R. 594; 3 Burr. 1909. The insured is required to disclose all the circumstances which are within his own knowledge only, and which increase the risk. He is not, however, bound to disclose general circumstances which apply to all policies of a particular description; notwithstanding they may greatly increase the risk. Under this rule it has been decided that a policy was void, which was obtained by the concealment by the assured of the fact that he had heard that a vessel like his was taken. 2 P. Wms. 170. And in a case where the assured had information of "a violent storm," about eleven hours after his vessel had sailed, and had stated only that "there had been blowing weather and severe storms on the coast after the vessel had sailed," but without any reference to the particular storm, it was decided that this was a concealment which vitiated the policy. 2 Caines, R. 57. Vide 1 Marsh. Ins. 468; Park, Ins. 276; 14 East, R. 494; 1 John. R. 522.

Fraudulent concealment avoids the contract. See generally, Verpl. on Contr. passim.; Marsh. Ins. B. 1, c. 9; 1 Bell's Com. B. 2, pt. 3, c. 1, s. 3, § 1; 1 M. & S. 517; 2 Marsh. R. 336.

CONCESSI, *conveyancing*; this is a Latin word signifying I have granted. It was frequently used when deeds and other conveyances were written in Latin; it had the effect of creating a covenant in law. It is a word of a general extent, and is said to amount to a grant, feoffment, lease, release and the like. 2 Saund. 96; Co. Litt. 301, 302; Dane's Ab. Index, h. t.; 5 Whart. R. 278.

CONCESSION. A grant. This word is frequently used in this sense when applied to grants made by the French and Spanish governments in Louisiana.

CONCLUSION, *practice*. Making the last address to the court or jury. The party on whom the *onus probandi* is cast has the conclusion.

CONCLUSION, *remedies*, an estopel; a bar; the act of a man by which he has confessed a matter or thing which he can no longer deny; as, for example, the sheriff is concluded by his return to a writ, and

therefore, if upon a capias he return *cepi corpus*, he cannot afterwards show that he did not arrest the defendant, but is concluded by his return. Vide Plowd. 276, b; 3 Tho. Co. Litt. 600.

CONCLUSION TO THE COUNTRY, *pleading*. The tender of an issue to be tried by a jury, is a formula called the *conclusion to the country*. This conclusion is in the following words, when the issue is tendered by the defendant; "And of this the said C D puts himself upon the country." When it is tendered by plaintiff, the formula is as follows; "And this the said A B prays may be inquired of by the country." It is held, however, that there is no material difference between these two modes of expression, and that, if *ponit se*, be substituted for *petit quod inquirator*, or *vice versa*, the mistake is unimportant. 10 Mod. 166. When there is an affirmative on one side, and a negative on the other, or *vice versa*, the conclusion should be to the country. T. Raym. 98; Carth. 87; 2 Saund. 189; 2 Burr. 1022; and so it is, though the affirmative and negative be not in express words, but only tantamount thereto. Co. Litt. 126, a; Yelv. 137; 1 Saund. 103; 1 Chit. Pl. 592; Com. Dig. Pleader, E 32.

CONCORD, *estates*, *conveyances*, *practice*, is an agreement or supposed agreement between the parties in levying a fine of lands, in which the deforciant (or he who keeps the other out of possession,) acknowledges that the lands in question, are the right of the complainant; and from the acknowledgment or recognition of right thus made, the party who levies the fine is called the cognizor, and the person to whom it is levied, the cognizee. 2 Bl. Com. 350; Cruise, Dig. tit. 35, c. 2, s. 33; Com. Dig. Fine (E 9.)

CONCUBINAGE. This term has two different significations; sometimes it means a species of marriage which took place among the ancients, and which is yet in use in some countries. In this country it means the carnal connexion between a man and a woman unmarried. Vide 1 Bro. Civ. Law, 80; Merl. Rép. h. t.; Dig. 32, 49, 4; Id. 7, 1, 1; Code, 5, 27, 12.

CONCURRENCE, *French law*. It is the equality of rights, or privilege which several persons have over the same thing; as, for example, the right which two judgment creditors, whose judgments were rendered at the same time, have to be paid out of the procceds of real estate bound by them. Dict. de Jur. h. t.

CONDEDIT, *eccl. law*, is the name of a plea, entered by a party to a libel filed in the ecclesiastical court, in which it is pleaded that the deceased made the will which is the subject of the suit, and that he was of sound mind. 2 Eng. Eccl. Rep. 438; 6 Eng. Eccl. Rep. 431.

CONDEMNATION, *mar. law*, is the sentence of a court of competent jurisdiction that a ship or vessel taken as a prize on the high seas, was liable to capture, and was properly and legally captured. By the general practice of the law of nations, a sentence of condemnation is, at present, generally deemed necessary in order to divest the title of a vessel taken as a prize; until this has been done the original owner may regain his property although the ship may have been in possession of the enemy twenty-four hours, or carried infra præsidia. 1 Rob. Rep. 134; 3 Rob. Rep. 97, n.; Carth. 423; Chit. Law of Nat. 99, 100; 10 Mod. 79; Abb. on Sh. 14; Wesk. on Ins. h. t.; Marsh. on Ins. 402. A sentence of condemnation is generally binding everywhere. Marsh. Ins. 402. The term condemnation is also applied to

the sentence which declares a ship to be unfit for service: this sentence and the grounds of it may however be re-examined and litigated by parties interested in disputing it. 5 Esp. N. P. C. 65; Abb. on Shipp. 4.

CONDEMNATION, *civil law*, is a sentence or judgment which condemns some one to do, to give, or to pay something; or which declares that his claim or pretensions are unfounded. This word is also used by common lawyers, though it is more usual to say conviction, both in civil and criminal cases. It is a maxim that no man ought to be condemned unheard, or without the opportunity of being heard.

CONDITION, *contracts*, is a clause in an agreement, the validity of which depends upon a future or uncertain event. Dict. de Jurisp. Condition; Poth. Obl. p. 2, c. 3, art. 1, § 1. See Bac. Abr. h. t. By the word condition is also understood some quality annexed to a real estate, by virtue of which it may be defeated, enlarged or created upon an uncertain event. Ib.; Co. Litt. 201, a. See *Estates upon Condition*.

A condition may be created by inserting the very word *condition*, or *on condition*, in the deed or agreement; there are, however, other words that will do so as effectually, as the word proviso, but then it must not depend upon another sentence. The words must be those of the grantor, and compulsory to enforce the grantee to do some act. Co. Litt. 203; Bac. Abr. Conditions, A. H.

Conditions must be lawful; those against law are void. Where the condition is entire and the whole is against law, it is void; but where the condition consists of several different parts, and some of them are lawful and others not, it is good for so much as is lawful, and void for the rest. 2 Bro. P. C. 381; 5 Vin. Abr. 99, pl. 9; 2 Ld. Raym. 1459; Hob. 14; Mo. 856, 857, pl. 1175; 3 Rep. 83, a; 1 Vent. 237. But if a bond be given with condition to do a thing against an act of the legislature; and also to pay a just debt, the whole bond is void, because the letter of the act makes it void, and is a strict law. Hob. 14. Conditions when considered as to the manner of their creation, are express or implied; when viewed as to the time when they are to take effect, they are precedent or subsequent; when examined as to their performance, they are executed or executory. They are also possible and impossible, positive and negative, legal and illegal, copulative, potestative and repugnant.

It is to be observed that the law makes a distinction between a condition to do an act *malum in se*, in which case it is absolutely void; and one which provides for the performance of a thing contrary to a maxim of law, which does not render the obligation void. 16 S. & R. 307; Co. Litt. 266. Vide *Void*.

See, in general, Bac. Abr. Conditions, Obligations, F; Com. Dig. Condition; Vin. Abr. Condition; Poth. Obl. Pt. 2, c. 3, art. 1, 2, and 3; 6 Toull. n. 512.

CONDITION, *persons*, is the situation in civil society which creates certain relations between the individual, to whom it is applied, and one or more others, from which mutual rights and obligations arise. Thus the situation arising from marriage gives rise to the conditions of husband and wife; that of paternity to the conditions of father and child. Domat, tom. 2, liv. 1, tit. 9. s. 1, n. 8. In contracts every one is presumed to know the condition of the person with whom he deals. A man making a contract with an infant cannot recover against him for a breach of the contract, on the ground that he was not aware of his condition.

CONDITION, (COPULATIVE,) A copulative condition, is one of several distinct matters, the whole of which are made precedent to the vesting of an estate or right. In this case the entire condition must be performed, or the estate or right can never arise or take place. 2 Freem. 186. Such a condition differs from a disjunctive condition, which gives to the party the right to perform the one or the other; for, in this case, if one becomes impossible by the act of God, the whole will, in general, be excused. This rule, however, is not without exception. 1 B. & P. 242; Cro. Eliz. 780; 5 Co. 21; 1 Lord Raym. 279. Vide *Conjunctive; Disjunctive.*

CONDITION, (EXPRESS,) is one created by express words, as for instance, a condition in a lease that if the tenant shall not pay the rent at the day, the lessor may re-enter. Litt. 328. Vide *Re-entry.*

CONDITION, (ILLEGAL.) Illegal conditions are those which are forbidden by the law. They have for their object, 1st, to do something *malum in se*, or *malum prohibitum;* 2dly, to omit the performance of some duty required by law; 3dly, to encourage such act or omission. 1 P. Wms. 189. When the law prohibits, in express terms, the transaction in respect to which the condition is entered, and declares it void, such condition is then void. 3 Binn. R. 533; but when it is prohibited, without being declared void, although unlawful, it is not void. 12 S. & R. 237.

CONDITION, (IMPLIED.) An implied condition is one created by law, and not by express words; for example, at common law, the tenant for life holds upon the implied condition not to commit waste. Co. Litt. 233, b.

CONDITION, (IMPOSSIBLE,) is one which cannot be accomplished according to the laws of nature; as, to go from the United States to Europe in one day; such a condition is void. 1 Swift's Dig. 93; 6 Toull. n. 481. When a condition becomes impossible by the act of God, it either vests the estate, or does not, as it is precedent or subsequent: when it is the former, no estate vests; when the latter, it becomes absolute. Co. Litt. 206, a, 218, a; 3 Pet. R. 374; 1 Hill. Ab. 249. When the performance of the condition becomes impossible by the act of the party who imposed it, the estate is rendered absolute. 3 Bro. Parl. Cas. 359. Vide 1 Paine's R. 652; Bac. Ab. Conditions, M; Roll. Ab. 420; Co. Litt. 206; 1 Rop. Leg. 505; Swinb. pt. 4, s. 6; Inst. 2, 4, 10; Dig. 28, 7, 1; Id. 44, 7, 31; Code 6, 25, 1; 6 Toull. n. 486, 686; and the article *Impossibility.*

CONDITION, (LEGAL.) A legal condition is one made in consonance with the law; this must be understood of the law as existing at the time of making the condition, for no change of the law, can change the force of the condition. For example, a conveyance was made to the grantee, on condition that he should not aliene until he reached the age of twenty-five years. Before he acquired this age he aliened, and made a second conveyance after he obtained it; the first deed was declared void, and the last valid. When the condition was imposed, twenty-five was the age of majority in the state; it was afterwards changed to twenty-one; under these circumstances the condition was held to be binding. 3 Miss. R. 40.

CONDITION, (NEGATIVE,) *contracts.* A negative condition is that which consists in the case where something that may or may not happen, shall, as, if *I do not marry.* Poth. Obl. Pt. 2, c. 3, art. 1, § 1.

CONDITION, (POSITIVE,) *in contracts.* A positive condition con-

sists in the case where a thing that may or may not happen, shall happen, as, *if I marry*. Poth. Obl. P. 2, c. 3, art. 1, § 1.

CONDITION, (POTESTATIVE,) *contracts*. A potestative condition is that which is in the power of the person in whose favour it is contracted; as if I engage to give my neighbour a sum of money, in case he cuts down a tree which obstructs my prospect. Poth. Obl. Pt. 2, c. 3, art. 1, § 1.

CONDITION, (PRECEDENT.) A condition precedent is one which must be performed before the estate will vest, or the obligation is to be performed. 2 Dall. R. 317. Whether a condition shall be considered as precedent or subsequent, depends not on the form or arrangement of the words, but on the manifest intention of the parties, on the fair construction of the contract. 2 Fairf. R. 318; 5 Wend. R. 496; 3 Pet. R. 374; 2 John. R. 148; 2 Caines, R. 352; 12 Mod. 464; 6 Cowen, R. 627; 9 Wheat. R. 350; 2 Virg. Cas. 138; 14 Mass. R. 453; 1 J. J. Marsh. R. 591; 6 J. J. Marsh. R. 161; 2 Bibb, R. 547; 6 Litt. R. 151; 4 Rand. R. 352.

CONDITION, (RESOLUTORY,) is a condition which has for its object, when accomplished, to revoke the principal obligation. This condition does not suspend either the existence or the execution of the obligation, it merely obliges the creditor to return what he has received.

CONDITION,(SUBSEQUENT,) is one which enlarges or defeats an estate or right, already created. A conveyanee in fee, reserving a life estate in a part of the land, and made upon condition that the grantee shall pay certain sums of money at divers times to several persons, passes the fee upon condition subsequent. 6 Greenl. R. 106. Sometimes it becomes of great importance to ascertain whether the condition is precedent or subsequent. When a precedent condition becomes impossible by the act of God, no estate or right vests; but if the condition is subsequent, the estate or right becomes absolute. Co. Litt. 206, 208; 1 Salk. 170.

CONDITION, (SUSPENSIVE,) is a condition which suspends the fulfilment of the obligation until it has been performed; as, if a man bind himself to pay one hundred dollars, upon condition that the ship Thomas Jefferson shall arrive from Europe. The obligation in this case, is suspended until the arrival of the ship, when the condition having been performed, the obligation becomes absolute, and it is no longer conditional. A suspensive condition is in fact a condition precedent.

CONDITIONAL OBLIGATION, is one which is superseded by a condition under which it was created and which is not yet accomplished. Poth. Obl. n. 176, 198.

CONDITIONS OF SALE, *contracts*. The terms upon which the vendor of property by auction proposes to sell it; the instrument containing these terms, when reduced to writing or printing, is also called the conditions of sale. It is always prudent and advisable that the conditions of sale should be printed and exposed in the auction room; when so done, they are binding on both parties, and nothing that is *said* at the time of sale, to add to or vary such printed conditions, will be of any avail. 1 H. Bl. 289; 12 East, 6; 6 Ves. 330; 15 Ves. 521; 2 Munf. Rep. 119; 1 Desauss. Ch. Rep. 573; 2 Desauss. Ch. R. 320; 11 John. Rep. 555; 3 Camp. 285. Vide forms of conditions of sale in Babington on Auctions, 233 to 243; Sugd. Vend. Appx. No. 4. Vide *Auction; Auctioneer; Puffer*.

CONDONATION, a term used

in the canon law. It is a forgiveness by the husband of his wife, or by a wife of her husband, of adultery committed, with an implied condition that the injury shall not be repeated, and that the other party shall be treated with conjugal kindness. 1 Hagg. R. 773; 3 Eccl. Rep. 310. See 5 Mass. 320; 5 Mass. 69; 1 Johns. Ch. R. 488. It may be express or implied, as if a husband knowing of his wife's infidelity, cohabit with her. 1 Hagg. Rep. 789; 3 Eccl. R. 338. Condonation is not, for many reasons, held so strictly against a wife as against a husband. 3 Eccl. R. 330; Ib. 341, n.; 2 Edw. R. 207. As all condonations by operation of law, are expressly or impliedly conditional, it follows that the effect is taken off by the repetition of misconduct. 3 Eccl. R. 329; 3 Phillim. Rep. 6; 1 Eccl. R. 35; and cruelty revives condoned adultery. Worsley v. Worsley, cited in Durant v. Durant, 1 Hagg. Rep. 733; 3 Eccl. Rep. 311. In New York, an act of cruelty alone, on the part of the husband, does not revive condoned adultery, to entitle the wife to a divorce. 4 Paige's R. 460. See 3 Edw. R. 207. Where the parties have separate beds, there must, in order to found condonation, be something of matrimonial intercourse presumed; it does not rest merely on the wife's not withdrawing herself. 3 Eccl. R. 341, n.; 2 Paige, R. 108. Condonation is a bar to a sentence of divorce. 1 Eccl. Rep. 284; 2 Paige, R. 108. In Pennsylvania, by the act of the 13th of March, 1815, § 7, 6 Reed's Laws of Penna. 288, it is enacted that "in any suit or action for divorce for cause of adultery, if the defendant shall allege and prove that the plaintiff has admitted the defendant into conjugal society or embraces, after he or she knew of the criminal fact, or that the plaintiff (if the husband,) allowed of his wife's prostitutions, or received hire for them, or exposed his wife to lewd company, whereby she became ensnared to the crime aforesaid, it shall be a good defence and perpetual bar against the same." The same rule may be found, perhaps, in the codes of most civilized countries. Vilanova Y Mañes, Materia Criminal Forense, Obs. 11, c. 20, n. 4. Vide, generally, 2 Edw. 207; Dev. Eq. R. 352; 4 Paige, 432; 1 Edw. R. 14; Shelf. on M. & D. 445.

CONDUCT, *law of nations*, is used in the phrase *safe conduct*, to signify the security given, by authority of the government, under the great seal, to a stranger, for his quietly coming into and passing out of the territories over which it has jurisdiction. A safe conduct differs from a passport, the former is given to enemies, the latter to friends or citizens.

CONFEDERACY, *intern. law*, is an agreement between two or more states or nations, by which they unite for their mutual protection and good. This term is applied to such agreement between two independent nations, but it is used to signify the union of different states of the same nation, as the confederacy of the states. The original thirteen states in 1781, adopted for their federal government the "Articles of confederation and perpetual union between the States," which continued in force until the present constitution of the United States went into full operation on the 30th day of April, 1789, when President Washington was sworn into office. Vide 1 Story on the Const. B. 2, c. 3 and 4.

CONFEDERACY, *crim. law*, is an agreement between two or more persons to do an unlawful act, or an act, which though not unlawful in itself, becomes so by the confederacy. The technical term usually employed to signify this offence, is *conspiracy*, (q. v.)

CONFEDERATION, *govern-*

ment, is the name given to that form of governmont which the American colonies, on shaking off the British yoke, devised for their mutual safety and government. The articles of confederation, (q. v.) were finally adopted on the 15th of November, 1777, and with the exception of Maryland, which, however, afterwards also agreed to them, were speedily adopted by the United States, and by which they were formed into a federal body, and went into force on the first day of March, 1781, 1 Story, Const. § 225; and so remained until the adoption of the present constitution, which acquired the force of the supreme law of the land on the first Wednesday of March, 1789; 5 Wheat. R. 420. Vide *Articles of Confederation.*

CONFERENCE, *practice, legislation.* In practice, it is the meeting of the parties or their attorneys in a cause, for the purpose of endeavouring to settle the same. In legislation, when the senate and house of representatives cannot agree on a bill or resolution which it is desirable should be passed, committees are appointed by the two bodies respectively, who are called committees of conference, and whose duty it is, if possible, to reconcile the differences between them. In the French law, this term is used to signify the similarity and comparison between two laws, or two systems of law; as the Roman and the common law. Encyclopédie, h. t.

CONFESSION, *crim. law, evidence*, is the voluntary declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation which he had in the same. When made without bias or improper influence, confessions are admissible in evidence, as the highest and most satisfactory proof, because it is fairly presumed that no man would make such a confession against himself, if the facts confessed were not true; but they are excluded, if liable to the imputation of having been unfairly obtained. Confessions should be received with great caution, as they are liable to many objections. There is danger of error from the misapprehension of witnesses, the misuse of words, the failure of a party to express his own meaning, the prisoner being oppressed by his unfortunate situation, and influenced by hope, fear, and sometimes a worse motive to make an untrue confession. See the case of the two Boorns in Greenl. Ev. § 214, note 1; North American Review, vol. 10, p. 418; and see 1 Chit. Cr. Law, 85. A confession must be made voluntarily, by the party himself, to another person. 1. *It must be voluntary.* A confession forced from the mind by the flattery of hope, or the torture of fear, comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it. 1 Leach, 263; this is the principle, but what amounts to a promise or a threat, is not so easily defined; vide 2 East, P. C. 659; 2 Russ. on Cr. 644; 4 Carr. & Payne, 387; S. C. 19 Eng. Com. L. Rep. 434; 1 Southard, R. 231; 1 Wend. R. 625; 6 Wend. R. 268; 5 Halst. R. 163; Miña's Trial, 10; 5 Rogers's Rec. 177; 2 Overton, R. 86; 1 Hayw. (N. C.) R. 482. But it must be observed that a confession will be considered as voluntarily made, although it was made after a promise of favour or threat of punishment, by a person *not in authority* over the prisoner. If, however, a person having such authority over him be present at the time, and he express no dissent, evidence of such confession cannot be given. 8 Car. & Payne, 733. 2. *The confession must be made by the party to be affected by it.* It is evidence only against him; in case of a conspiracy, the acts of one conspirator are the acts of all,

while active in the progress of the conspiracy, but after it is over, the confession of one as to the part he and others took in the crime, is not evidence against any but himself. Phil. Ev. 76, 77; 2 Russ. on Cr. 653. 3. *The confession must be to another person.* It may be made to a private individual, or under examination before a magistrate. The whole of the confession must be taken, together with whatever conversation took place at the time of the confession. Roscoe's Ev. N. P. 36; 1 Dall. R. 240; Ib. 392; 3 Halst. 275; 2 Penna. R. 27; 1 Rogers's Rec. 66; 3 Wheeler's C. C. 533; 2 Bailey's R. 569; 5 Rand. R. 701. *Confession*, in another sense, is where a prisoner being arraigned for an offence, confesses or admits the crime with which he is charged, whereupon the plea of guilty is entered. Com. Dig. Indictment, (K); Ib. Justices, (W 3); Arch. Cr. Pl. 121; Harr. Dig. h. t.; 20 Am. Jur. 68.

CONFESSION AND AVOIDANCE, *pleadings.* Pleas in confession and avoidance are those which admit the averments in the plaintiff's declaration to be true, and allege new facts which obviate and repel their legal effects. These pleas are to be considered, first, with respect to their *division.* Of pleas in confession and avoidance, some are distinguished (in reference to their subject-matter) as pleas in justification or excuse, others as pleas in discharge, Com. Dig. Pleader, 3 M 12. The pleas of the former class, show some justification or excuse of the matter charged in the declaration; those of the latter, some discharge or release of that matter. The effect of the former, therefore, is to show that the plaintiff never had any right of action, because the act charged was lawful; the effect of the latter to show that though he had once a right of action, it is discharged or released by some matter subsequent. Of those in justification or excuse the plea of son assault demesne is an example of those in discharge, a release. This division applies to *pleas* only; for replications and other subsequent pleadings in confession and avoidance, are not subject to such classification. Secondly, they are to be considered in respect to their form; as to their form the reader is referred to Stephen on Pleading, 72, 79, where forms are given. In common with all pleadings whatever, which do not tender issue, they always conclude with a verification and prayer of judgment. Thirdly, with respect to the quality of these pleadings, it is a rule that every pleading by way of confession and avoidance must give colour, (q. v.) And see generally, 1 Chit. Pl. 599; 2 Chit. Pl. 644; Co. Litt. 282, b; Arch. Civ. Pl. 215; Dane's Ab. Index, h. t.

CONFESSOR, *evid.* A priest of some Christian sects, who receives an account of the sins of his people, and undertakes to give them absolution of their sins. The general rule on the subject of giving evidence of confidential communications is, that the privilege is confined to counsel, solicitors and attorneys, and the interpreter between the counsel and client. Vide *Confidential Communications.* Contrary to this general rule it has been decided in New York that a priest of the Roman catholic denomination could not be compelled to divulge secrets which he had received in auricular confession. 2 City Hall Rec. 80, n.

CONFIDENTIAL COMMUNICATIONS, *evidence.* Whatever is communicated professionally by a client to his counsel, solicitor or attorney, is considered as a confidential communication. This the latter is not permitted to divulge, for this is the privilege of the client and not

of the attorney. The rule is, in general, strictly confined to counsel, solicitors or attorneys, except indeed the case of an interpreter between the counsel and client, when the privilege rests upon the same grounds of necessity. 3 Wend. R. 339. In New York, contrary to this general rule, it has been decided that information disclosed to a physician while attending upon the defendant in his professional character, and which information was necessary to enable the witness to prescribe for his patient, was a confidential communication which the witness need not have testified about; and in a case where such evidence had been received by the master, it was rejected. 4 Paige, R. 460. As to the matter communicated, it extends to all cases where the party applies for professional assistance. 6 Mad. R. 47; 14 Pick. R. 416. But the privilege does not extend to extraneous or impertinent communications; 3 John. Cas. 198; nor to information imparted to a counsellor in the character of a friend, and not as counsel. 1 Caines's R. 157. The cases in which communications to counsel have been holden not to be privileged may be classed under the following heads:—1, When the communication was made before the attorney was employed, at such,—1 Vent. 197; 2 Atk. 524;—2, after the attorney's employment has ceased, 4 T. R. 431;—3, when the attorney was consulted because he was an attorney, yet he refused to act as such, and was therefore only applied to as a friend, 4 T. R. 753;—4, where a fact merely took place in the presence of the attorney, Cowp. 846; 2 Ves. 189; but see Str. 1122;—5, when the matter communicated was not in its nature private, and could in no sense be termed the subject of a confidential communication, 7 East, R. 357; 2 B. & B. 176;—6, when the things disclosed had no reference to professional employment, though disclosed while the relation of attorney and client subsisted, Peake's R. 77;—7, when the attorney made himself a subscribing witness. 10 Mod. 40; 3 Burr. 1687;—8, when he was directed to plead the facts to which he is called to testify. 7 N. S. 179. See a well written article on this subject in the American Jurist, vol. xvii. p. 304. Vide generally, Stark. Ev. h. t.; 1 Peters's R. 356; 1 Root, 383; Whart. Dig. 275; Cary's R. 88, 126, 143; Toth. R. 177; Peake's Cas. 77; 2 Stark. Cas. 274; 4 Wash. C. C. R. 718; 11 Wheat. 280; 3 Yeates, R. 4; 4 Munf. R. 273; 1 Porter, R. 433; Wright, R. 136; 13 John. R. 492. As to a confession made to a catholic priest, see 2 N. Y. City Hall Rec. 77. Vide 2 Ch. Pr. 18-21. *Confessor.*

CONFIRMATION, *contracts, conveyancing.* 1. A contract by which that which was voidable, is made firm and unavoidable. 2. A species of conveyance.

1. When a contract has been entered into by a stranger without authority, he in whose name it has been made, may by his own act confirm it; or if the contract be made by the party himself in an informal and voidable manner, he may in a more formal manner confirm and render it valid; and in that event it will take effect, as between the parties, from the original making. To make a valid confirmation the party must be apprised of his rights, and where there has been a fraud in the transaction, he must be aware of it, and intend to confirm his contract. Vide 1 Ball & Beatty, 353; 2 Scho. & Lef. 486; 12 Ves. 373; 1 Ves. Jr. 215; Newl. Contr. 496; 1 Atk. 301; 8 Watts, R. 280.

2. Lord Coke defines a confirmation of an estate, to be "a conveyance of an estate or right *in esse*,

whereby a voidable estate is made sure and unavoidable; or where a particular estate is increased." The first part of this definition may be illustrated by the following case put by Littleton, § 516; where a person lets land to another for the term of his life, who lets the same to another for forty years, by force of which he is in possession; if the lessor for life confirms the estate of the tenant for years, by deed, and afterwards the tenant for life dies, during the term; this deed will operate as a confirmation of the term for years. As to the latter branch of the definition; whenever a confirmation operates by way of increasing the estate, it is similar in every respect to a release that operates by way of enlargement, for there must be privity of estate, and proper words of limitation. The proper technical words of a confirmation are, ratify, approve and confirm. A confirmation does not strengthen a void estate. ***Confirmatio est nulla, ubi donum precedens est invalidum, et ubi donatio nulla est nec valebit confirmatio.*** For conformation may make a voidable or defeasible estate good, but cannot operate on an estate void in law. Co. Litt. 295. The canon law agrees with this rule, and hence the maxim ***qui confirmat nihil dat.*** Toull. Dr. Civ. Fr. liv. 3, t. 3, c. 6, n. 476. Vide Vin. Ab. h. t.; Com. Dig. h. t.; Ayliffe's Pand. *386; 1 Chit. Pr. 315. 3 Gill & John. 290; 3 Yerg. R. 405; Co. Litt. 295; Gilbert on Ten. 75; 1 Breese's R. 236; 9 Co. 142, a.

CONFISCATION is the act by which the estate, goods or chattels, of a person who has been guilty of some crime, or who is a public enemy, is declared to be forfeited for the benefit of the public treasury. Domat, Droit Public, liv. 1, tit. 6, s. 2, n. 1. When property is forfeited as a punishment for the commission of crime, it is usually called a forfeiture. 1 Bl. Com. 299.

It is a general rule that the property of the subjects of an enemy found in the country may be appropriated by the government, without notice, unless there be a treaty to the contrary. 1 Gallis. R. 563; 3 Dall. R. 199; N. Car. Cas. 79. It has been frequently provided by treaty that foreign subjects should be permitted to remain and continue their business, notwithstanding a rupture between the governments, so long as they conducted themselves innocently; and when there was no such treaty, such a liberal permission has been announced in the very declaration of war. Vattel, liv. 3, c. 4, 4, § 63. Sir Michael Foster, (Discourses on High Treason, p. 185, 6,) mentions several instances of such declarations by the king of Great Britain; and he says that aliens were thereby enabled to acquire personal chattels and to maintain actions for the recovery of their personal rights, in as full a manner as alien friends. 1 Kent, Com. 57. In the United States, the broad principle has been assumed "that war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found. The mitigations of this rigid rule, which the policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself." 8 Cranch, 122, 3. Commercial nations have always considerable property in the possession of their neighbours; and when war breaks out, the question what shall be done with enemy's property found in the country, is one rather of policy than of law, and is properly addressed to the consideration of the legislature, and not to courts of law. The strict right of confiscation exists in congress; and without a legislative act authorising

its confiscation it cannot be condemned. 8 Cranch, 128, 129.

See Chit. Law of Nations, c. 3; Marten's Law of Nat. lib. 8, c. 3, s. 9; Burlamaqui, Princ. of Pol. Law, part 4, c. 7; Vattel, liv. 3, c. 4, § 63.

The claim of a right to confiscate debts, contracted by individuals in times of peace, and which remain due to subjects of the enemy in time of war, rests very much upon the same principles as that concerning the enemy's tangible property, found in the country at the commencement of the war. But it is the universal practice to forbear to seize and confiscate debts and credits. 1 Kent, Com. 64, 5; vide 4 Cranch, R. 415; Charlt. 140; 2 Harr. & John. 101, 112, 471; 6 Cranch, R. 286; 7 Conn. R. 428; 2 Tayl. R. 115; 1 Day, R. 4; Kirby, R. 228, 291; C. & N. 77, 492.

CONFLICT OF LAWS. This phrase is used to denote that the laws of different countries, on the subject-matter to be decided, are in opposition to each other; or that certain laws of the same country are contradictory. When this happens to be the case, it becomes necessary to decide which law is to be obeyed. This subject has occupied the attention and talents of some of the most learned jurists, and their labours are comprised in many volumes. A few general rules have been adopted on this subject which will be here noticed.

1. Every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The laws of every state, therefore, affect and bind directly all property, whether real or personal, within its territory; and all persons who are resident within it, whether citzens or aliens, natives or foreigners; and also all contracts made, and acts done within it. Vide *Lex Loci contractus;* Henry, For. Law, part 1, c. 1, § 1; Cowp. R. 208; 2 Hagg. C. R. 383; It is proper, however, to observe, that ambassadors and other public ministers, while in the territory of the state to which they are delegates, are exempt from the local jurisdiction. Vide *Ambassador.* And the persons composing a foreign army, or fleet, marching through, or stationed in the territory of another state, with whom the foreign nation is in amity, are also exempt from the civil and criminal jurisdiction of the place. Wheat Intern. Law, part 2, c. 2, § 10; Casaregis, Disc. 136–174; vide 7 Cranch, R. 116. Possessing exclusive authority, with the above qualification, a state may regulate the manner and circumstances, under which property, whether real or personal, in possession or in action, within it, shall be held, transmitted or transferred, by sale, barter, or bequest, or recovered or enforced; the condition, capacity, and state, of all persons within it; the validity of contracts and other acts done there; the resulting rights and duties growing out of these contracts and acts; and the remedies, and modes of administering justice in all cases. Story, Confl. of Laws, § 18; Vattel, B. 2, c. 7, § 84, 85; Wheat. Intern. Law, part 1, c. 2, § 5.

2. A state or nation cannot, by its laws, directly affect or bind property out of its own territory, or persons not resident therein, whether they are natural born or naturalized citizens or subjects, or others. This result flows from the principle that each sovereignty is perfectly independent. 13 Mass. R. 4. To this general rule there appears to be an exception, which is this, that a nation has a right to bind its own citizens or subjects by its own laws in every place; but this exception is not to be adopted without some qualification. Story, Confl. of Laws, § 21; Wheat. Intern. Law, part 2, c. 2, § 7.

3. Whatever force and obligation the laws of one country have in another, depends upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent. Huberus, lib. 1, t. 3, § 2. When a statute, or the unwritten or common law of the country, forbids the recognition of the foreign law, the latter is of no force whatever. When both are silent, then the question arises, which of the conflicting laws is to have effect. Whether the one or the other shall be the rule of decision must necessarily depend on a variety of circumstances, which cannot be reduced to any certain rule. No nation will suffer the laws of another to interfere with her own, to the injury of her own citizens; and whether they do or not, must depend on the condition of the country, in which the law is sought to be enforced; the particular state of her legislation, her policy, and the character of her institutions. In the conflict of laws, it must often be a matter of doubt, which should prevail; and, whenever a doubt does exist, the court which decides, will prefer the law of its own country to that of the stranger. 17 Mart. (Lo.) R. 569, 595, 596.

Vide, generally, Story, Confl. of Laws; Burge, Confl. of Laws; Liverm. on Contr. of Laws; Huberus, De Conflictu Legum; Hertius, De Collisione Legum; Boullenois, Traité de la personalité et de la réalité de lois, coutumes et statuts, par forme d'observations; Boullenois, Dissertations sur des questions qui naissent de la contrarieté des lois et des coutumes.

CONFRONTATION, *crim. law, practice*, is the act by which a witness is brought in the presence of the accused, so that the latter may object to him, if he can, and the former may know and identify the accused, and maintain the truth in his presence. No man can be a witness unless confronted with the accused, except by consent.

CONFUSION is the concurrence of two qualities in the same subject, which mutually destroy each other. Poth. Ob. P. 3, c. 5; 3 Bl. Com. 405; Story Bailm. § 40.

CONFUSION OF GOODS, is where those of two persons are so intermixed that the several portions can no longer be distinguished; if the intermixture be by consent, the proprietors have an interest in common, in proportion to their respective shares, 2 Bl. Com. 405; but if one wilfully mixes his money, corn, or hay with that of another man, without his approbation or knowledge, the law, to guard against fraud, gives the entire property without any account, to him whose original dominion is invaded and endeavoured to be rendered uncertain, without his consent. Ib.; and see 2 Johns. Ch. R. 62; 2 Kent's Comm. 297. There may be a case neither of consent nor of wilfulness, in the confusion of goods; as where a bailee by negligence or unskilfulness, or inadvertence, mixes up his own goods of the same sort with those bailed; and there may be a confusion arising from accident and unavoidable casualty. Now, in the latter case of accidental intermixture, the rule, following the civil law, which deemed the property to be held in common, might be adopted; and it would make no difference whether the mixture produced a thing of the same sort or not, as if the wine of two persons were mixed by accident. See Dane's Abr. ch. 76, art. 5, § 19. But in cases of mixture by unskilfulness, negligence, or inadvertence, the true principle seems to be, that if a man having undertaken to keep the property of another distinct from, mixes it with

his own, the whole must, both at law and in equity, be taken to be the property of the other, until the former puts the subject under such circumstances that it may be distinguished as satisfactorily, as it might have been before the unauthorised mixture on his part. 15 Ves. 440, 432, 436, 439; 2 John. Ch. R. 62; Story on Bailm. c. 1, § 40. And see 7 Mass. R. 123; Dane's Abr. c. 76, art. 3, § 15; Com. Dig. Pleader, 3 M 28; Bac. Ab. Trespass, E 2; 2 Campb. 576; 2 Roll. 566, l. 15; 2 Bul. 323; 2 Cro. 366; 2 Roll. 393; 5 East, 7; 21 Pick. R. 298.

CONFUSION OF RIGHTS, *contracts.* When the qualities of debtor and creditor are united in the same person, there arises a confusion of rights, which extinguishes the two credits; for instance, where a woman obligee marries the obligor, the debt is extinguished. 1 Salk. 306; Cro. Car. 551; 1 Ld. Raym. 515; Ca. Ch. 21, 117. There is, however, an excepted case in relation to a bond given by the husband to the wife; where it is given to the intended wife for a provision to take effect after his death. 1 Ld. Raym. 515; 5 T. R. 381; Hut. 17; Hob. 216; Cro. Car. 376; 1 Salk. 326; Palm. 99; Carth. 512; Com. Dig. Baron & Feme, D.

Where a person possessed of an estate, becomes in a different right entitled to a charge upon the estate; the charge is in general merged in the estate, and does not revive in favour of the personal representative against the heir; there are particular exceptions, as where the person in whom the interests unite is a minor, and can therefore dispose of the personalty, but not of the estate; but in the case of a lunatic the merger and confusion was ruled to have taken place. 2 Ves. jun. 261. See Louis. Code, art. 801 to 808; 2 Ld. R. 527; 3 L. R. 552; 4 L. R. 399, 488.

CONGE'. A French word which signifies permission, and is understood in that sense in law. Cunn. Dict. h. t. In the French maritime law, it is a species of passport or permission to navigate, delivered by public authority. It is also in the nature of a clearance. (q. v.) Bouch. Inst. n. 812.

CONGEABLE, *Eng. law.* This word is nearly obsolete. It is derived from the French *congé*, permission, leave; it signifies that a thing is done lawfully or with permission; as entry congeable, and the like. Litt. s. 279.

CONGRESS. This word has several significations. 1. An assembly of the deputies from different governments, united to treat of peace, or of other political affairs which interest them, is called a congress.

[2] 2. Congress is the name of the legislative body of the United States, composed of the senate and house of representatives. Const. U. S. art. 1, s. 1. Congress is composed of two independent houses, 1, the senate; and 2, the house of representatives.—1. The senate is composed of two senators from each state, chosen by the legislature thereof for six years, and each senator has one vote. They represent the states rather than the people, as each state has its equal voice and equal weight in the senate, without any regard to the disparity of population, wealth or dimensions. The senate have been, from the first formation of the government, divided into three classes; and the rotation of the classes was originally determined by lots, and the seats of one class are vacated at the end of the second year, and one-third of the senate is chosen every second year. Const. U. S., art. 1, s. 3. This provision was borrowed from a similar one in some of the state constitutions,

of which Virginia gave the first example. The qualifications of a senator which the constitution requires, are, that he should be thirty years of age, have been nine years a citizen of the United States, and, when elected, be an inhabitant of that state for which he shall be chosen. Art. 1, s. 3.—2. The house of representatives is composed of members chosen every second year by the people of the several states, who are qualified electors of the most numerous branch of the legislature of the state to which they belong. No person can be a representative until he has attained the age of twenty-five years, and has been seven years a citizen of the United States, and is, at the time of his election, an inhabitant of the state in which he is chosen. Const. U. S. art. 1, § 2. The constitution requires that the representatives and direct taxes shall be apportioned among the several states, which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. Art. 1, s. 1. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative. Ib.

[3] Having shown how congress is constituted, it is proposed here to consider the privileges and powers of the two houses, both aggregately and separately.

Each house is made the judge of the election, returns, and qualifications of its own members. Art. 1, s. 5. As each house acts in these cases in a judicial character, its decisions, like the decisions of any other court of justice, ought to be regulated by known principles of law, and strictly adhered to, for the sake of uniformity and certainty. A majority of each house shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorised to compel the attendance of absent members, in such manner, and under such penalties, as each may provide. Each house may determine the rules of its proceedings; punish its members for disorderly behaviour; and, with the concurrence of two-thirds, expel a member. Each house is bound to keep a journal of its proceedings, and from time to time, publish the same, excepting such parts, as may in their judgment, require secrecy; and to enter the yeas and nays on the journal, on any question, at the desire of one-fifth of the members present. Art. 1, s. 5. The members of both houses are in all cases, except treason, felony and breach of the peace, privileged from arrest during their attendance at the session of their respective houses, and in going to, and returning from the same. Art. 1, s. 6. These privileges of the two houses, are obviously necessary for their preservation and character; and, what is still more important to the freedom of deliberation, no member can be questioned in any other place for any speech or debate in either house. Ib. There is no express power given to either house to punish for contempts, except when committed by their own members, but they have such an implied power. 6 Wheat. R. 204. This power, however, extends no further than imprisonment, and that will continue no further than the duration of the power that imprisons. The imprisonment will therefore terminate with the adjournment or dissolution of congress.

[4] The house of representatives has the exclusive right of originating bills for raising revenue, and this is the only privilege that house enjoys in its legislative character, which is

not shared equally with the other; and even those bills are amendable by the senate, in its discretion. Art. 1, s. 7. The two houses are an entire and perfect check upon each other, in all business appertaining to legislation; and one of them cannot even adjourn, during the session of congress, for more than three days, without the consent of the other; nor to any other place than that in which the two houses shall be sitting. Art. 1, s. 5.

[5] The powers of congress extend generally to all subjects of a national nature. Congress are authorised to provide for the common defence and general welfare; and for that purpose, among other express grants, they have the power to lay and collect taxes, duties, imposts and excises; to borrow money on the credit of the United States; to regulate commerce with foreign nations, and among the several states, and with the Indians; 1 McLean, R. 257; to establish an uniform rule of naturalization, and uniform laws of bankruptcy throughout the United States; to establish post offices and post roads; to promote the progress of science and the useful arts, by securing for a limited time to authors and inventors, the exclusive right to their respective writings and discoveries; to constitute tribunals inferior to the supreme court; to define and punish piracies on the high seas, and offences against the laws of nations; to declare war; to raise and support armies; to provide and maintain a navy; to provide for the calling forth of the militia; to exercise exclusive legislation over the District of Columbia; and to give full efficacy to the powers contained in the constitution.

[6] The rules of proceeding in each house are substantially the same; the house of representatives choose their own speaker; the vice-president of the United States, is, ex officio, president of the senate, and gives the casting vote when the members are equally divided. The proceedings and discussions in the two houses are generally in public.

[7] The ordinary mode of passing laws is briefly this; one day's notice of a motion for leave to bring in a bill, in cases of a general nature, is required; every bill must have three readings before it is passed, and these readings must be on different days; and no bill can be committed and amended until it has been twice read. In the house of representatives, bills, after being twice read, are committed to a committee of the whole house, when a chairman is appointed by the speaker to preside over the committee; the speaker leaves the chair, and takes a part in the debate as an ordinary member. When a bill has passed one house, it is transmitted to the other, and goes through a similar form, though in the senate there is less formality, and bills are often committed to a select committee, chosen by ballot. If a bill be altered or amended in the house to which it is transmitted, it is then returned to the house in which it originated, and if the two houses cannot agree, they appoint a committee to confer on the subject. When a bill is engrossed, and has received the sanction of both houses, it is sent to the president for his approbation. If he approves of the bill, he signs it. If he does not, it is returned, with his objections, to the house in which it originated, and that house enters the objections at large on their journal, and proceeds to re-consider it. If, after such re-consideration, two-thirds of the house agree to pass the bill, it is sent, together with the objections, to the other house, by which it is likewise re-considered, and if approved by two-thirds of that house, it becomes a law. But in all such cases, the votes of both houses are deter-

mined by yeas and nays; and the names of the persons voting for and against the bill, are to be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress, by their adjournment, prevent its return; in which case it shall not be a law. Art. 1, s. 7. See *House of Representatives; President; Senate; Veto;* Kent, Com. lecture xi.; Rawle on the Const. ch. ix.

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CONGRESS, *med. juris.* This name was anciently given in France, England, and other countries, to the indecent consummation of marriage, when made in the presence of witnesses appointed by the courts, in cases when the husband or wife was charged by the other with impotence. Trebuchet, Jurisp. de Méd. 101; Dictionnaire des Sciences Medicales, art. *Congrès*, by Marc.

CONJUNCTIVE, *contracts, wills, instruments.* A term in grammar used to designate particles which connect one word to another, or one proposition to another proposition. There are many cases in law, where the conjunctive *and* is used for the disjunctive *or*, and *vice versa*. An obligation is conjunctive when it contains several things united by a conjunction, to indicate that they are all equally the object of the matter or contract; for example, if I promise for a lawful consideration, to deliver to you my copy of the Life of Washington, my Encyclopædia, and my copy of the History of the United States, I am then bound to deliver all of them and cannot be discharged by delivering one only. There are, according to Toullier, tom. vi. n. 686, as many separate obligations as there are things to be delivered, and the obligor may discharge himself pro tanto by delivering either of them, or in case of refusal the tender will be valid. It is presumed, however, that only one action could be maintained for the whole. But if the articles in the agreement had not been enumerated, I could not, according to

Toullier, deliver one in discharge of my contract, without the consent of the creditor; as if, instead of enumerating the books above mentioned, I had bound myself to deliver all my books, the very books in question. Vide *Disjunctive*, *Item*, and the cases there cited; and also, Bac. Ab. Conditions, M; 1 Bos. & Pull. 242; 4 Bing. N. C. 463; S. C. 33 E. C. L. R. 413.

CONJURATION, swearing together. It signifies a plot, bargain, or compact made by a number of persons under oath, to do some public harm. In times of ignorance this word was used to signify the personal conference which some persons were supposed to have had with the devil, or some evil spirit, to know any secret, or effect any purpose.

CONNECTICUT. The name of one of the original states of the United States of America. It was not until the year 1665 that the territory now known as the state of Connecticut was united under one government. The charter was granted by Charles the Second, in April, 1662, but as it included the whole colony of New Haven, it was not till 1665, that the latter ceased its resistance, when both the colony of Connecticut and that of New Haven agreed, and then they were indissolubly united and have so remained. This charter, with the exception of a temporary suspension, continued in force till the American revolution, and afterwards continued as a fundamental law of the state till the year 1818, when the present constitution was adopted. 1 Story on the Const. § 86–88. The constitution was adopted on the fifteenth day of September, 1818. The powers of the government are divided into three distinct departments, and each of them confided to a separate magistracy, to wit: those which are legislative, to one; those which are executive to another; and those which are judicial to another. Art. 2.—The legislative power is vested in two distinct houses or branches, the one styled the senate, and the other, the house of representatives, and both together the general assembly. 1. The senate consists of twelve members chosen annually by the electors. 2. The house of representatives consists of electors residing in towns from which they are elected. The number of representatives is to be the same as at present practised and allowed; towns which may be hereafter incorporated are to be entitled to one representative only. 2d. The executive power is vested in a governor and lieutenant-governor. 1. The supreme executive power of the state is vested in a governor, chosen by the electors of the state; he is to hold his office for one year from the first Wednesday of May, next succeeding his election, and until his successor be duly qualified. Art. 4, s. 1. The governor possesses the veto power, art. 4, s. 12. 2. The lieutenant-governor is elected immediately after the election of governor, in the same manner as is provided for the election of governor, who continues in office the same time, and is to possess the same qualifications as the governor. Art, 4, s. 3. The lieutenant-governor, by virtue of his office, is president of the senate; and in case of the death, resignation, refusal to serve, or removal from office of the governor, or of his impeachment or absence from the state, the lieutenant-governor exercises all the powers and authority appertaining to the office of governor, until another be chosen, at the next periodical election for governor, and be duly qualified; or until the governor impeached or absent shall be acquitted or return. Art. 4, s. 14. 3d. The judicial power of the state is vested in a supreme court of errors, a superior court, and such inferior courts as the

general assembly may from time to time ordain and establish; the powers of which courts shall be defined. A sufficient number of justices of the peace, with such jurisdiction, civil and criminal, as the general assembly may prescribe, are to be appointed in each county. Art. 5.

CONNIVANCE, is an agreement or consent, indirectly given, that something shall be done by another. The connivance of the husband to his wife's prostitution deprives him of the right of obtaining a divorce; or of recovering damages from the seducer. It may be satisfactorily proved by implication. Connivance differs from condonation, (q. v.) though either may have the same legal consequences. Connivance necessarily involves criminality on the part of the individual who connives; condonation may take place without imputing the slightest blame to the party who forgives the injury. Connivance must be the act of the mind before the offence has been committed, condonation, is the result of a determination to forgive an injury which was not known until after it was inflicted. 3 Hagg. Eccl. R. 350. Connivance differs also from collusion, (q. v.); the former is generally collusion for a particular purpose, while the latter may exist without connivance. 3 Hagg. Eccl. R. 130. Vide Shelf. on Mar. & Div. 449; 3 Hagg. R. 82; 2 Hagg. R. 376; Ib. 278; 3 Hagg. R. 58, 107, 119, 131, 312.

CONQUEST, *feudal law*. This term was used by the feudists to signify *purchase*.

CONQUEST, *international law*, is the acquisition of the sovereignty of a country by force of arms, exercised by an independent power which reduces the vanquished to the submission of its empire. It is a general rule that where conquered countries, have laws of their own, these laws remain in force after the conquest, until they are abrogated, unless they are contrary to our religion or enact any *malum in se*; for in all such cases the laws of the conquering country prevail; for it is not to be presumed that laws opposed to religion or sound morals could be sanctioned. 1 Story, Const. § 150, and the cases there cited. The conquest and military occupation of a part of the territory of the United States by a public enemy, renders such conquered territory, during such occupation, a foreign country with respect to the revenue laws of the United States. 4 Wheat. R. 246; 2 Gallis. R. 486. The people of a conquered territory change their allegiance; but, by the modern practice, their relations to each other, and their rights of property remain the same. 7 Pet. R. 86. Conquest does not, *per se*, give the conqueror *plenum dominium et utile*, but a temporary right of possession and government. 2 Gallis. R. 486; 3 Wash. C. C. R. 101. See 8 Wheat. R. 591; 2 Bay, R. 229; 2 Dall. R. 1; 12 Pet. 410. The right which the English government claimed over the territory now composing the United States was not founded on conquest but discovery. Ib. § 152 et seq.

CONQUÊTS, *French law*. The name given to every acquisition which the husband and wife, jointly or severally make, during the conjugal community. Thus whatever is acquired by the husband and wife, either by his or her industry or good fortune, enures to the extent of one half for the benefit of the other. Merl. Rép. mot Conquêt; Merl. Quest. mot Conquêt. In Louisiana these gains are called *aquets*, (q. v.) Civ. Code of Lo. art. 2369.

CONSANGUINITY is the relation subsisting among all the different persons descending from the same stock, or common ancestor. 2 Bl. Com. 202; Toull. Dr. Civ. Fr. liv.

3, t. 1, ch. n. 115. Some portion of the blood of the common ancestor flows into the veins of all his descendants, and though mixed with the blood flowing from many other families, yet it constitutes the kindred or alliance by blood between any two of the individuals. This relation by blood is of two kinds, lineal and collateral.

Lineal consanguinity is that relation which exists among persons, where one is descended from the other, as between the son and the father or the grandfather, and so upwards in a direct ascending line; and between the father and the son, or the grandson, and so downwards in a direct descending line. Every generation in this direct course makes a degree, computing either in the ascending or descending line. This being the natural mode of computing the degrees of lineal consanguinity, it has been adopted by the civil, the canon, and the common law.

Collateral consanguinity is the relation subsisting among persons who descend from the same common ancestor, but not from each other. It is essential to constitute this relation, that they spring from the same common root or stock, but in different branches. The mode of computing the degrees is to discover the common ancestor, to begin with him to reckon downwards, and the degree the two persons, or the more remote of them is distant from the ancestor, is the degree of kindred subsisting between them. For instance, two brothers are related to each other in the first degree, because from the father to each of them is one degree. An uncle and a nephew are related to each other in the second degree, because the nephew is two degrees distant from the common ancestor, and the rule of computation is extended to the remotest degrees of collateral relationship. This is the mode of computation by the common and canon law. The method of computing by the civil law, is to begin at either of the persons in question, and count up to the common ancestor, and then downwards to the other person calling it a degree for each person, both ascending and descending, and the degrees they stand from each other, is the degree in which they stand related. Thus from a nephew to his father is one degree, to the grandfather two degress, and then to the uncle three, which points out the relationship. The mode of the civil law is preferable, for it points out the actual degree of kindred in all cases; by the mode adopted by the common law, different relations may stand in the same degree. The uncle and nephew stand related in the second degree by the common law, and so are two first cousins, or two sons of two brothers; but by the civil law the uncle and nephew are in the third degree, and the cousins are in the fourth. The mode of computation, however, is immaterial, for both will establish the same person to be the heir. 2 Bl. Com. 202; 1 Swift's Dig. 113; Toull. Dr. Civ. Fr. liv. 3, t. 1, c. 3, n. 115. Vide *Branch; Degree; Line.*

CONSCIENCE. The moral sense, or that capacity of our mental constitution, by which we irresistibly feel the difference between right and wrong. The constitution of the United States wisely provides that "no religious test shall ever be required." No man, then, or body of men, have a right to control a man's belief or opinion in religious matters, or to forbid the most perfect freedom of iniquiry in relation to them, by force or threats, or by any other motives than arguments or persuasion. Vide Story, Const. § 1841–1843.

CONSENSUAL, *civil law*. This word is applied to designate one species of contract, known in the civil law; these contracts derive their name from the consent of the parties which is required in their formation, as they cannot exist without such consent. The contract of sale, among the civilians, is an example of a consensual contract, because the moment there is an agreement between the seller and the buyer as to the thing and the price, the vendor and the purchaser, have reciprocal actions. On the contrary, on a loan, there is no action by the lender or borrower, although there may have been consent, until the thing is delivered or the money counted. This is a real contract in the sense of the civil law. Leç. El. Dr. Rom. § 895. Poth. Ob. pt. 1, c. 1, s. 1, art. 2; 1 Bell's Com. (5th ed.) 435. Vide *Contract*.

CONSENT, is an agreement to something proposed, and differs from assent, (q. v.) Wolff, Ins. Nat. part 3, § 1054. Consent is either express or implied. Express when it is given viva voce, or in writing; implied, when it is manifested by signs, actions or facts, or by inaction or silence, which raise a presumption that consent has been given.—1. When a legacy is given with a condition annexed to the bequest, requiring the consent of executors to the marriage of the legatee, and under such consent being given a mutual attachment has been suffered to grow up, it would be rather late to state terms and conditions on which a marriage between the parties should take place, 2 Ves. & Beames, 234; Ambl. 264; 2 Freem. 201; unless such consent was obtained by deceit or fraud, 1 Eden, 6; 1 Phillim. 300; 12 Ves. 19.—2. Such a condition does not apply to a *second* marriage. 3 Bro. C. C. 145; 3 Ves. 239.—3. If the consent has been substantially given, though not *modo et forma*, the legatee will be held duly entitled to the legacy.. 1 Sim. & Stu. 172; 1 Meriv. 187; 2 Atk. 265.—4. When trustees under a marriage settlement are empowered to sell "with the consent of the husband and wife," a sale made by the trustees without the distinct consent of the wife, cannot be a due execution of their power. 10 Ves. 378.—5. Where a power of sale requires that the sale should be with the consent of certain specified individuals, the fact of such consent having been given, ought to be evinced in the manner pointed out by the creator of the power, or such power will not be considered as properly executed. 10 Ves. 308. Vide, generally, 2 Supp. to Ves. jr. 161, 165, 169; Ayliffe's Pand. 117; 1 Rop. Leg. 345, 539.—6. Courts of equity have established the rule that when the true owner of property stands by, and knowingly suffers a stranger to sell the same as his own, without objection, this will be such implied consent as to render the sale valid against the true owner. Story on Ag. § 91; Story on Eq. Jur. § 385 to 390. And courts of law, unless restrained by technical formalities, act upon the principles of justice; as, for example, when a man permitted, without objection, the sale of his goods under an execution against another person. 6 Adolph. & Ell. 469; 9 Barn. & Cr. 586; 3 Barn. & Adolph. 318, note.

The consent which is implied in every agreement is excluded, 1, by error in the essentials of the contract, as, if Paul, in the city of Philadelphia, buy the horse of Peter, which is in Boston, and promise to pay one hundred dollars for him, the horse at the time of sale, unknown to either party, being dead. 2. Consent is excluded by duress of the party making the agreement. 3. Consent is never given so as to bind the parties, when

it is obtained by fraud. 4. It cannot be given by a person who has no understanding, as an idiot, nor by one who, though possessed of understanding, is not in law capable of making a contract, as a feme covert.

CONSEQUENTIAL DAMAGES, *torts*, are those damages or those losses which arise, not from the immediate act of the party, but in consequence of such act; as, if a man throw a log in the public streets, and another fall on it and become injured by the fall; or if a man should erect a dam over his own ground, and by that means overflow his neighbour's to his injury. The form of action to be instituted for consequential damages caused without force, is by action on the case. 3 East, 602; 1 Stran. 636; 5 T. R. 649; 5 Vin. Ab. 403; 1 Chit. Pl. 127. Kames on Eq. 71. Vide *Immediate*.

CONSERVATOR, a preserver, a protector. Before the institution of the office of justices of the peace in England, the public order was maintained by officers who bore the name of conservators of the peace. All judges, justices, sheriffs and constables are conservators of the peace, and are bound, ex officio, to be aiding and assisting in preserving order. In Connecticut, this term is applied to designate a guardian who has the care of the estate of an idiot. 5 Conn. R. 280.

CONSIDERATIO CURIÆ, *practice*, is the judgment of the court. In pleadings where matters are determined by the court it is said, therefore it is considered and adjudged by the court, *ideo consideratum est per curiam*.

CONSIDERATION, *contracts*, is the compensation which is paid, or inconvenience suffered by the party from whom it flows. Or it is the reason which moves the contracting party to enter into the contract. 2 Bl. Com. 443. Viner defines it to be a cause or occasion meritorious, requiring a mutual recompense in deed or in law. Abr. tit. Consideration, A. A consideration of some sort or other, is so absolutely necessary to the forming a good contract, that a *nudum pactum*, or an agreement to do or to pay any thing on one side, without any compensation to the other, is totally void in law; and a man cannot be compelled to perform it. Dr. & Stud. d. 2, c. 24; 3 Call, R. 439; 7 Conn. 57; 1 Stew. R. 51; 5 Mass. 301; 4 John. R. 235; 6 Yerg. 418; Cooke, R. 497; 6 Halst. R. 174; 4 Munf. R. 95. But contracts under seal are valid without a consideration; or, perhaps more properly speaking, every bond imports in itself a sufficient consideration, though none be mentioned. 11 Serg. & R. 107; and negotiable instruments, as bills of exchange and promissory notes, carry with them prima facie evidence of consideration. 2 Bl. Com. 445.

The consideration must be some benefit to the party by whom the promise is made, or to a third person at his instance; or some detriment sustained at the instance of the party promising, by the party in whose favour the promise is made. 4 East, 455; 1 Taunt. 523; Chitty on Contr. 7; Dr. & Stu. 179; 1 Selw. N. P. 39, 40; 2 Pet. 182; 1 Litt. 123; 3 John. 100; 6 Mass. 58; 2 Bibb, 30; 2 J. J. Marsh. 222; 5 Cranch, 142, 150; 2 N. H. Rep. 97; Wright, R. 660; 14 John. R. 466; 13 S. & R. 29.

Considerations are good, as, when they are for natural love and affection; or valuable, where some benefit arises to the party to whom they are made, or inconvenience to the party making them; Vin. Abr. Consideration, B.

They are legal, which are sufficient to support the contract; or illegal, which renders it void. As to

illegal considerations, see 1 Hov. Supp. to Ves. jr. 295; 2 Hov. Supp. to Ves. jr. 448. If the performance be utterly impossible, in fact or in law, the consideration is void. 2 Lev. 161; Yelv. 197, and note; 3 Bos. & Pull. 296, n.; 14 Johns. R. 381.

A mere *moral* obligation to pay a debt or perform a duty, is a sufficient consideration for an express promise, although no legal liability existed at the time of making such promise. Cowp. 290; 2 Bl. Com. 445; 3 Bos. & Pull. 249, note; 2 East, 506; 3 Taunt. 311; 5 Taunt. 36; 13 Johns. R. 259; Yelv. 41, b, note; 3 Pick. 207. But it is to be observed that in such cases there must have been a good or valuable consideration; for example, every one is under a moral obligation to relieve a person in distress, a promise to do so, however, is not binding in law. One is bound to pay a debt which he owes, although he has been released; a promise to pay such debt is obligatory in law on the debtor, and can therefore be enforced by action. 12 S. & R. 177; 19 John. R. 147; 4 W. C. C. R. 86, 148; 7 John. R. 36; 14 John. R. 178; 1 Cowen, R. 249; 8 Mass. R. 127. See 7 Conn. R. 57; 1 Verm. R. 420; 5 Verm. R. 173; 5 Ham. R. 58; 3 Penna. R. 172; 5 Binn. R. 33.

In respect of time a consideration is either, 1st, executed, or something done before the making of the obligor's promise; Yelv. 41, a. n. In general an *executed* consideration is insufficient to support a contract, 7 John. R. 87; 2 Conn. R. 404; 7 Cowen, R. 358; but an executed consideration *on request*, 7 John. R. 87; 1 Caines, R. 584, or by some previous duty, or if the debt be continuing at the time, or it is barred by some rule of law, or some provision of a statute, as the act of limitation, it is sufficient to maintain an action. 4 W. C. C. R. 148; 14 John. R. 378; 17 S. & R. 126; 2dly, executory or something to be done after such promise; 3dly, concurrent, as in the case of mutual promises; and, 4thly, a continuing consideration. Chitty on Contr. 16.

As to cases where the contract has been set aside on the ground of a total failure of the consideration, see 11 Johns. R. 50; 7 Mass. 14; 3 Johns. R. 458; 8 Mass. 46; 6 Cranch, 53; 2 Caines's Rep. 246; and 1 Camp. 40, n.

See, in general, *Obligation; New Promise;* Evans's Poth. vol. ii. p. 19; 1 Fonb. Eq. 335; Newl. Contr. 65; 1 Com. Contr. 26; Fell on Guarrant. 337; 3 Chit. Com. Law, 63 to 99; 3 Bos. & Pull. 249, n; 1 Fonb. Eq. 122, note z; Ib. 370, note g; 5 East, 20, n.; 1 Saund. 211, note 2; Lawes Pl. Ass. 49; 1 Com. Dig. Action upon the case upon Assumpsit, B; Vin. Abr. Actions of Assumpsit, Q; Ib. tit. Consideration.

CONSIGNATION, *contracts*, in the civil law, is a deposit which a debtor makes of the thing that he owes into the hands of a third person, and under the authority of a court of justice. Poth. Oblig. P. 3, c. 1, art. 8. Generally the consignation is made with a public officer; it is very similar to our practice of paying money into court. The term to consign, or consignation, is derived from the Latin *consignare*, which signifies to seal, for it was formerly the practice to seal up the money thus received in a bag or box. Aso & Man. Inst. B. 2, t. 11, c. 1, § 5.

CONSIGNEE, *contracts*, one to whom a consignment is made. When the goods consigned to him are his own, and they have been ordered to be sent, they are at his risk the moment the consignment is made according to his direction; and the persons employed in the transmission

of the goods are his agents. 1 Liverm. on Ag. 9. When the goods are not his own, if he accept the consignment, he is bound to pursue the instructions of the consignor; as if the goods be consigned upon condition that the consignee will accept the consignor's bills, he is bound to accept them; Ib. 139; or if he is directed to insure, he must do so. Ib. 325. It is usual in bills of lading to state that the goods are to be delivered to the consignee or his assigns, he or they paying freight; in such case the consignee or his assigns by accepting the goods, by implication, become bound to pay the freight. Abbott on Sh. p. 3, c. 7, § 4; 3 Bing. R. 383.

CONSIGNOR, *contracts*, is one who makes a consignment to another. When goods are consigned to be sold on commissions, and the property remains in the consignor; or when goods have been consigned upon a credit, and the consignee has become a bankrupt or failed, the consignor has a right to stop them *in transitu*, (q. v.) Abbott on Sh. p. 3, c. 9, § 1. The consignor is generally liable for the freight or the hire for the carriage of goods. 1 T. R. 659.

CONSILIUM, or *dies consilii*, *practice*, a time allowed for the accused to make his defence, and now more commonly used for a day appointed to argue a demurrer.

CONSISTORY, *ecclesiastical law*. A court which was formerly held among protestants, in some church in which the bishop presided, assisted by some of his clergy. It is now held in England, by the bishop's chancellor or commissary, and some other ecclesiastical officers, either in the cathedral, church or other place in his diocese, for the determination of ecclesiastical cases arising in that diocese. Merl. Rép. h. t.; Burn's Dict. h. t.

CONSOLIDATION, *civil law*, is the union of the usufruct with the estate out of which it issues, in the same person; which happens when the usufructuary acquires the estate, or vice versa. In either case the usufruct is extinct. In the common law this is called a merger. Leç. El. Dr. Rom. 424. U. S. Dig. tit. Actions, V.

CONSOLIDATION RULE, *practice*, *com. law*. When a number of actions are brought on the same policy, it is the constant practice, for the purpose of saving costs to consolidate them by a rule of court or judge's order, which restrains the plaintiff from proceeding to trial in more than one, and binds the defendants in all the others to abide the event of that one; but this is done upon condition that the defendant shall not file any bill in equity, or bring any writ of error for delay. 2 Marsh. Ins. 701. For the history of this rule, vide Parke on Ins. xlix.; Marsh. Ins. B. 1, c. 16, s. 4. And see 1 John. Cas. 29; 19 Wend. 23; 13 Wend. 644; 5 Cowen, 282; 4 Cowen, 78; Id. 85; 1 John. 29; 9 John. 262. The term consolidation seems to be rather misapplied in those cases, for in point of fact there is a mere stay of proceedings in all those cases but one, 3 Chit. Pr. 644. The rule is now extended to other cases: when several actions are brought on the same bond against several obligors, an order for a stay of proceedings in all but one will be made. 3 Chit. Pr. 645; 3 Carr. & P. 58. See 4 Yeates, R. 128; 3 S. & R. 262; Coleman, 62; 3 Rand. 481; 1 N. & M. 417, n.; 1 Cowen, 89; 3 Wend. 441; 9 Wend. 451; 2 N. & M. 438, 440, n.; 5 Cowen, 282; 4 Halst. 335; 1 Dall. 145; 1 Browne, Appx. lxvii.

CONSORT. A man or woman married. The man is the consort of his wife, the woman is the consort of her husband.

CONSPIRACY, *crim. law, torts.* An agreement between two or more persons to do an unlawful act, or any of those acts which become by the combination injurious to others. Formerly this offence was much more circumscribed in its meaning than it is now. Lord Coke describes it as "a consultation or agreement between two or more to appeal or indict an innocent person falsely and maliciously, whom accordingly they cause to be indicted or appealed; and afterwards the party is acquitted by the verdict of twelve men," The crime of conspiracy, according to its modern interpretation, may be of two kinds, namely, conspiracies against the public, or such as endanger the public health, violate public morals, insult public justice, destroy the public peace, or affect public trade or business. To remedy these evils the guilty persons may be indicted in the name of the commonwealth: conspiracies against individuals are such as have a tendency to injure them in their persons, reputation or property. The remedy in these cases is either by indictment or by a civil action. In order to render the offence complete there is no occasion that any act should be done in pursuance of the unlawful agreement entered into between the parties, or that any one should have been defrauded or injured by it; the conspiracy is the gist of the crime. 2 Mass. R. 337; Id. 538; 6 Mass. R. 74; 3 S. & R. 220; 4 Wend. R. 259; 4 Halst. R. 293; 2 Stew. Rep. 360; 5 Harr. & John. 317; 8 S. & R. 420. By st. 1825, c. 76, § 23, 3 Story's L. U. S., 2006, a wilful and corrupt conspiracy to cast away, burn or otherwise destroy any ship or vessel, with intent to injure any underwriter thereon, or on the goods on board thereof, or any lender of money on such vessel, on bottomry or respondentia, is, by the laws of the United States, made felony, and the offender punishable by fine not exceeding ten thousand dollars, and by imprisonment and confinement at hard labour, not exceeding ten years. By the Revised Statutes of New York, vol. 2, p. 691, 692, it is enacted, that if any two or more persons shall conspire, either, 1, To commit any offence; or, 2, Falsely and maliciously to indict another for any offence; or, 3, Falsely to move or maintain any suit; or, 4, To cheat and defraud any person of any property by any means which are in themselves criminal; or, 5, To cheat and defraud any person of any property, by means which, if executed, would amount to a cheat, or to obtaining property by false pretences; or, 6, To commit any act injurious to the public health, to public morals, or to trade and commerce, or for the perversion or obstruction of justice, or the due administration of the laws; they shall be deemed guilty of a misdemeanor. No other conspiracies are there punishable criminally. And no agreement, except to commit a felony upon the person of another, or to commit arson or burglary, shall be deemed a conspiracy, unless some act besides such agreement be done to effect the object thereof, by one or more of the parties to such agreement.

When a felony has been committed in pursuance of a conspiracy, the latter, which is only a misdemeanor, is merged in the former; but when a misdemeanor only has been committed in pursuance of such conspiracy, the two crimes being of equal degree, there can be no legal technical merger. 4 Wend. R. 265. Vide 1 Hawk. 444 to 454; 3 Chit. Cr. Law, 1138 to 1193; 3 Inst. 143; Com. Dig. Justices of the Peace, B, 107; Burn's Justice, Conspiracy; Williams's Justice, Conspiracy; 4 Chit. Blacks. 92; Dick. Justice, Conspiracy; Bac. Ab. Actions on the Case, G; 2 Russ. on Cr. 553 to 574; 2 Mass. 329; Ib.

536; 5 Mass. 106; 2 Day, R. 205; Whart. Dig. Conspiracy; 3 Serg. & Rawle, 220; 7 Serg. & Rawle, 469; 4 Halst. R. 293; 5 Harr. & Johns. 317; 4 Wend. 229; 2 Stew. R. 360. For the French law, see Merl. Rép. mot Conspiration; Code Pénal, art. 89.

CONSTABLE, is an officer, generally elected by the people. He possesses power, virtute officii, as a conservator of the peace at common law, and by virtue of various legislative enactments; he may therefore apprehend a supposed offender without a warrant, for treason, felony, breach of the peace, and some misdemeanors less than felony, when committed in his view. 1 Hale, 587; 1 East, P. C. 303; 8 Serg. & Rawle, 47. He may also arrest a supposed offender upon the information of others, without any positive charge on his own knowledge of the circumstances on which the suspicion is founded; but he does so at his peril, unless he can show that a felony has been committed by some person, as well as the reasonableness of the suspicion that the party arrested is guilty. 1 Chit. Cr. L. 27; 6 Binn. R. 316; 2 Hale, 91, 92; 1 East, P. C. 301. He has power to call others to his assistance. A constable is also a ministerial officer, bound to obey the warrants and precepts of justices, coroners and sheriffs. Constables are also in some states bound to execute the warrants and process of justices of the peace in civil cases. In England they have many officers, with more or less power, who bear the name of constables; as, lord high constable of England, high constable, head constables, petty constables, constables of castles, constables of the tower, constables of the fees, constable of the exchequer, constable of the staple, &c. In some of the cities of the United States there are officers who are called high constables, who are the principal police officers where they reside. Vide the various Digests of American law, h. t.; 1 Chit. Cr. L. 20; 5 Vin. Ab. 427; 2 Phil. Ev. 253; 2 Sell. Pr. 70; Bac. Ab. h. t.; Com. Dig. Justices of the Peace, (B 79); Ib. (D 7); Ib. Officer, (E 2); Willc. Off. Const.

CONSTAT, *English law.* The name of a certificate, which the clerk of the pipe and auditors of the exchequer make at the request of any person who intends to plead or move in the court for the discharge of any thing; and the effect of it is, the certifying what *constat* (appears) upon record touching the matter in question. A *constat* is held to be superior to an ordinary certificate, because it contains nothing but what is on record. An exemplification under the great seal, of the enrolment of any letters-patent is called a *constat*. Co. Litt. 225. Vide *Exemplification*; *Inspeximus*.

CONSTITUENT, he who gives authority to another to act for him. The constituent is bound with whatever his attorney does by virtue of his authority. The electors of a member of the legislature are his constituents, to whom he is responsible for his legislative acts.

TO CONSTITUTE, *contr.* To empower, to authorise. In the common form of letters of attorney, these words occur, "I nominate, constitute and appoint."

CONSTITUTED AUTHORITIES. Those powers which the constitution of each people has established to govern them, to cause their rights to be respected, and to maintain those of each of its members. They are called *constituted* to distinguish them from the *constituting* authority which has created or organized them, or has delegated to an authority, which it has itself created, the right of establishing or regulating their movements. The

officers appointed under the constitution are also collectively called the constituted authorities.

CONSTITUTION, *in government*, is the fundamental law of the state, containing the principles upon which the government is founded, and regulating the divisions of the sovereign powers, directing to what persons each of these powers is to be confided, and the manner it is to be exercised; as, the constitution of the United States. See Story on the Constitution; Rawle on the Const. The words constitution and government (q. v.) are sometimes employed to express the same idea, the manner in which sovereignty is exercised in each state. Constitution is also the name of the instrument containing the fundamental laws of the state. By constitution the civilians, and, from them, the common law writers mean some particular law; as the constitutions of the emperors contained in the Code.

CONSTITUTION OF THE UNITED STATES OF AMERICA. The fundamental law of the United States. It was framed by a convention of the representatives of the people, who met at Philadelphia, and finally adopted it on the 17th day of September, 1787. It became the law of the land on the first Wednesday in March, 1789. 5 Wheat. 420.

A short analysis of this instrument so replete with salutary provisions for insuring liberty and private rights, and public peace and prosperity, will here be given.

The preamble declares that the people of the United States, in order to form a more perfect union, establish justice, insure public tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity, do ordain and establish this constitution for the United States of America.

1. The first article is divided into ten sections. By the *first* the legislative power is vested in congress. The *second* regulates the formation of the house of representatives, and declares who shall be electors. The *third* provides for the organization of the senate, and bestows on it the power to try impeachments. The *fourth* directs the times and places of holding elections; and the time of meeting of congress. The *fifth* determines the power of the respective houses. The *sixth* provides for a compensation to members of congress, and for their safety from arrests; and disqualifies them from holding certain offices. The *seventh* directs the manner of passing bills. The *eighth* defines the powers vested in congress. The *ninth* contains the following provisions; 1st, that the migration or importation of persons shall not be prohibited prior to the year 1808; 2dly, that the writ of habeas corpus shall not be suspended, except in particular cases; 3dly, that no bill of attainder, or ex post facto law shall be passed; 4thly, the manner of laying taxes; 5thly, the manner of drawing money out of the treasury; 6thly, that no title of nobility shall be granted; 7thly, that no officer shall receive a present from a foreign government. The *tenth* forbids the respective states to exercise certain powers there enumerated.

2. The second article is divided into four sections. The *first* vests the executive power in the president of the United States of America, and provides for his election and that of the vice-president. The *second* section confers various powers on the president. The *third* defines his duties. The *fourth* provides for the impeachment of the president, vice-president, and all civil officers of the United States.

3. The third article contains three sections. The *first* vests the judicial power in sundry courts, provides for the tenure of office by the judges, and for their compensation. The *second* provides for the extent of the judicial power, vests in the supreme court original jurisdiction in certain cases, and directs the manner of trying crimes. The *third* defines treason, and vests in congress the power to declare its punishment.

4. The fourth article is composed of four sections. The *first* relates to the faith which state records, &c., shall have in other states. The *second* secures the rights of citizens in the several states—for the delivery of fugitives from justice or from labour. The *third* for the admission of new states, and the government of the territories. The *fourth* guaranties to every state in the union the republican form of government, and protection from invasion or domestic violence.

5. The fifth article provides for amendments to the constitution.

6. The sixth article declares that the debts due under the confederation shall be valid against the United States—that the constitution and treaties made under its powers shall be the supreme law of the land—that public officers shall be required by oath or affirmation to support the constitution of the United States—that no religious test shall be required as a qualification for office.

7. The seventh article directs what shall be a sufficient ratification of this constitution by the states.

In pursuance of the fifth article of the constitution, articles in addition to, and amendment of, the constitution, were proposed by congress and ratified by the legislatures of the several states. These additional articles are to the following import:

1. Relates to religious freedom; the liberty of the press; the right of the people to assemble and petition.

2. Secures to the people the right to bear arms.

3. Provides for the quartering of soldiers.

4. Regulates the right of search and of arrest on criminal charges.

5. Directs the manner of being held to answer for crimes, and provides for the security of the life, liberty and property of the citizens.

6. Secures to the accused the right to a fair trial by jury.

7. Provides for a trial by jury in civil cases.

8. Directs that excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

9. Secures to the people the rights retained by them.

10. Secures the rights to the states or to the people the rights they have not granted.

11. Limits the powers of the courts as to suits against one of the United States.

12. Points out the manner of electing the president and vice-president.

CONSTITUTIONAL, that which is consonant to, and agrees with the constitution. When laws are made in violation of the constitution, they are null and void: but the courts will not declare such a law void unless there appears to be a clear and unequivocal breach of the constitution. 4 Dall. R. 14; 3 Dall. R. 399; 1 Cranch, R. 137; 1 Binn. R. 415; 6 Cranch, R. 87, 136; 2 Hall's Law Journ. 96, 255, 262; 3 Hall's Law Journ. 267; Wheat. Dig. tit. Constitutional Law; 2 Pet. R. 522; 2 Dall. 309; 12 Wheat. R. 270; Charlt. R. 175, 235; 1 Breese, R. 70, 209; 1 Blackf. R. 206; 2 Porter, R. 303; 5 Binn. 355; 3 S. & R. 169; 2 Penna. R. 184; 19 John. R. 58; 1 Cowen, R. 550; 1 Marsh. R. 290; Pr. Dec. 64, 89; 2 Litt. R. 90; 4 Munr. R. 43; 1 South. R. 192; 7 Pick. R. 466; 13 Pick. R.

60; 11 Mass. R. 396; 9 Greenl. R. 60; 5 Hayw. R. 271; 1 Harr. & J. 236; 1 Gill & J. 473; 7 Gill & J. 7; 9 Yerg. 490; 1 Rep. Const. Ct. 267; 3 Dessaus. R. 476; 6 Rand. R. 245; 1 Chip. R. 237, 257; 1 Aik. R. 314; 3 N. H. Rep. 473; 4 N. H. Rep. 16; 7 N. H. Rep. 65; 1 Murph. R. 58. See 3 Law Intell. 65, for a list of decisions made by the supreme court of the United States, declaring laws to be unconstitutional.

CONSTITUTOR, *civil law*. He who promised by a simple pact to pay the debt of another; and this is always a principal obligation. Inst. 4, 6, 9.

CONSTRAINT. In the civil and Scottish law, by this term is understood what in the common is known by the name of *duress*. It is a general rule that when one is compelled into a contract, there is no effectual consent, though ostensibly there is the form of it. In such case the contract will be declared void. The constraint requisite thus to annul a contract, must be a *vis aut metus qui cadet in constantem virum*, such as would shake a man of firmness and resolution. 3 Ersk. 1, § 16; and 4, 1, § 26; 1 Bell's Com. B. 3, part 1, c. 1, s. 1, art. 1, page 295.

CONSTRUCTION, *practice*, is defined by Mr. Powell to be "the drawing an inference by the act of reason, as to the intent of an instrument, from given circumstances, upon principles deduced from men's general motives, conduct and action." This definition may perhaps not be sufficiently complete, inasmuch as the term *instrument* generally implies something reduced into writing, whereas construction is equally necessary to ascertain the meaning of engagements merely verbal. In other respects it appears to be perfectly accurate. The Treatise of Equity, defines interpretation to be the collection of the meaning out of signs the most probable. 1 Powell on Con. 370. In the supreme court of the United States the rule which has been uniformly observed "in construing statutes is to adopt the construction made by the courts of the country by whose legislature the statute was enacted. This rule may be susceptible of some modification when applied to British statutes which are adopted in any of these states. By adopting them, they become our own, as entirely as if they had been enacted by the legislature of the state. The received construction in England, at the time they are admitted to operate in this country, indeed, to the time of our separation from the British empire, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But however we may respect the subsequent decisions, (and certainly they are entitled to great respect,) we do not admit their absolute authority. If the English courts vary their construction of a statute, which is common to the two countries, we do not hold ourselves bound to fluctuate with them." 5 Pet. R. 280.

The great object which the law has in all cases in contemplation, as furnishing the leading principle of the rules to be observed in the construction of contracts, is, that justice is to be done between the parties, by enforcing the performance of their agreement, according to the sense in which it was mutually understood and relied upon at the time of making it. When the contract is in writing, the difficulty lies only in the construction of the words; when it is to be made out by parol testimony, that difficulty is augmented by the possible mistakes of the witnesses as to the words used by the parties; but still when the evidence is received, it must be admitted to be perfectly cor-

rect, when a construction is to be put upon it. The following are the principal rules to be observed in the construction of contracts.

1. When the words used are of precise and unambiguous meaning, leading to no absurdity, that meaning is to be taken as conveying the intention of the parties. But should there be manifest absurdity in the application of such meaning, to the particular occasion, this will let in construction to discover the true intention of the parties: for example; 1st, when words are manifestly inconsistent with the declared purpose and object of the contract, they will be rejected; as if, in a contract for sales, the price of the thing sold should be acknowledged as received, while the obligation of the seller was *not* to deliver the commodity. 2 Atk. R. 32. 2dly, when words are omitted so as to defeat the effect of the contract, they will be supplied by the obvious sense and inference from the context; as if the contract stated that the seller for the consideration of one hundred dollars sold a horse, and the buyer promised to pay him for the said horse one hundred, the word *dollars* would be supplied. 3dly, when the words, taken in one sense, go to defeat the contract, while they are susceptible of another construction which will give effect to the design of the parties, and not destroy it, the latter will be preferred. Cowp. 714.

2. The plain, ordinary, and popular sense of the words, is to be preferred to the more unusual, etymological, and recondite meaning; or even to the literal, and strictly grammatical construction of the words, where these last would lead to any inefficacy or inconsistency.

3. When a peculiar meaning has been stamped upon the words by the usage of that particular trade or place in which the contract occurs, such technical or peculiar meaning will prevail. 4 East, R. 135. It is as if the parties in framing their contract had made use of a foreign language, which the court is not bound to understand, but which, on evidence of its import, must be applied. 7 Taunt. R. 272; 1 Stark. R. 504. But the expression so made technical and appropriate, and the usage by which it has become so, must be so clear that the court cannot entertain a doubt upon the subject. 2 Bos. & P. 164; 3 Stark. Ev. 1036; 6 T. R. 320. Technical words are to be taken according to their approved and known use in the trade in which the contract is entered into, or to which it relates, unless they have manifestly been understood in another sense by the parties. Vide 16 Serg. & R. 126.

4. The place where a contract has been made, is a most material consideration in its construction. Generally its validity is to be decided by the law of the place where it is made; if valid there, it is considered valid every where. 2 Mass. R. 88; 1 Pet. R. 317; Story, Confl. of Laws, § 242; 4 Cowen's R. 410, note; 2 Kent, Com. p. 39, 457, in the notes; 3 Conn. R. 253, 472; 4 Conn. R. 517. Its construction is to be according to the laws of the place where it is made; for example, where a note was given in China, payable eighteen months after date, without any stipulation as to the amount of interest, the court allowed the Chinese interest of one per centum per month from the expiration of the eighteen months. 1 Wash. C. C. R. 253; see 12 Mass. R. 4, and the article *Interest for money*.

5. Previous conversations and all that passes in the course of correspondence or negociation leading to the contract, are entirely superceded by a written agreement. The parties having agreed to reduce the terms of their contract to writing, the

document is constituted as the only true and final exposition of their admissions and intentions; and nothing which does not appear in the written agreement will be considered as a part of the contract. 5 Co. R. 26; 2 B. & C. 634; 4 Taunt. R. 779. But this rule admits of some exceptions; as, where a declaration is made before a deed is executed, showing the design with which it was to be executed, in cases of frauds, 1 S. & R. 464; 10 S. & R. 292; and trusts, though no trust was declared in the writing, 1 Dall. R. 426; 7 S. & R. 114.

6. All contracts made in general terms, in the ordinary course of trade, are presumed to incorporate the usage and custom of the trade to which they relate. The parties are presumed to know such usages, and not to intend to exclude them. But when there is a special stipulation in opposition to, or inconsistent with the custom, that will of course prevail. Holt's R. 95.

7. When there is an ambiguity which impedes the execution of the contract, it is first, if possible, to be resolved, on a view of the whole contract or instrument, aided by the admitted views of the parties, and, if indispensable, parol evidence may be admitted to clear it, consistently with the words. 1 Dall. R. 426; 4 Dall. R. 340; 3 S. & R. 609.

8. When the words cannot be reconciled with any practicable or consistent interpretation, they are to be considered as not made use of "perinde sunt ac si scripta, non essent."

It is the duty of the court to give a construction to all written instruments, 3 Binn. R. 337; 7 S. & R. 372; 15 S. & R. 100; 4 S. & R. 279; 8 S. & R. 381; 1 Watts, R. 425; 10 Mass. R. 384; 3 Cranch, R. 180; 3 Rand. R. 586; to written evidence, 2 Watts, R. 347; and to foreign laws, 1 Penna. R. 388.

For general rules respecting the construction of contracts, see 2 Bl. Com. 379; 2 Com. on Cont. 23 to 28; 3 Chit. Com. Law, 106 to 118; Poth. Oblig. P. 1, c. 1, art. 7; 2 Evans's Poth. Ob. 35; Long on Sales, 106; 1 Fonb. Eq. 145, n. b; Ib. 440, n. l; Whart. Dig. Contract, F; 1 Powell on Contr. 370; Shepp. Touchst. c. 5; Louis. Code, art. 1940 to 1957; Com. Dig. Merchant, (E 2,) n. (j,); 8 Com. Dig. tit. Contract, iv.; Lilly's Reg. 794; 18 Vin. Abr. 272, tit. Reference to Words; 16 Vin. Abr. 199, tit. Parols; Hall's Dig. 33, 339; 1 Ves. Jun. 210, n.; Vattel, B. 2, c. 17; Chit. Contr. 19 to 22; 4 Kent, Com. 419; Story's Const. § 397–456; Ayl. Pand. B. 1, t. 4; Rutherf. Inst. B. 2, c. 7, § 4–11; 20 Pick. 150; 1 Bell's Com. (5th ed.) 431, and the articles, *Communings; Evidence; Interpretation; Parol; Pourparler.*

As to the construction of wills, see 1 Supp. to Ves. Jr. 21, 39, 56, 63, 228, 260, 273, 275, 364, 399; 1 United States Law Journ. 583; 2 Fonb. Eq. 309; Com. Dig. Estates by Devise, (N 1.); 6 Cruise's Dig. 171; Whart. Dig. Wills, D.

As to the construction of laws, see Louis. Code, art. 13 to 21; Bac. Ab. Statutes, J.

The following examples of construction, it is believed, will be useful to the student.

A and his associates. 2 Nott & M'Cord, 400.

A B, agent. 1 Breese's R. 172.

A B, (seal) agent for C. D. 1 Blackf. R. 242.

A case. 9 Wheat. 738.

A piece of land. Moor. 702; S. C. Owen, 18.

A place called the vestry. 3 Lev. R. 96; 2 Ld. Raym. 1471.

A slave set at liberty. 3 Conn. R. 467.

A two penny bleeder. 3 Whart. R. 138.

Abbreviations. 4 C. & P. 51; S. C. 19 Engl. C. L. R. 268.

Abide. 6 N. H. Rep. 162.

About. 2 Barn. & Adol. 106; 22 E. C.

L. R. 36; 5 Greenl. R. 482. See 4 Greenl. 286. *About — dollars.* 5 Serg. & Rawle, 402.

Absolute disposal. 2 Eden, 87; 1 Bro. P. C. 476; 2 Johns. R. 391; 12 Johns. R. 389.

Accept. 4 Gill & Johns. 5, 129.

Acceptance. There is your bill, it is all right. 1 Esp. 17. If you will send it to the counting-house again, I will give directions for its being accepted. 3 Camp. 179. What, not accepted? we have had the money, and they ought to have been paid; but I do not interfere, you should see my partner. 3 Bing. R. 625; S. C. 13 Eng. C. L. R. 78. The bill shall be duly honoured, and placed to the drawer's credit. 1 Atk. 611. Vide Leigh's N. P. 420.

According to the bill delivered by the plaintiff to the defendant. 3 T. R. 575.

According to their discretion. 5 Co. 100; 8 How. St. Tr. 55 n.

Account. 5 Cowen, 587, 593. Account closed. 8 Pick. 191. Account stated. 8 Pick. 193.

Account and risk. 4 East, R. 211; Holt on Sh. 376.

Accounts. 2 Conn. R. 433.

Act of God. 1 Cranch, 345; 22 E. C. L. R. 36; 12 Johns. R. 44; 4 Add. Eccl. R. 490.

Acts. Platt on Cov. 334.

Actual cost. 2 Mason, R. 48, 393.

Actual damages. 1 Gall. R. 429.

Adjoining. 1 Turn. R. 21.

Administer. 1 Litt. R. 93, 100.

Advantage, priority or preference. 4 W. C. C. R. 447.

Adverse possession. 3 Watts, 70, 77, 205, 345; 3 Penna. R. 134; 2 Rawle's R. 305; 17 Serg. & Rawle, 104; 2 Penna. R. 183; 3 Wend. 337, 357; 4 Wend. 507; 7 Wend. 62; 8 Wend. 440; 9 Wend. 523; 15 Wend. 597; 4 Paige, 178; 2 Gill & John. 173; 6 Pet. R. 61, 291; 11 Pet. R. 41; 4 Verm. 155; 14 Pick. 461.

Advice. As per advice. Chit. Bills. 185.

Affecting. 9 Wheat. 855.

Aforesaid. Ld. Raym. 256; Ib. 405.

After paying debts. 1 Ves. jr. 440; 3 Ves. 738; 2 Johns. Ch. R. 614; 1 Bro. C. C. 34; 2 Sch. & Lef. 188.

Against all risks. 1 John. Cas. 337.

Aged, impotent and poor people. Preamble to stat. 43 Eliz. c. 4; 17 Ves. 373 in notes; Amb. 595; 7 Ves. 423; Scho. & Lef. 111; 1 P. Wms. 674; S. C. Eq. Cas. Ab. 192, pl. 9; 4 Vin. Ab. 485; 7 Ves. 98, note; 16 Ves. 206; Duke's Ch. Uses, by Bridgman, 361; 17 Ves. 371; Boyle on Charities, 31.

Agreed. 1 Rolle's Ab. 518.

Agreement. 7 E. C. L. R. 331; 3 B. & B. 14; Fell on Guar. 262. Of a good quality and moderate price. 1 Mo. & Malk. 483; S. C. 22 E. C. L. R. 363.

Aiding and abetting. Act of Congress of 1818, c. 86, § 3; 12 Wheat. 460.

All. 1 Vern. 3; 3 P. Wms. 56; 1 Vern. 341; Dane's Ab. Index, h. t. All debts due to me. 1 Meriv. 541, n.; 3 Meriv. 434. All I am worth. 1 Bro. C. C. 487; 8 Ves. 604. All I am possessed of. 5 Ves. 816. All my clothes and linen whatsoever. 3 Bro. C. C. 311. All my household goods and furniture, except my plate and watch. 2 Munf. 234. All my estate. Cowp. 299; 9 Ves. 604. All my real property. 18 Ves. 193. All my freehold lands. 6 Ves. 642. All and every other my lands, tenements and hereditaments. 8 Ves. 256; 2 Mass. 56; 2 Caines's R. 345; 4 Johns. R. 388. All the inhabitants. 2 Conn. R. 20. All sorts of. 1 Holt's N. P. R. 69. All business. 8 Wendell, 498; 23 E. C. L. R. 398; 1 Taunt. R. 349; 7 B. & Cr. 278, 283, 284. All claims and demands whatsoever. 1 Edw. Ch. R. 34. All baggage is at the owner's risk. 13 Wend. R. 611; 5 Rawle's R. 179; 1 Pick. R. 53; 3 Fairf. R. 422; 4 Har. & John. 317. All civil suits. 4 S. & R. 76. All demands. 2 Caines's R. 320, 327; 15 John. R. 197; 1 Ld. Raym. 114. All lots I own in the town of F. 4 Bibb, R. 288. All the buildings thereon. 4 Mass. R. 110; 7 John. R. 217.

All actions. 5 Binn. 457.

Also. 4 Rawle, R. 69.

Amongst. 9 Ves. 445; 9 Wheat. R. 164; 6 Munf. 352.

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Premises. All the premises, 17 Ves. 75; 1 East, R. 456.

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Prison charges. 4 Greenl. 82.

Private charity. Turn. & Russ. 260.

Pro A B, C D. 11 Mass. R. 97.

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Proceeds. 4 Mason, 529.

Procreatis—Procreandis. 1 M. & S. 124.

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Promise. "I don't consider the land as your's; prove your right to it, and I'll pay you for it." 9 Dow. & R. 480; S. C. 22 E. C. L. R. 394. "I promise *never* to pay." 2 Atk. 32; Bayl. Bills, 4; Chit. Bills, 54.

Promise to pay out of the proceeds of the next crop. 2 L. R. 258.

Promissory note. Due A B three hundred and twenty-five dollars, payable on demand. 10 Wend. 675. To pay P D or plaintiffs, or his or their order. 2 B. & A. 417. "I, B C, promise to pay E F the sum of 51*l.* or his order," signed, "B C or else H B." 4 B. & A. 679; 6 E. C. L. R. 563.

Property. 6 Serg. & Rawle, 452; 17 Johns. R. 281; 6 Binn. 94; 18 Ves. 193; 14 East, R. 370; 2 N. R. 214.

Proportion. Charge on estates in equal proportions. 3 Br. C. C. 286. In just and equal proportion. 7 Serg. & Rawle, 514.

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Residue, surplus, &c. 2 Atk. 168; 11 Ves. 330; 14 Ves. 364; 15 Ves. 406; 18 Ves. 466; Dick. 477; 1 Bro. C. C. 589; 4 Bro. C. C. 207; 1 Ves. jr. 63; 1 Wash. 45. 262; 3 Call, 507; 3 Munf. 76; 2 Des. Ch. R. 573; Prec. Ch. 264; 2 Vern. 690; Boyle on Char. 399; 8 Ves. 25, 6.

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Reversion. If the reversion should never fall to the testator. 10 Ves. 453.

Revoked. 1 Cowen, R. 335; 16 John. R. 205.

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Right and title in the deed. 2 Ham. 221.

Right, title, and interest. 4 Pick. 179.

River-feeder. 13 Pick. 50.

Rolling-mill. 2 Watts & Serg. 390.

Running days. 1 Bell's Com. 577, 5th ed.

To sail. 3 M. & S. 461.

Sail from. 3 B. & C. 501.

Same. Cro. Eliz. 838.

Sans recours. Chit. Bills, 266; 1 Leigh's N. P. 405.

Satisfied. 1 M'Cord, Ch. R. 53; 2 John. 395.

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Schools of learning. Wilm. Opin. & Judgm. 14; 2 Vern. 387; 14 Ves. 7; 1 Sim. 109; Jac. 474.

Sea stores. 1 Baldw. R. 504.

Security. 13 John. 481; 3 Blackf. 431.

Secured to be paid. 1 Paine's R. 518; 12 Wheat. 487.

See him paid. Fell on Guar. 36, 7; 1 Ld. Raym. 224; Cowp. 227; 2 T R. 86.

Sell. To sell. Boyle on Char. 307; 9 Greenl. 128.

Sell and convey. 3 Fairf. 460. See also 2 Greenl. 22.

Sell for at the pit's mouth. 7 T. R. 676; S. C. 1 B. & P. 524; 5 T. R. 564.

Settled. 2 Leach, 910.

Seventy acres, being and lying in the south-west corner of —— section. 2 Ham. 327; see 4 Monr. 63.

Shall. 1 Vern. 153. Shall be lawful. 2 D. & R. 172; 4 B. & A. 271; 1 B. & C. 35; 2 T. R. 172; 1 B. & C. 85; 4 B. & A. 271. Shall and may. 1 E. C. L. R. 46; 5 John. Ch. R. 101; 5 Cowen, 193.

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Share and share alike. 3 Dessaus. 143.
Shop. 5 Day, 131; 4 Conn. 446.
Should be secured. 5 Binn. 496.
Signing. I, A B, do make this my will. 18 Ves. 183.
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South-west corner of —— section. 2 Ham. 327.
Specially. 1 Dall. 208; 1 Binn. 254.
Specifically. 16 Ves. 451.
Stable. 1 Lev. R. 58.
Stage. Stage coach. 8 Adol. & Ell. 386; 35 E. C. L. R. 409.
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Sterling. 1 Carr. & P. 286.
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Straw. 4 C. & P. 245; S. C. 19 Eng. Com. Law Rep. 367; 1 Moody, C. C. 239.
Stretching along the bay. 2 John. R. 357; Harg. Law Tracts, 12.
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Subscriber. 6 B. & Cr. 341.
Such. 2 Atk. 292.
Sum in controversy. 9 Serg. & Rawle, 301.
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Superstitious use. 1 Watts, 224.
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Surplus. 18 Ves. 466; 3 Bac. Ab. 67.
Survivors. 17 Ves. 482; 5 Ves. 465.
Survivor and survivors. 3 Burr. 1881; 8 B. & Cr. 231.
Swine. 15 Mass. 205.
Take. 2 Pet. R. 538.
Take and fill shares. 1 Fairf. 478.
Taken out of the State. 1 Hill, 150.
Ten acres of pease. 1 Brownl. 149.
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That is to say. 1 Serg. & Rawle, 141.
The county aforesaid. 2 Bl. R. 847.
The dangers of the river excepted. 1 Miss. R. 81; 2 Bailey's R. 157.
The said defendant. 2 Marsh. R. 101; S. C. 6 Taunt. R. 122, 406.
The said E. R. 9 C. & P. 215; S. C. 38 E. C. L. R. 87.
The said N. 2 Car. Law Repos. 75.
The parties shall abide by the award of arbitrators. 6 N. H. Rep. 162.
The said plaintiff. 2 Marsh. R. 101; S. C. 6 Taunt. R. 122, 406.
The same rents and covenants. 1 Bro. P. C. 522; 3 Atk. 83; Cowp. 819; 2 Bro. Ch. R. 639, note.
Them. 9 Watts, R. 346.
Them or any of them. 3 Serg. & Rawle, 393.
Then. Then and there. 2 Atk. 310; 4 Ves. 698; 1 P. Wms. 594; 1 Brown's C. C. 190; Ld. Raym. 577; Ib. 123.
Thereafter. 13 L. R. 556.
Thereafterwards continuing his said assault. 2 Mass. 50.
Therefore the defendant is indebted. 1 T. R. 716; 2 B. & P. 48.
Thereunto belonging. 22 E. C. L. R. 171.
Things. 11 Ves. 666.
Third parties. 1 N. S. 384.
This demise. 2 Bl. R. 973.
Thousand. 3 B. & Ad. 728.
Through. 7 Pick. R. 274.
Timber. 7 Johns. R. 234; 1 Madd. Ch. 140, n.
Time. Till she arrives.—From her beginning to load.—On the ship's arrival.—And is there moored twenty-four hours in good safety. 3 Chit. Com. Law, 462. Within four days. 15 Serg. & Rawle, 43. Time being. Ang. Corp. 284.
Title. An indefeasible title in fee simple, such as the state makes. 3 Bibb, R. 317; 4 Shepl. R. 164.
To a stream. 3 Sumn. R. 170.
To be begotten. 1 M. & S. 124.
To be by her freely possessed and enjoyed. 12 S. & R. 56; Cowp. 352.
To be paid when in funds. Minor's R. 173; 7 Greenl. R. 126.
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To, from or by. 1 Shepley's R. 198.
To settle. 2 Miles, R. 1.
To his knowledge and belief. 1 H. Bl. 245.
To the best of his knowledge and belief. 8 T. R. 418; 1 Wils. 232.
To the legatees above named. 17 S. & R. 61.
To render a fair and perfect account, in writing, of all sums received. 1 Dougl. R. 382.
To wait a while. 1 Penna. R. 385.
Touch and stay. 1 Marsh. Ins. 188; 1 Esp. N. R. 610; Week. Ins. 548.
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Treasonable practices. 1 Stuart's (L. C.) R. 4.

Trees, woods, coppice—wood grounds, of what kind or growth soever. 4 Taunt. 316.

True value. 11 Wheat. R. 419; 1 Stuart's (L. C.) R. 419.

Truly. 2 Brock. R. 484, 5.

Turnpike Road. 20 Johns. R. 742.

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Understood. 2 Cox's Ch. R. 16.

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Unmarried. 2 Supp. to Ves. jr. 43; 2 Barn. & Ald. 452. Without being married. 7 Ves. 458.

Until. Cowp. 571; 5 East, 250. Until she hath moored at anchor twenty-four hours in good safety. Park, Ins. 35; 1 Marsh. Ins. 262; 2 Str. 1248; 1 Esp. Rep. 412.

Unto and amongst. 9 Ves. 445.

Up the creek. 1 Wilc. R. 508.

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Usual clauses. 2 Chit. Com. Law, 227; 1 Mer. R. 459.

Usual covenants. Platt on Cov. 430.

Usual terms. 8 Mod. 308; Barnes, 330; 3 Chit. Pr. 705.

Usurped power. 2 Marsh. Ins. 700; 2 Wils. 363.

Usury. Vide 2 Pick. (2d ed.) 152, n. 1; 5 Mass. R. 53; 7 Mass. R. 36; 10 Mass. R. 121; 13 Mass. R. 443; 4 Day, R. 37; 2 Conn. R. 341; 7 Johns. R. 402; S. C. 8 Johns. R. 218; 1 Dall. R. 216; 2 Dall. R. 92; 6 Munf. R. 433, 439; 3 Ohio R. 18; 1 Blackford's R. 336; 1 Fairfield, R. 315; 2 Chit. Cr. Law, *549; 3 Ld. Raym. 36; Trem. P. C. 269; Co. Entr. 394, 435; Rast. Entr. 689; Cro. C. C. 743; Com. Dig. Usury, (C); 4 Bl. Com. 158; Hard. 420.

Vacancies. 2 Wend 273.

Vacancy. 1 Breese's R. 70.

Valuable things. 1 Cox, 77; 1 Bro. C. C. 467.

Value received. 3 M. & S. 351; 5 M. & S. 65; 5 B. & C. 360; S. C. 11 Engl. C. L. 252; 3 Kent, Com. 50; Maxw. L. Dict. h. t.; 1 Hall, 201; 1 Blackf. R. 41. True value, 11 Wheat. 419.

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Victualler. 9 A. & E. 406.

Videlicet. 3 Ves. 194.

Village or town. Co. Litt. 5; Plowd. 168; Touchst. 92.

Voluntary assignment. 3 Sumn. R. 345.

Wantonness. 1 Wheel. Cr. Cas. 365; 4 W. C. C. R. 534; 1 Hill, 46, 363.

Warehouse. Cro. Car. 554; Gilb. Ej. 57; 2 Rose. R. Act. 484; 8 Mass. 490.

Waste. 1 Ves. 461; 2 Ves. 71.

Water lots. 14 Pet. R. 302.

Way. In, through, and along. 1 T. R. 560.

Well and truly execute the duties of his office. 1 Pet. R. 69. Well and truly to administer. 9 Mass. 114, 119, 370; 13 John. 441; 1 Bay, 328.

Well and truly to administer according to law. 1 Litt R. 93. 100.

What I may die possessed of. 8 Ves. 604; 3 Call, 225.

What remains. 11 Ves. 330.

Wharf. 6 Mass. 332.

Wheat. An unthrashed parcel of wheat. 1 Leach, 484; 2 East, P. C. 1018; 2 T. R. 255.

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When or if. 1 Hare, R. 10.

When paid. 15 S. & R. 114.

Wherefore he prays judgment, &c. 2 John. Cas. 312.

Whereupon. 6 T. R. 573.

Whilst. 7 East, 116.

Wholesale factory prices. 2 Conn. R. 69.

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Will. He will charge. 2 B. & B. 223.

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With all faults. 5 B. & A. 240; 7 E. C. L. R. 82; 3 E. C. L. R. 475. With surety. 6 Binn. 53; 12 Serg. & Rawle, 312. With the prothonotary. 5 Binn. 461.

With sureties. 2 Bos. & Pull. 443.

Within four days 15 Serg. & Rawle, 43. Within — days after. 3 Serg. & Rawle, 395.

Without fraud deceit or oppression. 6 Wend. 454.

Without prejudice. 2 Chit. Pr. 24, note (*x*).

Without recourse. 1 Cowen, 538; 3 Cranch, 193; 7 Cranch, 159; 12 Mass. 172; 14 Serg. & Rawle, 325. V. article *Sans Recours*, in the body of this work.

Wm. William. 1 Scam. R. 451.

Wood-land. 1 Serg. & Rawle, 169.

Woods. 4 Mass. 268.

Working days. 1 Bell's Com. 577, 5th ed.

Worldly labour. 4 Bing. 84; S. C. 13 E. C. L. R. 351.

Worth and value. 3 B. & C. 516.

Writing. 14 John. 484; 8 Ves. 504; 2 M. & S. 286; 17 Ves. 459.

Writing in pencil. 1 Eng. Eccl. Rep. 406.

Yard lane. Touchs. 93; Co. Litt. 5.

You. 2 Dowl. R. 145; S. C. 6 Leg. Obs. 138.

CONSTRUCTIVE. That which is interpreted. ***Constructive presence***, in the commission of crimes, is when a party is not actually present, an eye-witness to its commission, but acting with others, is watching while another commits the crime. 1 Russ. Cr. 22.—***Constructive larceny***, is one where the taking was not apparently felonious, but by construction of the prisoner's acts it is just to presume he intended at the time of taking to appropriate the property feloniously to his own use. 2 East, P. C. 685; 1 Leach, 212. ***Constructive breaking into a house.*** In order to commit burglary, there must be a breaking of the house; this may be actual or constructive. A constructive breaking is when the burglar gains an entry into the house by fraud, conspiracy, or threat. See ***Burglary.*** A familiar instance of constructive breaking is the case of a burglar who coming to the house under pretence of business, gains admittance, and after being admitted, commits such acts, as, if there had been an actual breaking, would have amounted to a burglary. Bac. Ab. Burglary, A. See 1 Moody, Cr. Cas. 87, 250. ***Constructive notice***, is such a notice, that although it be not actual, is sufficient in law; an example of this is the recording of a deed, which is notice to all the world, and so is the pendency a general notice of an equity. See ***Lis Pendens.*** ***Constructive annexation***, is the annexation to the inheritance by the law, of certain things which are not actually attached to it, for example, the keys of a house, and heir looms are constructively annexed. Shep. Touch. 90; Poth. Traité des choses, § 1.

CONSUL, ***government, commerce.*** Consuls are commercial agents appointed by a government to reside in the sea ports of a foreign country, and commissioned to watch over the commercial rights and privileges of the nation deputing them. A vice-consul is one acting in the place of a consul. Consuls have been greatly multiplied. Their duties and privileges are now generally limited, defined and secured by commercial treaties, or by the laws of the countries they represent. As a general rule, it may be laid down that they represent the subjects or citizens of their own nation, not otherwise represented. Bee, R. 209; 3 Wheat. R. 435; 6 Wheat. R. 152; 10 Wheat. 66; 1 Mason's R. 14. This subject will be considered by taking a view, first, of the appointment, duties, powers, rights and liabilities of American consuls; and secondly, of the recognition, duties, rights, and liabilities of foreign consuls.

1. ***Of American consuls. First,*** The president is authorised by the constitution of the United States, art. 2, s. 2, cl. 2, to nominate, and, by and with the advice and consent of the senate, appoint consuls. ***Secondly,*** Each consul and vice consul is required, before he enters on the execution of his office, to give bond, with such sureties as shall be approved by the secretary of state, in a sum not less than two thousand nor more than ten thousand dollars, conditioned for the true and faithful discharge of the duties of his office, and also for truly accounting for all moneys, goods and effects which may come into his possession by virtue of the act of 14 April, 1792, which bond is to be lodged in the office of the secretary of state. Act of April 14, 1792, sect. 6. ***Thirdly,*** They have the power and are required to perform many duties in relation to the commerce of the United States and towards masters of

ships, mariners, and other citizens of the United States; among these are the authority to receive protests or declarations which captains, masters, crews, passengers, merchants and others make relating to American commerce; they are required to administer on the estate of American citizens, dying within their consulate, and leaving no legal representatives, when the laws of the country permit it; to take charge and secure the effects of stranded American vessels in the absence of the master, owner or consignee; to settle disputes between masters of vessels and the mariners; to provide for destitute seamen within their consulate, and send them to the United States, at the public expense. See Act of 14 April, 1792; Act of 28 February, 1803, ch. 62; Act of 20 July, 1840, ch. 23. The consuls are also authorised to make certificates of certain facts, in certain cases, which receive faith and credit in the courts of the United States. But those consular certificates are not to be received in evidence unless they are given in the performance of a consular function. 2 Cranch, R. 187; Paine, R. 594; 2 Wash. C. C. R. 478; 1 Litt. R. 71; nor are they evidence, between persons not parties or privies to the transaction, of any fact, unless, either expressly or impliedly, made so by statute. 2 Sumn. R. 355. *Fourthly*, Their rights are to be protected agreeably to the laws of nations, and of the treaties made between the nation to which they are sent, and the United States. They are entitled by the act of 14th April, 1792, s. 4, to receive certain fees, which are there enumerated. And the consuls in certain places as London, Paris, and the Barbary states, receive besides, a salary. *Fifthly*, A consul is liable for negligence or omission to perform, seasonably, the duties imposed upon him, or for any malversation or abuse of power, to any injured person for all damages occasioned thereby; and for all malversation and corrupt conduct in office a consul is liable to indictment, and, on conviction by any court of competent jurisdiction, shall be fined not less than one nor more than ten thousand dollars; and be imprisoned not less than one nor more than five years. Act of July 20, 1840, ch. 23, ch. 18. The act of February 28, 1803, ss. 7 and 8, imposes heavy penalties for falsely and knowingly certifying that property belonging to foreigners is the property of citizens of the United States; or for granting a passport, or other paper, certifying that any alien, knowing him or her to be such, is a citizen of the United States.

The duties of consuls residing on the Barbary coast are prescribed by a particular statute. Act of May 1, 1810, s. 4.

2. *Of foreign consuls. First.* Before a consul can perform any duties in the United States, he must be recognized by the president of the United States, and have received his exequatur, (q. v.) *Secondly.* A consul is clothed only with authority for commercial purposes, and he has a right to interpose claims for the restitution of property belonging to the citizens or subjects of the country he represents; 10 Wheat. R. 66; 1 Mason, R. 14; Bee, R. 209; 6 Wheat. R. 152; but he is not to be considered as a minister or diplomatic agent, entrusted by virtue of his office to represent his sovereign in negotiations with foreign states. 3 Wheat. R. 435. *Thirdly.* Consuls are generally invested with special privileges by local laws and usages, or by international compacts, but by the laws of nations they are not entitled to the peculiar immunities of ambassadors. In civil and criminal cases, they are subject to the local laws in the same manner with other

foreign residents owing a temporary allegiance to the state. Wicquefort, De l'Ambassadeur, liv. 1, § 5; Bynk. cap. 10; Martens, Droit des Gens, liv. 4, c. 3, § 148. In the United States the act of September 24th, 1789, s. 13, gives to the supreme court original but not exclusive jurisdiction of all suits in which a consul or vice consul shall be a party. The act last cited, section 9, gives to the district courts of the United States jurisdiction exclusively of the courts of the several states of all suits against consuls or vice consuls except for offences, where whipping exceeding thirty stripes, a fine exceeding one hundred dollars, or a term of imprisonment exceeding six months is inflicted. For offences punishable beyond these penalties, the circuit has jurisdiction in the case of consuls. 5 S. & R. 545. See 1 Binn. 143; 2 Dall. 299; 2 N. & M. 217; 3 Pick. R. 80; 1 Green, R. 107; 17 Johns. 10; 6 Pet. R. 41; 7 Pet. R. 276; 6 Wend. 327. *Fourthly*. His functions may be suspended at any time by the government to which he is sent, and his *exequatur* revoked. In general a consul is not liable personally on a contract made in his official capacity on account of his government. 3 Dall. 384.

See, generally, Abbott on Ship. 210; 2 Bro. Civ. Law, 503; Merl. Répert. h. t.; Ayl. Pand. 160; Warden on Consuls; Marten on Consuls; Borel, de l'Origine et des fonctions des consuls; Rawle on the Const. 222, 223; Story on the Const. § 1654; Serg. Const. Law, 225; Azuni, Mar. Law, part. 1, c. 4, art. 8, § 7.

CONSULTATION, *practice*, is a conference between the counsel or attorneys engaged on the same side of a cause, for the purpose of examining their case, and, if possible, removing the difficulties in their way. This should be had sufficiently early to enable the counsel to obtain an amendment of the pleadings, or further evidence. At these consultations the exact course to be taken by the plaintiff in exhibiting his proofs should be adopted, in consultation by the plaintiff's counsel. In a consultation on a defendant's case, it is important to ascertain the statement of the defence, and the evidence which may be depended upon to support it, to arrange the exact course of defence, and to determine on the cross-examination of the plaintiff's witnesses; and above all whether or not evidence shall be given on the part of the defendant, or withheld so as to avoid a reply on the part of the plaintiff. The wishes of the client should in all cases be consulted. 3 Chit. Pr. 864.

CONSULTATION, *Eng. law*, is the name of a writ whereby a cause being formerly removed by prohibition out of an inferior court into some of the king's courts in Westminster, is returned thither again: for if the judges of the superior court, comparing the proceedings with the suggestion of the party, find the suggestion false or not proved, and that therefore the cause was wrongfully called from the inferior court, then, upon consultation and deliberation, they decree it to be returned, whereupon this writ issues. T. de la Ley.

CONSULTATION, *French law*. The opinion of counsel on a point of law submitted to them is so called. Dict. de Jur. h. t.

CONSUMMATION. The completion of a thing; as the consummation of marriage; (q. v.) the consummation of a contract, and the like. A contract is said to be consummated, when every thing to be done in relation to it, has been accomplished. It is frequently of great importance to know when a contract has been consummated in order to ascertain the rights of the parties, particularly in

the contract of sale. Vide *Delivery*, where the subject is more fully examined. It is also sometimes of consequence to ascertain where the consummation of the contract has taken place, in order to decide by what law it is to be governed. It has been established as a rule, that when a contract is made by persons absent from each other, it is considered as consummated in, and is governed by the law of, the country where the final assent is given. If, therefore, Paul in New Orleans, order goods from Peter in London, the contract is governed by the laws of the latter place. 8 M. R. 135; Plowd. 343. Vide *Conflict of Laws; Inception; Lex Loci contractus; Lex Fori; Offer.*

CONSUMMATION OF MARRIAGE. The first time that the husband and wife cohabit together after the ceremony of marriage has been performed is thus called. The marriage when otherwise legal, is complete without this, for it is a maxim of law borrowed from the civil law, that *consensus, non concubitus, facit nuptias.* Co. Litt. 33; Dig. 50, 17, 30; 1 Black. Com. 434.

CONTAGIOUS DISORDERS, *police, crim. law*, are diseases which are capable of being transmitted by mediate or immediate contact. It is indictable at common law unlawfully and injuriously to expose persons infected with the small-pox or other contagious disease in the public streets where persons are passing, or near the habitations of others, to their great danger. 1 Russ. Cr. 114. Lord Hale seems to doubt whether if a person infected with the plague, should go abroad with intent to infect another, and another should be infected and die, it would not be murder; and he thinks it clear that though there should be no such intent, yet if another should be infected it would be a great misdemeanor. 1 Pl. Cor. 422. Vide 4 M. & S. 73, 272; Dane's Ab. h. t.

CONTEMPT, *crim. law*, is a wilful disregard or disobedience of a public authority. By the constitution of the United States, each house of congress may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member. The same provision is substantially contained in the constitutions of the several states. The power to make rules carries that of enforcing them, and to attach persons who violate them, and punish them for contempts. This power of punishing for contempts, is confined to punishment during the session of the legislature, and cannot extend beyond it; 6 Wheat. R. 204, 230, 231; and, it seems this power cannot be exerted beyond imprisonment.

Courts of justice have an inherent power to punish all persons for contempt of their rules and orders, for disobedience of their process, and for disturbing them in their proceedings. Bac. Ab. Courts and their jurisdiction in general (E); Rolle's Ab. 219; 8 Co. 38 b; 11 Co. 43 b. In some states, as in Pennsylvania, the power to punish for contempts is restricted to offences committed by the officers of the court, or in its presence, or in disobedience of its mandates, orders, or rules; but no one is guilty of a contempt for any publication made or act done out of court, which is not in violation of such lawful rules or orders, or disobedience of its process. Similar provisions limiting the power of the courts of the United States to punish for contempts, are incorporated in the act of March 2, 1831. 4 Sharsw. cont. of Stor. L. U. S. 2256. When a person is in prison for a contempt, it has been decided in New York that he cannot be discharged by another judge, when brought before him on a *habeas corpus;* and,

according to Chancellor Kent, 3 Comm. 27, it belongs exclusively to the court offended to judge of contempts, and what amounts to them; and no other court or judge can, or ought to undertake, in a collateral way, to question or review an adjudication of a contempt made by another competent jurisdiction. This may be considered as the established doctrine equally in England as in this country. 3 Wils. 188; 14 East, R. 1; 2 Bay, R. 182; 6 Wheat. R. 204; 7 Wheat. R. 38; 1 Breese, R. 266; 1 J. J. Marsh. 575; Charlt. R. 136; 1 Blackf. 166; 9 Johns. 395; 6 John. 337.

CONTENTIOUS JURISDICTION, *eccles. law.* In those cases where there is an action or judicial process, and it consists in hearing and determining the matter between party and party, it is said there is contentious jurisdiction, in contradistinction to *voluntary* jurisdiction which is exercised in matters that require no judicial proceeding, as in taking probate of wills, granting letters of administration, and the like.

CONTESTATIO LITIS, *civil law*, the joinder of issue in a cause. Code of Pr. of Lo. art. 357.

CONTINGENT. What may or may not happen; what depends upon a doubtful event; as, a contingent debt, which is a debt depending upon some uncertain event. 9 Ves. R. 110; Co. Bankr. Laws, 245; 7 Ves. R. 301; 1 Ves. & Bea. 176; 8 Ves. R. 334; 1 Rose, R. 523; 3 T. R. 539; 4 T. R. 570. A contingent legacy is one which is not vested. Will. on Executors, h. t. See *Contingent Remainder; Contingent Use.*

CONTINGENT REMAINDER, *estates.* When an estate in remainder 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, the remainder is then contingent. Vide *Remainder.*

CONTINGENT USE, *estates*, is a use limited in a deed or conveyance of land which may or may not happen to vest, according to the contingency expressed in the limitation of such use. A contingent use is such as by possibility may happen in possession, reversion or remainder. 1 Rep. 121; Com. Dig. Uses, (K 6).

CONTINUAL CLAIM, *English law.* When the feoffee of land is prevented from taking possession by fear of menaces or bodily harm, he may make a claim to the land in the presence of the *pares*, and if this claim is regularly made once every year and a day, which is then called a continual claim, it preserves to the feoffee his rights, and is equal to a legal entry. 3 Bl. Com. 175; 2 Bl. Com. 320; 1 Chit. Pr. 278 (a) in note; Crabbe's Hist. E. L. 403.

CONTINUANCE, *practice.*— The adjournment of a cause from one day to another is called a continuance, an entry of which is made upon the record. If these continuances are omitted, the cause is thereby discontinued, and the defendant is discharged *sine die*, without a day, for this term. By his appearance he has obeyed the command of the writ, and, unless he be adjourned over to a certain day, he is no longer bound to attend upon that summons. 3 Bl. Com. 316. Continuances may, however, be entered at any time, and if not entered, the want of them is aided or cured by the appearance of the parties; and as a discontinuance can never be objected to *pendente placito*, so after the judgment it is cured by the statute of jeofails. Tidd's Pr. 628, 835. Before the declaration the continuance is by *dies datus prece partium*; after declaration and

before issue joined, by imparlance, after issue joined and before verdict, by *vice come non misit breve;* and after verdict or demurrer by *curia advisare vult.* 1 Chit. Pl. 421, n. (p); see Vin. Abr. 454; Bac. Abr. Pleas, &c. P; Bac. Abr. Trial, H; Com. Dig. Pleader, V. See as to the origin of continuances, Steph. Pl. 31; 1 Ch. Pr. 778, 779.

CONTINUANDO, *plead.* The name of an averment sometimes contained in a declaration in trespass, that the injury or trespass has been *continued.* For example, if Paul turns up the ground of Peter and tramples upon his grass, for three days together, and Peter desires to recover damages, as well for the subsequent acts of treading down the grass and subverting the soil, as for the first, he must complain of such subsequent trespasses in his actions brought to compensate the former. This he may do by averring that Paul on such a day trampled upon the herbage and turned up the ground, "*continuing* the said trespasses for three days following." This averment seems to impart a continuation of the same identical act of trespass, it has, however, received, by continued usage, another interpretation, and is taken also to denote a repetition of the same kind of injury. When the trespass is not of the same kind, it cannot be averred in a *continuando*, for example, when the injury consists in killing and carrying away an animal, there remains nothing to which a similar injury may again be offered.

There is a difference between the *continuando* and the averment *diversis diebus et temporibus*, on divers days and times. In the former the injuries complained of, have been committed upon one and the same occasion; in the latter, the acts complained of, though of the same kind, are distinct and unconnected. See Gould, Pl. ch. 2, § 86 et seq.; Ham. N. P. 90, 91; Bac. A. Trespass, I, 2, n. 2.

CONTRA BONOS MORES.—Against good morals. All contracts contra bonos mores, are illegal. These are reducible to several classes, namely, those which are, 1, *incentive to crime.* A claim cannot be sustained, therefore, on a bond for compounding a crime, as, for example, a prosecution for perjury, 2 Wils. R. 341, 447, or for procuring a pardon. A distinction has been made between a contract made as a reparation for an injury to the honour of a lady, and one which is to be the reward of future illicit cohabitation; the former is good and valid, and the latter is illegal. 3 Burr. 1568; 1 Bligh's R. 269.—2. *Indecent or mischievous consideration.* An obligation or engagement prejudical to the feelings of a third party; or offensive to decency or morality; or which has a tendency to mischievous or pernicious consequences is void. Cowp. 729; 4 Campb. R. 152; Rawle's R. 42; 1 B. & A. 683; 4 Esp. Cas. 97; 16 East, R. 150. Vide *Wagers.*—3. *Gaming.* The statutes against gaming render all contracts made for the purpose of gaming void. Vide *Gaming; Unlawful; Void.*

CONTRA FORMAM STATUTI, contrary to the form of the statute.—1. When one statute prohibits a thing and another gives the penalty, in an action for the penalty, the declaration should conclude *contra formam statutorum.* Plowd. 206; 2 East, R. 333; Esp. on Pen. Act. 111; 1 Gallis. R. 268. The same rule applies to informations and indictments. 2 Hale, P. C. 172; 2 Hawk. c. 25, § 117; Owen, 135.—2. But where a statute refers to a former one, and adopts and continues the provisions of it, the declaration or indictment should conclude *contra formam statuti*, Hale, P. C. 172; 1 Lutw. 212.—3. Where a thing is

prohibited by several statutes if one only gives the action, and the others are explanatory and restrictive, the conclusion should be *contra formam statuti*. Yelv. 116; Cro. Jac. 187; Noy, 125, S. C.; Rep. temp. Hard. 409; Andr. 115, S. C.; 2 Saund. 377.—4. When the act prohibited was not an offence or ground of action at common law, it is necessary in all cases, criminal and civil, to conclude against the form of the statute or statutes. 1 Saund. 135, c.; 2 East, 333; 1 Chit. Pl. 358; 1 Saund. 249; 7 East, 516; 2 Mass. 116; 7 Mass. 9; 11 Mass. 280; 10 Mass. 36; 1 M'Cord, 121; 1 Gallis. 30.—5. But if the act prohibited by the statute is an offence or ground of action at common law, the indictment or action may be in the common law form, and the statute need not be noticed, even though it prescribe a form of prosecution or of action; the statute remedy is merely cumulative. 2 Inst. 200; 2 Burr. 803; 4 Burr. 2351; 3 Burr. 1418; 2 Wils. 146; 3 Mass. 515.—6. When a statute only inflicts a punishment on that which was an offence at common law, the offence prescribed may be inflicted, though the statute is not noticed in the indictment. 2 Binn. 332.—7. If an indictment for an offence at common law only, conclude "against the form of the statute in such case made and provided;" or "the form of the statute" generally, the conclusion will be rejected as surplusage, and the indictment maintained as at common law. 1 Saund. 135, n. 3.—8. But it will be otherwise if it conclude against the form of "the statute aforesaid," when a statute has been previously recited. 1 Chit. Cr. Law, 266, 289. See further, Com. Dig. Pleader, C. 76; 5 Vin. Abr. 552, 556; 1 Gallis. 26, 257; 9 Pick. 162; 5 Pick. 168; 2 Yerg. 390; 1 Hawks, 192; 3 Conn. 1; 11 Mass. 280; 5 Greenl. 79.

CONTRA PACEM, *pleadings*. Against the peace. In actions of trespass, the words *contra pacem* should uniformly accompany the allegation of the injury; in some cases they are material to the foundation of the action. Trespass to lands in a foreign country cannot be sustained. 4 T. R. 503; 2 Bl. Rep. 1058. The conclusion of the declaration in trespass or ejectment, should be contra pacem, though these are now mere words of form and not traversable, and the omission of that allegation will be aided if not specially demurred to. 1 Chit. Pl. 375, 6; vide Arch. Civ. Pl. 169; 5 Vin. Ab. 557; Com. Dig. Action upon the case, C 4; Pleader, 3 M 8; Prohibition, F 7.

CONTRABAND, *mar. law*, in its most extensive sense means all commerce which is carried on contrary to the laws of the state. The term is usually applied to that commerce which is so carried on in time of war. Merlin, Répert. h. t. Commodities particularly useful in war are contraband, as arms, ammunition, horses, timber for ship building, and every kind of naval stores. When articles come into use as implements of war, which were before innocent, they may be declared to be contraband. The greatest difficulty to decide what is contraband seems to have occurred in the instance of provisions, which have not been held to be universally contraband, though Vattel admits that they become so on certain occasions, when there is an expectation of reducing an enemy by famine. In modern times one of the principal criteria adopted by the courts for the decision of the question, whether any particular cargo of provisions be confiscable as contraband, is to examine whether those provisions be in a rude or manufactured state; for all articles, in such examinations, are treated with

greater indulgence in their natural condition than when wrought up for the convenience of the enemy's immediate use. Iron unwrought, is therefore treated with indulgence, though anchors and other instruments fabricated out of it, are directly contraband. 1 Rob. Rep. 189. See Vattel, b. 3, c. 7; Chitty's L. of Nat. 120; Marsh. Ins. 78; 2 Bro. Civ. Law, 311; 1 Kent, Com. 135; 3 Ib. 215.

Contraband of war, is the act by which, in times of war, a neutral vessel introduces, or attempts to introduce into the territory of one of the belligerent parties, arms, ammunition or other effects intended for, or which may serve hostile operations. Merlin Répert, h. t.; 1 Kent, Com. 135; Mann. Comm. B. 3, c. 7.

CONTRACT. This term, in its more extensive sense, includes every description of agreement or obligation, whereby one party becomes bound to another to pay a sum of money, or perform or omit to do a certain act. In its more confined sense, it is an agreement between two or more persons, concerning something to be done, whereby both parties are bound to each other, or one is bound to the other. 1 Pow. Contr. 6; Civ. Code of Lo. art. 1754; Code Civ. 1101; Poth. Oblig. pt. i. c. 1, s. 1, § 1; Blackstone, (2 Comm. 442,) defines it to be an agreement, upon a sufficient consideration, to do or not to do a particular thing. A contract has also been defined to be a compact between two or more persons. 6 Cranch, R. 136.

Contracts are divided into express or implied. An express contract, is one where the terms of the agreement are openly uttered and avowed at the time of making, as to pay a stated price for certain goods. 2 Bl. Com. 443. Express contracts are of three sorts; 1. By parol, or in writing, as contradistinguished from specialties. 2. By specialty or under seal. 3. Of record.

1. A parol contract is defined to be a bargain or voluntary agreement made, either verbally, or in writing not under seal, upon a good consideration, between two or more persons capable of contracting, to do a lawful act, or omit to do any thing, the performmance whereof is not enjoined by law. 1 Com. Contr. 2; Chit. Contr. 2. From this definition it appears, that to constitute a sufficient parol agreement, there must be, 1st. The reciprocal or mutual assent of two or more persons competent to contract. Every agreement ought to be so certain and complete, that each party may have an action upon it; and the agreement would be incomplete if either party withheld his assent to any of its terms. Peake's R. 227; 3 T. R. 653; 1 B. & A. 681; 1 Pick. R. 278. The agreement must, in general, be obligatory on both parties, or it binds neither. To this rule there are, however, same exceptions, as in the case of an infant's contract. He may always sue, though he cannot be sued, on his contract. Stra. 937. See other instances; 6 East, 307; 3 Taunt. 169; 5 Taunt. 788; 3 B. & C. 232. 2dly. There must be a good and valid consideration, motive or inducement to make the promise, upon which a party is charged, for this is of the very essence of a contract not under seal, and must exist, although the contract be reduced to writing. 7 T. R. 350, note (a); 2 Bl. Com. 444. See this Dict. *Consideration;* Fonb. Tr. Eq. 335, n. (a); Chit. Bills, 68. 3dly. There must be a thing to be done, which is not forbidden; or a thing to be omitted, the performance of which is not enjoined by law. A fraudulent or immoral contract, or one contrary to public policy is void. Chit. Contr. 215, 217, 222; and it is also void if contrary

to a statute. Ib. 228 to 250; 1 Binn. 118; 4 Dall. 298; 4 Yeates, 24, 84; 6 Binn. 321; 4 Serg. & Rawle, 159; 4 Dall. 269; 1 Binn. 110; 2 Browne's R. 48. As to contracts which are void for want of a compliance with the statutes of Frauds, see *Frauds, Statute of.*

2. The second kind of express contracts, are those which are made under seal, or specialties, as deeds, bonds, and the like; they are not merely written, but delivered over by the party bound. The solemnity and deliberation with which, on account of the ceremonies to be observed, a deed or bond is presumed to be entered into, attach to it an importance and character which do not belong to a simple contract. In the case of specialty, no consideration is necessary to give it validity, even in a court of equity. Plowd. 308; 7 T. R. 477; 4 B. & A. 652; 3 T. R. 438; 3 Bingh. 111, 112; 1 Fonb. Eq. 342, note.

3. The highest kind of express contracts, are those of record, such as judgments, recognizances of bail, and in England, statutes merchant and staple, and other securities of the same nature, entered into with the intervention of some public authority. 2 Bl. Com. 465. See *Authentic Acts.*

Implied contracts are such as reason and justice dictate, and which, therefore the law presumes every man undertakes to perform; as if a man employs another to do any business for him, or perform any work, the law implies that the former contracted or undertook to pay the latter as much as his labour deserved; see *Quantum meruit;* or if one takes up goods from a tradesman, without any agreement of price, the law concludes that he contracts to pay their value. 2 Bl. Com. 443. See *Quantum valebant; Assumpsit.* Com. Dig. Action upon the case upon assumpsit, A, 1; Ib. Agreement.

By the laws of Louisiana, when considered as to the obligation of the parties, contracts are either unilateral, or reciprocal. When the party to whom the engagement is made, makes no express agreement on his part, the contract is called unilateral, even in cases where the law attaches certain obligations to his acceptance; Civ. Code of Lo. art. 1758. A loan for use, and a loan of money are of this kind. Poth. Ob. P. 1, c. 1, s. 1, art. 2. A reciprocal contract is where the parties expressly enter into mutual engagements, such as sale, hire, and the like. Ib.

Contracts, considered in relation to their substance, are either commutative or independent, principal or accessory. Commutative contracts, are those in which what is done, given or promised by one party, is considerered as equivalent to, or in consideration of what is done, given or promised by the other. Civ. Code of Lo. art. 1761. Independent contracts are those in which the mutual acts or promises have no relation to each other, either as equivalents or as considerations. Ib. art. 1762. A principal contract is one entered into by both parties, on their accounts, or in the several qualities they assume. An accessory contract is made for assuring the performance of a prior contract, either by the same parties or by others, such as suretyship, mortgage and pledges. Ib. Art. 1764. Poth. Obl. P. 1, c. 1, s. 1, art. 2, n. 14.

Contracts, considered in relation to the motive for making them, are either gratuitous or onerous. To be gratuitous, the object of a contract must be to benefit the person with whom it is made, without any profit or advantage, received or promised as a consideration for it. It is not, however, the less gratuitous, if it proceed either from gratitude for a

benefit before received, or from the hope of receiving one hereafter, although such benefit be of a pecuniary nature. Ib. art. 1766. Any thing given or promised, as a consideration for the engagement or gift; any service, interest, or condition, imposed on what is given or promised, although unequal to it in value, makes a contract onerous in its nature. Ib. art. 1767.

Considered in relation to their effects, contracts are either certain or hazardous. A contract is certain, where the thing to be done is supposed to depend on the will of the party, or where in the usual course of events, it must happen in the manner stipulated. It is hazardous, when the performance of that which is one of its objects, depends on an uncertain event. Ib. art. 1769.

Pothier, in his excellent treatise on Obligations. p. 1, c. 1, s. 1, art. 2, divides contracts under the five following heads:

1. Into reciprocal and unilateral.

2. Into consensual, or those which are formed by the mere consent of the parties, such as sale, hiring and mandate; and those in which it is necessary there should be something more than mere consent, such as loan of money, deposite or pledge, which from their nature require a delivery of the thing, (rei); whence they are called real contracts. See *Real Contracts.*

3. Into—1st, contracts of mutual interest, which are such as are entered into for the reciprocal interest and utility of each of the parties, as sales, exchange, partnership and the like; 2dly, contracts of beneficence, which are those by which only one of the contracting parties is benefitted, as loans, deposit and mandate; 3dly, mixed contracts, which are those by which one of the parties confers a benefit on the other, receiving something of inferior value in return, such as a donation subject to a charge.

4. Into principal and accessory.

5. Into those which are subjected by the civil law to certain rules and forms, and those which are regulated by mere natural justice.

See generally as to contracts, Chitty on Contracts; Comyn on Contracts; Newland on Contracts; Com. Dig. titles Abatement, E 12, F 8; Admiralty, E 10, 11; Action upon the Case upon Assumpsit; Agreement; Bargain and Sale; Baron and Feme, Q; Condition; Dett, A 8, 9; Enfant, B 5; Idiot, D 1; Merchant, E 1; Pleader, 2 W 11, 43; Trade, D 3; War, B 2; Bac. Abr. tit. Agreement; Id. Assumpsit; Condition; Obligation; Vin. Abr. Condition; Contracts and Agreements; Covenants; Vendor, Vendee; Supp. to Ves. jr. vol. 2, p. 260, 295, 376, 441; Yelv. 47; 4 Ves. jr. 497, 671; Archb. Civ. Pl. 22; Code Civ. L. 3, tit. 3 to 18; Pothier's Tr. of Obligations; Sugden on Vendors and Purchasers; Story's excellent treatise on Bailments; Jones on Bailments. Toullier, Droit Civil Français, tomes 6 et 7; Ham. Parties to Actions, Ch. 1; Chit. Pr. Index, h. t.; and the articles *Agreement; Apportionment; Appropriation; Assent; Assignment; Assumpsit; Attestation; Bailment; Bargain and sale; Bidder; Bilateral contract; Bill of exchange; Buyer; Commodate; Commulative contract; Condition; Consensual contract; Conjunctive; Consummation; Construction; Contract of benevolence; Covenant; Debt; Deed; Delegation; Delivery; Discharge of a contract; Disjunctive; Equity of redemption; Exchange; Guaranty; Impairing the obligation of contracts; Insurance; Interested contracts; Item; Misrepresentation; Mortgage; Mixed contract; Negociorum gestor; Novation; Obliga-*

tion; Pactum constitutæ pecuniæ; Partners; Partnership; Pledge; Promise; Purchaser; Quasi contract; Representation; Sale; Seller; Settlement; Simple contract; Synallagmatic contract; Subrogation; Title; Unilateral contract.

CONTRACT OF BENEVOLENCE, *civil law*, is one which is made for the benefit of only one of the contracting parties; such as loan for use, deposit, and mandate. Poth. Obl. n. 12. See *Contracts.*

CONTRACTOR. One who enters into a contract; this term is usually applied to persons who undertake to do public work, or the work for a company or corporation on a large scale, at a certain fixed price, or to furnish goods to another at a fixed or ascertained price. 2 Pardess. n. 300. Vide 5 Whart. 366.

CONTRAFACTION, *crim. law*, counterfeiting, imitating. In the French law contrafaction (contrefaçon) is the illegal reprinting of a book for which the author or his assignee has a copy-right to the prejudice of the latter. Merl. Répert. mot Contrefaçon.

CONTRAVENTION. *French law*, is the act which violates the law, a treaty or an agreement which the party has made. The Penal Code, art. 1, denominates a contravention that infraction of the law which is punished by a fine which does not exceed fifteen francs, and an imprisonment not exceeding three days.

CONTREFACON, *French law*, Counterfeit. This is a bookseller's term, which signifies the offence of those who print or cause to be printed without lawful authority a book of which the author or his assigns have a copy-right. Merl. Rèp. h. t.

CONTRIBUTION, *civil law*, is said of the partition by which the creditors of an insolvent debtor divide among themselves the proceeds of his property, proportionably to the amount of their respective credits. Civ. Code of Lo. art. 2522, n. 10. It is a division pro rata. Merl. Rép. h. t.

CONTRIBUTION, *contracts.* When two or more persons jointly owe a debt, and one is compelled to pay the whole of it, the others are bound to indemnify him for the payment of their shares, the indemnity is called a contribution. 1 Bibb, R. 562; 4 John. Ch. R. 545. When land is charged with the payment of a legacy, or an estate with the portion of a posthumous child, every part is bound to make contribution. 3 Munf. R. 20; 1 John. Ch. R. 425. Contribution takes place in another case, namely, when in order to save a ship or cargo, a part of the goods are cast overboard, the ship and cargo are liable to contribution in order to indemnify the owner of the goods lost, except his just proportion. No contribution can be claimed between joint wrong doers. Bac. Ab. Assumpsit A. Vide 3 Com. Dig. 143; 8 Com. Dig. 373; 5 Vin. Ab. 561; 2 Supp. to Ves. jr. 159, 343; 3 Ves. jr. 64; Wesk. Ins. 130. 10 S. & R. 75.

CONTROVER, *obsolete.* One who invents false news. 2 Inst. 227.

CONTROVERSY, is a dispute arising between two or more persons; it differs from case, which includes all suits criminal as well as civil; whereas a controversy is a civil and not a criminal proceeding. 2 Dall. R. 419, 431, 432; 1 Tuck. Bl. Com. App. 420, 421; Story, Const. § 1668. By the constitution of the United States the judicial power shall extend to controversies, to which the United States shall be a party. Art. 2, 1. The meaning to be attached to the word controversy in the constitution, is that above given.

CONTUBERNIUM, *civ. law.* As among the Romans slaves had

no civil state, their marriages although valid according to natural law, when contracted with the consent of their masters, and when there was no legal bar to them, yet such marriages were without civil effects, they having none except what arose from natural law: a marriage of this kind was called *contubernium*. It was so called whether both or only one of the parties was a slave. Poth. Contr. de Mariage, prem. part. c. 2, § 3.

CONTUMACY, *civil law*, is the refusal or neglect of a party accused to appear and answer to a charge preferred against him in a court of justice. This word is derived from the Latin *contumacia*, disobedience. 1 Bro. Civ. Law, 455; Ayl. Parer. 196; Dig. 50, 17, 52; Code Nap. art. 22.

CONTUMAX, *civ. law*, one accused of a crime who refuses to appear and answer to the charge. An outlaw.

CONTUSION, *med. jurisp.* An injury or lesion, arising from the shock of a body with a large surface, which presents no loss of substance, and no apparent wound. If the skin be divided the injury takes the name of a contused wound. Vide 1 Ch. Pr. 38; 4 Carr. & P. 381, 487, 558, 565; 6 Carr. & P. 684; 2 Beck's Med. Jur. 178.

CONUSANCE, CLAIM OF, *English law*, is defined to be an intervention by a third person, demanding judicature in the cause against the plaintiff, who has chosen to commence his action out of claimant's court. 2 Wilson's R. 409. It is a question of jurisdiction between the two courts. Fortesc. R. 157; 5 Vin. Abr. 588; and not between the plaintiff and defendant, as in the case of plea to the jurisdiction, and therefore it must be demanded by the party entitled to conusance, or by his representative, and not by the defendant or his attorney. Id. ibid. A plea to the jurisdiction must be pleaded in person, but a claim of conusance may be made by attorney. 1 Chit. Pl. 403. There are three sorts of conusance, 1. *Tenere placita*, which does not oust another court of its jurisdiction, but only creates a concurrent one. 2. *Cognitio placitorum*, when the plea is commenced in one court, of which conusance belongs to another. 3. A conusance of exclusive jurisdiction; as that no other court shall hold plea, &c. Hard. 509; Bac. Ab. Courts, D.

CONUSANT, one who knows; as if a party knowing of an agreement in which he has an interest, he makes no objection to it, he is said to be conusant. Co. Litt. 157.

CONUSOR. See *Cognisor*.

CONVENTION, *contract, civil law*, is a general term which comprehends all kinds of contracts, treaties, pacts, or agreements. It is defined to be the consent of two or more persons to form with each other an engagement, or to dissolve or change one which they had previously formed. Domat, Lois. Civ. l. 1, t. 1, s. 1; Dig. lib. 2, t. 14, l. 1; lib. 1, t. 1, l. 1, 4 and 5.

CONVENTION, *legislation.*—This term is applied to a meeting of the delegates elected by the people for other purposes than usual legislation. It is mostly used to denote an assembly to make or amend the constitution of a state, but it sometimes indicates an assembly of the delegates of the people to nominate officers to be supported at an election.

CONVERSION, *torts*, is the turning or applying the property of another to one's own use. When a party takes away or wrongfully assumes the right to goods which belong to another, it will in general be sufficient evidence of a conversion; but when the original taking was

lawful, as when the party found the goods, and the detension only is illegal, it is absolutely necessary to make a demand of the goods, and there must be a refusal to deliver them before the conversion will be complete. 1 Ch. Pr. 566; 2 Saund. 47 e, note; 1 Ch. Pl. 179; Bac. Ab. Trover, B; 1 Com. Dig. 439; 3 Com. Dig. 142; 1 Vin. Ab. 236; Yelv. 174, n.; 2 East, R. 405; 6 East, R. 540; 4 Taunt. 799; 5 Barn. & Cr. 149; S. C. 11 Eng. C. L. Rep. 185; 3 Bl. Com. 152. The tortious taking of property is, of itself, a conversion, 15 John. R. 431; and any intermeddling with it, or any exercise of dominion over it, subversive of the dominion of the owner, or the nature of the bailment, if it be bailed, is evidence of a conversion. 1 Nott & McCord, R. 592; 2 Mass. R. 398; 1 Har. & John. 519; 7 John. R. 254; 10 John. R. 172; 14 John. R. 128; Cro. Eliz. 219; 2 John. Cas. 411. Vide *Trover*.

CONVEYANCE, *contracts*, is the transfer of the title to land by one or more persons to another or others. By the term persons is here understood not only natural persons but corporations. The instrument which conveys the property is also called a conveyance. For the several kinds of conveyances see *Deed*. Vide generally, Roberts on Fraud. Conv. *passim;* 16 Vin. Ab. 138; Com. Dig. Chancery, 2 T 1; 3 M 2; 4 S 2; Ib. Discontinuance, C 3, 4, 5; Ib. Garranty, D; Ib. Pleader, C 37; Ib. Poiar, C 5. When there is no express agreement to the contrary, the expense of the conveyance falls upon the purchaser, 2 Ves. Jr. 155, note, who must prepare and tender the conveyance; the expense of the execution of the conveyance is, on the contrary, always borne by the vendor. Sugd. Vend. 296. Vide 5 Mass. R. 472; 3 Mass. 487; *Voluntary Conveyance*.

CONVEYANCER. One who makes it his business to draw deeds of conveyance of lands for others. It is usual also for conveyancers to act as brokers for the buyer and seller. In these cases the conveyancer should examine with scrupulous exactness into the title of the lands which are conveyed by his agency, and, if this be good, to be very cautious that the estate be not encumbered. In cases of doubt he should invariably propose to his employer to take the advice of counsel.

Conveyancers also act as brokers for the loan of money on real estate secured by mortgage. The same care should be observed in these cases.

CONVICT. One who has been condemned by a competent court. This term is more commonly applied to one who has been convicted of a crime or misdemeanor. There are various local acts which punish the importation of convicts.

CONVICTION, *practice*. A condemnation. In its most extensive sense this word signifies the giving judgment against a defendant, whether criminal or civil. In a more limited sense, it means the judgment given against a criminal. And in its most restricted sense it is a record of the summary proceedings upon any penal statute before one or more justices of the peace, or other persons duly authorised, in a case where the offender has been convicted and sentenced: this last is usually termed a summary conviction. As summary convictions have been introduced in derogation of the common law, and operate to the exclusion of trial by jury, the courts have required that the strict letter of the statute should be observed, and that the magistrates should have been guided by rules, similar to those adopted by the common law, in criminal prosecution, and founded in natural justice; un-

less when the statute dispenses with the form of stating them. The general rules in relation to convictions are, first, it must be under the hand and seal of the magistrate before whom it is taken; secondly, it must be in the present tense, but this, perhaps, ought to extend only to the judgment; thirdly, it must be certain; fourthly, although it is well to lay the offence to be contra pacem, this is not indispensable; fifthly, a conviction cannot be good in part and bad in part. A conviction usually consists of six parts; first, the information; which should contain, 1, the day when it was taken; 2, the place where it was taken; 3, the name of the informer; 4, the name and style of the justice or justices to whom it was given; 5, the name of the offender; 6, the time of committing the offence; 7, the place where the offence was committed; 8, an exact description of the offence. Secondly, the summons. Thirdly, the appearance or non-appearance of the defendant. Fourthly, his defence or confessions. Fifthly, the evidence. Sixthly, the judgment or adjudication, which should state, 1, that the defendant is convicted; 2, the forfeiture or penalty. Vide Bosc. on Conviction; Espinasse on Penal Actions; 4 Dall. 266; 3 Yeates, 475; 1 Yeates, 471. As to the effect of a conviction as evidence in a civil case, see 1 Phil. Ev. 259.

CONVOCATION, *Eccles. law.* This word literally signifies *called together*. The assembly of the representatives of the clergy. As to the powers of convocations, see Shelf. on M. & D. 23. See *Court of Convocation.*

CONVOY, *mar. law*, is a naval force under the command of an officer appointed by government, for the protection of merchant ships and others, during the whole voyage, or such part of it as is known to require such protection. Marsh. Ins. B. 1, c. 9, s. 5; Park. Ins. 388.

Warranties are sometimes inserted in policies of insurance that the ship shall sail with convoy. To comply with this warranty five things are essential; first, the ship must sail with the regular convoy appointed by the government; secondly, she must sail from the place of rendezvous appointed by government; thirdly, the convoy must be for the voyage; fourthly, the ship insured must have sailing instructions; fifthly, she must depart and continue with the convoy till the end of the voyage, unless separated by necessity. Marsh. Ins. B. 1, c. 9, s. 5.

CO-OBLIGOR, *contracts*, is one who is bound together with one or more others to fulfil an obligation. He may be jointly or severally bound.

When obligors are jointly and not severally bound to pay a joint debt, they must be sued jointly during their joint lives, and after the death of some of them, the survivors alone can be sued; each is bound to pay the whole debt; having recourse to the others for contribution. When co-obligors are severally bound, each may be sued separately; and in case of the death of any one of them his executors or administrators may be sued. On payment of the obligation by any one of them, when it was for a joint debt, the payer is entitled to contribution from the other co-obligors.

COOL BLOOD. A phrase sometimes used to signify tranquillity, or calmness; that is, the condition of one who has the use of his reason. In cases of homicide, it frequently becomes necessary to ascertain whether the act of the person killing was done in cool blood or not, in order to ascertain the degree of his guilt. Bac. Ab. Murder, B; Kiel. 56; Sid. 177; Lev. 180. Vide *Intention; Manslaughter; Murder; Will.*

COPARCENERS, *estates*, are persons on whom lands of inheritance descend from their ancestor. According to the English law, there must be no males; that is not the rule in this country. Vide *Estates in coparcenary*, and 4 Kent, Com. 262.

COPULATIVE TERM, is one which is placed between two or more others to join them together: the word *and* is frequently used for this purpose. For example, a man promises to pay another a certain sum of money *and* to give his note for another sum: in this case he must perform both. But the copulative may sometimes be construed into a disjunctive (q. v.) as when things are copulated which cannot possibly be so; for example, "I wish to die testate and intestate." For examples of construction of disjunctive terms, see the cases cited at the word *Disjunctive*, and Ayl. Pand. 55; 5 Com. Dig. 338; Bac. Ab. Conditions, P 5; Owen, 52; Leon. 74; Golds. 71; Roll. Ab. 444; Cro. Jac. 594.

COPY. A copy is a true transcript of an original writing. Copies cannot be given in evidence, unless proof is made that the originals from which they are taken, are lost or in the power of the opposite party; and in the latter case that notice has been given him to produce the original. See 12 Vin. Abr. 97; Phil. Ev. Index, h. t.; Poth. Obl. Pt. 4, c. 1, art. 3. To prove a copy of a record, the witness must be able to swear that he has examined it, line for line, with the original, or has examined the copy while another person read the original, 1 Campb. R. 469; it is not requisite that the persons examining should exchange papers, and read them alternately. 2 Taunt. R. 470. Vide, generally, 1 Stark. R. 183; 2 E. C. L. Rep. 183; 4 Campb. 372; 2 Burr. 1179; B. N. P. 129; 1 Carr. & P. 578; 1 M. & M. 109. An examined copy of the books of unincorporated banks are not, *per se*, evidence. 12 S. & R. 256. See 13 S. & R. 135, 334; 2 N. & McC. 299.

COPY-RIGHT. The property which has been secured to the author of a book, map, chart, or musical composition, print, cut or engraving, for a limited time, by the constitution and laws of the United States. Lord Mansfield defines copy, or as it is now termed copyright, as follows: "I use the word copy in the technical sense in which that name or term has been used for ages, to signify an incorporeal right to the sole printing and publishing of somewhat intellectual communicated by letters." 4 Burr. 2396; Merl. Répert. mot Contrefaçon.

[2] This subject will be considered by taking a view of, 1, the legislation of the United States; 2, of the persons entitled to a copy-right; 3, for what it is granted; 4, nature of the right; 5, its duration; 6, proceedings to obtain such right; 7, requisites after the grant; 8, remedies; 9, former grants.

[3] § 1. *The legislation of the United States.* The constitution of the United States, art. 1, s. 8, gives power to congress "to promote the progress of science and the useful arts by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries."

In pursuance of this constitutional authority congress passed the act of May 31, 1790, 1 Story's L. U. S. 94, and the act of April 29, 1802, 2 Story's L. U. S. 866, but now repealed by the act of February 3, 1831, 4 Sharsw. cont. of Story, 2221, saving always such rights as may have been obtained in conformity to their provision. By this last-mentioned act, entitled "An act to amend the several acts respecting copy-rights," the subject is now regulated.

[4] § 2. *Of the persons entitled to a copy-right.* Any person or persons, being a citizen, or citizens of the United States, or resident therein, who is the author or authors of any book or books, map, chart or musical composition, or who has designed, etched, engraved, worked, or caused to be engraved, etched or worked from his own design, any print or engraving, and the executors, administrators, or legal representatives of such person or persons. Sect. 1, and sect. 8.

[5] § 3. *For what work the copy-right is granted.* The copy-right is granted for any book or books, map, chart, or musical composition, which may be now, (February 3, 1831, the date of the act,) made or composed, and not printed or published, or shall hereafter be made or composed, or any print or engraving, which the author has invented, designed, etched, engraved, or worked, or caused to be engraved, etched or worked from his own design. Sect. 1.

[6] § 4. *Nature of the right.* The person or persons to whom a copy-right has been lawfully granted, have the sole right and liberty of printing, reprinting, publishing and vending such book or books, map, chart, musical composition, print, cut or engraving, in whole or in part. Sect. 1.

[7] § 5. *Duration of the copy-right.* The right extends for the term of twenty-eight years from the time of recording the title of the book, &c. in the office of the clerk of the court, as directed by law. Sect. 1.

[8] But this time may be extended by the following provisions of the act.

Sect. 2. If, at the expiration of the aforesaid term of years, such author, inventor, designer, engraver, or any of them, where the work had been originally composed and made by more than one person, be still living, and a citizen or citizens of the United States, or resident therein, or being dead, shall have left a widow, or child, or children, either or all then living, the same exclusive right shall be continued to such author, designer, or engraver, or if dead, then to such widow and child, or children, for the further term of fourteen years: *Provided*, That the title of the work so secured shall be a second time recorded, and all such other regulations as are herein required in regard to original copy-rights, be complied with in respect to such renewed copy-right, and that within six months before the expiration of the first term.

[9] Sect. 3. In all cases of renewal of copy-right under this act, such author or proprietor shall, within two months from the date of said renewal, cause a copy of the record thereof to be published in one or more of the newspapers printed in the United States, for the space of four weeks.

[10] Sect. 16. Whenever a copy-right has been heretofore obtained by an author or authors, inventor, designer, or engraver, of any book, map, chart, print, cut, or engraving, or by a proprietor of the same; if such author or authors, or either of them, such inventor, designer or engraver, be living at the passage of this act, then, such author or authors, or the survivor of them, such inventor, engraver, or designer, shall continue to have the same exclusive right to his book, chart, map, print, cut or engraving, with the benefit of each and all the provisions of this act, for the security thereof, for such additional period of time as will, together with the time which shall have elapsed from the first entry of such copy-right, make up the term of twenty-eight years, with the same right to his widow, child, or children, to renew the copy-right, at the expiration thereof, as is above provided in relation to

copy-rights originally secured under this act. And if such author or authors, inventor, designer, or engraver, shall not be living at the passage of this act, then, his or their heirs, executors and administrators, shall be entitled to the like exclusive enjoyment of said copy-right, with the benefit of each and all the provisions of this act for the security thereof, for the period of twenty-eight years from the first entry of said copy-right; with the like privilege of renewal to the widow, child, or children, of author or authors, designer, inventor, or engraver, as is provided in relation to copy-rights originally secured under this act.

[11] § 6. *Proceedings to obtain a copy-right.* No person shall be entitled to the benefit of this act, unless he shall, before publication, deposit a printed copy of the title of such book, or books, map, chart, musical composition, print, cut, or engraving, in the clerk's office of the district court of the district wherein the author or proprietor shall reside, and the clerk of such court is hereby directed and required to record the same therein forthwith, in a book to be kept for that purpose, in the words following (giving a copy of the title under the seal of the court, to the said author or proprietor, whenever he shall require the same;) "District of to wit: Be it remembered, that on the day of anno Domini, A. B. of the said district, hath deposited in this office the title of a book, (map, chart, or otherwise as the case may be,) the title of which is in the words following, to wit: (here insert the title;) the right whereof he claims as author (or proprietor as the case may be;) in conformity with an act of congress, entitled 'An act to amend the several acts respecting copy-rights,' C. D. clerk of the district." For which record, the clerk shall be entitled to receive, from the person claiming such right as aforesaid, fifty cents; and the like sum for every copy, under seal, actually given to such person or his assigns.

[12] § 7. *Requisites after the grant.* No person shall be entitled to the benefit of this act, unless he shall give information of copy-right being secured, by causing to be inserted, in the several copies of each and every edition published during the term secured on the title page, or the page immediately following, if it be a book, or, if a map, chart, musical composition, print, cut, or engraving, by causing to be impressed on the face thereof, or if a volume of maps, charts, music or engravings, upon the title or frontispiece thereof, the following words, viz.: "Entered according to act of Congress, in the year —— by A. B., in the clerk's office of the district court of ——" (as the case may be.)

[13] The author or proprietor of any such book, map, chart, musical composition, print, cut, or engraving, shall, within three months from the publication of said book, map, chart, musical composition, print, cut or engraving, deliver or cause to be delivered a copy of the same to the clerk of said district. And it shall be the duty of the clerk of each district court, at least once in every year, to transmit a certified list of all such records of copy-right, including the titles so recorded, and the date of record, and also all the several copies of books or other works deposited in his office, according to this act, to the secretary of state, to be preserved in his office.

[14] § 8. *The remedies* may be considered with regard, 1, to the penalties which may be incurred; 2, the issue in actions under this act; 3, the costs; 4, the limitation.

[15] 1. The *penalties* imposed by this act relate, first, to the violation of the copy-right of books; se-

condly, the violation of the copy-right of prints, cuts or engravings, maps, charts, or musical compositions; thirdly, the printing or publishing of any manuscripts without the consent of the author or legal proprietor; fourthly, for inserting in any book, &c., that the copy-right has been secured contrary to truth.

[16] *First.* If any other person or persons, from and after recording the title of any book or books, according to this act, shall, within the term or terms herein limited, print, publish, or import, or cause to be printed, published or imported, any copy of such book or books, without the consent of the person legally entitled to the copy-right thereof, first had and obtained in writing, signed in presence of two or more credible witnesses, or shall, knowing the same to be so printed or imported, publish, sell, or expose to sale, or cause to be published, sold, or exposed to sale, any copy of such book, without such consent in writing; then such offender, shall forfeit every copy of such book to the person legally, at the time, entitled to the copy-right thereof; and shall also forfeit and pay fifty cents for every such sheet which may be found in his possession, either printed or printing, published, imported, or exposed to sale, contrary to the intent of this act; the one moiety thereof to such legal owner of the copy-right as aforesaid, and the other to the use of the United States; to be recovered by action of debt in any court having competent jurisdiction thereof.

[17] *Secondly.* If any person or persons after the recording the title of any print, cut or engraving, map, chart, or musical composition, according to the provisions of this act, shall, within the term or terms limited by this act, engrave, etch, or work, sell, or copy, or cause to be engraved, etched, worked or sold, or copied, either on the whole, or by varying, adding to, or diminishing the main design, with intent to evade the law, or shall print or import for sale, or cause to be printed or imported for sale, any such map, chart, musical composition, print, cut, or engraving, or any parts thereof, without the consent of the proprietor or proprietors of the copy-right thereof, first obtained in writing, signed in the presence of two credible witnesses; or, knowing the same to be so printed or imported without such consent, shall publish, sell, or expose to sale, or in any manner dispose of any such map, chart, musical composition, engraving, cut, or print, without such consent, as aforesaid; then such offender or offenders shall forfeit the plate or plates on which such map, chart, musical composition, engraving, cut, or print, shall be copied, and also all and every sheet thereof so copied or printed, as aforesaid, to the proprietor or proprietors of the copy-right thereof; and shall further forfeit one dollar for every sheet of such map, chart, musical composition, print, cut, or engraving, which may be found in his or their possession, printed or published, or exposed to sale, contrary to the true intent and meaning of this act; the one moiety thereof to the proprietor or proprietors, and the other moiety to the use of the United States, to be recovered in any court having competent jurisdiction thereof.

[18] Nothing in this act shall be construed to extend to prohibit the importation or vending, printing or publishing, of any map, chart, book, musical composition, print, or engraving written, composed, or made by any person not being a citizen of the United States, nor resident within the jurisdiction thereof.

[19] *Thirdly.* Any person or persons, who shall print or publish any manuscript whatever without the

consent of the author or legal proprietor first obtained as aforesaid, (if such author or proprietor be a citizen of the United States, or resident therein,) shall be liable to suffer and pay to the author or proprietor, all damages occasioned by such injury, to be recovered by a special action on the case founded upon this act, in any court having cognizance thereof; and the several courts of the United States empowered to grant injunctions to prevent the violation of the rights of authors and inventors, are hereby empowered to grant injunctions, in like manner, according to the principles of equity, to restrain such publication of any manuscript as aforesaid.

[20] *Fourthly.* If any person or persons, from and after the passing of this act, shall print or publish any book, map, chart, musical composition, print, cut, or engraving, not having legally acquired the copy-right thereof, and shall insert or impress that the same hath been entered according to act of congress, or words purporting the same, every person so offending shall forfeit and pay one hundred dollars; one moiety thereof to the person who shall sue for the same, and the other to the use of the United States, to be recovered by action of debt, in any court of record having cognizance thereof.

[21] The *issue.* If any person or persons shall be sued or prosecuted, for any matter, act, or thing done under or by virtue of this act, he or they may plead the general issue, and give the special matter in evidence.

[22] The *costs.* In all recoveries under this act, either for damages, forfeitures, or penalties, full costs shall be allowed thereon, any thing in any former act to the contrary notwithstanding.

[23] The *limitation* of actions is regulated as follows. No action or prosecution shall be maintained in any case of forfeiture or penalty under this act, unless the same shall have been commenced within two years after the cause of action shall have arisen.

[24] § 9. *Former grants.* All and several the provisions of this act, intended for the protection and security of copy-rights, and providing remedies, penalties, and forfeitures in case of violation thereof, shall be held and construed to extend to the benefit of the legal proprietor or proprietors of each and every copy-right heretofore obtained, according to law, during the term thereof, in the same manner as if such copy-right had been entered and secured according to the directions of this act. And by the 16th section it is provided that this act shall not extend to any copy-right heretofore secured, the term of which has already expired.

[25] Copy-rights are secured in most countries of Europe.

In Great Britain an author has a copy-right in his work absolutely for twenty-eight years, and if he be living at the end of that period for the residue of his life.

In France the copy-right of an author extends to twenty years after his death.

In most, if not in all the German states, it is perpetual; it extends only over the state in which it is granted.

In Russia the right of an author or translator continues during his life, and his heirs enjoy the privilege twenty-five years afterwards. No manuscript or printed work of an author can be sold for his debts. 2 Amer. Jur. 253, 4.

Vide generally, 2 Am. Jur. 248; 10 Am. Jur. 62; 1 Law Intell. 66; and the articles ***Literary property; Manuscript.***

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COPYHOLD, *estates, in the English law.* A copyhold estate is a parcel of the demesne of a manor, held at the will of the lord, according to the custom of the manor, by a grant from the lord, and admittance of the tenant, entered on the rolls of the manor court. Cruise, Dig. t. 10, c. 1, s. 3. Vide Ch. Pr. Index, h. t.

CORAM. In the presence of; before. *Coram nobis*, before us; *coram vobis*, before you; *coram non judice*, is said of those acts of a court over which it has no jurisdiction; not before the proper judge before an improper tribunal. Those acts have no validity. Where a thing is required to be done before a particular person, it would not be considered as done before him, if he were asleep or non compos. Vide Dig. 4, 8, 27, 5; Dane's Ab. Index, h. t.; 5 Harr. & John. 42; 8 Cranch, 9; Paine's R. 55.

CORD, *measures.* A cord of wood must, when the wood is piled close, measure eight feet by four, and the wood must be four feet long. There are various local regulations in our principal cities as to the manner in which wood shall be measured and sold.

CORN. In its most comprehensive sense, this term signifies every sort of grain, as well as peas and beans; this is its meaning in the memorandum usually contained in policies of insurance. But it does not include rice. Park. Ins. 112; Marsh. Ins. 223, note; Stev. on Av. part 4, art. 2; Ben. on Av. ch. 10; 1 Marsh. Ins. 223; Park on Ins. 112; Wesk. Ins. 145. Vide Com. Dig. Biens, G 1.

CORODY, *incorporeal hereditament*, is an allowance of meat, drink, money, clothing, lodging, and such like necessaries for sustenance. 1 Bl. Com. 283; 1 Ch. Pr. 225.

CORONER, an officer whose principal duty it is to hold an inquisition, with the assistance of a jury, over the body of any person who may have come to a violent death, or who has died in prison. It is his duty also in case of the death of the

sheriff, or when a vacancy happens in that office, to serve all the writs and process which the sheriff is usually bound to serve. Vide Bac. Ab. h. t.; 6 Vin. Ab. 242; 3 Com. Dig. 222; 5 Com. Dig. 212; and the article *Death*.

The duties of the coroner are of the greatest consequence to society, both for the purpose of bringing to punishment murderers and other offenders against the lives of the citizens, and of protecting innocent persons from criminal accusations. His office, it is to be regretted, is regarded with too much indifference. This officer should be properly acquainted with the medical and legal knowledge so absolutely indispensable in the faithful discharge of his office. It not unfrequently happens that the public mind is deeply impressed with the guilt of the accused, and when probably he is guilty, and yet the imperfections of the early examinations leave no alternative to the jury but to acquit. It is proper in most cases to procure the examination to be made by a physician, and in some cases, it is his duty. 4 Car. & P. 571.

CORPORAL, an epithet for any thing belonging to the body, as, corporal punishment, for punishment inflicted on the person of the criminal; corporal oath, which is an oath by the party who takes it being obliged to lay his hand on the Bible.

CORPORAL TOUCH. It was once decided that before a seller of personal property could be said to have stopped it in transitu, so as to regain the possession of it, it was necessary that it should come to his corporal touch. 3 T. R. 466; 5 East, 184. But the contrary is now settled. These words were used merely as a figurative expression. 3 T. R. 464; 5 East, 184.

CORPORATION. An aggregate corporation is an intellectual body, created by law, composed of individuals united under a common name, the members of which succeed each other, so that the body continues the same, notwithstanding the changes of the individuals who compose it, and which for certain purposes is considered as a natural person. Browne's Civ. Law, 99; Civ. Code of Lo. art. 418; 2 Kent's Com. 215; Mr. Kyd, (Corpor. vol. 1, p. 13,) defines a corporation as follows: "A corporation, or body politic, or body incorporate, is a collection of many individuals united in one body, under a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law, with a capacity of acting in several respects as an individual, particularly of taking and granting property, contracting obligations and of suing and being sued; of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation, or at any subsequent period of its existence." In the case of Dartmouth College against Woodward, 4 Wheat. Rep. 636, Chief Justice Marshall describes a corporation to be "an artificial being, invisible, intangible and existing only in contemplation of law. Being the mere creature of law," continues the judge, "it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as

the single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyance for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use." See 2 Bl. Com. 37.

The words corporation and incorporation are frequently confounded, particularly in the old books. The distinction between them is, however, obvious; the one is a political institution, the other the act by which that institution is created.

Corporations are divided into public and private.

Public corporations which are also called political, and sometimes municipal corporations, are those which have for their object the government of a portion of the state. Civil Code of Lo. art. 420; and although in such case it involves some private interests, yet, as it is endowed with a portion of political power, the term public has been deemed appropriate. Another class of public corporations are those which are founded for public, (though not for political or municipal purposes,) and the whole interest in which belongs to the government. The Bank of Philadelphia, for example, if the whole stock belonged exclusively to the government, would be a public corporation; but inasmuch as there are other owners of the stock, it is a private corporation. Domat's Civil Law, 452; 4 Wheat. R. 668; 9 Wheat. R. 907; 3 M'Cord's R. 377; 1 Hawk's R. 36; 2 Kent's Com. 222. Nations or states, are denominated by publicists, bodies politic, and are said to have their affairs and interests, and to deliberate and resolve, in common. They thus become as moral persons, having an understanding and will peculiar to themselves, and are susceptible of obligations and laws. Vattel, 49. In this extensive sense the United States may be termed a corporation; and so may each state singly. Per Iredell, J. 3 Dall. 447.

Private corporations. In the popular meaning of the term, nearly every corporation is public, inasmuch as they are created for the public benefit; but if the whole interest does not belong to the government, or if the corporation is not created for the administration of political or municipal power, the corporation is private. A bank for instance may be created by the government for its own uses; but if the stock is owned by private persons, it is a private corporation, although it is created by the government, and its operations partake of a private nature. 9 Wheat. R. 907. The rule is the same in the case of canal, bridge, turnpike, insurance companies, and the like. Charitable or literary corporations, founded by private benefaction, are in point of law, private corporations, though dedicated to public charity, or for the general promotion of learning. Ang. & Ames on Corp. 22.

Private corporations are divided into ecclesiastical and lay.

Ecclesiastical corporations, in the United States, are commonly called religious corporations; they are created to enable religious societies to manage with more facility and advantage, the temporalities belonging to the church or congregation.

Lay corporations are divided into civil and eleemosynary. *Civil* corporations are created for an infinite variety of temporal purposes, such as affording facilities for the obtaining loans of money; the making of canals, turnpike roads, and the like. And also such as are established for

the advancement of learning. 1 Bl. Com. 471. *Eleemosynary* corporations are such as are instituted upon a principle of charity; their object being the perpetual distribution of the bounty of the founder of them, to such persons as he has directed. Of this kind are hospitals for the relief of the impotent, indigent and sick, or deaf and dumb. 1 Kyd on Corp. 26; 4 Conn. R. 272; Angell & A. on Corp. 26.

Corporations considered in another point of view, are either sole or aggregate.

A sole corporation, as its name implies, consists of only one person, to whom and his successors belongs that legal perpetuity, the enjoyment of which is denied to all natural persons. 1 Black. Com. 469. Those corporations are not common in the United States. In those states, however, where the religious establishment of the church of England was adopted, when they were colonies, together with the common law on that subject, the minister of the parish was seised of the freehold, as persona ecclessiæ, in the same manner as in England; and the right of his successors to the freehold being thus established was not destroyed by the abolition of the regal government, nor can it be divested even by an act of the state legislature. 9 Cranch, 328. A sole corporation cannot take personal property in succession; its corporate capacity of taking property is confined altogether to real estate. 9 Cranch, 43.

An aggregate corporation consists of several persons, who are united in one society, which is continued by a succession of members. Of this kind are the mayor and commonalty of a city; the heads and fellows of a college; the members of trading companies, and the like. 1 Kyd on Corp. 76; 2 Kent's Com. 221; Ang. & A. on Corp. 20.

CORPOREAL PROPERTY,—*civil law*, is that which consists of such subjects as are palpable to sense. In the common law the term to signify the same thing is *property in possession*. It differs from *incorporeal property*, (q. v.) which consists of choses in action and easements, as a right of way, and the like.

CORPSE is the *dead body*, (q. v.) of a human being. Russ. & Ry. 366, n.; 2 T. R. 733; 1 Leach, 497; 16 Eng. Com. L. Rep. 413; 8 Pick. 370; Dig. 47, 12, 3, 7; Ib. 11, 7, 38; Code, 3, 44, 1.

CORPUS, a Latin word which signifies the body; as, *corpus delicti*, the body of the offence, the essence of the crime; *corpus juris canonis*, the body of the canon law; *corpus juris civilis*, the body of the civil law.

CORPUS JURIS CIVILIS. The body of the civil law. This is the name given to a collection of the civil law consisting of Justinian's Institutes, the Pandects or Digest, the Code, and the Novels.

CORPUS CUM CAUSA, *practice*. The writ of *habeas corpus cum causa*, (q. v.) is a writ commanding the person to whom it is directed *to have the body* together *with the cause* for which he is committed before the court or judge issuing the same.

CORRECTION, *punishment*.—Chastisement by one having authority, of a person who has committed some offence, for the purpose of bringing him to legal subjection. It is chiefly exercised in a parental manner by parents or those who are placed in loco parentis. A parent may therefore justify the correction of the child either corporally or by confinement; and a school master, under whose care and instruction a parent has placed his child, may equally justify similar correction; but the correction in both cases must be

moderate and in a proper manner. Com. Dig. Pleader, 3 M 19; Hawk. c. 60, s. 23, and c. 62, s. 2.—c. 29, s. 5. The master of an apprentice for disobedience may, himself, correct him moderately; 1 Barn. & Cres. 469; Cro. Car. 179; 2 Show. 289; but he cannot delegate the authority to another. 9 Co. 96. A master has no right to correct his servants who are not apprentices. Soldiers are liable to moderate correction from their superiors; for the sake of maintaining their discipline on board of the navy, the captain of a vessel, either belonging to the United States, or to private individuals, for disobedience or disorderly conduct, may inflict moderate correction on a sailor. Abbott on Shipp. 160; 1 Ch. Pr. 73; 14 John. R. 119; 15 Mass. 365; 1 Bay, 3; Bee, 161; 1 Pet. Adm. Dec. 168; Molloy, 209; 1 Ware's R. 83. Any excess of correction by the parent, master, officer or captain, may render the party guilty of an assault and battery, and liable to all its consequences. In some prisons the keepers have the right to correct the prisoners.

CORRUPTION, is an act done with an intent to give some advantage inconsistent with official duty and the rights of others. It includes bribery, but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it be not offered by another. Merl. Rép. h. t.

CORRUPTION OF BLOOD,—*English crim. law*, is the incapacity to inherit or pass an inheritance, in consequence of an attainder to which the party has been subject. When this consequence flows from an attainder, the party is stripped of all honours and dignities he possessed and becomes ignoble. The constitution of the United States, Amendm. art. 5, provides, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger;" and by art. 3, s. 3, n. 2, it is declared that "no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted." The constitution of Pennsylvania, art. 9, s. 19, directs that "no attainder shall work corruption of blood." 3 Cruise, 240, 378 to 381, 473; 1 Cruise, 52; 1 Chit. Cr. Law, 740; 4 Bl. Com. 388.

CORSNED, *ancient Eng. law*. This was a piece of accursed bread which a person accused of a crime swallowed to test his innocence. It was supposed that if he was guilty, it would choak him.

COSENAGE, *torts*. Deceit, fraud: that kind of circumvention and wrong, which has no other specific name. Vide Ayl. Pand. 103; Dane's Ab. Index, h. t.

COSTS, *practice*, the expenses of a suit or action which may be recovered by law from the losing party. At common law neither the plaintiff nor the defendant could recover costs *eo nomine*, but in all actions in which damages were recoverable, the plaintiff in effect recovered his costs when he obtained a verdict, for the jury always computed them in the damages. When the defendant obtained a verdict, or the plaintiff became nonsuit, the former was wholly without remedy for any expenses he had incurred; it is true the plaintiff was amerced *pro falso clamore suo*, but the amercement was given to the king. Hull. on Costs, 2; 2 Arch. Pr. 281. This defect was afterwards corrected by the statute of Gloucester, 6 Ed. 1, c. 1, by which it is enacted that "the demandant in assise of novel disseisin, in writs of

mort d'ancestor, cosinage, aiel and besaïl, shall have damages. And the demandant shall have the costs of the writ purchased, together with damages, and this act shall hold place in *all cases where the party recovers damages*, and every person shall render damages where land is recovered against him upon his own intrusion or his own act." This statute has been adopted substantially in all the United States. Though it speaks of the costs of the writ only, it has by construction been extended to the costs of the suit generally. The costs which are recovered under it are such as shall be allowed by the master or prothonotary upon taxation, and not those expenses which the plaintiff may have incurred for himself or the extraordinary fees he may have paid counsel, or for the loss of his time. 2 Sell. Pr. 429. Costs are single, when the party receives the same amount he has expended, to be ascertained by taxation; double, vide *Double costs;* and treble, vide *Treble costs.*

Vide generally, Hullock on Costs; Sayer's Law of Costs; Tidd's Pr. c. 40; 2 Sell. Pr. c. 19; Archb. Pr. Index, h. t.; Bac. Ab. h. t.; Com. Dig. h. t.; 6 Vin. Ab. 321; Grah. Pr. c. 23; Chit. Pr. h. t.; 1 Salk. 207; 1 Supp. to Ves. Jr. 109; Amer. Dig. h. t.; Dane's Ab. h. t.; Harr. Dig. h. t. As to the liability of executors and administrators for costs, 1 Chit. R. 628, note; 18 E. C. L. R. 185; 2 Bay's R. 166, 399; 1 Wash. R. 138; 2 Hen. & Munf. 361, 369; 4 John. R. 190; 8 John. R. 389; 2 John. Ca. 209. As to costs in actions *qui tam*, see Esp. on Pen. Act. 154 to 165.

COTTAGE, *estates*, is nearly synonymous with messuage or house; it imports a smaller and inferior building. 1 Thom. Co. Litt. 216. By the grant of a cottage, it is said, passes a small dwelling-house, which has no land belonging to it. Shep. To. 94.

COUCHANT. Lying down. Animals are said to have been *levant* and *couchant*, when they have been upon another person's land, damage feasant, one night at least. 3 Bl. Com. 9.

COUNCIL, *legislation.* This word signifies an assembly. It was used among the Romans to express the meeting of only a part of the people, and that the most respectable, in opposition to the assemblies of the whole people. It is now usually applied to the legislative bodies of cities and boroughs. In some states, as in Massachusetts, a body of men called the council, are elected, whose duties are to advise the governor in the executive part of the government. Const. of Mass. part 2, c. 2, s. 3, art. 1 and 2. See 14 Mass. 470; 3 Pick. 517; 4 Pick. 25; 19 John. R. 58. In England, the king's council are the king's judges of his courts of justice. 3 Inst. 125; 1 Bl. Com. 229.

COUNSEL. Advice given to another as to what he ought to do or not to do. To counsel another to do an unlawful act, is to become accessary to it, if it be a felony, or principal, if it be treason, or a misdemeanor. By the term counsel is also understood counsellor at law. Vide *To open; Opening.*

COUNSEL, *practice, crim. law.* In the oath of the grand jurors there is a provision requiring them to keep secret "the commonwealth's counsel, their fellows and their own." In this sense this word is synonymous with knowledge; therefore, all the knowledge acquired by grand jurors in consequence of their office, either from the officers of the commonwealth, from their fellow jurors, or which they have obtained in any other manner, in relation to cases which come officially before them,

must be kept secret. See *Grand Jury*.

COUNSELLOR, *government*. A counsellor is a member of a council. In some of the states the executive power is vested in a governor, or a governor and lieutenant governor, and council. The members of such council are called counsellors. See the names of the several states.

COUNSELLOR AT LAW, *offices*, is an officer in the supreme court of the United States, and in some other courts, who is employed by a party in a cause, to conduct the same on its trial on his behalf. He differs from an attorney at law, (q. v.) In the supreme court of the United States the two degrees of attorney and counsel are kept separate, and no person is permitted to practise both. It is the duty of the counsel to draft or review and correct the special pleadings, to manage the cause on trial, and, during the whole course of the suit, to apply established principles of law to the exigencies of the case. 1 Kent, Com. 307. In all the other courts of the United States, as well as in the courts of Pennsylvania, the same person performs the duty of counsellor and attorney at law. In giving their advice to their clients, counsel and other professional men have duties to perform to their clients, to the public, and to themselves. In such cases they have thrown upon them something which they owe to the fair administration of justice, as well as to the private interests of their employers. The interests propounded for them ought in their own apprehension to be just, or at least fairly disputable; and when such interests are propounded they ought not to be pursued *per fas et nefas*. 1 Hagg. R. 222.

COUNT, *pleading*. This word derived from the French, *conte*, a narrative, is in our old law books used synonymously with declaration; but practice has introduced the following distinction: when the plaintiff's complaint embraces only a single cause of action, and he makes only one statement of it, that statement is called, indifferently, a declaration or count; though the former is the more usual term. But when the suit embraces two or more causes of action, (each of which of course requires a different statement;) or when the plaintiff makes two or more different statements of one and the same cause of action, each several statement is called a count, and all of them, collectively, constitute the declaration. In all cases, however, in which there are two or more counts, whether there is actually but one cause of action or several, each count purports, upon the face of it, to disclose a distinct right of action; unconnected with that stated in any of the other counts. One object proposed, in inserting two or more counts in one declaration, when there is in fact but one cause of action, is, in some cases, to guard against the danger of an insufficient statement of the cause, where a doubt exists as to the legal sufficiency of one or another of two different modes of declaring; but the more usual end proposed in inserting more than one count in such case, is to accommodate the statement to the cause, as far as may be, to the possible state of the proof to be exhibited on trial; or to guard, if possible, against the hazard of the proof's varying materially from the statement of the cause of action: so that if one or more of several counts be not adapted to the evidence, some other of them may be so. Gould on Pl. c. 4, s. 2, 3, 4; Steph. Pl. 279; Doct. Pl. 178; 3 Com. Dig. 291; Dane's Ab. Index, h. t. In real actions, the declaration is most usually called a count. Steph. Pl. 36.

COUNTER, *Engl. law*, the name

of an ancient prison in the city of London, which has now been demolished.

TO COUNTERFEIT, *criminal law.* To make something false, in the semblance of that which is true; it always implies a fraudulent intent. Vide Vin. Ab. h. t.; *Forgery.*

COUNTERMAND. This word signifies a change of orders which had been given. It may be express or implied. Express when contrary orders are given and a revocation of the former order is made. Implied, when a new order is given which is inconsistent with the former order; as if a man should order a merchant to ship him in a particular vessel certain goods which belonged to him, and then, before the goods were shipped, he directed him to ship them in another vessel; this would be a countermand of the first order. While the first command is unrecalled, the person who gave it would be liable to all the consequences in case he should be obeyed: but if, for example, a man should command another to commit a crime, and, before its perpetration, he should repent and countermand it, he would not be liable for the consequences if the crime should afterwards be committed. Vide *Command;* and Com. Dig. Attorney, B 9, C 8; Dane's Ab. Index, h. t.

COUNTERPART, *contracts.* Formerly each party to an indenture executed a separate deed; that part which was executed by the grantor was called the original, and the rest the counterparts. It is now usual for all the parties to execute every part, and this makes them all originals. 2 Bl. Com. 296. In granting lots subject to a ground-rent reserved to the grantor, both parties execute the deeds, of which there are two copies, although both are original, one of them is sometimes called the counterpart. Vide 12 Vin. Ab. 104; Dane's Ab. Index, h. t.; 7 Com. Dig. 443; Merl. Répert. mots Double Ecrit.

COUNTERPLEA, *pleading.*—When a tenant in any real action, tenant by the curtesy, or tenant in dower, in his answer and plea, vouches any one to warrant his title, or prays in aid of another who has a larger estate, as of the remainder-man or reversioner; or when a stranger to the action comes and prays to be received to save his estate; then that which the defendant alleges against it, why it should not be admitted, is called a counterplea. T. de la Ley; Doct. Placit. 200; Com. Dig. h. t.; Dane's Ab. Index, h. t.

COUNTY. A district into which a state is divided. The United States are generally divided into counties; counties are divided into townships or towns. In some states, as Illinois, 1 Breese, R. 115, a county is considered as a corporation; in others it is only a quasi corporation; 16 Mass. R. 87; 2 Mass. R. 544; 7 Mass. R. 461; 1 Greenl. R. 125; 3 Greenl. R. 131; 9 Greenl. R. 88; 8 John. R. 385; 3 Munf. R. 102. Frequent difficulties arise on the division of a county. On this subject, see 16 Mass. R. 86; 6 J. J. Marsh. 147; 4 Halst. R. 357; 5 Watts, R. 87; 1 Cowen, R. 550; 6 Cowen, R. 642; 9 Cowen, R. 640; 4 Yeates, R. 399; 10 Mass. Rep. 290; 11 Mass. Rep. 339.

COUNTY COMMISSIONERS, are certain officers generally entrusted with the superintendence of the collection of the county taxes, and the disbursements made for the county. They are administrative officers invested by the local laws with various powers.

COUNTRY. The same as *Pais,* (q. v.)

COUPONS are those parts of a commercial instrument which are to be *cut,* and which are evidence of something connected with the con-

tract mentioned in the instrument. They are generally attached to certificates of loan, where the interest is payable at particular periods, and, when the interest is paid, they are cut off and delivered to the payor.

COURSE. The direction in which a line runs in surveying. When there are no monuments, (q. v.) the land must be bounded by the courses and distances mentioned in the patent or deed. 4 Wheat. 444; 3 Pet. 96; 3 Murph. 82; 2 Har. & John. 267; 5 Har. & John. 254; when the lines are actually marked, they must be adhered to, though they vary from the course mentioned in the deeds. 2 Overt. 304; 7 Wheat. 7. See 3 Call, 239; 7 Monr. 333. Vide *Boundary; Line.*

COURT, *practice*, a court is an incorporeal political being, which requires for its existence, the presence of the judges, or a competent number of them, and a clerk or prothonotary, at the time during which, and at the place where it is by law authorised to be held; and the performance of some public act, indicative of a design to perform the functions of a court. In another sense, the judges, clerk or prothonotary, counsellors and ministerial officers, are said to constitute the court. According to Lord Coke, a court is a place where justice is judicially administered. Co. Litt. 58, a. The judges alone, are also called the court. Vide 6 Vin. Ab. 484; Wheat. Dig. 127; Merl. Rép. h. t.; 3 Com. Dig. 300; 8 Id. 386; Dane's Ab. Index, h. t.

Courts are of various kinds; when considered as to their powers, they are of record and not of record, Bac. Ab. Courts, D; when compared to each other, they are supreme, superior, and inferior, Id.; when examined as to their original jurisdiction, they are civil or criminal; when viewed as to their territorial jurisdiction, they are central, or local; when divided as to their object, they are courts of law, courts of equity, courts martial, admiralty courts, and ecclesiastical courts. They are also courts of original jurisdiction, courts of error, and courts of appeal. Vide *Open Court.*

COURT OF ARCHES, *eccles. law*, is the most ancient consistory court belonging to the archbishop of Canterbury for the trial of spiritual causes. It is so called, because it was anciently held in the church of *Saint Mary le Bow;* which church had that appellation from its steeple, which was raised at top with stone pillars, in the manner of an arch or bow. Termes de la Ley.

COURT, INSTANCE. Vide *Instance Court.*

COURT MARTIAL, is a court authorised by the articles of war, for the trial of all offenders in the army or navy, for military offences. Article 64, directs that general courts-martials, may consist of any number of commissioned officers, from five to thirteen, inclusively; but they shall not consist of less than thirteen, where the number can be convened, without manifest injury to the service. Vide Gord. Dig. Laws U. S., art. 3331 to 3357; 2 Story, L. U. S. 1000; and also the Treatises of Adye, Delafon, Hough, J. Kennedy, M. V. Kennedy, McArthur, McNaghten, Simmons and Tyler on Courts Martial.

COURT OF INQUIRY. A court constituted by authority of the articles of war, invested with the power to examine into the nature of any transaction, accusation or imputation against any officer or soldier; the said court shall consist of one or more officers, not exceeding three, and a judge advocate, or other suitable person, as a recorder, to reduce the proceedings and evidence to writing, all of whom shall be sworn to the performance of their duty. Art.

91. Gord. Dig. Laws U. S., art. 3558 to 3560.

COURT, PRIZE. Vide *Prize Court.*

COURTS OF THE UNITED STATES. The judiciary of the United States is established by virtue of the following provisions, contained in the third article of the constitution, namely:

"§ 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."

"§ 2. (1) The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizen of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

"(2) In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as congress shall make.

"(3) The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as congress may by law have directed."

By the amendments to the constitution, the following alteration has been made:

"Art. 11. The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

This subject will be considered by taking a view of 1, the central courts; and 2, the local courts.

Art. 1. *The Central Courts of the United States.*

[2] The central courts of the United States are, the senate for the trial of impeachments, and the supreme court. The territorial jurisdiction of these courts extends over the whole country.

1. *Of the Senate of the United States.*

[3] 1. The constitution of the United States, art. 1, § 3, provides that the Senate shall have the sole power to try all impeachments. When sitting for that purpose, the senate shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

[4] It will be proper here to consider, 1. The organization of this extraordinary court; and, 2. Its jurisdiction.

§ 1. Its *organization* differs according as it has or has not the president of the United States to try. For the trial of an impeachment of the president, the presence of the chief justice is required. There must also be a sufficient number of senators present to form a quorum. For the trial of all other impeachments, it is sufficient if a quorum be present.

§ 2. The *jurisdiction* of the senate as a court for the trial of impeachments extends to the following officers, namely, the president, vice-president, and all civil officers of the United States, art. 2, § 4, when they shall have been guilty of treason, bribery, and other high crimes and misdemeanors. Ib. The constitution defines treason, art. 3, § 3, but recourse must be had to the common law for a definition of bribery. Not having particularly mentioned what is to be understood by "other high crimes and misdemeanors," resort, it is presumed, must be had to parliamentary practice and the common law, in order to ascertain what they are. Story, Const. § 795.

2. *Of the Supreme Court.*

[5] The constitution of the United States directs that the judicial power of the United States shall be vested in one supreme court; and in such inferior courts as congress may, from time to time, ordain and establish. It will be proper to consider, 1st, Its organization; 2dly, Its jurisdiction.

[6] § 1. *Of the organization of the supreme court.* Under this head will be considered, 1. The appointment of the judges; 2. The number necessary to form a quorum; 3. The time and place of holding the court.

1. The judges of the supreme court are appointed by the president, by and with the advice and consent of the senate. Const. art. 2, § 2. They hold their office during good behaviour, and receive for their services a compensation, which shall not be diminished during their continuance in office. Const. art. 3, § 1. They consist of a chief justice and eight associate justices. Act of March 3, 1837, § 1.

2. Five judges are required to make a quorum, Act of March 3, 1837, § 1; but those attending on the day appointed for holding a session of the court, although less than four, have authority to adjourn the court from day to day, for twenty days, after the time appointed for the commencement of said session, unless five justices shall sooner attend; and the business shall not be continued over till the next session of the court, until the expiration of the said twenty days. Act of January 21, 1829. By the same act, if, after the judges shall have assembled, on any day less than five shall assemble, the judge or judges so assembling shall have authority to adjourn the said court, from day to day, until a quorum shall attend, and, when expedient and proper, may adjourn the same without day.

3. The supreme court is holden at the city of Washington; Act of April 29, 1802; the session commences on the second Monday of January, in each and every year; Act of May 4, 1826; the first Monday of August in each year is appointed as a return day. Act of April 29, 1802. In case of a contagious sickness, the chief justice or his senior associate may direct in what other place the court shall be held, and the court shall accordingly be adjourned to such place. Act of February 25, 1799, § 7. The officers of a court are a clerk, who is appointed by the court, a marshal, appointed by the president, by and with the advice and consent of the senate, crier, and other inferior officers.

[7] § 2. *Of the jurisdiction of the supreme court.* The jurisdiction of the supreme court is either civil or criminal.

1. The *civil* jurisdiction is either original or appellate.

(1.) The provisions of the constitution that relate to the *original* jurisdiction of the supreme court, are contained in the articles of the constitution already cited.

[8] By the act of September 24th, 1789, § 13, the supreme court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens; and except also, between a state and citizens of other states or aliens, in which latter case it shall have original, but not exclusive jurisdiction. And shall have, exclusively, all such jurisdiction of suits or proceedings *against* ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have or exercise consistently with the law of nations. And original, but not exclusive jurisdiction of all suits brought *by* ambassadors or other public ministers, or in which a consul or vice-consul shall be a party. And the trial of issues in fact, in the supreme court, in all actions at law, against citizens of the United States, shall be by jury.

[9] In consequence of the decision of the case of Chisholm v. Georgia, where it was held that assumpsit might be maintained against a state by a citizen of a different state, the 11th article of the amendments of the constitution above quoted, was adopted. In those cases in which original jurisdiction is given to the supreme court, the judicial power of the United States cannot be exercised in its appellate form. With the exception of those cases in which original jurisdiction is given to this court, there is none to which the judicial power extends, from which the original jurisdiction of the inferior courts is excluded by the constitution. The constitution establishes the supreme court and defines its jurisdiction. It enumerates the cases in which its jurisdiction is original and exclusive, and defines that which is appellate. See 11 Wheat. 467. Congress cannot vest in the supreme court original jurisdiction in a case in which the constitution has clearly not given that court original jurisdiction; and affirmative words in the constitution, declaring in what cases the supreme court shall have original jurisdiction, must be construed negatively as to all other cases, or else the clause would be inoperative and useless. 1 Cranch, 137. See 5 Pet. 1; 5 Pet. 284; 12 Pet. 657; 9 Wheat. 738; 6 6 Wheat. 264.

[10] 2. The supreme court exercises appellate jurisdiction in the following different modes:

(1.) By writ of error from the final judgments of the circuit courts; of the district courts, exercising the powers of circuit courts; and of the superior courts of the territories, exercising the powers of circuit courts, in certain cases. A writ of error does not lie to the supreme court to reverse the judgment of a circuit court, in a civil action by writ of error carried from the district court to the circuit court. The United States v. Goodwin, 7 Cranch, 108. But now, by the act of July 4, 1840, c. 20, § 3, it is enacted that writs of error shall lie to the supreme court from all judgments of a circuit court, in cases brought there by writs of error from the district court, in like manner and under the same regulations, as are provided by law for writs of error for judgments rendered upon suits originally brought in the circuit court.

[11] (2.) The supreme court has jurisdiction by appeals from the final

decrees of the circuit courts; of the district courts exercising the powers of circuit courts; and of the superior courts of territories, exercising the powers of circuit courts in certain cases. See 8 Cranch, 251; 6 Wheat. 448.

[12] (3.) The supreme court has also jurisdiction by writ of error from the final judgments and decrees of the highest courts of law or equity in a state in the cases provided for by the twenty-fifth section of the act of September 24th, 1789, which enacts that a final judgment or decree, in any suit in the highest court of law or equity of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favour of such their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said constitution, treaty, statute, or commission, may be re-examined, and reversed or affirmed in the supreme court of the United States, upon a writ of error, the citation being signed by the chief justice or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the supreme court of the United States, in the same manner, and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a circuit court; and the proceeding upon the reversal shall also be the same, except that the supreme court, instead of remanding the cause for a final decision as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity, or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

[13] The appellate jurisdiction of the supreme court extends to all cases pending in the state courts; and the twenty-fifth section of the judiciary act, which authorizes the exercise of this jurisdiction in the specified cases by writ of error, is supported by the letter and spirit of the constiution. 1 Wheat. 304. When the construction or validity of a treaty of the United States is drawn in question in the state courts, and the decision is against its validity, or the title specially set up by either party under the treaty, the supreme court has jurisdiction to ascertain that title, and to determine its legal meaning. 1 Wheat. 358; 5 Cranch, 344; 9 Wheat. 738; 1 Pet. 94; 9 Pet. 224; 10 Pet. 368; 6 Pet. 515. The supreme court has jurisdiction although one of the parties is a state, and the other a citizen of that state. 6 Wheat. 264. Under the twenty-fifth section of the judiciary act, when any clause of the constitution or any statute of the United States is drawn in question, the decision must be against the title or right set up by the party under such clause or statute; otherwise the supreme court has no appellate jurisdiction of the

case. 12 Wheat. 117, 129; 6 Wheat. 598; 3 Cranch, 268; 4 Wheat. 311; 7 Wheat. 164; 2 Peters, 449; 2 Pet. 241; 11 Pet. 167; 1 Pet. 655; 6 Pet. 41; 5 Pet. 248. When the judgment of the highest court of law of a state, deciding in favour of the validity of a statute of a state drawn in question, on the ground of its being repugnant to the constitution of the United States, it is not a final judgment within the twenty-fifth section of the judiciary act; if the suit has been remanded to the inferior court, where it originated, for further proceedings, not inconsistent with the judgment of the highest court. 12 Wheat. 135. The words "matters in dispute" in the act of congress, which is to regulate the jurisdiction of the supreme court, seem appropriated to civil causes. 3 Cranch, 159. As to the manner of ascertaining the matter in dispute, see 4 Cranch, 216; 4 Dall. 22; 3 Pet. 33; 3 Dall. 365; 2 Pet. 243; 7 Pet. 634; 5 Cranch, 13; 4 Cranch, 316.

[14] (4.) The supreme court has jurisdiction by certificate from the circuit court that the opinions of the judges are opposed on points stated, as provided for by the 6th section of the act of April 29th, 1802. The provisions of the act extend to criminal as well as to civil cases. See 2 Cranch, 33; 10 Wheat. 20; 2 Dall. 385; 4 Hall's Law Journ. 462; 5 Wheat. 434; 6 Wheat. 542; 12 Wheat. 212; 7 Cranch, 279.

[15] (5.) It has also jurisdiction by mandamus, prohibition, habeas corpus, certiorari, and procedendo.

[16] 2. The *criminal* jurisdiction of the supreme court is derived from the constitution and the act of September 24th, 1789, s. 13, which gives the supreme court, exclusively, all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, as a court of law can have or exercise consistently with the law of nations. But it must be remembered that the act of April 30th, 1790, sections 25 and 26, declares void any writ or process whereby the person of any ambassador, or other public minister, their domestics or domestic servants, may be arrested or imprisoned.

Art. 2. *The local courts.*

[17] The local courts of the United States are, circuit courts, district courts, and territorial courts.

1. *The circuit courts.*

[18] In treating of circuit courts, it will be convenient to consider, 1st, Their organization; and, 2dly, Their jurisdiction.

[19] § 1. *Of the organization of the circuit courts.* The circuit courts are the principal inferior courts established by congress. There are nine circuit courts, composed of the districts which follow, to wit:

1. The *first* circuit consists of the districts of New Hampshire, Massachusetts, Rhode Island, and Maine. It consists of a judge of the supreme court and the district judge of the district where such court is holden. See Acts 29 April, 1802; March 26, 1812; and March 30, 1820.

2. The *second* circuit is composed of the district of Vermont, Connecticut and New York. Act of 3 March, 1837.

3. The *third* circuit consists of the districts of New Jersey, and eastern and western Pennsylvania. Act of 3 March, 1837.

4. The *fourth* circuit is composed of Maryland, Delaware, and Virginia. Act of Aug. 16, 1842.

5. The *fifth* circuit is composed of Alabama and Louisiana. Act of Aug. 16, 1842.

6. The *sixth* circuit consists of the districts of North Carolina, South Carolina, and Georgia. Act of Aug. 16, 1842.

7. The *seventh* circuit is composed

of Ohio, Indiana, Illinois, and Michigan. Act of 3 March, 1837, § 1.

8. The *eighth* circuit includes Kentucky, East and West Tennessee, and Missouri. Act of March 3, 1837, § 1. By the act of April 14, 1842, ch. 20, § 1, it is enacted that the district court of the United States at Jackson, in the district of West Tennessee, shall in future be attached to, and form a part of the eighth judicial district of the United States, with all the power and jurisdiction of the circuit court held at Nashville, in the middle district of Tennessee.

9. The *ninth* circuit is composed of the districts of Alabama, the eastern district of Louisiana, the district of Mississippi, and the district of Arkansas. Act of March 3, 1837, § 1.

[20] In several districts of the United States, owing to their remoteness from any justice of the supreme court, there are no circuit courts held. But in these, the district court there is authorized to act as a circuit court, except so far as relates to writs of error or appeals from judgments or decrees in such district court.

[21] The act of March 3, 1837, provides, "That so much of any act or acts of congress as vests in the district courts of the United States for the districts of Indiana, Illinois, Missouri, Arkansas, the eastern district of Louisiana, the district of Mississippi, the northern district of New York, the western district of Virginia, and the western district of Pennsylvania, and the districts of Alabama, or either of them, the power and jurisdiction of circuit courts, be, and the same is hereby, repealed; and there shall hereafter be circuit courts held for said districts by the chief or associate justices of the supreme court, assigned or allotted to the circuit to which such districts may respectively belong, and the district judges of such districts severally and respectively, either of whom shall constitute a quorum; which circuit courts, and the judges thereof, shall have like powers, and exercise like jurisdiction as other circuit courts and the judges thereof; and the said district courts, and the judges thereof, shall have like powers and exercise like jurisdiction, as the district courts, and the judges thereof, in the other circuits. From all judgments and decrees, rendered in the district courts of the United States for the western district of Louisiana, writs of error and appeals shall lie to the circuit court in the other district in said state, in the same manner as from decrees and judgments rendered in the districts within which a circuit court is provided by this act."

[22] In all cases where the day of meeting of the circuit court is fixed for a particular day of the month, if that day happen on Sunday, then, by the act of 29th April, 1802, and other acts, the court shall be held the next day.

[23] The act of 29th April, 1802, § 5, further provides, that on every appointment which shall be hereafter made, of a chief justice, or associate justice, the chief justice and associate justices shall allot among themselves the aforesaid circuits, as they shall think fit, and shall enter such allotment on record.

[24] The act of March 3, 1837, § 4, directs that the allotment of the chief justice and the associate justices of the said supreme court to the several circuits shall be made as heretofore.

And by the act of August 16, 1842, the justices of the supreme court of the United States, or a majority of them, are required to allot the several districts among the justices of the said court.

[25] And in case no such allotment shall be made by them, at their sessions next succeeding such appointment, and also, after the appointment

of any judge as aforesaid, and before any other allotment shall have been made, it shall and may be lawful for the President of the United States, to make such allotment as he shall deem proper—which allotment, in either case, shall be binding until another allotment shall be made. And the circuit courts constituted by this act shall have all the power, authority and jurisdiction, within the several districts of their respective circuits, that before the 13th February, 1801, belonged to the circuit courts of the United States.

[26] The justices of the supreme court of the United States, and the district judge of the district where the circuit is holden, compose the judges of the circuit court. The district judge may alone hold a circuit court, though no judge of the supreme court may be allotted to that circuit. Pollard v. Dwight, 4 Cranch, 421.

[27] The act of September 24th, 1789, § 6, provides, that a circuit court may be adjourned from day to day, by one of its judges, or if none are present, by the marshal of the district, until a quorum be convened. By the act of May 19th, 1794, a circuit court in any district, when it shall happen that no judge of the supreme court attends within four days after the time appointed by law, for the commencement of the sessions, may be adjourned to the next stated term, by the judge of the district, or, in case of his absence also, by the marshal of the district. But by the 4th section of the act of 29th April, 1802, where only one of the judges thereby directed to hold the circuit courts shall attend, such circuit court may be held by the judge so attending.

By the act of March 2d, 1809, certain duties are imposed on the justice of the supreme court, in case of the disability of the district judge to hold a district court. Sect. 2, enacts, that in case of the disability of the district judge of either of the district courts of the United States, to hold a district court, and to perform the duties of his office, and satisfactory evidence thereof being shown to the justice of the supreme court allotted to that circuit, in which such district court ought, by law to be holden, and on application of the district attorney, or marshal of such district, in writing, to the said justice of the supreme court, said justice of the supreme court shall, thereupon, issue his order in the nature of a certiorari, directed to the clerk of such district court, requiring him forthwith to certify unto the next circuit court, to be holden in said district, all actions, suits, causes, pleas, or processes, civil or criminal, of what nature or kind soever, that may be depending in such district court, and undetermined, with all the proceedings thereon, and all files, and papers relating thereto, which said order shall be immediately published in one or more newspapers, printed in said district, and at least thirty days before the session of such circuit court, and shall be deemed a sufficient notification to all concerned. And the said circuit court shall, thereupon, have the same cognisance of all such actions, suits, causes, pleas, or processes, civil or criminal, of what nature or kind soever, and in the like manner, as the district court of said district by law might have, or the circuit court, had the same been originally commenced therein, and shall proceed to hear and determine the same accordingly; and the said justice of the supreme court, during the continuance of such disability, shall, moreover, be invested with, and exercise all and singular the powers and authority, vested by law in the judge of the district court in said district. And all bonds and recognisances taken for, or returnable to, such district court, shall be construed

and taken to be to the circuit court to be holden thereafter, in pursuance of this act, and shall have the same force and effect in such court as they would have had in the district court to which they were taken. *Provided*, that nothing in this act contained shall be so construed, as to require of the judge of the supreme court, within whose circuit such district may lie, to hold any special court, or court of admiralty, at any other time than the legal time for holding the circuit court of the United states in and for such district. Sect. 2, provides, that the clerk of such district shall, during the continuance of the disability of the district judge, continue to certify as aforesaid, all suits or actions, of what nature or kind soever, which may thereafter be brought to such district court, and the same transmit to the circuit court next thereafter to be holden in the same district. And the said circuit court shall have cognisance of the same, in like manner as is hereinbefore provided in this act, and shall proceed to hear and determine the same. *Provided*, nevertheless, that when the disability of the district judge shall cease, or be removed, all suits or actions then pending and undetermined in the circuit court, in which by law the district courts have an exclusive original cognisance, shall be remanded, and the clerk of the said circuit court shall transmit the same, pursuant to the order of the said court, with all matters and things relating thereto, to the district court next thereafter to be holden in said district, and the same proceedings shall be had therein, as would have been, had the same originated or been continued in the said district court. Sect. 3, enacts, that in case of the district judge in any district being unable to discharge his duties as aforesaid, the district clerk of such district shall be authorised and empowered, by leave or order of the circuit judge of the circuit in which such district is included, to take, during such disability of the district judge, all examinations, and depositions of witnesses, and to make all necessary rules and orders, preparatory to the final hearing of all causes of admiralty and maritime jurisdiction. See 1 Gall. 337; 1 Cranch, 309; note to Hayburn's case, 3 Dall. 410. If the disability of the district judge terminate in his death, the circuit court must remand the certified causes to the district court. Ex parte United States, 1 Gall. 337.

[28] By the first section of the act of 3d March, 1821, in all suits and actions in any district court of the United States in which it shall appear that the judge of such court is any ways concerned in interest, or has been of counsel for either party, or is so related to, or connected with either party as to render it improper for him, in his opinion, to sit on the trial of such suit or action, it shall be the duty of such judge, on application of either party, to cause the fact to be entered on the records of the court, and also an order that an authenticated copy thereof, with all the proceedings in such suit or action, shall be forthwith certified to the next circuit court of the district, and if there be no circuit court in such district, to the next circuit court in the state, and if there be no circuit court in such state, to the most convenient circuit court in an adjacent state; which circuit court shall, upon such record being filed with the clerk thereof, take cognisance thereof, in like manner as if such suit or action had been originally commenced in that court, and shall proceed to hear and determine the same accordingly, and the jurisdiction of such circuit court shall extend to all such cases to be removed, as were cognisable in the district court from which the same was removed.

[29] And the act of February

28, 1839, § 8, enacts, "That in all suits and actions in any circuit court of the United States in which it shall appear that both the judges thereof, or the judge thereof, who is solely competent by law to try the same, shall be any ways concerned in interest therein, or shall have been of counsel for either party, or is, or are so related to, or connected with, either party as to render it improper for him or them, in his or their opinion, to sit in the trial of such suit or action, it shall be the duty of such judge or judges, on application of either party, to cause the fact to be entered on the records of the court; and, also to make an order that an authenticated copy thereof, with all the proceedings in such suit or action, shall be certified to the most convenient circuit court in the next adjacent state, or in the next adjacent circuit; which circuit court shall, upon such record and order being filed with the clerk thereof, take cognisance thereof in the same manner as if such suit or action had been rightfully and originally commenced therein, and shall proceed to hear and determine the same accordingly; and the proper process for the due execution of the judgment or decree rendered therein, shall run into and may be executed in the district where such judgment or decree was rendered; and, also, into the district from which such suit or action was removed."

[30] The judges of the supreme court are not appointed as circuit court judges, or in other words, have no distinct commission for that purpose: but practice and acquiescence under it for many years, were held to afford an irresistible argument against this objection to their authority to act, when made in the year 1803, and to have fixed the construction of the judicial system. The court deemed the contemporary exposition to be of the most forcible nature, and considered the question at rest, and not to be disturbed then. Stuart v. Laird, 1 Cranch, 308. If a vacancy exist by the death of the justice of the supreme court to whom the district was alloted, the district judge may under the act of congress, discharge the official duties, (Pollard v. Dwight, 4 Cranch, 428. See the fifth section of the act of 29th April, 1802,) except that he cannot sit upon a writ of error from a decision in the district court. United States v. Lancaster, 5 Wheat. 434.

[31] It is enacted by the act of February 28, 1839, § 2, that all the circuit courts of the United States shall have the appointment of their own clerks; and in case of disagreement between the judges, the appointment shall be made by the presiding judge of the court.

[32] The marshal of the district is an officer of the court, and the clerk of the district court is also clerk of the circuit court in such district. Act of September 24th, 1789, § 7.

[33] In the District of Columbia, there is a circuit court established by particular acts of congress composed of a chief justice and two associates. See act of February 27, 1801; 12 Pet. 524; 7 Pet. 203; 7 Wheat. R. 534; 3 Cranch, 159; 8 Cranch, 251; 6 Cranch, 233.

§ 2. *Of the Jurisdiction of the Circuit Courts.*

[34] The jurisdiction of the Circuit Courts is either civil or criminal.

(1.) *Civil Jurisdiction.*

The civil jurisdiction is either at law or in equity.

Their civil jurisdiction *at law* is, 1st, original; 2d, by removal of actions from the state courts; 3d, by writ of mandamus; 4th, by appeal.

1st. The *original* jurisdiction of the circuit courts at law, may be considered first, as to the matter in controversy; second, with regard to the parties litigant.

(1.) *The Matter in Dispute.*

[35] By the act of September

24th, 1789, § 11, to give jurisdiction to the circuit court the matter in dispute must exceed $500. In actions to recover damages for torts, the sum laid in the declaration is the criterion as to the amount of the matter in dispute. 3 Dall. 358. In an action of covenant on an instrument under seal, containing a penalty less than $500, the court has jurisdiction if the declaration demand more than $500. 1 Wash. C. C. R. 1. In ejectment the value of the land should appear in the declaration, 4 Wash. C. C. R. 624; 8 Cranch, 220; 1 Pet. 73; but though the jury do not find the value of the land in dispute, yet if evidence be given on the trial, that the value exceeds $500, it is sufficient to fix the jurisdiction; or the court may ascertain its value by affidavits. Pet. C. C. R. 73.

If the matter in dispute arise out of a local injury, for which a local action must be brought in order to give the circuit court jurisdiction, it must be brought in the district where the lands lie. 4 Hall's Law Journal, 78.

By various acts of congress jurisdiction is given to the circuit courts in cases where actions are brought to recover damages for the violation of patent and copy-rights, without fixing any amount as the limit. See Acts of April 17, 1800, § 4; Feb. 15, 1819; 7 Johns. 144; 9 Johns. 507.

The circuit courts have jurisdiction in cases arising under the patent laws. By the Act of July 4, 1836, § 17, it is enacted, "That all actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to inventors the exclusive right to their inventions or discoveries, shall be originally cognizable, as well in equity as at law, by the circuit courts of the United States, or any district court having the powers and jurisdiction of a circuit court; which courts shall have power, upon bill in equity filed by any party aggrieved, in any such case, to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any inventor, as secured to him by any law of the United States, on such terms and conditions as said courts may deem reasonable. *Provided, however*, That from all judgments and decrees, from any such court rendered in the premises, a writ of error or appeal, as the case may require, shall lie to the supreme court of the United States, in the same manner and under the same circumstances as is now provided by law in other judgments and decrees of circuit courts, and in all other cases in which the court shall deem it reasonable to allow the same."

For the jurisdiction given to the circuit courts in cases of bankruptcy, see *Bankrupt.*

In general the circuit court has no original jurisdiction of suits for penalties and forfeitures arising under the laws of the United States, nor in admiralty cases. 2 Dall. 365; 4 Dall. 342; Bee, 19.

(2.) *The Character of the Parties.*

[36] Under this head will be considered, 1. The United States; 2 Citizens of different states; 3. Suits where an alien is a party; 4. When an assignee is plaintiff; 5. Defendant must be an inhabitant of the circuit.

(i.) *The United States.*

[37] The United States may sue on all contracts in the circuit courts where the sum in controversy exceeds, besides costs, the sum of $500; but in cases of penalties the action must be commenced in the district court, unless the law gives express jurisdiction to the circuit courts. 4 Dall. 342. Under the act of March 3, 1815, § 4, the circuit court has jurisdiction concurrently with the district court of all suits at common law where any officer of the United States sues under the authority of an act of congress; as where the postmaster-general sues under an act of congress

for debts or balances due to the general postoffice. 12 Wheat. 136. See 2 Pet. 447; 1 Pet. 318.

[38] The circuit court has jurisdiction on a bill in equity filed by the United States against the debtor of their debtor, they claiming priority under the statute of March 2, 1798, c. 28, § 65, though the law of the state where the suit is brought permits a creditor to proceed against the debtor of his debtor by a peculiar process at law. 4 Wheat. 108.

(ii.) *Suits between Citizens of different States.*

[39] The act of September 24, 1789, § 11, gives jurisdiction to the circuit court in suits of a civil nature when the matter in dispute is of a certain amount, between a citizen of the state where the suit is brought, and a citizen of another state, one of the parties must therefore be a citizen of the state where the suit is brought. See 4 Wash. C. C. R. 84; Pet. C. C. R. 431: 1 Sumn. 581; 1 Mason, 520; 5 Cranch, 288; 3 Mason, 185; 8 Wheat. 699; 2 Mason, 472; 5 Cranch, 57; Id. 51; 6 Wheat. 450; 1 Pet. 238; 4 Wash. C. C. R. 482, n.; Id. 595.

Under this section the division of a state into two or more districts does not affect the jurisdiction of the circuit court, on account of citizenship. The residence of a party in a different district of a state from that in which the suit is brought does not exempt him from the jurisdiction of the court; if he is found in the district where he is sued he is not within the prohibition of this section. 11 Pet. 25.

(iii.) *Suits where an Alien is a Party.*

[40] The act of September 24, 1789, § 11, gives the circuit court cognisance of all suits of a civil nature where an alien is a party; but these general words must be restricted by the provision in the constitution which gives jurisdiction in controversies between a state, or the citizens of a state, and foreign states, citizens, or subjects; and the statute cannot extend the jurisdiction beyond the limits of the constitution. 4 Dall. 11; 5 Cranch, 303. When both parties are aliens, the circuit court has no jurisdiction. 4 Cranch, 46; 4 Dall. 11. An alien who holds lands under a special law of the state in which he is resident, may maintain an action in relation to those lands, in the circuit court. 1 Baldw. 216.

(iv.) *When an Assignee is the Plaintiff.*

[41] The court has no jurisdiction unless a suit might have been prosecuted in such court to recover on the contract assigned, if no assignment had been made, except in cases of bills of exchange. Act of September 24, 1789, § 11; see 2 Pet. 319; 1 Mason, 243; 6 Wheat. 146; 11 Pet. 83; 9 Wheat. 537; 6 Cranch, 332; 4 Wash. C. C. R. 349; 4 Mason, 435; 12 Pet. 164; 2 Mason, 252. It is said that this section of the act of congress has no application to the conveyance of lands from a citizen of one state to a citizen of another. The grantee in such case may maintain his action in the circuit court, when otherwise properly qualified, to try the title to such lands. 2 Sumn. 252.

(v.) *The Defendant must be an Inhabitant of or found in the Circuit.*

[42] The circuit court has no jurisdiction of an action against a defendant unless he be an inhabitant of the district in which such court is located or found therein, at the time of serving the writ. 3 Wash. C. C. R. 456. A citizen of one state may be sued in another, if the process be served upon him in the latter; but in such cases, the plaintiff must be a citizen of the latter state, or an alien 1 Pet. C. C. R. 431.

2*d. Removal of Actions from the State Courts.*

[43] The act of September 24, 1789, gives, in certain cases, the right of removing a suit instituted in a state court to the circuit court of the district. It is enacted by that law, that if a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought, against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court, and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial, into the next circuit court, to be held in the district where the suit is pending, and offer good and sufficient security for his entering in such court, on the first day of its session, copies of said process against him, and also for his then appearing and entering special bail in the cause, if special bail was originally required therein, it shall then be the duty of the state court to accept the surety, and proceed no further in the cause. And any bail that may have been originally taken, shall be discharged. And the said copies being entered as aforesaid in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process. And any attachment of the goods or estate of the defendant, by the original process, shall hold the goods or estate so attached, to answer the final judgment, in the same manner as by the laws of such state they would have been holden to answer final judgment, had it been rendered by the court in which the suit commenced. Vide act of September 24, 1789, § 12 ; 4 Dall. 11 ; 5 Cranch, 303 ; 4 Johns. R. 493 ; 1 Pet. R. 220 ; 2 Yeates R. 275 ; 4 W. C. C. R. 286, 344.

[44] By the constitution, art. 3, § 2, 1, the judicial power shall extend to controversies between citizens of the same state, claiming lands under grants of different states. By a clause of the 12th section of the act of September 24th, 1789, it is enacted, that if, in any action commenced in a state court, the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear to the satisfaction of the court, either party, before the trial, shall state to the court, and make affidavit, if it require it, that he claims, and shall rely upon a right or title to the land, under grant from a state, other than that in which the suit is pending, and produce the original grant, or an exemplification of it, except where the loss of records shall put it out of his power, and shall move that the adverse party inform the court, whether he claims a right or title to the land under a grant from the state in which the suit is pending ; the said adverse party shall give such information, otherwise not be allowed to plead such grant, or give it in evidence upon the trial ; and if he informs that he does claim under any such grant, the party claiming under the grant first mentioned, may then, on motion, remove the cause for trial, to the next circuit court to be holden in such district. But if he is the defendant, he shall do it under the same regulations as in the before-mentioned case of the removal of a cause into such court by an alien. And neither party removing the cause shall be allowed to plead, or give evidence of, any other title than that by him stated as aforesaid, as the ground of his claim. See 9 Cranch, 292 ; 2 Wheat. R. 378.

[45] Application for removal must be made during the term at which the defendant enters his appear-

ance. 1 J. J. Marsh. 232. If a state court agree to consider a petition to remove the cause as filed of the preceding term, yet if the circuit court see by the record, that it was not filed till a subsequent term, they will not permit the cause to be docketed. Pet. C. C. R. 44; Paine, 410; but see 2 Penning. 625. In chancery, when the defendant wishes to remove the suit, he must file his petition when he enters his appearance; 4 Johns. Ch. 94; and in an action in a court of law, at the time of putting in special bail. 12 Johns. 153. And if an alien file his petition when he filed special bail, he is in time, though the bill be excepted to. 1 Caines, 248; Coleman, 58. A defendant in ejectment may file his petition when he is let in to defend. 4 Johns. 493. See Pet. C. C. R. 220; 2 Wash. C. C. R. 463; 2 Yeates, 275, 352; 3 Dall. 467; 4 Wash. C. C. R. 286; 2 Root, 444; 5 John. Ch. R. 300; 3 Ham. 48; 4 Wash. C. C. R. 84.

3d. Remedy by Mandamus.

[46] The power of the circuit court to issue a mandamus, is confined, exclusively, to cases in which it may be necessary for the exercise of a jurisdiction already existing; as, for instance, if the court below refuse to proceed to judgment, there a mandamus in the nature of a procedendo may issue. 7 Cranch, 504; 6 Wheat. R. 598. After the state court had refused to permit the removal of a cause on petition, the circuit court issued a mandamus to transfer the cause.

4th. Appellate Jurisdiction.

[47] The appellate jurisdiction is exercised by means of, 1. Writs of error; 2. Appeals from the district courts in admiralty and maritime jurisdiction; 3. Certiorari; 4. Procedendo.

[1.] This court has jurisdiction to issue writs of error to the district court, on judgments of that court in civil cases at common law. The 11th section of the act of September 24th, 1789, provides, that the circuit courts shall also have appellate jurisdiction from the district courts, under the regulations and restrictions hereinafter provided. By the 22d section, final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a circuit court holden in the same district, upon a writ of error, whereto shall be annexed and returned therewith at the day and place therein mentioned, an authenticated transcript of the record and assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by the judge of such district court, or a justice of the supreme court, the adverse party having at least twenty days' notice. But there shall be no reversal on such writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact. And writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of; or, in case the person entitled to such writ of error be an infant, *non compos mentis*, or imprisoned, then within five years, as aforesaid, exclusive of the time of such disability. And every justice or judge signing a citation, or any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs, if he fail to make his plea good. The district judge cannot sit in the circuit court on a writ of error to district court. 5 Wheat R. 434. It is above observed, that writs of error may be issued to the district court in civil cases at common law, but a writ of error does not lie from a circuit to a district

court in an admiralty or maritime cause. 1 Gall. R. 5.

[48] [2.] Appeals from the district to the circuit court take place generally in civil causes of admiralty or maritime jurisdiction. By the act of March 3, 1803, § 2, it is enacted, That from all final judgments or decrees in any of the district courts of the United States, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars, shall be allowed to the district court next to be holden in the district where such final judgment or judgments, decree or decrees shall be rendered: and the circuit courts are thereby authorized and required, to hear and determine such appeals.

[49] [3.] Although no act of congress authorizes the circuit court to issue a certiorari to the district court for the removal of a cause, yet if the cause be so removed, and instead of taking advantage of the irregularity in proper time and in a proper manner, the defendant makes defence and pleads to issue, he thereby waives the objection, and the suit will be considered as an original one in the circuit court, made so by consent of parties. 2 Wheat. R. 221.

[50] [4.] The circuit court may issue a writ of procedendo to the district court.

2. *Equity Jurisdiction of the Circuit Courts.*

[51] Circuit courts are vested with equity jurisdiction in certain cases. The act of September, 1789, § 11, gives original cognisance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in *equity*, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, between certain parties therein mentioned. And the act April 15, 1819, § 1, provides, "That the circuit court of the United States shall have original cognisance, as well in equity as at law, of all actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to authors or inventors, the exclusive right to their respective writings, inventions, and discoveries; and upon any bill in equity filed by any party aggrieved, in such cases, shall have authority to grant injunctions according to the course and principles of courts of equity, to prevent the violation of the rights of any authors or inventors, secured to them by any laws of the United States, on such terms and conditions as the said courts may deem fit and reasonable: *provided, however*, that from all judgments and decrees of any circuit courts rendered in the premises, a writ of error or appeal, as the case may require, shall lie to the supreme court of the United States, in the same manner and under the same circumstances, as is now provided by law, in other judgments and decrees of such circuit court."

[52] By the act of August 23, 1842, it is enacted, § 5, "That the district courts as courts of admiralty, and the circuit courts as courts of equity, shall be deemed always open for the purpose of filing libels, bills, petitions, answers, pleas, and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings whatever, preparatory to the hearing of all causes pending therein upon their merits. And it shall be competent for any judge of the court, upon reasonable notice to the parties, in the clerk's office or at chambers, and in vacation as well as in term, to make and direct, and award all such process, commissions, and interlocutory orders, rules, and other proceedings, whenever the same are not grantable

of course according to the rules and practice of the court."

(2.) *Criminal Jurisdiction of the Circuit Courts.*

[53] The often cited 11th section of the act of the 24th of September, 1789, gives the circuit courts exclusive cognisance of all crimes and offences cognisable under the authority of the United States, except where that act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognisable therein. The jurisdiction of the circuit courts in criminal cases is confined to offences committed within the district for which those courts respectively sit when they are committed on land. Serg. Const. Law, 129.

2. *Of the District Courts.*

[54] In treating of *district courts*, the same division which was made, in considering circuit courts, will here be adopted, by taking a view, 1, Of their organization; and 2, Of their jurisdiction.

§ 1. *Of the Organization of the District Courts.*

[55] The United States are divided into districts, in each of which is a court called a district court, which is to consist of one judge, who is to reside in the district for which he is appointed, and to hold annually four sessions. Act of September 24, 1789. By subsequent acts of congress, the number of annual sessions in particular districts, is sometimes more and sometimes less; and they are to be held at various places in the district. There is also a district court in the District of Columbia, held by the chief justice of the circuit court of that district.

§ 2. *Jurisdiction of the District Courts.*

[56] Their jurisdiction is either civil or criminal.

(1.) Their *civil* jurisdiction extends, 1. To admiralty and maritime causes: the admiralty and maritime jurisdiction, is either the ordinary jurisdiction, which comprehends prize suits; cases of salvage; actions for torts; and actions on contracts, such as seamen's wages, pilotage, bottomry, ransom, materials, and the like; or the extraordinary or expressly vested jurisdiction; which includes cases of seizures under the revenue laws, &c.; and captures within the jurisdiction of the United States. 2. To cases of seizure on land under the laws of the United States, and in suits for penalties and forfeitures, incurred under the laws of the United States. 3. To cases in which an alien sues for a tort, in violation of the laws of nations, or a treaty of the United States. 4. To suits instituted by the United States. 5. To actions by and against consuls. 6. To cases in bankruptcy. 7. To certain cases in equity.

[57] 1. The admiralty and maritime jurisdiction of the district court is ordinary or extraordinary.

1st. The *ordinary* jurisdiction is granted by the act of September 24th, 1789, § 9; it is there enacted, that the district court shall have exclusive original cognisance of all civil causes of admiralty and maritime jurisdiction. This jurisdiction is exclusive. Bee, 19; 3 Dall. 16; Paine, 111; 4 Mason, 139.

This ordinary jurisdiction is exercised in

[58] (1.) *Prize suits.* The act of September 24, 1789, § 9, vests in the district courts as full jurisdiction of all prize causes as the admiralty of England; and this jurisdiction is an ordinary inherent branch of the powers of the court of admiralty, whether considered as *prize* courts or *instance* courts. 3 Dall. 16; Paine, 111.

The act of Congress marks out not only the general jurisdiction of

the district courts, but also that of the several courts in relation to each other, in cases of seizure on the waters of the United States, navigable, &c. When the seizure is made within the waters of one district, the court of that district has exclusive jurisdiction, though the offence may have been committed out of the district. When the seizure is made on the high seas, the jurisdiction is in the court of the district where the property may be brought. 9 Wheat. 402; 6 Cranch, 281; 1 Mason, 360; Paine, 40.

When the seizure has been made within the waters of a foreign nation, the district court has jurisdiction, when the property has been brought into the district and a prosecution has been instituted there. 9 Wheat. 402; 9 Cranch, 102.

The district court has jurisdiction of seizures, and of the question who is entited to their proceeds, as informers or otherwise; and the principal jurisdiction is exclusive, the question as to who is the informer is also exclusive. 4 Mason, 139.

[59] (2.) *Cases of salvage.* Under the constitution and laws, this court has exclusive original cognisance in cases of salvage; and, as a consequence, it has the power to determine to whom the residue of the property belongs, after deducting the salvage. 3 Dall. 183.

[60] (3.) *Actions arising out of torts and injuries.* The district court has jurisdiction over all torts and injuries committed on the high seas, and in ports or harbours within the ebb and flow of the tide. Vide 1 Wheat. R. 304; 2 Gall. R. 389; 1 Mason, 96; 3 Mason, 242; 4 Mason, 380; 18 Johns. R. 257.

A court of admiralty has jurisdiction to redress personal wrongs committed on a passenger, on the high seas, by the master of a vessel, whether those wrongs be by direct force or consequential injuries. 3 Mason, 242.

The admiralty may decree damages for an unlawful capture of an American vessel by a French privateer, and may proceed by attachment *in rem.* Bee, 60.

It has jurisdiction in cases of maritime torts, *in personam* as well as *in rem.* 10 Wheat. 473.

This court has also jurisdiction of petitory suits to reinstate owners of vessels who have been displaced from their possession. 5 Mason, 465. It exercises jurisdiction of all torts and injuries committed on the high seas, and in ports or harbours within the flow or ebb of the tide. 2 Gallis. 398; Bee, 51.

A father, whose minor son has been tortiously abducted and seduced on a voyage on the high seas, may sue in the admiralty in the nature of an action *per quod*, &c., also for wages earned by such son in maritime service. 4 Mason, 380.

[61] (4.) *Suits on contracts.* As a court of admiralty, the district court has a jurisdiction, concurrent with the courts of common law, over all maritime contracts, wheresoever the same may be made or executed, or whatsoever be the form of the contract. 2 Gallis. 398. It may enforce the performance of charter-parties for foreign voyages, and by proceeding *in rem*, a lien for freight under them. 1 Sumn. 551; 2 Sumn. 589. It has jurisdiction over contracts for the hire of seamen, when the service is substantially performed on the sea, or on waters within the flow and reflow of the tide. 10 Wheat. 428; 7 Pet. 324; Bee, 199; Gilp. 529. But unless the services are essentially maritime, the jurisdiction does not attach. 10 Wheat. 428; Gilp. 529.

The master of a vessel may sue in the admiralty *in personam* for his wages; and the mate who on his death succeeds him has the same right. 1 Sumn. 157; 9 Mason, 161;

4 Mason, 196. But when the services for which he sues have not been performed by him as master, they cannot be sued for in admiralty. 3 Mason, 161.

The jurisdiction of the admiralty attaches when the services are performed on a ship in port where the tide ebbs and flows. 7 Pet. 324; Gilp. 529.

Seamen employed on board of steamboats and lighters engaged in trade or commerce on tide water are within the admiralty jurisdiction. But those in ferry boats are not so. Gilp. 532; Gilp. 203.

Wages may be recovered in the admiralty by the pilot, deck-hands, engineer, and firemen on board of a steamboat. Gilp. 505.

But unless the service of those employed contribute in navigating the vessel, or to its preservation, they cannot sue for their wages in the admiralty; musicians on board of a vessel, who are hired and employed as such, cannot therefore enforce a payment of their wages by a suit *in rem* in the admiralty. Gilp. 516.

[62] 2d. The *extraordinary* jurisdiction of the district court, as a court of admiralty, or that which is vested by various acts of congress, consists of

(1.) Seizures under the laws of impost, navigation, or trade of the United States. It is enacted by the act of September 24, 1789, § 9, that the district court shall have exclusive original cognisance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, when the seizures are made on waters which are navigable from the sea, by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas, saving to suitors, in all cases, the right of a common law remedy, when the common law is competent to give it.

Causes of this kind are to be tried by the district court, and not by a jury. 4 Cranch, 438; 5 Cranch, 281; 1 Wheat. 9, 20; 7 Cranch, 112; 3 Dall. 297.

It is the place of seizure and not the committing of the offence, that, under the act of September 24, 1789, gives jurisdiction to the court, 4 Cranch, 443; 5 Cranch, 304; for until there has been a seizure, the forum cannot be ascertained. 9 Cranch, 289.

When the seizure has been voluntarily abandoned, it loses its validity, and no jurisdiction attaches to any court unless there be a new seizure. 10 Wheat. 325; 1 Mason, 361.

[63] (2.) The admiralty jurisdiction expressly vested in the district court embraces also captures made within the jurisdictional limits of the United States. By the act of April 20, 1818, § 7, the district court shall take cognisance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts and shores thereof.

[64] 2. The civil jurisdiction of the district court extends to cases of seizure on land under the laws of the United States, and in suits for penalties and forfeitures incurred under the laws of the United States.

The act of September 24, 1789, § 9, gives to the district court exclusive original cognisance of all seizures made on land, and other waters than as aforesaid, (that is, those which are navigable by vessels of ten or more tons burden, within their respective districts, or on the high seas,) and of all suits for penalties and forfeitures, incurred under the laws of the United States.

In all cases of seizure on land, the district court sits as a court of common law, and its jurisdiction is entirely distinct from that exercised in

case of seizure on waters navigable by vessels of ten tons burden and upwards. 8 Wheat. 395.

Seizures of this kind are triable by jury; they are not cases of admiralty and maritime jurisdiction. 4 Cranch, 443.

[65] 3. The civil jurisdiction of the district court extends also to cases in which an alien sues for a tort, in violation of the law of nations, or a treaty of the United States.

The act of September 24, 1789, § 9, directs that the district court shall have cognisance, concurrent with the courts of the several states, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only, in violation of the law of nations, or of a treaty of the United States.

[66] 4. The civil jurisdiction of this court extends further to suits instituted by the United States. By the 9th section of the act of September 25th, 1789, the district court shall also have cognisance, concurrent as last mentioned, of all suits at common law, where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And by the act of March 3d, 1815, § 4, it has cognisance, concurrent with the courts and magistrates of the several states, and the circuit courts of the United States, of all suits at common law where the United States, or any officer thereof, under the authority of any act of congress sue, although the debt, claim, or other matter in dispute, shall not amount to one hundred dollars.

These last words do not confine the jurisdiction given by this act to one hundred dollars, but prevent it from stopping at that sum: and consequently, suits for sums over one hundred dollars are cognisable in the district, circuit, and state courts, and before magistrates, in the cases here mentioned. By virtue of this act, these tribunals have jurisdiction over suits brought by the postmaster-general, for debts and balance due the general post office. 12 Wheat. 147; 2 Pet. 447; 1 Pet. 318.

[67] 5. This court has jurisdiction of actions by and against consuls or vice-consuls, exclusively of the courts of the several states, except for offences where other punishment than whipping, not exceeding thirty stripes, a fine exceeding one hundred dollars, or a term of imprisonment exceeding six months, is inflicted.

For offences above this description formerly the circuit court only had jurisdiction in cases of consuls. 5 S. & R. 545; 1 Binn. 143; 2 Dall. 299. But by the act of August 23d, 1842, the district courts shall have concurrent jurisdiction with the circuit courts of all crimes and offences against the United States, the punishment of which is not capital. And by the act of February 28th, 1839, § 5, the punishment of whipping is abolished.

[68] 6. The jurisdiction of the district court under the bankrupt laws will be found under the title *Bankrupt*.

[69] 7. The district courts have equitable jurisdiction in certain cases.

By the first section of the act of February 13th, 1807, the judges of the district courts of the United States shall have as full power to grant writs of injunctions, to operate within their respective districts, as is now exercised by any of the judges of the supreme court of the United States, under the same rules, regulations, and restrictions, as are prescribed by the several acts of congress establishing the judiciary of the United States, any law to the contrary notwithstanding. *Provided*, that the same shall not, unless so ordered by the circuit court, continue longer than to the circuit then next ensuing; nor shall

an injunction be issued by a district judge in any case, where the party has had a reasonable time to apply to the circuit court for the writ. An injunction may be issued by the district judge under the act of March 3d, 1820, § 4, 5, where proceedings have taken place by warrant and distress against a debtor to the United States or his sureties, subject by § 6, to appeal to the circuit court from the decision of such district judge in refusing or dissolving the injunction, if such appeal be allowed by a justice of the supreme court. On which, with an exception as to the necessity of an answer on the part of the United States, the proceedings are to be as in other cases. The act of 24th September, 1789, § 14, vests in the judges of the district courts, power to grant writs of habeas corpus, for the purpose of an inquiry into the cause of commitment. Other acts give them powers to issue writs, make rules, take depositions, &c. The acts of congress already treated of relating to the privilege of not being sued out of the district of which the defendant is an inhabitant or in which he is found, restricting suits by assignees, and various others, apply to the district court as well as to the circuit court. By the 9th section of the act of September 24th, 1789, the trial of issues in fact in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury. Serg. Const. Law, 226, 227.

(2.) *The criminal jurisdiction of the district court.*

[70] By the act of August 23d, 1842, § 3, it is enacted that the district courts of the United States shall have concurrent jurisdiction with the circuit courts, of all crimes and offences against the United States, the punishment of which is not capital.

[71] There is a class of district courts of a peculiar description. These exercise the power of a circuit court, under the same regulations as they were formerly exercised by the district court of Kentucky, which was the first of the kind. The act of September 24th, 1789, § 10, gives the district court of the Kentucky district, besides the usual jurisdiction of a district court, the jurisdiction of all causes, except of appeals and writs of error, therein after made cognisable in a circuit court, and writs of error and appeals were to lie from decisions therein to the supreme court, and under the same regulations. By the 12th section, authority was given to remove cases from a state court to such court, in the same manner as to a circuit court.

3. *The territorial courts.*

[72] These courts have been established in the several territories of the United States to administer justice there. They are as follows:

§ 1. In Florida, the judicial power is vested in two superior courts and such inferior courts and justices of the peace, as the legislative council of the territory may establish. These will be separately considered, by taking a view of the superior courts, 1st, Of their organization; and, 2d, Of their jurisdiction. (1.) There is one superior court for East Florida, to consist of one judge, appointed by the president, by and with the advice and consent of the senate, who holds his office for four years. The other superior court is for West Florida, to consist of one judge, to be appointed by the same authority, and to hold his office for the same period. (2.) Each court has jurisdiction in all criminal cases, and exclusive jurisdiction in all capital cases, and original jurisdiction in all civil cases of the value of one hundred dollars, arising under, or cognisable by the laws of the territory. Each superior court has also the same jurisdiction within its limits, in all cases arising under the laws and

constitution of the United States, which by the act of September 24th, 1789, was vested in the court of Kentucky district. (See above, [71].)

[73] § 2. In Wisconsin the judicial power is vested in a supreme court, district courts, probate courts and in justices of the peace. Act of April 20, 1836, § 9; 4 Sharsw. cont. of Story's L. U. S. 2426. The supreme court shall consist of a chief justice and two associate judges, any two of whom shall be a quorum, and who shall hold a term at the seat of government of the said territory, annually; and they shall hold their offices during good behaviour. The said territory shall be divided into three judicial districts; and a district court or courts shall be held in each of the three districts, by one of the judges of the supreme court, at such times and places as may be prescribed by law. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts, and of the justices of the peace, shall be as limited by law: *Provided, however*, That justices of the peace shall not have jurisdiction of any matter of controversy, when the title or boundaries of land may be in dispute, or where the debt or sum claimed exceeds fifty dollars. And the said supreme and district courts, respectively, shall possess chancery as well as common law jurisdiction. Each district court shall appoint its clerk, who shall keep his office at the place where the court may be held; and the said clerks shall also be the registers in chancery; and any vacancy in said office of clerk happening in the vacation of said court, may be filled by the judge of said district, which appointment shall continue until the next term of said court. And writs of error, bills of exception, and appeals in chancery causes, shall be allowed in all cases from the final decisions of the said district courts to the supreme court, under such regulations as may be prescribed by law; but in no case removed to the supreme court, shall a trial by jury be allowed in said court. The supreme court may appoint its own clerk; and every clerk shall hold his office at the pleasure of the court by which he shall have been appointed. And writs of error and appeals from the final decisions of the said supreme court shall be allowed and taken to the supreme court of the United States, in the same manner, and under the same regulations, as from the circuit courts of the United States, where the value of the property, or the amount in controversy, to be ascertained by the oath or affirmation of either party, shall exceed one thousand dollars. And each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States. And the first six days of every term of the said courts, or so much thereof as shall be necessary, shall be appropriated to the trial of causes arising under the said constitution and laws. And writs of error, and appeals from the final decisions of the said courts, in such cases, shall be made to the supreme court of the territory, in the same manner as in other cases. The said clerks shall receive, in all such cases, the same fees which the clerk of the district court of the United States in the northern district of the state of New York receives for similar services.

[74] And by the tenth section it is enacted, that there shall be an attorney for the said territory appointed, who shall continue in office four years, unless sooner removed by the president, and who shall receive the same fees and salary as the attorney of the United States for the Michigan territory. There shall also be a marshal

for the territory appointed, who shall hold his office for four years, unless sooner removed by the president, who shall execute all process issuing from the said courts when exercising their jurisdiction as circuit and district courts of the United States. He shall perform the same duties, be subject to the same regulations and penalties, and be entitled to the same fees, as the marshal of the district court of the United States for the northern district for the state of New York; and shall, in addition, be paid the sum of two hundred dollars, annually, as a compensation for extra services.

[75] § 3. The act of June 12, 1838, to establish the territorial government of Iowa, enacts, section 9, that the judicial power of the said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. The supreme court shall consist of a chief justice, and two associate judges, any two of whom shall be a quorum, and who shall hold a term at the seat of government of the said territory annually, and they shall hold their offices during the term of four years. The said territory shall be divided into three judicial districts; and a district court or courts shall be held in each of the three districts, by one of the judges of the supreme court, at such times and places as may be prescribed by law; and the said judges shall, after their appointment, respectively, reside in the districts which shall be assigned to them. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts, and of the justices of the peace, shall be as limited by law: *Provided, however*, That justices of the peace shall not have jurisdiction of any matter of controversy, when the title or boundaries of land may be in dispute, or where the debt or sum claimed exceeds fifty dollars. And the said supreme and district courts, respectively, shall possess a chancery as well as a common law jurisdiction. Each district court shall appoint its clerk, who shall keep his office at the place where the court may be held; and the said clerks shall also be the registers in chancery; and any vacancy in said office of clerk happening in the vacation of said court, may be filled by the judge of said district, which appointment shall continue until the next term of said court. And writs of error, bills of exception, and appeals in chancery causes shall be allowed in all cases, from the final decisions of the said district courts to the supreme court under such regulations as may be prescribed by law; but in no case removed to the supreme court shall trial by jury be allowed in said court. The supreme court may appoint its own clerk, and every clerk shall hold his office at the pleasure of the court by which he shall have been appointed. And writs of error and appeals from the final decisions of the said supreme court shall be allowed and taken to the supreme court of the United States, in the same manner and under the same regulations as from the circuit court of the United States, where the value of the property, or the amount in controversy, to be ascertained by the oath or affirmation of either party, shall exceed one thousand dollars. And each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States, as is vested in the circuit and district courts of the United States. And the first six days of every term of the said courts, or so much thereof as shall be necessary, shall be appropriated to the trial of causes arising under the said constitution and laws. And writs of errors and appeals from the final decisions of the said courts, in all such cases, shall be made to the

supreme court of the territory, in the same manner as in other cases. The said clerks shall receive in all such cases, the same fees which the clerk of the district courts of Wisconsin territory now receives for similar services.

[76] And by the tenth section it is enacted, that there shall be an attorney for the said territory appointed, who shall continue in office four years, unless sooner removed by the president, and who shall receive the same fees and salary as the attorney of the United States, for the present territory of Wisconsin. There shall also be a marshal for the territory appointed, who shall hold his office for four years, unless sooner removed by the president, who shall execute all process issuing from the said courts when exercising their jurisdiction as circuit and district courts of the United States. He shall perform the same duties, be subject to the same regulations and penalties, and be entitled to the same fees, as the marshal of the district court of the United States for the present territory of Wisconsin; and shall, in addition, be paid the sum of two hundred dollars annually, as a compensation for extra services.

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COURT OF ADMIRALTY, is a court having jurisdiction of all maritime causes. Vide *Admiralty; Courts of the United States; Instance Court; Prize Court.* 2 Chit. Pr. 508 to 538.

COURT OF AUDIENCE, *Eng. eccl. law*, the name of a court kept by the archbishop in his palace, in which are transacted matters of form only; as confirmation of bishops, elections, consecrations, and the like.

COURT OF COMMON PLEAS. The name of an English court which was established on the breaking up of the *aula regis* for the determination of pleas merely civil. It was at first ambulatory, but was afterwards located. This jurisdiction is founded on original writs issuing out of chancery, in the cases of common persons. But when an attorney or person belonging to the court, is plaintiff, he sues by writs of privilege, and is sued by bill, which is in the nature of a petition; both which originate in the common pleas. There are courts in most of the states of the United States which bear the name of common pleas; they have various powers and jurisdictions.

COURT OF CONSCIENCE, *Eng. law.* The name of a court in London. It has equity jurisdiction in certain cases. The reader is referred to Bac. Ab. Courts in London, 2.

COURT OF CONVOCATION, *eccles. law*, is the name of an English ecclesiastical court. It is composed of every bishop, dean and archdeacon, a proctor for the chapter, and two proctors for the clergy of each diocese in the province of Canterbury; for the province of York, there are two proctors for each archdeaconry. This assembly meet at the time appointed in the king's writ, and constitute an ecclesiastical parliament. The archbishop and his suffragans, as his peers, are sitting together, and composing one house, called the upper house of convocation; the deans, archdeacons, a proctor for the chapter, and two proctors for the clergy, the lower house. In this house a prolocutor, performing the duty of a president, is elected. The jurisdiction of this tribunal extends to matters of heresy, schisms, and other mere spiritual or ecclesiastical causes. Bac. Ab. Ecclesiastical Courts, A 1.

COURT OF EXCHEQUER, *Eng. law*, is a court of record anciently established for the trial of all matters relating to the revenue of the crown. Bac. Ab. h. t.

COURT OF FACULTIES, *Eng. eccl. law*. The name of a court which belongs to the archbishop, in which his officer, called *magister ad facultates*, grants dispensations to marry, to eat flesh on days prohibited, to ordain a deacon under age, and the like. 4 Inst. 337.

COURT OF KING'S BENCH. Vide *King's Bench*.

COURT OF PECULIARS. *Eng. eccl. law*. The name of a court, which is a branch of, and annexed to, the court of arches. It has jurisdiction over all those parishes dispersed through the province of Canterbury, in the midst of other dioceses. In the other peculiars, the jurisdiction is exercised by commissaries. 1 Phill. R. 202, n. There are three sorts of peculiars; 1. Royal peculiars. 3 Phill. R. 245. 2. The second sort are those in which the bishop has no concurrent jurisdiction, and are exempt from his visitation. 3. The third are subject to the bishop's visitation, and liable to his superintendence and jurisdiction. 3 Phill. R. 246; Skinn. R. 589.

COURT, PREROGATIVE. Vide *Prerogative Court*.

COURT, SUPREME. Vide *Courts of the United States*.

COUSIN, *domest. rel.* Cousins are kindred who are the issue of two brothers or two sisters, or of a brother and a sister. Those who descend from the brother or sister of the father of the person spoken of are called paternal cousins; maternal cousins are those who are descended from the brothers or sisters of the mother. Vide 2 Bro. C. C. 125; 1 Sim. & Stu. 301; 3 Russ. C. C. 140; 9 Sim. R. 386, 457.

COVENANT, *remedies*. The name of an action instituted for the recovery of damages for the breach of a covenant or promise *under seal*. 2 Ld. Raym. 1536; F. N. B. 145; Com. Dig. Pleader, 2 V 2; Ib. Covenant, A 1. The subject will be considered with reference, 1, to the kind of claim or obligation on which this action may be maintained; 2, The form of the declaration; 3, The plea; 4, The judgment.

1. To support this action, there must be a breach of a promise under seal. Such promise may be contained in a deed-poll, or indenture, or be express or implied by law from the terms of the deed; or for the performance of something *in futuro*, or that something has been done; or in some cases, though it relate to something *in presenti*, as that the covenantor has a good title. 2 Saund. 181, b. Though, in general, it is said that covenant will not lie on a contract *in presenti*, as on a cove-

nant to stand seized, or that a certain horse shall henceforth be the property of another. Plowd. 308; Com. Dig. Covenant, A 1; 1 Chit. Pl. 110. The action of covenant is the peculiar remedy for the non-performance of a promise under seal, where the damages are *unliquidated*, and depend in amount on the opinion of a jury, in which case neither debt nor assumpsit can be supported. When the breach of the covenant amounts to misfeasance, the covenantee has an election to proceed by action of covenant, or by action on the case for a tort, as against a lessee, either during his term or afterwards for waste. 2 Bl. R. 1111; 2 Bl. R. 848; but this has been questioned. When the contract under seal has been enlarged by parol, the substituted will be considered, together with the original agreement, as a simple contract. 2 Watts's R. 451; 1 Chit. Pl. 96; 3 T. R. 590.

2. The declaration must state that the contract was under seal; and it should make profert of it, or show some excuse for the omission, 3 T. R. 151. It is not in general requisite to state the consideration of the defendant's promise, because a contract under seal usually imports a consideration; but when the performance of the consideration constitutes a condition precedent, such performance must be averred. So much only of the deed and covenant should be set forth as is essential to the cause of action: although it is usual to declare in the words of the deed, each covenant may be stated as to its legal effect. The breach may be in the negative of the covenant generally, 4 Dall. R. 436, or according to the legal effect, and sometimes in the alternative; and several breaches may be assigned at common law. Damages being the object of the suit, should be laid sufficient to cover the real amount. Vide 3 Serg. & Rawle, 364; 4 Dall. R. 436; 2 Yeates's R. 470; 3 Serg. & Rawle, 564, 567; 9 Serg. & Rawle, 45.

3. It is said that strictly there is no general issue in this action, though the plea of *non est factum*, has been said by an intelligent writer to be the general issue. Steph. Pl. 174; but this plea only puts in issue the fact of sealing the deed. 1 Chit. Pl. 116. *Non infregit conventionem*, and *nil debet*, have both been held to be insufficient. Com. Dig. Pleader, 2 V 4. In Pennsylvania, by a practice peculiar to that state, the defendant may plead *covenants performed*, and under this plea, upon notice to the plaintiff, without form, he may give any thing in evidence which he might have pleaded. 4 Dall. 439; 2 Yeates, 107; 15 Serg. & Rawle, 105. And this evidence may be given without notice, unless called for. 2 W. C. C. R. 456.

4. The judgment is that the plaintiff recover a named sum for his damages, which he has sustained by reason of the breach or breaches of covenant, together with costs.

COVENANT, *contracts*. A covenant in its most general signification, means any kind of promise or contract, whether it be made in writing or by parol. Hawk. P. C. b. 1, c. 27, § 7, s. 4. In a more technical sense, and the one in which it is here considered, a covenant is an agreement between two or more persons, entered into in writing and under seal, whereby either party stipulates for the truth of certain facts, or promises to perform or give something to the other, or to abstain from the performance of certain things. 2 Bl. Com. 303, 4; Bac. Ab. Covenant, 4 Cruise, 446; Sheppard, Touchs. 160; 1 Harring. 151, 233; 1 Bibb, 379; 2 Bibb, 614; 3 John. 44; 20 John. 85; 4 Day, 321. It differs

from an express assumpsit in this, that the former may be verbal, or in writing not under seal, while the latter must always be by deed. In an assumpsit, a consideration must be shown; in a covenant no consideration is necessary to give it validity, even in a court of equity, Plowd. 308; 7 T. R. 447; 4 Barn. & Ald. 652; 3 Bingh. 111.

It is proposed to consider, first, the general requisites to make a covenant; and secondly, the several kinds of covenants.

§ 1. The general requisites are, 1st, proper parties; 2dly, an agreement; 3dly, a legal purpose; 4thly, a proper form.

1st. The parties must be such as by law they can enter into a contract. If either for want of understanding, as in the case of an idiot or lunatic; or in the case of an infant, where the contract is not for his benefit; or where there is understanding, but owing to certain causes, as coverture in the case of a married woman, or duress, in every case, the parties are not competent, they cannot bind themselves. See *Parties to Actions*.

2dly. There must be an agreement. The assent or consent must be mutual; for the agreement would be incomplete if either party withheld his assent to any of its terms. The assent of the parties to a contract necessarily supposes a free, fair, serious exercise of the reasoning faculty. Now, if from any cause, this free assent be not given, the contract is void. See *Consent*.

3dly. A covenant against any positive law, or public policy, is generally void. See *Nullity;* Shep. Touchs. 163. As an example of the first is a covenant by one man that he will rob another; and of the last, a covenant by a merchant or tradesman that he will not follow his occupation or calling. This, if it be unlimited, is absolutely void; but, if the covenant be that he shall not pursue his business in a particular place, as, that he will not trade in the city of Philadelphia, the covenant is no longer against public policy. See Shep. Touchs. 164. A covenant to do an impossible thing is also void. Ib.

4thly. To make a covenant, it must, according to the definition above given, be by deed, or under seal. The law does not seem to have appropriated any set of words, absolutely required in creating a covenant. Any words which manifest the intention of the parties, to perform an act are sufficient. See numerous examples in Bac. Abr. Covenant, (A); Selw. N. P. 469; Com. Dig. Covenant, A 2; 3 Johns. R. 44; 5 Munf. 483. In Pennsylvania, Delaware, and Missouri, it is declared by statute that the words *grant*, *bargain*, and *sell* shall amount to a covenant that the grantor was seised of an estate in fee, free from all incumbrances done or suffered by him, and for quiet enjoyment against his acts. But it has been adjudged that those words in the Pennsylvania statute of 1715, (and the decision will equally apply to the statutory language in the other two states,) did not amount to a general warranty, but merely to a covenant that the grantor had not done any act, nor created any incumbrance whereby the estate might be defeated, 2 Binn. 95; 4 Kent, Com. 460.

§ 2. The several kinds of covenants. They are,

1. Express or implied. 1. An *express* covenant, or a covenant in fact, is one expressly agreed between the parties and inserted in the deed. 2. An *implied* or covenant in law, is one which the law intends and implies, though it be not expressed in words; as if a lessor demise and grant to his lessee a house or lands

for a certain term, the law will intend a covenant on the lessor's part, that the lessee shall during the term, quietly enjoy the same against all incumbrances. Co. Litt. 384; Bac. Abr. Covenant, (B).

2. Real and personal. 1. Covenants *real* are such as are annexed to estates, and descend to the heirs of the covenantee; such covenants are said to run with the land, so that he that has the one is subject to the other. Bac. Abr. Covenant, E 2. A covenant of warranty, and the covenant for quiet enjoyment are in the nature of real covenants. 4 Kent, Com. 459. 2. A *personal* covenant is one annexed to the person, as if a man covenants to serve another, F. N. B. 340, A.

3. Dependent and independent. 1. Those covenants are *dependent*, in which the performance of one depends on the prior performance of the other; and, therefore, till this prior condition is performed, the other party is not liable to an action on his covenant. 8 Serg. & Rawle, 268. 2. Covenants are *independent*, when either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favour, and when it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. 2 W. C. C. Rep. 456. There is also a sort of covenants which are mutual conditions to be performed at the same time; and, in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered, has fulfilled his engagement, and may maintain an action for default of the other, though it is not certain that either is obliged to perform the first act. Dougl. 688.

Covenants are to be construed to be either dependent or independent of each other, according to the intention and meaning of the parties, and the good sense of the case; and technical words should give way to such intention. 1 T. R. 645; 6 T. R. 668, 571; 7 T. R. 130; 1 Saund. 320, n. 4.

COVENANT, AFFIRMATIVE. An affirmative covenant is one by which the covenantor binds himself that something has already been done or shall be performed hereafter. Such a covenant will not deprive a man of a right lawfully enjoyed by him independently of the covenant; as if the lessor agreed with the lessee that he shall have thorns for hedges growing upon the land, by assignment of the lessor's bailiff; here no restraint is imposed upon the exercise of that liberty which the law allows to the lessee, and therefore he may take hedge-bote without assignment. Dy. 19 b, pl. 115; 1 Leon. 251.

COVENANTS, *in the disjunctive or alternative*, are those which give the covenantor the choice of doing, or the covenantee the choice of having performed one of two or more things at his election; as a covenant to make a lease to Titus, or pay him one hundred dollars on the fourth day of July, as the covenantor, or the covenantee, as the case may be, shall prefer. Platt on Cov. 21.

COVENANTS, COLLATERAL. Collateral covenants are such as concern some collateral thing, which does not at all, or not so immediately relate to the thing granted; as, to pay a sum of money in gross, that the lessor shall distrain for rent, on some other land than that which is demised, or the like. Touchs. 161; 4 Burr. 2446; 2 Wils. R. 27; 1 Ves. R. 56. These covenants are also termed covenants in gross. Vide 5 Barn. & Ald. 7, 8; Platt on Cov. 69, 70.

COVENANTS, CONCURRENT. Concurrent covenants are

those which are to be performed by the parties to each other at the same time. When, in these cases, 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 he is obliged to do the first act. 4 Wash. C. C. Rep. 714; 2 Selw. N. P. 443.

COVENANTS DECLARATORY are those which serve to limit and direct uses. 1 Sid. 27.

COVENANT, DEPENDENT. A dependent covenant is one which it is not the duty of the covenantor to perform, until some other covenant, contained in the same agreement, has been performed by the opposite party. When covenants are dependent or concurrent the covenantee is not entitled to recover for the breach of such a covenant until after he has performed the covenants on his part. 4 Wash. C. C. Rep. 714. Vide 2 Dougl. R. 689; Lofft, 194; Platt on Cov. 71; 2 Selw. N. P. 443, 444. To ascertain whether covenants are dependent or not, the intention of the parties is to be discovered, rather than the order or time in which the acts are to be done, the structure of the instrument, or the arrangement of the covenants. 4 Wash. C. C. R. 714, 715; Willis, 157; 7 T. R. 130; 8 T. R. 366; 5 Bos. & Pull. 233; 1 Saund. 320, note 4; Dougl. 690; 4 Watts, R. 26; 2 Johns. R. 145.

COVENANT, EXECUTED.—Where the covenant relates to an act already done, it is called a covenant executed. Shep. Touch. 161.

COVENANT, EXECUTORY.—An executory covenant is one to be performed at a future time. Shep. Touch. 161.

COVENANT, EXPRESS; express covenants are such as are created by the express words of the parties, in a deed, declaratory of their intentions. The law does not require any particular form to create an express covenant. The formal word "covenant" is not indispensably necessary, 2 Mod. 268; 3 Keb. 848; 1 Leon. 324; 1 Bing. 433; 8 J. B. Moore, 546; 1 Ch. Cas. 294; 16 East, 352; 12 East, 182, n. The words "I oblige," "agree," 1 Ves. 516; 2 Mod. 266; or, "I bind myself to pay so much such a day, and so much at another day," Hardr. 178; 3 Leon. 119, pl. 199, are held to be covenants, and so are the words of a bond, 1 Ch. Cas. 194. But words merely importing an order or direction that other persons should pay a sum of money are not a covenant. 6 J. B. Moore, 202, n. (a)

COVENANT, INHERENT.—Inherent covenants are such as are made in relation to land; as that the thing demised shall be quietly enjoyed; shall be kept in repair; shall not be aliened, or, if sold, that the lessor shall have the first refusal; to make further assurances and the like. Touchs. 161.

COVENANTS, IMPLIED. Implied covenants depend for their existence on the intendment and construction of law. There are some words which of themselves do not import an express covenant, yet being made use of in certain contracts have a similar operation and are called covenants in law; and are as effectually binding on the parties, as if expressed in the most unequivocal terms. Bac. Abr. Covenant, B. A few examples will be given of words on which implied covenants may be raised. If a lease for years be made by any of the following words, "grant," 1 Mod. 113; Freem. 367; Cro. Eliz. 214; 5 B. & Co. 609; 4 Taunt. 609; "grant and demise," 4 Wend. 502; "*demisi*," 10 Mod. 162; 4 Co. 80; Hob. 12; or, "*de-*

miserunt," 1 Show. 79; 1 Salk. 137. By legislative enactment in Pennsylvania the words "grant, bargain, and sell," shall be adjudged an express covenant to the grantee, his heirs and assigns; to wit, that the grantor was seized of an indefeasible estate in fee simple, freed from incumbrances done or suffered from the grantor, (excepting the rents and services due to the lord of the fee) as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed, and that the grantee, his heirs, executors, and assigns, may in any action assign breaches, as if such covenants were expressly inserted. Act of 28 May, 1715, s. 6; 2 Binn. 99; 4 Dall. 441; 4 Kent, Com. 460.

COVENANT, JOINT. A joint covenant is one by which several parties agree to perform or do a thing together. In this case although there are several covenantors there is but one contract, and if the covenant be broken, all the covenantors living must be sued; as there is not a separate obligation of each, they cannot be sued separately.

COVENANTS, MUTUAL or INDENDENT. Mutual or independent covenants are those entered into by the parties to an agreement towards each other, which each is bound to perform towards the other, notwithstanding the opposite party may not have fulfilled his. Platt on Cov. 71.

COVENANT, NEGATIVE. A negative covenant is one where the party binds himself that he has not performed and will not perform a certain act; as, that he will not encumber. Such a covenant cannot be said to be performed until it becomes impossible to break it. On this ground the courts are unwilling to construe a covenant of this kind to be a condition precedent. Therefore, where a tailor assigned his trade to the defendant and covenanted thenceforth to desist from carrying on the said business with any of the customers, and the defendant, in consideration of the performance thereof, covenanted to pay him a life annuity of 100*l*., it was held that if the words *in consideration of the performance thereof*, should be deemed to amount to a condition precedent, the plaintiff would never obtain his annuity; because as at any time during his life he might exercise his former trade, until his death it could never be ascertained whether he had performed the covenant or not. 2 Saund. 156; 1 Sid. 464; 1 Mod. 64; 2 Keb. 674. The defendant, however, on a breach by plaintiff, might have his remedy by a cross-action of covenant. There is also a difference between a negative covenant, which is only in affirmance of an affirmative covenant precedent, and a negative covenant which is additional to the affirmative covenant. 1 Sid. 87; 1 Keb. 334, 372. To a covenant of the former class a plea of performance generally is good, but not to the latter; the defendant in that case must plead specially. Ibid.

COVENANT NOT TO SUE. This is a covenant entered into by a party who had a cause of action at the time of making it, and by which he agrees not to sue the party liable to such action. Covenants of this nature, are either covenants perpetual not to sue, or covenants not to sue for a limited time; for example, seven years.

§ 1. Covenants perpetual not to sue. These will be considered with regard to their effect as relates, 1, to the covenantee; 2, to his partners or co-debtors.

1. A covenant not to sue the covenantee at all, has the effect of a release to him, and may be pleaded as such to avoid a circuity of action.

Cro. Eliz. 623; 1 T. R. 446; 8 T. R. 486; 1 Ld. Raym. 688; S. C. Holt, 178; 2 Salk. 575; 3 Salk. 298; 12 Mod. 415, 548. And see 11 Serg. & Rawle, 149.

2. Where the covenantee is jointly and *severally* bound with another to the covenantor, a covenant to sue him will be no protection to the other who may be sued on his several obligations, and such a covenant does not amount to a release to him. 2 Salk. 575; S. C. 12 Mod. 551; 8 T. R. 168; 6 Munf. 6; 8 T. R. 168; 1 Com. 139. A covenant not to sue, entered into by only one of several partners, cannot be set up as a release in an action by all the partners. 3 P. & D. 149.

§ 2. Covenant not to sue for a limited time.

Such a covenant does not operate as a release, nor can it be pleaded as such, but is a covenant only for a breach of which the obligor may bring his action. Carth. 63; 1 Show. 46; Comb. 123, 4; 2 Salk. 573; 6 Wend. 471.

COVENANT, PERSONAL. A personal covenant relates only to matters personal, as distinguished from real, and is binding on the covenantor during his life, and on his personal representatives after his decease, in respect of his assets. According to Sir William Blackstone, a personal covenant may be transformed into a real covenant by the mere circumstance of the heir's being named therein, and having assets by descent from the covenantor. A covenant is personal in another sense, where the covenantor is bound to fulfil the covenant himself personally, as to teach an apprentice. Platt on Cov. 66, 7. Personal covenants are also said to be transitive and intransitive; the former, when the duty of performing them passes to the covenantor's representatives; the latter when it is limited to himself. Bac. Ab. h. t.

COVENANT, REAL, is one which has for its object something annexed to, or inherent in, or connected with land, or other property. Co. Litt. 384; Jenk. 241; Cruise, Dig. tit. 32, c. 25, s. 22. A covenant real, runs with the land, and descends to the heir; it is also transferred to a purchaser. Bac. Ab. Covenant (E). But see the distinctions and definitions made by Mr. Platt. Platt on Cov. 62.

COVENANT, SEVERAL. A several covenant is one entered into by one person only. It frequently happens that a number of persons enter into the same contract, and that each binds himself to perform the whole of it, in such case, when the contract is under seal, the covenantors are severally bound for the performance of it. The terms usually employed to make a several covenant are "severally," or "each of us." In practice, it is common for the parties to bind themselves jointly and severally, and then the covenant is both joint and several. Vide Hamm. on Parties, 19; Cruise, Dig. tit. 32, c. 25, s. 18; Bac. Ab. Covenant (D).

COVENANT TO STAND SEISED TO USES, is a species of conveyance which derives its effect from the statute of uses, and operates without transmutation of possession. By this conveyance, a person seised of lands, covenants that he will stand seised of them to the use of another. On executing the covenant, the other party becomes seised of the use of the land, according to the terms of the use; and the statute immediately annexes the possession to the use. This conveyance has the same force and effect as a common deed of bargain and sale; the great distinction between them is, that the former can only be made use of among near domestic relations, for it must be founded on the considera-

tion of blood or marriage. 2 Bl. Com. 338; 4 Kent, Com. 480; Lilly's Reg. h. t.; 1 Vern. by Raithby, 40, n.; Cruise, Dig. tit. 32, c. 10. 11 John. R. 337; 1 John. Cas. 91; 7 Pick. R. 111; 1 Hayw. R. 251, 259. 271 note; 1 Conn. R. 354; 20 John. R. 85; 4 Mass. R. 135; 4 Hayw. R. 229; 1 Cowen, R. 622; 3 N. H. Rep. 234; 16 John. R. 515; 9 Wend. R. 641; 7 Mass. R. 384.

COVENANTS OBLIGATORY, are those which shall never be construed to raise a use. 1 Sid. 27.

COVENANTS PERFORMED, *pleading*. In Pennsylvania, the defendant may plead covenants performed to an action of covenant, and upon this plea, upon notice to the plaintiff, without form, he may give any thing in evidence which he might have pleaded. 4 Dall. 439; 2 Yeates, 107; 15 S. & R. 105. And this evidence may be given without notice unless called for. 2 Wash. C. C. R. 456.

COVENTRY ACT, *criminal law*, is the common name for the statute 22 & 23 Car. II. c. 1; it having been enacted in consequence of an assault on Sir John Coventry in the street, and slitting his nose in revenge, as was supposed, for some obnoxious words uttered by him in parliament. By this statute it is enacted, that if any person shall, of malice aforethought, and by laying in wait, unlawfully cut or disable the tongue, put out an eye, slit the nose, cut off the nose or lip, or cut off or disable any limb, or member of any other person, with intent to maim or disfigure him; such persons, his counsellors, aiders and abetters, shall be guilty of felony, without benefit of clergy; 4 Bl. Com. 207. This statute is copied by the act of the legislature of Pennsylvania, of the 22d April, 1794, s. 6, 3 Smith's Laws of Pa. 188, and punished by fine and imprisonment. For the act of Connecticut, see 2 Swift's Dig. 293.

COVERT, BARON, a wife so called, from her being under the cover or protection of her husband, baron or lord.

COVERTURE. The state or condition of a married woman. During coverture, the being of the wife is merged, for many purposes, into that of her husband, she can, therefore, in general, make no contracts without his consent, express or implied. Com. Dig. Baron and Feme, W; Pleader, 2 A 1; 1 Ch. Pl. 19, 45; Litt. s. 28; Chit. Contr. 39. To this rule there are some exceptions; she may contract, when it is for her benefit, as to save her from starvation. Chit. Contr. 40. In some cases, when coercion has been used by the husband to induce her to commit crime, she is exempted from punishment. 1 Hale, P. C. 516; 1 Russ. Cr. 16.

COVIN, *fraud*, is a secret contrivance between two or more persons to defraud and prejudice another of his rights. Co. Litt. 357, b; Com. Dig. Covin, A; 1 Vin. Abr. 473; vide *Collusion; Fraud.*

COW. A well known animal. In a penal statute which mentions both cows and heifers, it was held that by the term cow, must be understood one that had had a calf. 2 East, P. C. 616; 1 Leach, 105.

COWARDICE. Pusillanimity; fear. By the act for the better government of the navy of the United States, passed April 21, 1800, 1 Story, L. U. S. 761, it is enacted, art. 5, "every officer or private who shall not properly observe the orders of his commanding officer, or shall not use his utmost exertions to carry them into execution, when ordered to prepare for, join in, or when actually engaged in, battle; or shall, at such time, basely desert his duty or station, either then, or while in sight of an enemy, or shall induce others to

do so, every person so offending shall, on conviction thereof by a general court martial, suffer death, or such other punishment as the said court shall adjudge. Art. 6. Every officer or private who shall, through cowardice, negligence, or disaffection, in time of action, withdraw from, or keep out of, battle, or shall not do his utmost to take or destroy every vessel which it is his duty to encounter, or shall not do his utmost endeavour to afford relief to ships belonging to the United States, every such offender shall, on conviction thereof by a general court martial, suffer death, or such other punishment as the said court shall adjudge." By the act for establishing rules and articles for the government of the armies of the United States, passed April 10, 1806, it is enacted, art. 52, "any officer or soldier, who shall misbehave himself before the enemy, run away, or shamefully abandon any fort, post, or guard, which he or they may be commanded to defend, or speak words inducing others to do the like; or shall cast away his arms and ammunition, or who shall quit his post or colours to plunder and pillage, every such offender, being duly convicted thereof, shall suffer death, or such other punishment as shall be ordered by the sentence of a general court martial."

CRANAGE. A toll paid for drawing merchandize out of vessels to the wharf, so called because the instrument used for the purpose is called a crane. 8 Co. 46.

CRAVEN. A word of obloquy, which in trials by battel, was pronounced by the vanquished; upon which judgment was rendered against him.

CREDENTIALS, *international law*, are the instruments which authorise and establish a public minister in his character with the state or prince to whom they are addressed. If the state or prince receive the minister, he can be received only in the quality attributed to him in his credentials. They are, as it were, his letter of attorney, his mandate patent, mandatum manifestum. Vattel, liv. 4, c. 6, § 76.

CREDIBILITY, worthiness of belief. To entitle a witness to credibility, he must be competent. Vide *Competency*. Human testimony can never acquire the certainty of demonstration. Witnesses not unfrequently are mistaken or wish to deceive; the most that can be expected is that moral certainty which arises from analogy. The credibility which is attached to such testimony, arises from the double presumption that the witnesses have good sense and intelligence, and that they are not mistaken or deceived; they are further presumed to have probity, and that they do not wish to deceive. To gain credibility, we must be assured, first, that the witness has not been mistaken nor deceived; to be assured as far as possible on this subject, it is proper to consider the nature and quality of the facts proved; the quality and person of the witness; the testimony in itself; and to compare it with the depositions of other witnesses on the subject, and with known facts. Secondly, we must be satisfied that he does not wish to deceive; there are strong assurances of this, when the witness is under oath, is a man of integrity, and disinterested. Vide Arch. Civ. Pl. 444; 5 Com. Dig. 449; 8 Watts, R. 227; *Competency*.

CREDIT, *com. law*, *contracts*, is the ability to borrow on the opinion conceived by the lender that he will be repaid; this definition includes the effect and the immediate cause of credit; the debt due in consequence of such a contract is also called a credit, as, administrator of all the goods, chattels, effects and *credits*,

&c. The time extended for the payment of goods sold, is also called a credit; as, the goods were sold at six months' credit. In commercial law, credit is understood as opposed to debit; credit is what is due to a merchant, debit, what is due by him. According to M. Duvergier, credit also signifies that influence acquired by intrigue connected with certain social positions. 20 Toull. n. 19. This last species of credit is not of such value as to be the object of commerce. Vide, generally, 5 Taunt. R. 338.

CREDITOR, *persons, contracts.* A creditor is he who has a right to require the fulfilment of an obligation or contract. Creditors may be divided into personal and real. The former are so called, because their claims are mainly against the person, and who affect the property of their debtors only by virtue of the general rule by which he who has become personally obligated, is bound to fulfil his engagements, with all his property, acquired and to be acquired, which is a common guaranty for all his creditors. The latter are called real, because they have mortgages or other securities binding on the real estates of their debtors. It is proper to state that personal creditors may be divided in two classes: first, those who have a right on all the property of their debtors, without considering the origin, or the nature of their claims; secondly, those who, in consequence of some provision of law, are entitled to some special prerogative, either in the manner of recovery, or in the rank they are to hold among creditors; these are entitled to preference. As an example, may be mentioned the case of the United States, when they are creditors, they have always a preference in case of insolvent estates.

A creditor sometimes becomes so, unknown to his debtor, as is the case when the former receives an assignment of commercial paper, the title to recover which may be conveyed either by endorsement, or, in some cases, by mere delivery. But in general, it is essential there should be a privity of contract between the parties. Vide, generally, 7 Vin. Ab. 42; 3 Com. Dig. 343; 8 Com. Dig. 388; 1 Supp. to Ves. Jr. 302; 2 Supp. to Ves. Jr. 305; Code, 7, 72, 6; Id. 8, 18; Dig. 42, 6, 17; Nov. 97, ch. 3.

CREEK, *mar. law*, is defined to be a place where officers commonly are or have been placed for prevention only, and which are not in general lawful places of exportation or importation without particular license from the port or member under which they are placed. 1 Chit. Com. Law, 726; Postlewaite's Com. Dict. h. t.; and see Hale's Tract. de Portibus Maris, part 2, c. 1, vol. 1, page 46. It is, according to Lord Hale, only an inlet from the sea, or a narrow passage with the shore on each side of it, within the precincts or extent of a port or without, and which gives no harbour to ships, and is endowed with no privileges. Com. Dig. Navigation, C; Callis, 34. In a more popular sense, creek signifies a small stream, less than a river. 12 Pick. R. 184.

CRETION, *civil law.* The acceptance of a succession. Cretion was an act made before a magistrate, by which an instituted heir, who was required to accept of the succession within a certain time, declared within that time, that he accepted the succession. Clef des Lois Rom. h. t.

CREW. Those persons who are employed in the navigation of a vessel. A vessel to be seaworthy must have a sufficient crew. 1 Caines, R. 32; 1 John. R. 184. In general, the master or captain (q. v.) has the selection of the crew. Vide ***Muster roll; Seaman; Ship; Shipping articles.***

CRIB-BITING. A defect in horses,

which are accustomed to biting the crib while in the stable; this is not considered as a breach of a general warranty of soundness. Holt's Cas. 630.

CRIME. A crime is an act committed or omitted in violation of a public law, either forbidding or commanding it. This word in its most general signification comprehends all offences, but in its limited sense it is confined to felony. 1 Chitty, Gen. Pr. 14; the term *misdemeanor* includes every offence inferior to felony, but punishable by indictment, or by particular prescribed proceedings. The term *offence* also may be considered as having the same meaning, but is usually, by itself, understood to be a crime not indictable but punishable summarily or by the forfeiture of a penalty. Burn's Just. Misdemeanor.

Crimes are defined and punished by statutes and by the common law. Most common law offences are as well known and as precisely ascertained as those which are defined by statutes; yet, from the difficulty of exactly defining and describing every act which ought to be punished, the vital and preserving principle has been adopted that all immoral acts which tend to the prejudice of the community are punishable by courts of justice. 2 Swift's Dig. 257. Crimes are *mala in se* or bad in themselves, these include all offences against the moral law; or they are *mala prohibita*, bad because prohibited, as being against sound policy, and which unless so prohibited would have been innocent or indifferent. Crimes may be classed into such as affect—

1. Religion and public worship; viz. blasphemy, disturbing public worship.

2. The sovereign power: treason, misprision of treason.

3. The current coin: as counterfeiting or impairing it.

4. Public justice: 1, bribery of judges or jurors, or receiving the bribe.—2. Perjury.—3. Prison breaking.—4. Rescue.—5. Barratry.—6. Maintenance.—7. Champerty.—8. Compounding felonies.—9. Misprision of felonies.—10. Oppression.—11. Extortion.—12. Suppressing evidence.—13. Negligence or misconduct in inferior officers.—14. Obstructing legal process.—15. Embracery.

5. Public peace: 1. Challenges to fight a duel.—2. Riots, routs and unlawful assemblies.—3. Affrays.—4. Libels.

6. Public trade: 1. Cheats.—2. Forestalling.—3. Regrating.—4. Engrossing.—5. Monopolies.

7. Chastity: 1. Sodomy.—2. Adultery.—3. Incest.—4. Bigamy.—5. Fornication.

8. Decency and morality: 1. Public indecency.—2. Drunkenness.—3. Violating the grave.

9. Public police and economy: 1. Common nuisances.—2. Keeping disorderly houses and bawdy houses.—3. Idleness, vagrancy and beggary.

10. Public policy: 1. Gambling. 2. Illegal lotteries.

11. Individuals: 1. Homicide, which is justifiable, excusable or felonious.—2. Mayhem.—3. Rape.—4. Poisoning, with intent to murder.—5. Administering drugs to a woman quick with child to cause miscarriage.—6. Concealing death of bastard child.—7. Assault and battery, which is either simple or with intent to commit some other crime.—8. Kidnapping.—9. False imprisonment.—10. Abduction.

12. Private property: 1. Burglary.—2. Arson.—3. Robbery.—4. Forgery.—5. Counterfeiting.—6. Larceny.—7. Receiving stolen goods, knowing them to have been stolen, or theft-bote.—8. Malicious mischief.

13. The public, individuals, or their property, according to the intent of the criminal: 1. Conspiracy.

CRIMEN FALSI, *civil law, crimes.* It is a fraudulent alteration or forgery, to conceal or alter the truth, to the prejudice of another. This crime may be committed in three ways, namely, 1, by forgery; 2, by false declarations or false oath, perjury; 3, by acts, as, by dealing with false weights and measures, by altering the current coin, by making false keys, and the like. Vide Dig. 48, 10, 22; Dig. 34, 8, 2; Code, lib. 9, t. 22, l. 2, 5, 9, 11, 16, 17, 23 and 24; Merl. Rép. h. t.; 1 Bro. Civ. Law, 426; 1 Phil. Ev. 26; 2 Stark. Ev. 715.

CRIMINAL, relating to, or having the character of crime, as, criminal law, criminal conversation, &c. It also signifies, substantively, a person convicted of a crime; as, the criminal is to be hanged.

CRIMINAL CONVERSATION, *crim. law.* This phrase is usually employed to denote the crime of adultery. It is abbreviated *crim. con.* Bac. Ab. Marriage, E 2; 4 Blackf. R. 157.

TO CRIMINATE, to accuse of a crime; to admit having committed a crime or misdemeanor. It is a rule that a witness cannot be compelled to answer any question, which has a tendency to expose him to a penalty, or to any kind of punishment, or to a criminal charge. 4 St. Tr. 6; 10 How. St. Tr. 1090; 6 St. Tr. 649; 16 How. St. Tr. 1149; 2 Dougl. R. 593; 2 Ld. Raym. 1088; 24 How. St. Tr. 720; 16 Ves. jr. 242; 2 Swanst. Ch. R. 216; 1 Cranch, R. 144; 2 Yerg. R. 110; 5 Day, Rep. 260; 1 Carr. & Payne, 11; 2 Nott & McC. 13; 6 Cowen, Rep. 254; 2 Peak. N. P. C. 105; 1 John. R. 498; 12 S. & R. 284; 8 Wend. 598. An accomplice admitted to give evidence against his associates in guilt, is bound to make a full and fair confession of the whole truth respecting the subject-matter of the prosecution, but he is not bound to answer with respect to his share in other offences, in which he was not concerned with the prisoner. 9 Cowen, R. 721, note (a); 2 Carr. & Payne, 411. Vide *Disgrace; Witness.*

CRIMINATION, is the act by which a party accused is proved to be guilty. It is a rule founded in common sense that no one is bound to criminate himself. A witness may refuse to answer a question, when the answser would criminate him, and subject him to punishment. And a party in equity is not bound to answer a bill when the answer would form a step in the prosecution. Coop. Eq. Pl. 204; Mitf. Eq. Pl. by Jeremy, 194; Story, Eq. Pl. § 591; 14 Ves. 59.

CRITICISM, is the art of examining and judging of the character of an intellectual work; usually of writings or books; when the criticism is reduced to writing, the writing itself is called a criticism. Liberty of criticism must be allowed, or there would be neither purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and advancement of science. That publication therefore is not a libel which has for its object not to injure the reputation of an individual, but to correct misrepresentations of facts, to refute sophistical reasoning, to expose a vicious taste for literature, or to censure what is hostile to morality. 1 Campb. R. 351, 2. As every man who publishes a book commits himself to the judgment of the public, any one may comment on his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. And the critic does a great service to the public who writes down any vapid or useless publication, such as ought never to have appeared; and, although the author may suffer a loss

from it, the law does not consider such loss an injury; because it is a loss which the party ought to sustain. It is the loss of fame and profit to which he was never entitled. 1 Campb. R. 358, n. See 1 Esp. N. P. Cas. 28.

CROFT, *obsolete*. A little close adjoining to a dwelling-house, and enclosed for pasture or arable, or any particular use. Jacob's Law Dict.

CROP. This word is nearly synonymous with emblements, (q. v.) As between the landlord and tenant, the former has a lien, in some of the states, upon the crop for the rent, for a limited time, and if sold on an execution against the tenant, the purchaser succeeds to the liability of the tenant, for rent and good husbandry, and the crop is still liable to be distrained. Tenn. St. 1825, c. 21; Misso. St. 377; Del. St. 1829, 366; 1 N. J. R. C. 187; Aik. Dig. 357; 1 N. Y. R. S. 746; 1 Ky. R. L. 639; 5 Watts, R. 134; 4 Griff. Reg. 671, 404; 1 Hill. Ab. 148, 9.

CROPPER, *contracts*, is one who having no interest in the land, works it in consideration of receiving a portion of the crop for his labour. 2 Rawle, R. 12.

CROSS, *contracts*, a mark made by persons who are unable to write, instead of their names. When properly attested, and proved to have been made by the party whose name is written with the mark, it is generally admitted as evidence of the party's signature.

CROSS BILLS, *practice*. When an individual prosecutes a bill of indictment against another, and the defendant procures another bill to be found against the first prosecutor, the bills so found by the grand jury are called cross bills. They most usually occur in cases of assault and battery. In chancery practice it is not unusual for parties to file cross bills. Vide *Bill, cross*.

CROSS-EXAMINATION, *practice*, is the examination of a witness by the party who did not call him. Every party has a right to cross-examine a witness produced by his antagonist, in order to test whether the witness has the knowledge of the things he testifies; and, if upon such examination, it is found that the witness had the means and ability to ascertain the facts about which he testifies, then his memory, his motives, every thing may be scrutinized by the cross-examination. In cross-examinations a great latitude is allowed in the mode of putting questions, and the counsel may put *leading questions*, (q. v.). Vide further on this subject, and for some rules which limit the abuse of this right, 1 Stark. Ev. 96; 1 Phil. Ev. 210.

The object of a cross-examination is to sift the evidence and try the credibility of a witness who has been called and given evidence in chief. It is one of the principal tests which the law has devised for the ascertainment of truth, and it is certainly one of the most efficacious. By this means the situation of the witness, with respect to the parties and the subject of litigation, his interest, his motives, his inclinations and his prejudices, his means of obtaining a correct and certain knowledge of the facts to which he testifies, the manner in which he has used those means, his powers of discerning the facts in the first instance, and of his capacity in retaining and describing them, are fully investigated and ascertained. The witness, however artful he may be, will seldom be able to elude the keen perception of an intelligent court or jury, unless indeed his story be founded on truth. When false he will be liable to detection at every step. 1 Stark. Ev. 96; 1 Phil. Ev. 227; Fortesc. Rep. pref. 2 to 4; Vaugh. R. 143.

In order to entitle a party to a

cross-examination, the witness must have been sworn and examined, for, even if the witness be asked a question in chief, yet if he make no answer, the opponent has no right to cross-examine. 1 Cr. M. & Ros. 95; 16 S. & R. 77; Rosc. Cr. Ev. 128; 3 Car. & P. 16; S. C. 14 E. C. L. Rep. 189. Formerly, however, the rule seems to have been different. 1 Phil. Ev. 211.

CRUELTY. This word has different meanings as it is applied to different things. Between husband and wife those acts which affect the life, the health, or even the comfort of the party aggrieved, and give a reasonable apprehension of bodily hurt, are called cruelty. What merely wounds the feelings is seldom admitted to be cruelty, unless the act be accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, will not amount to legal cruelty; a fortiori the denial of little indulgences and particular accommodations, which the delicacy of the world is apt to number among its necessaries, is not cruelty. These negative descriptions of cruelty are perhaps the best, under the infinite variety of cases that may occur, by showing what is not cruelty. 1 Hagg. R. 35; S. C. 4 Eccles. R. 311, 312; 2 Hagg. Suppl. 1; S. C. 4 Eccles. R. 238; 1 McCord's Ch. R. 205; 2 J. J. Marsh. R. 324; 2 Chit. Pr. 461, 489; Poynt. on Mar. & Div. c. 15, p. 208; Shelf. on Mar. & Div. 425; 1 Hagg. Cons. R. 37, 458; 2 Hagg. Cons. Rep. 154; 1 Phillim. 111, 132; 8 N. H. Rep. 307. It is to be remarked that exhibitions of passion and gusts of anger which would be sufficient to create irreconcilable hatred between persons educated and trained to respect each other's feelings, would, with persons of coarse manners and habits, have but a momentary effect. An act which towards the latter would cause but a momentary difference, would, with the former, be excessive cruelty. 1 Briand, Méd. Lég. 1ere part. c. 2, art. 3.

Cruelty towards weak and helpless persons takes place where a party bound to provide and protect them either abuses them by whipping them unnecessarily, or by neglecting to provide for them those necessaries which their helpless condition requires. To expose a person of tender years, under a party's care to the inclemency of the weather, 2 Campb. 650; or to keep such a child, of inability to provide for himself, without adequate food, 1 Leach, 137; Russ. & Ry. 20; or for an overseer neglecting to provide food and medical care to a pauper having urgent and immediate occasion for them, Russ. & Ry. 46, 47, 48, are examples of this species of cruelty.

By the civil code of Louisiana, art. 192, it is enacted, that when the master shall be convicted of cruel treatment of his slave, the judge may pronounce, besides the penalty established for such cases, that the slave shall be sold at public auction, in order to place him out of the reach of the power which his master has abused.

Cruelty to animals is an indictable offence. A defendant was convicted of a misdemeanor for tying the tongue of a calf so near the root, as to prevent its sucking, in order to sell the cow at a greater price, by giving to her udder the appearance of being full of milk, while affording her calf all he needed. 6 Rogers, City Hall Rec. 62. A man may be indicted for cruelly beating his horse. 3 Rogers, City H. Rec. 191.

CRUISE, *mar. law*, is a voyage or expedition in quest of vessels or fleets of the enemy which may be

expected to sail through any particular track of the sea, at a certain season of the year; the region in which these cruises are performed is usually termed the rendezvous or cruising latitude. When the ships employed for this purpose, which are accordingly called *cruisers*, have arrived at the destined station, they traverse the sea backwards and forward, under an easy sail, and within a limited space conjectured to be in the track of their expected adversaries. Wesk. Ins. h. t.; Lex Merc. Rediv. 271, 284; Dougl. R. 509; Park. Ins. 58; Marsh. Ins. 196, 199, 520.

CRYER, *practice.* An officer in a court whose duty it is to make various proclamations ordered by the court.

CUEILLETTE, a term in French maritime law. Affreightment of a vessel *à cueillette* is a contract by which the captain obligates himself to receive a partial cargo, only upon condition that he shall succeed in completing his cargo by other partial lading; that is, by gathering it (*en recueillant*) wherever he may be able to find it. If he fails to collect a cargo, such partial chartering is void. Code de Com. par M. Fournel, art. 286, n.

CUI ANTE DIVORTIUM. The name of an ancient writ which was issued in favour of a woman divorced from her husband to recover the lands and tenements which she had in fee simple, or in tail, or for life, from him to whom her husband alienated them during the marriage when she could not gainsay it. F. N. B. 240. Vide *Sur cui ante divortium.*

CUI IN VITA. The name of a writ of entry for a widow against a person to whom the husband had, in his life time, aliened the lands of the wife. F. N. B. 193.

CUL DE SAC. This is a French phrase which signifies literally, the bottom of a bag, and, figuratively, a street not open at both ends. It seems not to be settled whether a *cul de sac* is to be considered a highway. See 1 Camp. R. 260; 11 East, R. 376, note; 5 Taunt. R. 137; 5 B. & Ald. 456; Hawk. P. C. b. 1, c. 76, s. 1.

CULPRIT, *crim. law.* When a prisoner is arraigned and he pleads not guilty, in the English practice the clerk who arraigns him on behalf of the crown, replies that the prisoner is guilty and that he is ready to prove the accusation; this is done by two monosyllables cul. prit. Vide *Abbreviations.* 4 Bl. Com. 339; 1 Chit. Cr. Law, 416.

CUM TESTAMENTO ANNEXO, with the testament or will annexed. It often happens that the deceased although he makes a will, appoints no executor, or else the appointment fails; in either of which events he is said to die *quasi intestatus*, 2 Inst. 397. The appointment of an executor fails, 1st, when the person appointed refuses to act; 2dly, when the person appointed dies before the testator, or before he has proved the will, or when from any other legal cause he is incapable of acting; 3dly, when the executor dies intestate, (and in some places, as in Pennsylvania, whether he die testate or intestate,) after having proved the will, but before he has administered all the personal estate of the deceased. In all these cases as well as when no executor has been appointed, administration with the will annexed must be granted by the proper officer; in the case where the goods are not all administered before the death of the executor, the administration is also called an administration *de bonis non.* The office of such an administrator differs little from that of an executor. Vide Com. Dig. Administration; Will. Ex. p. 1, b. 5, c. 3, s. 1; 2 Bl. Com. 504,

5; 11 Vin. Ab. 78; Toll. 92; Gord. Law of Deced. 98.

CUMULATIVE LEGACY, vide *Legacy accumulative;* and 8 Vin. Ab. 308; 1 Supp. to Ves. jr. 133, 282, 332.

CURATE, *eccl. law.* One who represents the incumbent of a church parson or vicar, and takes care of the church, and performs divine service in his stead.

CURATOR, *persons, contracts,* is one who has been legally appointed to take care of the interests of one who on account of his youth or defect of his understanding, or for some other cause, is unable to attend to them himself. There are curators *ad bona*, of property, who administer the estate of a minor, take care of his person, and intervene in all his contracts; curators *ad litem*, of suits, who assist the minor in courts of justice, and act as curator *ad bona* in cases where the interests of the curator are opposed to the interests of the minor. Civ. Code of Louis. art. 357 to 36[8]. There are also curators of insane persons. Ib. art. 31; and of vacant successions and absent heirs. Ib. art. 1105 to 1125. The term curator is usually employed in the civil law for that of guardian.

CURATORSHIP, *offices, contracts, in the civil law*, is the power given by authority of law to one or more persons to administer the property of an individual, who is unable to take care of his own estate and affairs, either on account of his absence without an authorized agent, or in consequence of his prodigality or want of mind. Poth. Tr. des Personnes, t. 6, s. 5. As to the laws of Louisiana, which authorise a curatorship, vide Civ. Code, art 31, 50 et seq.; 357 et seq.; 382; 1105 et seq. Curatorship differs from tutorship, (q. v.) in this, that the latter is instituted for the protection of property in the first place, and secondly of the person; while the former is intended to protect first the person, and secondly the property. 1 Leçons Elem. du Droit Civ. Rom. 241.

CURE. A restoration to health. A person who had quitted the habit of drunkenness for the space of nine months, in consequence of medicines he had taken, and who had lost his appetite for ardent spirits, was held to have been cured. 7 Yerg. R. 146.

CURIA ADVISARE VULT, *practice*, the court will consider the matter. This entry is made on the record when the court wish to take time to consider of a case before they give a final judgment, which is made by an abbreviation *cur. ad. vult*, for the purpose of marking the continuance.

CURIA REGIS. An English court which assumed this name during the reign of Henry II. It was *Curia* or *Aula Regis* because it was held in the great hall of the king's palace; and where the king, for some time, administered justice in person. But afterwards the judicial power was more properly entrusted to the king's judges. The judges who sat in this court were distinguished by the name of justices or justiciaries. Besides these the chief justiciary, the stewart of all England, the constable of all England, the chancellor, the chamberlain and the treasurer, also took part in the judicial proceedings of this court.

CURTESY, or COURTESY, by the laws of Scotland, is a life-rent given by law to the surviving husband of all his wife's heritage of which she died infeft, if there was a child of the marriage born alive. The child born of the marriage must be the mother's heir. If she had a child by a former marriage, who is to succeed to her estate, the husband has no right to the curtesy while such child is alive; so that the cur-

tesy is due to the husband rather as father to the heir, than as husband to an heiress, conformable to the Roman law which gives to the father the usufruct of what the child succeeds to by the mother, Ersk. Pr. L. Scot. B. 2, t. 9, s. 30.

CURTESY, vide *Estate by the curtesy.*

CURTILAGE, *estates*, is the space situated within a common enclosure belonging to a dwelling-house. Vide 2 Roll. Ab. 1, l. 30; Com. Dig. Grant, (E 7), (E 9); Russ. & Ry. 360; Ib. 334, 357; Ry. & Mood. 13; 2 Leach, 913; 2 Bos. & Pull. 508; 2 East, P. C. 494; Russ. & Ry. 170, 289, 322; 22 Eng. Com. Law R. 330; 1 Ch. Pr. 175; Shep. Touchs. 94.

CUSTODY, is the detainer of a person by virtue of a lawful authority. To be in custody is to be lawfully detained under arrest. Vide 14 Vin. Ab. 359; 3 Chit. Pr. 355. In another sense custody signifies having the care and possession of a thing; as, the chancellor is entitled to the custody as the keeper of the seal.

CUSTOM. A usage which has acquired the force of law. A custom derives its force from the tacit consent of the legislature and the people. It follows, therefore, there can be no custom in relation to a matter regulated by law. 8 M. R. 309. Law cannot be established or abrogated except by the sovereign will, but this will may be express or implied and presumed; and whether it manifests itself by words or by a series of facts, is of little importance. When a custom is public, peaceable, uniform, general, continued, reasonable and certain, and has lasted "time whereof the memory of man runneth not to the contrary," it acquires the force of law. And when any doubts arise as to the meaning of a statute, the custom which has prevailed on the subject ought to have weight in its construction, for the manner in which a law has always been executed is one of its modes of interpretation. Vide Bac. Ab. h. t.; 1 Bl. Com. 76; 2 Bl. Com. 31; 1 Lill. Reg. 516; 7 Vin. Ab. 164; Com. Dig. h. t.; Nelson's Ab. h. t.; the various Amer. Dig. h. t.; Ayl. Pand. 15, 16; Ayl. Parerg. [194]; Doct. Pl. 201; 3 W. C. C. R. 150; 1 Gilp. 486; Pet. C. C. R. 230; 1 Edw. Ch. R. 147; 1 Gall. R. 443; 3 Watts, R. 178; 1 Rep. Const. Ct. 303, 308; 1 Caines, R. 45; 15 Mass. R. 433; 1 Hill, R. 270; Wright, R. 573; 1 N. & M. 176; 5 Binn. R. 287; 5 Ham. R. 436; 3 Conn. R. 9; 2 Pet. R. 148; 6 Pet. R. 715; 6 Porter, R. 123; 2 N. H. Rep. 93; 1 Hall, R. 612; 1 Hall & Gill, 239; 1 N. S. 192; 4 L. R. 160; 7 L. R. 529; Ib. 215.

CUSTOM-HOUSE. A place appointed by law, in ports of entry, where importers of goods, wares and merchandise are bound to enter the same, in order to pay or secure the duties or customs due to the government.

CUSTOMS. This term is usually applied to those taxes, which are payable upon goods and merchandise imported or exported. Story, Const. § 949; Bac. Ab. Smuggling.

CUSTOS ROTULORUM, *Eng. law.* The principal justice of the peace of a county, who is keeper of the records of the county. 1 Bl. Com. 349.

TO CUT, *crim. law*, is to wound with an instrument having a sharp edge. 1 Russ. on Cr. 597. Vide *To Stab; Wound.*

CY PRES, *construction.* These are old French words which signify *as near as.* In cases where a perpetuity is attempted in a will, the courts do not, if they can avoid it, construe the devise to be utterly void, but expound the will in such a manner as to carry the testator's

intentions into effect, as far as the rules respecting perpetuities will allow; this is called a construction *cy pres*. When the perpetuity is attempted in a deed, all the limitations are totally void. Cruise, Dig. t. 38, c. 9, s. 34; and vide 1 Vern. 250; 2 Ves. jr. 380, 336, 357, 364; 3 Ves. jr. 141, 220; 4 Ves. 13; Com. Dig. Condition, (L 1); 1 Rop. Leg. 514; Swinb. pt. 4, s. 7, a. 4; Dane's Ab. Index, h. t.; Toull. Dr. Civ. Fr. liv. 3, t. 3, n. 586, 595, 611; Domat, Loix Civ. liv. 6, t. 2, s. 1; 1 Supp. to Ves. jr. 134, 259, 317; 2 Ib. 316, 473; Boyle on Charities, Index, h. t.; Shelford on Mortmain, Index, h. t.

D.

DAM. A construction of wood, stone, or other materials made across a stream of water for the purpose of confining it; a mole. The owner of a stream, not navigable, may erect a dam across it, and employ the water in any reasonable manner, either for his use or pleasure, so as not to destroy or render useless, materially diminish, or affect the application of the water by the proprietors below on the stream. He must not shut the gates of his dams and detain the water unreasonably, or let it off in unusual quantities to the annoyance of his neighbours. 4 Dall. 211; 3 Caines, 207; 13 Mass. 420; 3 Pick. 268; 2 N. H. Rep. 532; 17 John. 306; 3 John. Ch. Rep. 282; 3 Rawle, 256; 2 Conn. Rep. 584; 5 Pick. 199; 20 John. 90; 1 Pick. 180; 4 Ib. 460; 2 Binn. 475; 14 Serg. & Rawle, 71; Ib. 9; 13 John. 212; 1 M'Cord, 530; 3 N. H. Rep. 321; 1 Halst. R. 1; 3 Kent, Com. 354. When one side of the stream is owned by one person and the other by another, neither, without the consent of the other, can build a dam which extends beyond the thread of the river, without committing a trespass. Cro. Eliz. 269; 12 Mass. 211; Ang. on W. C. 14, 104, 141; vide Lois des Bât. P. 1, c. 3, s. 1, a. 3; Poth. Traité du Contrat de Société, second app. 236; Hill. Ab. Index, h. t.; 7 Cowen, R. 266; 2 Watts, R. 327; 3 Rawle, R. 90; 17 Mass. R. 289; 5 Pick. R. 175; 4 Mass. R. 401. Vide *Inundation*.

DAMAGE, *torts*, the loss caused by one person to another, or his property, either with the design of injuring him, or with negligence and carelessness, or by inevitable accident. He who has caused the damage is bound to repair it; and, if he has done it maliciously, he may be compelled to pay beyond the actual loss. When damage occurs by accident without blame to any one, the loss is borne by the owner of the thing injured; as, if a horse run away with his rider, without any fault of the latter, and injure the property of another person, the injury is the loss of the owner of the thing. When the damage happens by the act of God, or inevitable accident, as by tempest, earthquake or other natural cause, the loss must be borne by the owner. Vide Com. Dig. h. t.; Sayer on Damages. Pothier defines damage (dommages et intérêts) to be the loss which some one has sustained, and the gain which he has failed of making. Obl. n. 159.

DAMAGE FEASANT, *torts*. This is a corruption of the French words *faisant dommage*, and signifies doing damage. This term is usually applied to the injury

which animals belonging to another do upon the owner's land, by feeding there, treading down his grass, corn, or other production of the earth. 3 Bl. Com. 6; Co. Litt. 142, 161; Com. Dig. Pleader, 3 M 26; vide *Animals.*

DAMAGED GOODS, in the language of the customs, are goods subject to duties, which have received some injury either in the voyage home, or in the bonded ware-houses. See *Abatement*, merc. law.

DAMAGES, *practice.* The indemnity given by law, to be recovered from the wrong doer by a person who has sustained an injury, either in his person, property or relative rights, in consequence of the acts of another. Damages are given either for breaches of contracts or for tortious acts. Damages for breach of contract may be given, for example, for the non-performance of a written or verbal agreement; or of a covenant to do or not to do a particular thing. As to the measure of damages the general rule is, that the delinquent shall answer for all the injury which results from the immediate and direct breach of his agreement, but not from any remote consequences. In cases of eviction, on a covenant of seisin and warranty, the rule seems to be to allow the consideration money with interest and costs. But in Massachusetts, on the covenant of warranty the measure of damages is the value of the land at the time of eviction. 4 Kent's Com. 462, 3, and the cases there cited. In estimating the measure of damages sustained in consequence of the acts of a common carrier, it frequently becomes a question whether the value of the goods at the place of embarcation or the port of destination is the rule to establish the damages sustained. It has been ruled that the value at the port of destination is the proper criterion. 12 S. & R. 186; 8 John. R. 213; 10 John. R. 1; 14 John. R. 170; 15 John. R. 24; but contrary decisions have taken place, 3 Caines, R. 219; 4 Hayw. R. 112; and see 4 Mass. R. 115; 1 T. R. 31; 4 T. R. 582. In cases of eviction, the measure of damages is generally the consideration money, with interest, and costs, and no more. Vide *Eviction.* This seems not, however, to be the universal rule in the United States. 3 Mass. R. 523; 4 Mass. R. 108; 1 Bay, R. 19, 265; 3 Dess. Eq. R. 247. Damages for tortious acts are given for acts against the person, as an assault and battery; against the reputation, as libels and slander; against the property, as, trespass, when force is used, or for the consequential acts of the tort-feasor; as, when in consequence of a man building a dam on his own premises, he overflows his neighbour's land; against the relative rights of the party injured, as, criminal conversation with his wife. No settled rule or line of distinction can be marked out when a possibility of damages shall be accounted too remote to entitle a party to claim a recompense: each case must be ruled by its own circumstances. Ham. N. P. 40; Kames on Eq. 73, 74. Vide 7 Vin. Ab. 247; Yelv. 45, a; Ib. 176, a; Bac. Ab. h. t.; 1 Lilly's Reg. 525; Domat, liv. 3, t. 5, s. 2, n. 4; Toull. liv. 3, n. 286; 2 Saund. 107, note; 1 Rawle's Rep. 27; Coop. Just. 606; Com. Dig. h. t.

In cases of loss of goods which have been insured from maritime dangers, when an adjustment is made, the damages are settled by valuing the property, not according to prime cost, but at the price at which it may be sold at the time of settling the average. Marsh. Ins. B. 1, c. 14, s. 2, p. 621. See *Adjustment; Price.*

DAMAGES ON BILLS OF EXCHANGE, *contracts*, is a penalty affixed by law on the non-payment

of a bill of exchange when it is not paid at maturity, and which the parties to it are obliged to pay to the holder. The discordant and shifting regulations on this subject which have been enacted in the several states render it almost impossible to give a correct view of this subject.

The following abstract of the law of most of the United States, will be acceptable to the commercial lawyer.

Alabama. 1. When drawn on a person in the United States. By the act of January 15, 1828, the damages on a protested bill of exchange drawn on a person, either in this or any other of the United States are ten per cent. By the act of December 21, 1832, the damages on such bills drawn on any person in this State, or upon any person payable in New Orleans, and purchased by the Bank of Alabama or its branches, are five per cent.—2. Damages on protested bills drawn on persons out of the United States are twenty per cent.

Arkansas. 1. It is provided by the act of February 28, 1838, s. 7, Ark. Rev. Stat. 150, that "every bill of exchange expressed to be for value received, drawn or negociated within this state, payable after date, to order or bearer, which shall be duly presented for acceptance or payment, and protested for non-acceptance or non-payment, shall be subject to damages in the following cases: *first*, if the bill have been drawn on any person at any place within this state, at the rate of two per centum on the principal sum specified in the bill: *second*, if the bill shall be drawn on any person, and payable in any of the states of Alabama, Louisiana, Mississippi, Tennessee, Kentucky, Ohio, Indiana, Illinois and Missouri, or any point on the Ohio river, at the rate of four per centum on the principal sum in such bill specified; *third*, if the bill shall have been drawn on any person, and payable at any place within the limits of the United States, not hereinbefore expressed, at the rate of five per centum on the principal sum specified in the bill; *fourth*, if the bill shall have been drawn on any person, and payable at any port or place beyond the limits of the United States, at the rate of ten per centum on the sum specified in the bill.—2. And, by the 8th section of the same act, if any bill of exchange, expressed to be for value received, and made payable to order or bearer, shall be drawn on any person at any place within this state, and accepted and protested for non-payment, there shall be allowed and paid to the holder, by the acceptor damages in the following cases; *first*, if the bill be drawn by any person at any place within this state, at the rate of two per centum on the principal sum therein specified; *second*, if the bill be drawn at any place without this state, but within the limits of the United States, at the rate of six per centum on the sum therein specified: *third*, if the bill be drawn on any person at any place without the limits of the United States, at the rate of ten per centum on the sum therein specified. And, by sect. 9, in addition to the damages allowed in the two preceding sections to the holder of any bill of exchange protested for non-payment or non-acceptance, he shall be entitled to costs of protest, and interest at the rate of ten per centum per annum, on the amount specified in the bill, from the date of the protest until the amount of such bill shall be paid."

Connecticut. 1. When drawn on another place in the United States. When drawn upon persons in the city of New York, two per cent. When in other parts of the State of New York, or the New England states (other than this), New Jersey, Pennsylvania, Delaware, Maryland, Virginia, or the District of Columbia, three per cent. When on persons in

North or South Carolina, Georgia, or Ohio, five per cent. On other states, territories or districts, in the United States, eight per cent. on the principal sum in each case, with interest on the amount of such sum, with the damages after notice and demand. Stat. Tit. 71, Notes and Bills, 413, 414. When drawn on persons residing in Connecticut no damages are allowed.—2. When the bill is drawn on persons out of the United States, twenty per cent. is said to be the amount which ought reasonably to be allowed. Swift's Ev. 336. There is no statutory provision on the subject.

Delaware. If any person shall draw or indorse any bill of exchange upon any person in Europe, or beyond seas, and the same shall be returned back unpaid, with a legal protest, the drawer thereof and all others concerned shall pay and discharge the contents of the said bill, together with twenty per cent. advance for the damage thereof; and so proportionably for a greater or less sum, in the same specie as the same bill was drawn, or current money of this government equivalent to that which was first paid to the drawer or indorser.

Georgia. 1. Bills on persons in the United States. First, in the state. No damages are allowed on protested bills of exchange drawn in the state, on a person in the state, except bank bills on which the damages are ten per cent. for refusal to pay in specie. 4 Laws of Geo. 75. Secondly, Upon bills drawn or negociated in the state on persons out of the state, but within the United States five per cent. and interest. Act of 1823, Prince's Dig. 454; 4 Laws of Geo. 212.—2. When drawn upon a person out of the United States, ten per cent. damages and postage, protest and necessary expenses; also the premium, if any, on the face of the bill; but if at a discount, the discount must be deducted. Act of 1827, Prince's Dig. 462; 4 Laws of Geo. 221.

Indiana. 1. When drawn by a person in the state on another person in Indiana, no damages are allowed. 2. When drawn on a person in another state, territory, or district, five per cent. 3. When drawn on a person out of the United States, ten per cent. Rev. Code, c. 13, Feb. 17, 1838.

Kentucky. 1. When drawn by a person in Kentucky on a person in the state, or in any other state, territory, or district of the United States, no damages are allowed. See Acts, Session of 1820, p. 823.—2. When on a person in a foreign country, damages are given at the rate of ten per cent. per ann. from the date of the bill, until paid, but not more than eighteen months interest to be collected. 2 Litt. 101.

Louisiana. The rate of damages to be allowed and paid upon the usual protest for non-acceptance, or for non-payment of bills of exchange, drawn or negociated within this state, in the following cases, is as follows: on all bills of exchange drawn on or payable in foreign countries, ten dollars upon the hundred upon the principal sum specified in such bills; on all bills of exchange, drawn on and payable in other states in the United States, five dollars upon the hundred upon the principal sum specified in such bill. Act of March 7, 1838, s. 1. By the second section of the same act it is provided that such damages shall be in lieu of interest, charge of protest, and all other charges, incurred previous to the time of giving notice of non-acceptance or non-payment; but the principal and damages shall bear interest thereafter. By section 3, it is enacted, that if the contents of such bill be expressed in the money of account of the United States, the amount of the principal

and of the damages herein allowed for the non-acceptance or non-payment shall be ascertained and determined, without any reference to the rate of exchange existing between this state and the place on which such bill shall have been drawn, at the time of the payment on notice of non-acceptance or non-payment.

Maine. 1. When drawn payable in the United States. The damages in addition to the interest are as follows: if for one hundred dollars or more, and drawn, accepted, or endorsed in the state, at a place, seventy-five miles distant from the place where drawn, one per cent.; if, for any sum, drawn, accepted, and endorsed in this state, and payable in New Hampshire, Vermont, Connecticut, Rhode Island, or New York, three per cent.; if payable in New Jersey, Pennsylvania, Delaware, Maryland, Virginia, South Carolina, Georgia, or the District of Columbia, six per cent.; if payable in any other state, nine per cent. Rev. St. tit. 10, c. 115, §§ 110, 111.—2. Out of the United States, no statutory provision. It is the usage to allow the holder of the bill the money for which it was drawn, reduced to the currency of the state, at par, and also the charges of protest with American interest upon those sums from the time when the bill should have been paid; and the further sum of one-tenth of the money for which the bill was drawn, with interest upon it from the time payment of the dishonoured bill was demanded of the drawer. But nothing has been allowed for re-exchange, whether it is below or above par. Per Parsons, Ch. J., 6 Mass. 157, 161; see 6 Mass. 162.

Maryland. 1. No Damages are allowed when the bill is drawn in the state on another person in Maryland.—2. When it is drawn on any "person, company, or society, or corporation in any other of the United States," eight per cent. damages on the amount of the bill are allowed, and an amount to purchase another bill, at the current exchange, and interest and losses of protest.—3. If the bill be drawn on a "foreign country," fifteen per cent. damages are allowed, and the expense of purchasing a new bill as above, besides interest and costs of protest. See Act of 1785, c. 38.

Michigan. 1. When a bill is drawn in the state on a person in the state, no damages are allowed.—2. When drawn or endorsed within the state, and payable out of it, within the United States, the rule is as follows: in addition to the contents of the bill, with interest and costs, if payable within the states of Wisconsin, Illinois, Indiana, Ohio, and New York, three per cent. on the contents of the bill; if payable within the states of Missouri, Kentucky, Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, or the District of Columbia, five per centum; if payable elsewhere in the United States, out of Michigan, ten per cent. Rev. St. 156, s. 10.—3. When the bill is drawn within this state, and payable out of the United States, the party liable must pay the same at the current rate of exchange at the time of demand of payment, and damages at the rate of five per cent. on the contents thereof, together with interest on the said contents, which must be computed from the date of the protest, and are in full of all damages and charges and expenses. Rev. Stat. 156, s. 9.

Mississippi. 1. When drawn on a person in the state, five per cent. damages are allowed. How. & Hutch. 376, ch. 35, s. 20, L. 1827; How. Rep. 3, 195.—2. When drawn on a person in another state or territory, no damages are given. Id.—3.

When drawn on a person out of the United States, ten per cent. damages are given, and all charges incidental thereto with lawful interest. How. & Hutch. 376, ch. 35, s. 19, L. 1837.

Missouri. 1. When drawn on a person within the state, four per cent. damages on the sum specified in the bill are given. Rev. Code, 1835, § 8, cl. 1, p. 120.—2. When on another state or territory, ten per cent. Rev. Code, 1835, § 8, cl. 2, p. 120. —3. When on a person out of the United States, twenty per cent. Rev. Code, 1835, § 8, cl. 3, p. 120.

New York. By the Revised Statutes, Laws of N. Y. sess. 42, ch. 34, it is provided that upon bills drawn or negotiated within the state, upon any person, at any place within the six states east of New York or in New Jersey, Pennsylvania, Ohio, Delaware, Maryland, Virginia, or the District of Columbia, the damages to be allowed and paid upon the usual protest for non-acceptance or non-payment, to the holder of the bill, as purchaser thereof, or of some interest therein, for a valuable consideration shall be three per cent. upon the principal sum specified in the bill; and upon any person at any place within the states of North Carolina, South Carolina, Georgia, Kentucky, and Tennessee, five per cent.; and upon any person in any other state or territory of the United States, or at any other place on, or adjacent to, this continent, and north of the equator, or in any British or foreign possessions in the West Indies, or elsewhere in the Western Atlantic Ocean, or in Europe, ten per cent. The damages are to be in lieu of interest, charges of protest, and all other charges incurred previous to, and at the time of, giving notice of non-acceptance or non-payment. But the holder will be entitled to demand and recover interest upon the aggregate amount of the principal sum specified in the bill, and the damages, from time of notice of the protest for non-acceptance, or notice of a demand and protest for non-payment. If the contents of the bill be expressed in the money of account of the United States, the amount due thereon, and the damages allowed for the non-payment, are to be ascertained and determined, without reference to the rate of exchange existing between New York and the place on which the bill is drawn. But if the contents of the bill be expressed in the money of account or currency of any foreign country, then the amount due, exclusive of the damages, is to be ascertained and determined by the rate of exchange, or the value of such foreign currency, at the time of the demand of payment.

Pennsylvania. The act of March 30, 1821, entitled an act concerning bills of exchange enacts, that, § 1, "whenever any bill of exchange hereafter to be drawn or endorsed within this commonwealth, upon any person or persons or body corporate, of, or in any other state, territory or place shall be returned unpaid with a legal protest, the person or persons to whom the same shall or may be payable, shall be entitled to recover and receive of and from the drawer or drawers, or the endorser or endorsers of such bill of exchange, the damages herein after specified, over and above the principal sum for which such bill of exchange shall have been drawn, and the charges of protest, together with lawful interest on the amount of such principal sum, damages and charges of protest, from the time at which notice of said protest shall have been given, and the payment of said principal sum and damages, and charges of protest demanded; that is to say, if such bill shall have been drawn upon any person or persons, or body corporate, of,

or in any of the United States or territories thereof, excepting the state of Louisiana, five per cent. upon such principal sum; if upon any person or persons, or body corporate, of, or in Louisiana, or of, or in any other state or place in North America or the islands thereof, excepting the north-west coast of America and Mexico, or of, or in any of the West India or Bahama islands, ten per cent. upon such principal sum; if upon any person or persons, or body corporate, of, or in the island of Madeira, the Canaries, the Azores, the Cape de Verd islands, the Spanish Main, or Mexico, fifteen per cent. upon such principal sum; if upon any person or persons, or body corporate, of, or in any state or place in Europe, or any of the islands thereof, twenty per cent. upon such principal sum; if upon any person or persons, or body corporate, of, or in any other part of the world, twenty-five per cent. upon such principal sum.

§ 2. "The damages which by this act are to be recovered upon any bill of exchange, shall be in lieu of interest and all other charges, except the charges of protest, to the time when notice of the protest and demand of payment shall have been given and made as aforesaid; and the amount of such bill and of the damages payable thereon, as specified in this act, shall be ascertained and determined by the rate of exchange, or value of the money or currency mentioned in such bill, at the time of notice of protest and demand of payment as before-mentioned."

Tennessee. 1. On a bill drawn or endorsed within the state upon any person or persons, or body corporate, of, or in any other state, territory or place which shall be returned unpaid with a legal protest, the holder shall be entitled to the damages hereinafter specified over and above the principal sum for which such bill of exchange shall have been drawn, and the charges of protest, together with lawful interest on the amount of such principal sum, damages and charges of protest from the time at which notice of such protest shall have been given, and the payment of said principal sum, damages and charges of protest demanded; that is to say, if such bill shall have been drawn on any person or persons, or body corporate, of, or in any of these United States, or the territories thereof, three per ct. upon such principal sum: if upon any other person or persons, or body corporate, of, or in any other state or place in North America, bordering upon the Gulf of Mexico, or of, or in any of the West India islands, fifteen per cent. upon such principal sum; if upon any person or persons, or body corporate, of, or in any other part of the world, twenty per cent. upon such principal sum.—2. The damages which by this act are to be recovered upon any bill of exchange, shall be in lieu of interest and all other charges, except charges of protest, to the time when notice of the protest and demand of payment shall have been given and made as aforesaid. Carr. & Nich. Comp. 125; Act of 1827, ch. 14.

DAMAGES, DOUBLE or TREBLE, *practice.* In cases where a statute gives a party double or treble damages, the jury are to find single damages, and the court to enhance them according to the statute. Bro. Abr. Damages, pl. 70; 2 Inst. 416; 1 Wils. 126; 1 Mass. 155. In Sayer on Damages, p. 244, it is said, the jury may assess the statute damages; and it would seem from some of the modern cases, that either the jury or the court may assess. Say. R. 214, 1 Gallis. 29.

DAMAGES, GENERAL, *torts.* General damages are such as the law implies to have accrued from the act of a tort-feasor. To call a man

a thief or to commit an assault and battery on his person, are examples of this kind. In the first case the law presumes that calling a man a thief must be injurious to him, without showing that it is so. Sir W. Jones, 196; 1 Saund. 243, b. n. 5; and, in the latter case, the law implies that his person has been more or less deteriorated, and that the injured party is not required to specify what injury he has sustained, nor to prove it. Ham. N. P. 40; 1 Chit. Pl. 386; 2 L. R. 76.

DAMAGES, LAYING, *pleading*. In personal and mixed actions, (but not in penal actions, for obvious reasons,) the declaration must allege, in conclusion, that the injury is to the damage of the plaintiff; and must specify the amount of damage. Com. Dig. Pleader, C 84; 10 Rep. 116, b. In personal actions there is a distinction between actions that sound in damages, and those that do not; but in either of these cases, it is equally the practice to lay damages. There is, however, this difference, that, in the former case, damages are the main object of the suit, and are, therefore, always laid high enough to cover the whole demand; but in the latter the liquidated debt, or the chattel demanded, being the main object, damages are claimed in respect of the detention only, of such debt or chattel; and are, therefore, usually laid at a small sum. The plaintiff cannot recover greater damages than he has laid in the conclusion of his declaration. Com. Dig. Pleader, C 84; 10 Rep. 117, a. b; Vin. Ab. Damages, R. In real actions, no damages are to be laid, because, in these, the demand is specially for the land withheld, and damages are in no degree, the object of the suit. Steph. Pl. 426; 1 Chit. Pl. 397 to 400.

DAMAGES, LIQUIDATED, *contracts*. When the parties to a contract stipulate for the payment of a certain sum, as a satisfaction fixed and agreed upon by them, for the doing or not doing of certain things particularly mentioned in the agreement; the sum so fixed upon is called *liquidated damages*. It differs from a penalty, because the latter is a forfeiture from which the defaulting party can be relieved. An agreement for liquidated damages can only be when there is an engagement for the performance of certain acts, the not doing of which would be an injury to one of the parties; or to guard against the performance of acts, which if done, would also be injurious. In such cases an estimate of the damages may be made by a jury, or by a previous agreement between the parties, who may forsee the consequences of a breach of the engagement, and stipulate accordingly. 1 H. Bl. 232; and vide 2 Bos. & Pul. 335, 350–355; 2 Bro. P. C. 431; 4 Burr. 2225; 2 T. R. 32. The civil law appears to agree with these principles, Inst. 3, 16, 7; Toull. liv. 3, n. 809; Civil Code of Louis. art. 1928, n. 5; Code Civil, 1152, 1153. And vide generally, 7 Vin. Ab. 247; 16 Vin. Ab. 58; 2 W. Bl. Rep. 1190; Coop. Just. 606; 1 Chit. Pr. 872; 2 Atk. 194; Finch, 117; Prec. in Ch. 102; 2 Bro. P. C. 436; Fonbl. 151, 2, note; Chit. Contr. 336.

DAMAGES, SPECIAL, *torts*. Special damages are such as really took place, and are not implied by law; these are either superadded to general damages arising from an act injurious in itself, as when some particular loss arises from the uttering of slanderous words actionable in themselves, or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as when the words become actionable only by reason of special damage ensuing. To consti-

tute special damage the legal and natural consequence must arise from the tort, and not be a mere wrongful act of a third person, or a remote consequence. 1 Camp. 58; Ham. N. P. 40; 1 Chit. Pl. 385, 6.

DAMAGES, SPECIAL, *pleading*, as distinguished from the gist of the action, signifies that special damage which is stated to result from the gist; as if a plaintiff in an action of trespass for entering his house, breaking his closes, and tossing his goods about, were to state that by means of the damage done to his house, he was obliged to seek lodging elsewhere. But sometimes the special damage is said to constitute the gist of the action itself; for example, in an action wherein the plaintiff declares for slanderous words, which of themselves are not a sufficient ground or foundation for the suit, if any particular damage result to the plaintiff from the speaking of them, that damage is properly said to be the gist of the action. But whether special damage be the gist of the action, or only collateral to it, it must be particularly stated in the declaration, as the plaintiff will not otherwise be permitted to go into evidence of it at the trial, because the defendant cannot also be prepared to answer it. Willes, 23. See *Gist*.

DAMAGES, UNLIQUIDATED. The unascertained amount which is due to a person by another for an injury to the person, property or relative rights of the party injured. These damages being unknown cannot be set-off against a claim which the tort feasor has against the party injured, 2 Dall. 237; S. C. 1 Yeates, 571; 10 Serg. and Rawle, 14; 5 Serg. & Rawle, 122.

DAMNOSA HŒRIDITAS. A name given by Lord Kenyon 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. The assignees are not bound to take such property, but they must make their election, and, having once entered into possession, they cannot afterwards abandon the property. 7 East, R. 342; 3 Campb. 340.

DAMNUM ABSQUE INJURIA. A loss or damage without injury. There are cases when the act of one man may cause a damage or loss to another, and for which the latter has no remedy, he is then said to have received damnum absque injuria; as, for example, if a man should set up a school in the neighbourhood of another school, and, by that means, deprive the former of its patronage; or if a man should build a mill along side of another, and consequently reduce its custom. 9 Pick. 59, 528. When a man slanders another by publishing the truth, the person slandered is said to have sustained loss without injury. Bac. Ab. Actions on the Case, C; Dane's Ab. Index, h. t.

DANGERS OF THE SEA, *mar. law*. This phrase is sometimes put in bills of lading, the master of the ship agreeing to deliver the goods therein mentioned to the consignee, who is named, the dangers of the sea excepted. Sometimes the phrase is *Perils of the Sea*, (q. v.) See 1 Brock. R. 187.

DARREIN. A corruption of the French word *dernier*, the last. It is sometimes used, as, *darrein continuance*, the last continuance. When any matter has arisen in discharge of the defendant in an action, he may take advantage of it, provided he pleads it *puis darrein continuance*, for if he neglect to do so, he waives his right. Vide article, *Puis darrein continuance*.

DATE, is the designation or indication in an instrument of writing, of the time when it was made. This

word is derived from the Latin, *datum*, because when deeds and agreements were written in that language, immediately before the day, month and year in which they were made, was set down, it was usual to put the word *datum*, given. All writings ought to bear a date, and in some it is indispensable, in order make them valid, as in policies of insurance; but the date in these instruments is not inserted in the body of the writing, because as each subscription makes a separate contract, each underwriter sets down the day, month and year, he makes his subscription. Marsh. Ins. 336. Deeds, and other writings, when the date is an impossible one, take effect from the time of delivery, the presumption of law is, that the deed was dated on the day it bears date, unless, as just mentioned, the time is impossible; for example, the 32d day of January. The proper way of dating, is to put the day, month, and year of our Lord, the hour need not be mentioned, unless specially required; an instance of which may be taken from the Pennsylvania act, of the 16th of June, 1836, sect. 40, which requires the sheriff on receiving a writ of *fieri facias*, or other writ of execution, to endorse thereon the day of the month, the year and the *hour* of the day whereon he received the same. In public documents, it is usual to give not only the day, the month and the year of our Lord, but also the year of the United States, when issued by authority of the general government, or of the commonwealth, when issued under its authority. Vide, generally, Bac. Ab. Obligations, C; Com. Dig. Fait, B 3; Cruise, Dig. tit. 32, c. 20, s. 1-6; 1 Burr. 60; 2 Rol. Ab. 27, l. 22; 13 Vin. Ab. 34; Dane's Ab. Index, h. t. See *Almanac*.

DATION, *civil law*, *contracts*, is the act of giving something. It differs from donation, which is a gift; dation, on the contrary, is giving something without any liberality, as the giving of an office. Dation in payment, *datio in solutum*, which was the giving one thing in payment of another, which was due, corresponds nearly to the *accord and satisfaction* of the common law.

DATION EN PAIEMENT, *civil law*. This term is used in Louisiana; it signifies that, when instead of paying a sum of money due on a pre-existing debt, the debtor gives and the creditor agrees to receive a movable or immovable. It is somewhat like the accord and satisfaction of the common law. 16 Toull. n. 45; Poth. Vente, n. 601. Dation en paiement is somewhat like the contract of sale; *dare in solutum, est quasi vendere*. There is, however, a very marked difference between a sale and a dation en paiement. 1st. The contract of sale is complete by the mere agreement of the parties; the dation en paiement requires a delivery of the thing given. 2d. When the debtor pays a certain sum which he supposed he was owing, and he discovers he did not owe so much, he may recover back the excess, not so when property other than money has been given in payment. 3d. He who has in good faith sold a thing of which he believed himself to be the owner, is not precisely required to transfer the property of it to the buyer; and, while he is not troubled in the possession of the thing, he cannot pretend that the seller has not fulfilled his obligations. On the contrary the dation en paiement is good only when the debtor transfers to the creditor the property in the thing which he has agreed to take in payment; and if the thing thus delivered be the property of another, it will not operate as a payment. Poth. Vente, n. 602, 603, 604.

DATIVE, that which may be

given or disposed of at will and pleasure. It sometimes means that which is not cast upon the party by the law, or by a testator, but which is given by the magistrate; in this sense it is, that tutorship is dative, when the tutor is appointed by the magistrate. Leç. Elem. § 239; Civ. Code of Lo. art. 288, 1671.

DAY, is a division of time. It is natural, and then it consists of twenty-four hours; or artificial, which contains the time, from the rising until the setting of the sun, except a short time before rising and after setting. Vide *Night;* and Co. Lit. 135, a. Days are sometimes calculated exclusively, as when an act required that an appeal should be made within twenty days after a decision. 3 Penna. 200; 3 B. & A. 581; 15 Serg. & Rawle, 43. In general, if a thing is to be done within such time after such a fact, the day of the fact shall be taken inclusively. Hob. 139; Doug. 463; 3 T. R. 623; Com. Dig. Temps, A; 3 East, 407. The law, generally, rejects fractions of days, but in some cases it takes notice of such parts. 2 B. & A. 586. Vide *Date*. By the custom of some places, the word *days*, is understood to be working days, and not including Sundays; 3 Espin. N. P. C. 121. Vide, generally, 2 Chit. Bl. 141, note 3; 1 Chit. Pr. 774, 775; 3 Chit. Pr. 110; Lill. Reg. h. t.; 1 Rop. Leg. 518; 15 Vin. Ab. 554; Dig. 33, 1, 2; Dig. 50, 16, 2, 1; Ib. 2, 12, 8; and articles, *Hour; Month; Year*.

DAY BOOK, *mer. law*, is an account book, in which merchants and others make entries of their daily transactions. This is generally a book of original entries, and as such may be given in evidence to prove the sale and delivery of merchandize or of work done.

DAY RULE, or DAY WRIT, *in English practice*, is a rule or order of the court, by which a prisoner on civil process, and not committed, is enabled, in term time, to go out of the prison, and its rules or bounds; a prisoner is enabled to quit the prison, for more or less time, by three kinds of rules, namely; 1, the day-rule; 2, the term-rule; and, 3, the rules. See 9 East, R. 151.

DAYS IN BANK, *Eng. practice*, are days of appearance in the court of common pleas, usually called *bancum*. They are the distance of about a week from each other, and are regulated by some festival of the church. 3 Bl. Com. 277.

DAYS OF GRACE, are certain days after the time limited by the bill or note, which the acceptor or drawer has a right to demand for payment of the bill or note; these days were so called because they were formerly gratuitously allowed, but now, by the custom of merchants, sanctioned by decisions of courts of justice, they are demandable of right. The number of these in the United States is generally three. Chitty on Bills, h. t.; but where the last day of grace happens on the 4th of July, 2 Caines's Cas. in Err. 195, or on Sunday, 2 Caines's R. 343; 7 Wend. 460, the demand must be made on the day previous. In Louisiana, the days of grace are no obstacle to a set-off, the bill being due for this purpose, before the expiration of those days. Louis. Code, art. 2206. In France all days of grace, of favour, of usage, or of local custom, for the payment of bills of exchange are abolished. Code de Comm. art. 135.

DE, a preposition used in many Latin phrases; as, de bene esse, de bonis non.

DE BENE ESSE, *practice*. A technical phrase applied to certain proceedings which are deemed to be well done for the present, or until an exception or other avoidance; that is, *conditionally*, and in that

meaning is the phrase usually accepted. For example, a declaration is filed or delivered, special bail put in, witness examined, &c. de bene esse, or conditionally; good for the present. When a judge has a doubt as to the propriety of finding a verdict, he may direct the jury to find one de bene esse; which verdict if the court shall afterwards be of opinion it ought to have been found, shall stand. Bac. Ab. Verdict, A. Vide 11 S. & R. 84.

DE BONIS NON. This phrase is used to signify that the goods of a deceased person have not all been administered. When an executor or administrator has been appointed, and the estate is not fully settled, and the executor or administrator is dead, has absconded, or from any cause has been removed, a second administrator is appointed to perform the duty remaining to be done, who is called an administrator *de bonis non*, an administrator of the goods not administered, and he becomes by the appointment the only representative of the deceased. 11 Vin. Ab. 111; 2 P. Wms. 340; Com. Dig. Administration, B 1; 1 Root's R. 425. And it seems that though the estate has been distributed, an administrator *de bonis non* may be appointed, if some debts remain unsatisfied. 1 Root's R. 174.

DE BONIS PROPRIIS. Of his own goods. When an executor or administrator has been guilty of a *devastavit*, (q. v.) he is responsible for the loss which the estate has sustained, *de bonis propriis*. He may also subject himself to the payment of a debt of the deceased *de bonis propriis*, by his false plea, when sued in a representative capacity; as, if he plead *plene administravit*, and it be found against him, or a release to himself, when false. In this latter case the judgment is *de bonis testatoris si, et si non de bonis propriis.* 1 Saund. 336 b, n. 10; Bac. Ab. Executor, B 3.

DE FACTO, i. e. in deed; a term used to denote a thing actually done; a president of the United States *de facto* is one in the exercise of the executive power, and is distinguished from one who being legally entitled to such power is ejected from it; the latter would be a president *de jure*. An officer *de facto* is frequently considered as an officer *de jure*, and his official acts are of equal validity. 10 S. & R. 250; 4 Binn. R. 371; 11 S. & R. 411, 414.

DE HOMINE REPLEGIANDO. Vide *Homine Replegiando*.

DE INJURIA, *pleading*. The name of a replication in an action for a tort, that the defendant committed the trespasses or grievances of his own wrong without the cause by him in his plea alleged. The import of this replication is to insist that the defendant committed the act complained of, from a motive and impulse altogether different from that insisted on by the plea. For example, if the defendant has justified a battery under a writ of *capias*, having averred as he must do, that the arrest was made by virtue of the writ; the plaintiff may reply *de injuria sua propria absque tali causa*, that the defendant did the act of his own wrong, without the cause by him alleged. This replication, then, has the effect of denying the alleged motive contained in the plea, and to insist that the defendant acted from another, which was unlawful, and not in consequence of the one insisted upon in his plea. Steph. Pl. 186; 2 Chit. Pl. 523, 642; Hamm. N. P. 120, 131; Arch. Civ. Pl. 264; Com. Dig. Pleader, F 19. The form of this replication is, "*precludi non*, because he says that the said defendant at the same time when, &c. of his own wrong and, without the cause by him in his said second plea alleg-

ed, committed the said trespass in the introductory part of that plea, in manner and form as the said plaintiff hath above in his said declaration complained against the said defendant, and this the said plaintiff prays may be inquired of by the country, &c." This is the uniform conclusion of such a replication. 1 Chit. Pl. 585. The replication *de injuria* is only allowed when an excuse is offered for personal injuries. 1 B. & P. 76; 5 Johns. R. 112; 4 Johns. 150; 12 Johns. 491. Vide 7 Vin. Ab. 503; 3 Saund. 295, note; 1 Lilly's Reg. 587.

DE JURE, by right. Vide *De facto.*

DE MERCATORIBUS. This is the name of a statute passed in the 11 Edw. I.; it is usually called the statute of Acton Burnell, De Mercatoribus. It was passed in consequence of the complaints of foreign merchants, who could not recover their claims because the lands of the debtors could not be sold for their debts. It enacted that the chattels and devisable burgages of the debtor might be sold for the payment of their debts. Cruise, Dig. t. 14, s. 6.

DE NOVO. Anew; afresh.—When a judgment is reversed on error, for some mistake made by the court, in the course of the trial, a venire de novo is awarded in order that the case may again be submitted to a jury.

DE ODIO ET ATIA. Vide *Writ de odio et atia.*

DE PROPRIETATE PROBANDA, *Eng. practice*, is the name of a writ which issues in a case of replevin, when the defendant claims property in the chattels replevied, and the sheriff makes a return accordingly. This writ directs the sheriff to summon an inquest to determine on the validity of the claim, and, if they find for the plaintiff to replevy the chattels; but if they find for the defendant, the sheriff merely returns their finding. The plaintiff is not concluded by such finding, he may come into the court above and traverse it. Hamm. N. P. 456.

DE SON TORT. Of his own wrong. This term is usually applied to a person who, having no right to meddle with the affairs or estate of a deceased person, yet undertakes to do so, by acting as executor of the deceased. Vide *Executor de son tort.*

DE SON TORT DEMESNE, *pleading.* The name of a replication in an action for a wrong or injury. When the defendant pleads a matter merely in excuse of an injury to the person or reputation of another, the plaintiff may reply *de son tort demesne sans tiel cause;* that it was the defendant's own wrong without such cause. Vide the articles, *De Injuria*, and *Without*, and also 8 Co. 67 a; Bro. h. t.; Com. Dig Pleader, F 18.

DEAD BODY, *crim. law.* A corpse. To take up a dead body without lawful authority, even for the purposes of dissection, is a misdemeanor, for which the offender may be indicted at common law. 1 Russ. on Cr. 414; 1 Dowl. & R. 13; Russ. & Ry. 366, n. (b); 2 Chit. Cr. Law, 35; this offence is punished by statute in New Hampshire, Laws of N. H. 339, 340; in Vermont, Laws of Vermont, 368, c. 361; in Massachusetts, stat. 1830, c. 51; 8 Pick. 370; 11 Pick. 350; in New York, 2 Rev. Stat. 698. Vide 1 Russ. 414, n. (A). The preventing a dead body from being buried is also an indictable offence. 2 T. R. 734; 4 East, 460; 1 Russ. on Cr. 415 and 416, note (A). To inter a dead body found in a river, it seems, would render the offender liable to an indictment for a misdemeanor, unless he first sent for the coroner. 1 Kenyon's R. 250.

DEAD BORN, *descent, persons.* Children dead born are considered in law as if they had never been conceived, so that no one can claim a title by descent through such dead born child. This is the doctrine of the civil law, Dig. 50, 16, 129. *Non nasci, et natum mori, pari sunt. Mortuus exitus, non est exitus.* Civil Code of Louis. art. 28; as a child in ventre sa mere is considered by the common law in being only when it is for its advantage, and not for the benefit of a third person, the rule in the common law is probably the same, that a dead born child is to be considered as if he had never been conceived or born; in other words it is presumed he never had life. It being a maxim of the common law that mortuus exitus non est exitus. Co. Litt. 29 b. See 2 Paige, R. 35.

DEAD FREIGHT, *contracts.* When the charterer of a vessel has shipped part of the goods on board, and is not ready to ship the remainder, the master, unless restrained by his special contract, may take other goods on board, and the amount which is not supplied, required to complete the cargo, is called *dead freight.* The dead freight is to be calculated according to the actual capacity of the vessel. 3 Chit. Com. Law, 399; 2 Stark. 450.

DEAD MAN'S PART, *English law.* By the custom of London, when a deceased freeman of the city left a widow and children, after deducting what was called the widow's chamber, (q. v.) his personal property was divided into three parts; one of which belonged to the widow, another to the children, and the third to the administrator. When there was only a widow, or only children, in either case they respectively took one moiety, and the administrator the other; when there was neither widow nor child, the administrator took the whole for his own use; and this portion was called the *dead man's part.* By statute of 1 Jac. 2, c. 17, this was changed and the dead man's part is declared to be subject to the statute of distribution. 2 Bl. Com. 518. See Bac. Ab. Customs of London, D 4.

DEAD LETTERS, are those which remain in the post office, uncalled for. By the act of March 3, 1825, 3 Story, L. U. S. 1993, it is enacted by § 26, "That the postmasters shall, respectively, publish, at the expiration of every three months, or oftener, when the postmaster general shall so direct, in one of the newspapers published at or nearest the place of his residence, for three successive weeks, a list of all the letters remaining in their respective offices; or, instead thereof, shall make out a number of such lists, and cause them to be posted at such public places in their vicinity, as shall appear to them best adapted for the information of the parties concerned; and, at the expiration of the next three months, shall send such of the said letters as then remain on hand, as dead letters, to the general post office, where the same shall be opened and inspected; and if any valuable papers or matters of consequence, shall be found therein, it shall be the duty of the postmaster general to return such letter to the writer thereof, or cause a descriptive list thereof to be inserted in one of the newspapers published at the place most convenient to the supposed residence of the owner, if within the United States; and such letter, and the contents, shall be preserved, to be delivered to the person to whom the same shall be addressed, upon payment of the postage, and the expense of publication. And if such letter contain money, the postmaster general may appropriate it to the use of the department, keeping an account thereof, and the amount shall be paid by the department to the rightful claim-

ant as soon as he shall be found." And by the act of July 2, 1836, 4 Sharsw. cont. of Story, L. U. S., 2474, it is enacted by § 35, that advertisements of letters remaining in the post offices may, under the direction of the postmaster general, be made in more than one newspaper; provided, that the whole cost of advertising shall not exceed four cents for each letter.

DEAF AND DUMB. No definition is requisite as the words are sufficiently known. A person deaf and dumb is *doli capax;* but with such persons who have not been educated, and who cannot communicate their ideas in writing, a difficulty sometimes arises on the trial. A case occurred of a woman, deaf and dumb, who was charged with a crime. She was brought to the bar and the indictment was then read to her, and the question, in the usual form, was put, guilty or not guilty? The counsel for the prisoner then rose, and stated that he could not allow his client to plead to the indictment, until it was explained to her that she was at liberty to plead guilty or not guilty. This was attempted to be done, but was found impossible, and she was discharged from the bar *simpliciter*. A person, deaf and dumb, may be examined as a witness, provided he can be sworn, that is, that he is capable of understanding the terms of the oath, and assents to it; and that after he is sworn he can convey his ideas with or without an interpreter, to the court and jury. Phil. Ev. 14.

DEAF, DUMB AND BLIND. A man born deaf, dumb and blind is considered an idiot (q. v.) 1 Bl. Com. 304; F. N. B. 233.

DEALINGS. Traffic, trade; the transaction of business between two or more persons. The English statute of 6 Geo. 4, c. 16, s. 81, declares all dealings with a bankrupt within a certain time immediately before his bankruptcy to be void. It has been held under this statute that payments were included under the term *dealings*. M. & M. 137; 3 Car. & P. 85; S. C. 14 Eng. C. L. R. 219.

DEATH, *med. jur., crim. law, evidence*. The cessation of life. It is either natural, as when it happens in the usual course without any violence; or violent, when it is caused either by the acts of the deceased, or those of others. Natural death will not be here considered further than may be requisite to illustrate the manner in which violent death occurs. A violent death is either accidental or criminal; and the criminal act was committed by the deceased or by another. The subject will be considered, 1, as it relates to medical jurisprudence; and, 2, with regard to its effects upon the rights of persons.

§ 1. It is the office of medical jurisprudence, by the light and information which it can bestow, to aid in the detection of criminals against the persons of others, in order to subject them to the punishment which is awarded by the criminal law. Medical men are very frequently called upon to make examinations of the bodies of persons who have been found dead, for the purpose of ascertaining the causes of their death. When it is recollected that the honour, the fortune and even the life of the citizen, as well as the distribution of impartial justice frequently depend on these examinations, one cannot but be struck at the responsibility which rests upon such medical men, particularly when the numerous qualities which are indispensably requisite to form a correct judgment, are considered. In order to form a correct opinion, the physician must be not only skilled in his art, but he must have made such examinations his special study. A

man may be an enlightened physician and a skilful chemist, and yet he may find it exceedingly difficult to resolve, properly, the grave and almost always complicated questions which arise in cases of this kind. Judiciary annals unfortunately afford but too many examples of the fatal mistakes made by physicians and others when considering cases of violent deaths. In the examination of bodies of persons who have come to a violent death, every precaution should be taken to ascertain the situation of the place where the body was found; as to whether the ground appears to have been disturbed from its natural condition; whether there are any marks of footsteps, their size, their number, the direction to which they lead and whence they came; whether any traces of blood or hair can be found; and whether any and what weapons or instruments, likely to have caused death, are found in the vicinity; and these instruments should be carefully preserved so that they may be identified. A case or two may here be mentioned to show the importance of examining the ground in order to ascertain the facts. Mr. Jeffries was murdered at Walthamstow, in England, in 1751, by his niece and servant. The perpetrators were suspected from the single circumstance that the dew on the ground surrounding the house had not been disturbed on the morning of the murder. Mr. Taylor of Hornsey was murdered in December, 1818, and his body thrown into the river. It was evident he had not gone into the river willingly, as the hands were found clenched and contained grass, which, in the struggle, he had torn from the bank. The marks of footsteps, particularly in the snow, have been found, not unfrequently, to correspond with the shoes or feet of suspected persons, and led to their detection. Paris, Med. Jur. vol. iii. p. 38, 41. In the survey of the body the following rules should be observed: 1. It should be as thoroughly examined as possible without changing its position or that of any of the limbs; this is particularly desirable when, from appearances, the death has been caused by a wound, because by moving it the altitude of the extremities may be altered, or the state of a fracture or luxation changed, for the internal parts vary in their position with one another, according to the general position of the body. When it is requisite to remove it, it should be done with great caution. 2. The clothes should be removed, as far as necessary, and it should be noted what compresses or bandages, (if any) are applied to particular parts, and to what extent. 3. The colour of the skin, the temperature of the body, the rigidity or flexibility of the extremities, the state of the eyes, and of the sphincter muscles, noting at the same time whatever swellings, ecchymosis or livid black or yellow spots, wounds, ulcer, contusion, fracture or luxation may be present. The fluids from the nose, mouth, ears, sexual organs, &c. should be examined; and, when the deceased is a female, it may be proper to examine the sexual organs with care, in order to ascertain whether before death she has been ravished or not. 1 Briand, Méd. Lég. 2eme partie, ch. 1, art. 3, n. 5, p. 318. 4. The clothes of the deceased should be carefully examined, and if parts are torn or defaced, this fact should be noted. A list should also be made of the articles found on the body, and of their state or condition, as whether the purse of the deceased had been opened; whether he had any money, &c. 5. The state of the body as to decomposition should be particularly stated, as by this it may sometimes be ascertained when the death took place; experience proves that in

general after the expiration of fourteen days after death, decomposition has so far advanced, that identity cannot be ascertained, excepting in some strongly developed peculiarity; but in a drowned body adipocire is not produced until five or six weeks after death; but this depends upon circumstances, and varies according to climate, season, &c. It is exceedingly important, however, to keep this fact in view in some judicial inquiries relative to the time of death. 1 Chit. Med. Jur. 443. A memorandum should be made of all the facts as they are ascertained; when possible, it should be made on the ground; but when this cannot be done, as, when chemical experiments have to be made, or the body is to be dissected, they should be made in the place where these operations are performed. 1 Beck's Med. Jur. 5; Dr. Gordon Smith, 505; Ryan's Med. Jur. 145; Dr. Male's Elem. of Judicial and For. Med. 101; 3 Paris & Fonbl. Med. Jur. 23 to 25; Vilanova Y Mañes, Materia Criminal Forense, Obs. 11, cap. 7, n. 7; Trebuchet, Médécine Légale, 12 et seq.; 1 Briand, Méd. Lég. 2eme partie, ch. 1, art. 5. Vide article *Circumstances.*

§ 2. In examining the law as to the effects which death has upon the rights of others, it will be proper to consider, 1, what is the presumption of life or death; 2, the effects of a man's death.

1. It is a general rule, that persons who are proved to have been living, will be presumed to be alive till the contrary is proved; and when the issue is upon the death of a person, the proof of the fact lies upon the party who asserts the death. 2 East, 312; 2 Rolle's R. 461. But when a person has been absent for a long time, unheard from, the law will presume him to be dead. It has been adjudged that after twenty-seven years, 3 Bro. C. C. 510; twenty years, in another case; sixteen years, 5 Ves. 458; fourteen years, 3 Serg. & Rawle, 390; twelve years, 18 John. R. 141; seven years, 6 East, 80, 85; and even five years, Finch's R. 419; the presumption of death arises. It seems that seven years has been agreed as the time when death may in general be presumed. 1 Phil. Ev. 159. See 24 Wend. R. 221; 4 Whart. R. 173.

The survivorship of two or more is to be proved by facts, and not by any settled legal rule, or prescribed presumption. 5 B. & Adolp. 91; 27 E. C. L. R. 45; Cro. Eliz. 503; Bac. Ab. Execution, D; 2 Phillim. 261; 1 Mer. R. 308; 3 Hagg. Eccl. R. 748. But see 1 Yo. & Coll. N. C. 121; 1 Curt. R. 405, 406, 429. In the following cases, no presumption of survivorship was held to arise; where two men, the father and son were hanged about the same time, and one was seen to struggle a little longer than the other, Cro. Eliz. 503; in the case of General Stanwix, who perished at sea in the same vessel with his daughter, 1 Bl. R. 610; and in the case of Taylor and his wife who also perished by being wrecked at sea with his wife, to whom he had bequeathed the principal part of his fortune. 2 Phillim. R. 261, S. C. 1 Eng. Eccl. R. 250, S. C. Vide Fearne on Rem. iv.; Poth. Obl. by Evans, vol. ii. p. 345; 1 Beck's Med. Jur. 487 to 502. The Code Civil of France has provided for most, perhaps all possible cases, art. 720, 721, and 722. These provisions have been transcribed in the Civil Code of Louisiana, in these words:

Art. 930. If several persons respectively entitled to inherit from one another, happen to perish in the same event, such as a wreck, a battle, or a conflagration, without any possibility of ascertaining who died first, the presumption of survivor-

ship is determined by the circumstances of the fact.

Art. 931. In defect of the circumstances of the fact, the determination must be guided by the probabilities resulting from the strength, age, and difference of sex, according to the following rules.

Art. 932. If those who have perished together were under the age of fifteen years, the eldest shall be presumed to have survived. If both were of the age of sixty years, the youngest shall be presumed to have survived. If some were under fifteen years, and some above sixty, the first shall be presumed to have survived.

Art. 933. If those who perished together, were above the age of fifteen years, and under sixty, the male must be presumed to have survived, where there was an equality of age, or a difference of less than one year. If they were of the same sex, the presumption of survivorship, by which the succession becomes open in the order of nature, must be admitted, thus the younger must be presumed to have survived the elder.

2. The death of a man, as to its effects upon others, may be considered with regard, 1, to his contracts; 2, torts committed by or against him; 3, the disposition of his estate; and 4, to the liability or discharge of his bail.

1st. The contracts of a deceased person are in general not affected by his death, and his executors or administrators are required to fulfil his engagements, and may enforce those in his favour. But to this general rule there are some exceptions; some contracts are either by the terms employed in making them, or by implication of law to continue only during the life of the contracting party. Among these may be mentioned the following cases: 1. The contract of marriage. 2. The partnership of individuals; the contract of partnership is dissolved by death, unless otherwise provided for. Indeed the partnership will be dissolved by the death of one or more of the partners, and its effects upon the other partners or third persons will be the same, whether they have notice of the death or otherwise. 3 Mer. R. 593; Story, Partn. § 319; 336, 343; Colly. Partn. 71; 2 Bell's Com. 639, 5th ed.; 3 Kent, Com. 56, 4th ed.; Gow, Partn. 351; 1 Molloy, R. 465; 15 Ves. 218; S. C. 2 Russ. R. 325. 3. Contracts which are altogether personal, as for example where the deceased had agreed to accompany the other party to the contract on a journey, or to serve another, Poth. Ob. P. 3, c. 7, a. 3, § 2 and 3; or to instruct an apprentice, Bac. Ab. Executor, P; 1 Burn's Just. 82, 3; Hamm. on Part. 157; 1 Rawle's R. 61. The death of either the constituent or of an attorney puts an end to the power of attorney. To recall such power two things are necessary; 1st, the will or intention to recall; and, 2dly, special notice or general authority. Death is a sufficient recall of such power, answering both requisites. Either it is, according to one hypothesis, the intended termination of the authority; or, according to the other, the cessation of that will, the existence of which is requisite to the existence of the attorney's power; while on either supposition, the event is, or is supposed to be, notorious. But exceptions are admitted where the death is unknown, and the authority, in the meanwhile, is in action, and relied on. 3 T. R. 215; Poth. Ob. n. 448.

2d. In general when the tortfeasor or the party who has received the injury dies, the action for the recovery of damages dies with him, but when the deceased might have waived the tort, and maintained assumpsit against the defendant, his

personal representative may do the same thing. See the article *Actio personalis moritur cum persona*, where this subject is more fully examined. When a person accused and guilty of crime dies before trial, no proceedings can be had against his representatives or his estate.

3d. By the death of a person seised of real estate, or possessed of personal property at the time of his death; his property vests when he has made a will, as he has directed by that instrument; but when he dies intestate, his real estate vests in his heirs at law by descent, and his personal property, whether in possession or in action, belongs to his executors or administrators.

4th. The death of a defendant discharges the special bail. Tidd, Pr. 243; but when he dies after the return of the *ca. sa.*, and before it is filed, the bail are fixed. 6 T. R. 284; 5 Binn. R. 332, 338; 2 Mass. R. 485; 1 N. H. Rep. 172; 12 Wheat. 604; 4 John. R. 407; 3 M'Cord, R. 49; 4 Pick. R. 120; 4 N. H. Rep. 29.

Death is also divided into natural and civil. By the former is understood the cessation of life; and by the latter the deprivation of all civil rights.

DEATH BED or DYING DECLARATIONS, are those which are made *in extremis*, when the person making them was conscious of his danger and had given up all hopes of recovery, in cases of homicide, charging some other person or persons with the murder. See 1 Phil. Ev. 200; Stark. Ev. part 4, p. 458; 15 Johns. R. 288; 1 Hawk's R. 442; 2 Hawk's R. 31; M'Nally Ev. 174; Swift's Ev. 124. These declarations, contrary to the general rule that hearsay is not evidence, are constantly received. The principle of this exception is founded partly on the situation of the dying person, which is considered to be as powerful over his conscience as the obligation of an oath, and partly on the supposed absence of interest on the verge of the next world, which dispenses with the necessity of a cross-examination. But before such declarations can be admitted in evidence against a prisoner, it must be satisfactorily proved, that the deceased at the time of making them was conscious of his danger and had given up all hopes of recovery. 1 Phil. Ev. 215, 216; Stark. Ev. part 4, p. 460.

See, in general, Bac. Abr. Evidence, K; Addis. R. 332; East's P. C. 354, 356; 1 Stark. C. 522; 2 Hayw. R. 31; 1 Hawk's R. 442; Swift's Ev. 124; Pothier, by Evans, vol. 2, p. 293; Anth. N. P. 176, and note (a); Str. 500.

DEATH, CIVIL, is the state of a person who though possessing natural life, has lost all his civil rights, and, as to them is considered as dead. A person convicted and attainted of felony, and sentenced to the state prison for life, is, in the state of New York, in consequence of the act of 29th of March, 1799, and by virtue of the conviction and sentence of imprisonment for life, to be considered as civilly dead. 6 Johns. C. R. 118; 4 Johns. C. R. 228, 260; Laws of N. Y. Sess. 24, ch. 49, s. 29, 30, 31; 1 N. R. L. 157, 164; Co. Litt. 130, a; 3 Inst. 215; 1 Bl. Com. 132, 133; 4 Bl. Com. 332; 4 Vin. Ab. 152. See Code Civ. art. 22 a 25.

DEATH'S PART, *English law*, is that portion of the personal estate of a deceased man which remained after his wife and children had received their reasonable parts from his estate; which was, if he had both a wife and child or children, one-third part; if a wife and no child, or a child or children and no wife, one-half; if neither wife nor child, he had the whole to dispose

of by his last will and testament; and if he made no will, the same was to go to his administrator. And within the city of London, and throughout the province of York, in case of intestacy, the wife and children were till lately entitled to their reasonable parts, and the residue only was distributable by the statute of distribution; but by the 11 G. 1, c. 18, s. 17, 18, the power of devising was thrown generally open. Burn's L. Dict. See this Dict. tit. *Legitime*, and *Lex Falcidia*.

DEATH OF A PARTNER. The following effects follow the death of a partner; namely, 1, The partnership is dissolved, unless otherwise provided for by the articles of partnership; Gow's Partn. 429; 2, The representatives of the deceased partner become tenants in common with the survivor in all partnership effects in possession; 3, Choses in action so far survive that the right to reduce them into possession vests exclusively in the survivor; 4, When recovered, the representatives of the deceased partner have, in equity, the same right of sharing and participating in them that their testator or intestate would have had had he been living; 5, It is the duty and the right of the surviving partner to settle the affairs of the firm, for which he is not allowed any compensation; 6, The surviving partner is alone to be sued at law for debts of the firm, yet recourse can be had in equity against the assets of the deceased debtor. Gow's Partn. 460. Vide *Dissolution; Firm; Partners; Partnership.*

DEATH, PUNISHMENT OF. Vide *Capital, Crime.*

DEBATE, *legislation, practice*, is a contestation between two or more persons, in which they take different sides of a question, and maintain them respectively by facts and argument; or it is a discussion in writing of some contested point. The debate should be conducted with fairness, candour and decorum, and supported by facts and arguments founded in reason; when, in addition, it is ornamented by learning, and decorated by the powers of rhetoric, it becomes eloquent and persuasive. It is essential that the power of debate should be free, in order to an energetic discharge of his duty by the debator. The constitution of the United States, art. 1, s. 6, provides that for any speech or debate in either house, the senators and representatives shall not be questioned in any other place. It is a rule of the common law that counsel may, in the discharge of professional duty, use strong epithets, however derogatory to the character of the opponent or his attorney, or other agent or witness, in commenting on the facts of the case, if pertinent to the cause and stated in his instructions, without any liability to any action for the supposed slander, whether the thing stated were true or false. 1 B. & Ald. 232; 3 Dow's R. 273, 277, 279; 7 Bing. R. 459; S. C. 20 E. C. L. R. 198. Respectable and sensible counsel, however, will always refrain from the indulgence of any unjust severity, both on their own personal account, and because browbeating a witness, or other person, will injuriously affect their case in the eyes of a respectable court and jury. 3 Chit. Pr. 887, 8.

DEBENTURE. Is a certificate given in pursuance of law, by the collector of a port of entry, for a certain sum due by the United States, payable at a time therein mentioned, to an importer for drawback of duties on merchandize imported and exported by him, provided the duties arising on the importation of the said merchandise shall have been discharged prior to the time aforesaid. Vide act of con-

gress of March 2, 1799, s. 80; Encyclopédie, h. t.; Dane's Ab. Index, h. t.

DEBET ET DETINET, *pleading*. He owes and detains. In an action of debt the form of the writ is either in the *debet* and *detinet*, that is, it states that the defendant owes and unjustly detains the debt or thing in question; it is so brought between the original contracting parties; or, it is in the *detinet* only, that is that the defendant unjustly detains from the plaintiff the debt or thing for which the action is brought; this is the form in action by an executor, because the debt or duty is not due to him, but it is unjustly detained from him. There is one case in which the writ must be in the *detinet* between the contracting parties. This is when the action is instituted for the recovery of goods, as a horse, a ship and the like, the writ must be in the *detinet*, for it cannot be said a man owes another a horse or a ship, but only that he detains them from him. 3 Bl. Com. 153, 4; 11 Vin. Ab. 321; Bac. Ab. Debt, F; 1 Lilly's Reg. 543; Dane's Ab. h. t.

DEBIT, *accounts, commerce;* a term used in book-keeping to express the left hand page of the ledger, to which are carried all the articles supplied or paid on the subject of an account, or that are charged to that account. It also signifies the balance of an account.

DEBT, *contracts*, is a sum of money due by certain and express agreement, 3 Bl. Com. 154. In a less technical sense, as in the "act to regulate arbitrations and proceedings in courts of justice," of Pennsylvania passed the 21st of March, 1806, s. 5, it means any claim for money. In a still more enlarged sense it denotes any kind of a just demand; as the debts of a bankrupt. 4 S. & R. 506.

Debts arise or are proved by matter of record as judgment debts; by bonds or specialties; and by simple contracts, where the quantity is fixed and specific and does not depend upon any future valuation to settle it. 3 Bl. Com. 154; 2 Hill. R. 220.

According to the civilians, debts are divided into *active* and *passive*. By the former is meant what is due to us, by the latter what we owe. By *liquid* debt they understand, one, the payment of which may be immediately enforced, and not one which is due at a future time, or is subject to a condition; by *hypothecary debt* is meant one which is a lien over an estate; and a *doubtful debt*, is one, the payment of which is uncertain. Clef des Lois Rom. h. t.

Debts are discharged in various ways, but principally by payment. See *Accord and Satisfaction; Bankruptcy; Confusion; Compensation; Delegation; Defeasance; Discharge of a contract; Extinction; Extinguishment; Former recovery; Lapse of time; Novation; Payment; Release; Rescision; Set-off.*

In payment of debts some are to be paid before others in cases of insolvent estates; first, in consequence of the character of the creditor, as debts due to the United States are generally to be first paid; and secondly, in consequence of the nature of the debt, as funeral expenses and servants' wages which are generally paid in preference to other debts. See *Preference; Privilege; Priority.*

DEBT, *remedies*, the name of an action used for the recovery of a debt *eo nomine* and in numero; though damages are generally awarded for the detention of the debt; these are, however, in most instances merely nominal. 1 H. Bl. 550; Bull. N. P. 167; Cowp. 588. Debt is a more extensive remedy for the recovery of money, than assumpsit or covenant, for it lies to re-

cover money due upon legal liabilities, as for money lent, paid, had and received, due on an account stated, Com. Dig. Dett, A; for work and labour, or for the price of goods, and a quantum valebant thereon. Com. Dig. Dett, B; Hob. 206; or upon simple contracts, express or implied, whether verbal or written, or upon contracts under seal, or of record, or by a common informer, whenever the demand for a sum is certain, or is capable of being reduced to certainty. Bull. N. P. 167. It also lies to recover money due on any specialty or contract under seal to pay money. Str. 1089; Com. Dig. Dett, A 4; 1 T. R. 40. This action also lies on a record, or upon a judgment of a court of record. Gilb. Debt, 391; Salk. 109; 17 S. & R. 1. Debt is a frequent remedy on statutes, either at the suit of the party grieved, or of a common informer. Com. Dig. Action on Statute, E; Bac. Ab. Debt, A. See generally, Com. Dig. h. t.; Bac. Ab. h. t.; Dane's Ab. h. t.; Vin. Ab. h. t.; Chit. Pl. 100 to 109; Selw. N. P. 553 to 682; Leigh's N. P. Index, h. t. Debt also lies in the *detinet*, for goods; which action differs from detinue, because it is not essential in this action, as in detinue, that the property in any specific goods should be vested in the plaintiff, at the time the action is brought, Dy. 24 b; Com. Dig. Dett, A 5; Bac. Ab. Debt, F; 3 Woodd. 103, 4; 1 Dall. R. 458. Vide *Remedy*.

DEBTOR, *contracts*. One who owes a debt; he who may be constrained to pay what he owes. A debtor is bound to pay his debt personally, and all the estate he possesses or may acquire is also liable for his debt. Debtors are joint or several; joint, when they all equally owe the debt in solido; in this case if a suit should be necessary to recover the debt, all the debtors must be sued together, or, when some are dead, the survivors must be sued, but each is bound for the whole debt, having a right to contribution from the others; they are several, when each promises severally to pay the whole debt; and obligations are generally binding on both or all the debtors jointly and severally. When they are severally bound each may be sued separately, and on the payment of the debt by one, the others will be bound to contribution, where all had participated in the money or property, which was the cause of the debt. Debtors are also principal and surety; the principal debtor is bound as between him and his surety to pay the whole debt, and if the surety pay it, he will be entitled to recover against the principal. Vide Vin. Ab. Creditor and Debtor; Ib. Debt; 8 Com. Dig. 388; Dig. 50, 16, 108; Ib. 50, 16, 178, 3; Toull. liv. 2, n. 250.

DECAPITATION, *punishment*, the punishment of putting a person to death by taking off his head.

DECEDENT. In the acts of descent and distribution in Pennsylvania, this word is frequently used for a deceased person, testate or intestate.

DECEIT, *torts*, is a fraudulent misrepresentation or contrivance by which one man deceives another, who has no means of detecting the fraud, to the injury and damage of the latter. Fraud, or the intention to deceive is the very essence of this injury, for if the party misrepresenting was himself mistaken, no blame can attach to him. The representation must be made *malo animo*, but whether or not the party is himself to gain by it, is wholly immaterial. Deceit may not only be by asserting a falsehood deliberately to the injury of another, as, that Paul is in flourishing circumstances, whereas he is in truth insolvent; that Peter is an

honest man, when he knew him to be a rogue; that property real or personal possesses certain qualities, or belongs to the vendor, whereas he knew these things to be false; but by any act or demeanor which would naturally impress the mind of a careful man with a mistaken belief. Therefore, if one whose manufactures are of a superior quality, distinguishes them by a particular mark, which facts are known to Peter, and Paul counterfeits this mark, and affixes them to articles of the same description, but not made by such person, and sells them to Peter as goods of such manufacture, this is a deceit. Again, the vender having a knowledge of a defect in a commodity which cannot be obvious to the buyer, does not disclose it, or, if apparent, uses an artifice and conceals it, he has been guilty of a fraudulent misrepresentation, for there is an implied condition in every contract that the parties to it act upon equal terms, and the seller is presumed to have assured or represented to the vendee that he is not aware of any secret deficiencies by which the commodity is impaired, and that he has no advantage which himself does not possess. But in all these cases the party injured must have no means of detecting the fraud, for if he has such means, his ignorance will not avail him; in that case he becomes the willing dupe of the other's artifice, and *volunti non fit injuria*. For example, if a horse is sold wanting an eye, and the defect is visible to a common observer, the purchaser cannot be said to be deceived, for by inspection he might discover it; but if the blindness is only discoverable by one experienced in such diseases, and the vendee is an inexperienced person, it is a deceit provided the seller knew of the defect.

The remedy for a deceit, unless the right of action has been suspended or discharged, is by an action of trespass on the case. The old writ of deceit was brought for acknowledging a fine, or the like, in another name, and this being a perversion of law to an evil purpose, and a high contempt, the act was laid *contra pacem*, and a fine imposed upon the offender. When two or more persons unite in a deceit upon another, they may be indicted for a conspiracy, (q. v.) Vide, generally, Com. Dig. Action upon the case for a deceit; Chancery, 3 F 1 and 2; 3 M 1; 3 N 1; 4 D 3; 4 H 4; 4 L 1; 4 O 2; Covin; Justices of the Peace, B 30; Pleader, 2 H; 1 Vin. Ab. 560; 8 Vin. Ab. 490; Doct. Pl. 51; Dane's Ab. Index, h. t.; 1 Chit. Pr. 832; Ham. N. P. c. 2, s. 4; Ayl. Pand. 99; 2 Day, 531; 12 Mass. 20; 3 Johns. 269; 6 Johns. 181; 2 Day, 205, 381; 4 Yeates, 522. Vide also articles *Equality; Fraud.*

DECEM TALES, *practice*. In the English law this is a writ which gives to the sheriff *apponere decem tales*, i. e. to appoint ten such men for the supply of jury men, when a sufficient number do not appear to make up a full jury.

DECIES TANTUM, *Eng. law*. The name of an obsolete writ which formerly lay against a juror who had taken money for giving his verdict, called so, because it was sued out to recover from him ten times as much as he took.

DECISION, *practice*, is a judgment given by a competent tribunal. The French lawyers call the opinions which they give on questions propounded to them, decisions. Vide Inst. 1, 2, 8; Dig. 1, 2, 2.

DECLARATION, *pleading*. A declaration is a specification, in a methodical and legal form, of the circumstances which constitute the plaintiff's cause of action. 1 Chit.

Pl. 248; Co. Litt. 17, a, 303, a; Bac. Abr. Pleas, B; Com. Dig. Pleader, C 7; Lawes on Pl. 35; Steph. Pl. 36; 6 Serg. & Rawle, 28. In real actions, it is most properly called the *count;* in a personal one the declaration. Steph. Pl. 36; Doct. Pl. 83; Lawes, Plead. 33; see F. N. B. 16, a, 60, d. The latter, however, is now the general term; being that commonly used when referring to real and personal actions without distinction. The declaration in an action at law answers to the bill in chancery, the libel of the civilians, and the allegation of the ecclesiastical courts.

It may be considered with reference, 1st, to those general requisites or qualities which govern the whole declaration; and, 2dly, to its form, particular parts and requisites.

1. The general requisites or qualities of a declaration are, *first*, that it correspond with the process. But according to the present practice of the courts, oyer of the writ cannot be craved; and a variance between the writ and declaration cannot be pleaded in abatement. 1 Sau. 318, a. *Secondly*, the second general requisite of a declaration is that it contain a statement of all the facts necessary, in point of law, to sustain the action, and no more. Co. Litt. 303, a; Plowd. 84, 122. See 2 Mass. 363; Cowp. 682; 6 East, R. 422; 5 T. R. 623; Vin. Ab. Declarations. *Thirdly*, These circumstances must be stated with certainty and truth. The certainty necessary in a declaration is to a certain intent in general, which should pervade the whole declaration and is particularly required in setting forth, 1st, the *parties;* it must be stated with certainty who are the parties to the suit, and therefore a declaration by or against "C D and Company," not being a corporation, is insufficient. See Com. Dig. Pleader, C 18; 1 Camp. R. 466; 1 T. R. 508; 3 Caines's R. 170. 2dly, The *time;* in personal actions the declaration must in general state a time when every material or traversable fact happened, and when a venue is necessary, time must also be mentioned. 5 T. R. 620; Com. Dig. Plead. C 19; Plowd. 24; 14 East, R. 390. The precise time, however, is not material, 2 Dall. 346; 3 Johns. R. 43; 13 Johns. R. 253; unless it constitute a material part of the contract declared upon, or where the date, &c. of a written contract or record is averred, 4 T. R. 590; 10 Mod. 313; 2 Camp. R. 307, 8, n.; or, in ejectment, in which the demise must be stated to have been made after the title of the lessor of the plaintiff, and his right of entry accrued, 2 East, R. 257; 1 Johns. Cas. 283. 3dly, The *place*. See *Venue*. 4thly, Other circumstances necessary to maintain the action.

2. The parts and particular requisites of a declaration are, *first*, the title of the court and term; see 1 Chit. Pl. 261 et seq. *Secondly*, The venue. Immediately after the title of the declaration follows the statement in the margin of the *venue* or county in which the facts are alleged to have occurred, and in which the cause is tried. See *Venue*. *Thirdly*, The *commencement*. What is termed the commencement of the declaration follows the venue in the margin, and precedes the more circumstantial statement of the cause of action. It contains a statement, 1st, of the names of the parties to the suit, and if they sue or be sued in another right, or in a political capacity, (as executors, assignees, *qui tam*, &c.) of the character or right in respect of which they are parties to the suit. 2dly, Of the mode in which the defendant has been brought into court; and, 3dly, A brief recital of the form of action to be proceeded in. 1 Saund. 318, n. 3; Ib. 111, 112;

6 T. R. 130. *Fourthly*, The *statement of the cause of action*, in which all the requisites of certainty before mentioned must be observed, necessarily varies, according to the circumstances of each particular case, and the form of action, whether in assumpsit, debt, covenant, detinue, case, trover, replevin or trespass. *Fifthly*, The *several counts*. A declaration may consist of as many counts as the case requires, and the jury may assess entire or distinct damages on all the counts, 3 Wils. R. 185; 2 Bay, R. 206; and it is usual particularly in actions of assumpsit, debt on simple contract, and actions on the case, to set forth the plaintiff's cause of action in various shapes in different counts, so that if the plaintiff fail in proof of one count he may succeed in another. 3 Bl. Com. 295. *Sixthly*, The *conclusion*; in personal and mixed actions the declaration should conclude to the *damage* of the plaintiff, Com. Dig. Pleader, C 84; 10 Co. 116, b, 117, a; unless in *scire facias* and in penal actions at the suit of a common informer. *Seventhly*, The *profert* and *pledges*. In an action at the suit of an executor or administrator, immediately after the conclusion to the damages, &c. and before the pledges, a profert of the letters testamentary or letters of administration should be made. Bac. Abr. Executor, C; Dougl. 5, in notes. At the end of the declaration it is usual to add the plaintiff's common pledges to prosecute, John Doe and Richard Roe.

See, generally, 1 Chit. Pl. 248 to 402; Lawes, Pl. Index, h. t.; Arch. Civ. Pl. Index, h. t.; Steph. Pl. h. t.; Grah. Pr. h. t.; Com. Dig. Pleader, h. t.; Dane's Ab. h. t.

DECLARATION OF INDEPENDENCE. This is a state paper issued by the congress of the United States of America, in the name and and by the authority of the people, on the fourth day of July, 1776, wherein are set forth,

1. The rights of mankind; the uses and purposes of governments; the rights of the people to institute or to abolish them; the sufferings of the colonies, and their right to withdraw from the tyranny of the king of Great Britain.

2. The various acts of tyranny of the British king.

3. The petitions for redress of these injuries, and the refusal to redress them; the recital of an appeal to the people of Great Britain, and of their being deaf to the voice of justice and consanguinity.

4. An appeal to the Supreme Judge of the world for the rectitude of the intentions of the representatives.

5. A declaration 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 connexion between them and the state of Great Britain is and ought to be dissolved.

6. A pledge by the representatives to each other of their lives, their fortunes, and their sacred honour.

The effect of this declaration was the establishment of the government of the United States as free and independent, and thenceforth the people of Great Britain have been held, as the rest of mankind, enemies in war, in peace friends.

DECLARATION OF INTENTIONS, is the act of an alien, who goes before a court of record, and in a formal manner declares that it is bona fide, his intention to become a citizen of the United States and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, whereof he may at the time be a citizen or subject. Act of Congress of April 14, 1802, s. 1. This declaration must in usual cases be made at least three

years before his admission. Id. But there are numerous exceptions to this rule. See *Naturalization*.

DECLARATION OF TRUST, is the act by which an individual acknowledges that a property, the title of which he holds, does in fact belong to another, for whose use he holds the same. The instrument in which the acknowledgment is made, is also called a declaration of trust; but such a declaration is not always in writing, though it is highly proper it should be so. Will. on Trust. 49, note (y); Sugd. on Pow. 200. See Merl. Rép. Declaration au profit d'un tiers.

DECLARATION OF WAR, is an act of the national legislature, in which a state of war is declared to exist between the United States and some other nation. This power is vested in congress by the constitution, art. 1, s. 8. There is no form or ceremony necessary, except the passage of the act. A manifesto stating the causes of the war, is usually published, but war exists as soon as the act takes effect. It was formerly usual to precede hostilities by a public declaration communicated to the enemy, and to send a herald to demand satisfaction. Poter, Antiquities of Greece, b, 3, c. 7. Dig. 49, 15, 24. But that is not the practice of modern times.

In some countries, as England and France, the power of declaring war is vested in the king, but he has no power to raise men or money to carry it on, which renders the right almost nugatory.

The public proclamation of the government of a state, by which it declares itself to be at war with a foreign power, which is named, and which forbids all and every one to aid or assist the common enemy, is also called a declaration of war.

DECLARATIONS, *evidence*, are the statements made by the parties to a transaction, in relation to the same. These declarations when proved are received in evidence for the purpose of illustrating the peculiar character and circumstances of the transaction. Declarations are admitted to be proved in a variety of cases.

1. In cases of rape the fact that the woman made declarations, in relation to it, soon after the assault took place, is evidence; but the particulars of what she said cannot be heard. 2 Stark. N. P. C. 242; S. C. 3 E. C. L. R. 344. But it is to be observed that these declarations can be used only to corroborate her testimony, and cannot be received as independent evidence; where, therefore, the prosecutrix died, these declarations could not be received. 9 C. & P. 420; S. C. 38 Eng. C. L. R. 173; 9 C. & P. 471; S. C. 38 E. C. L. R. 188.

2. When more than one person is concerned in the commission of a crime, as in cases of riots, conspiracies, and the like, the declarations of either of the parties, made *while acting in the common design*, are evidence against the whole; but the declarations of one of the rioters or conspirators, made *after the accomplishment of their object*, and when they no longer acted together, are evidence only against the party making them. 2 Stark. Ev. 235; 2 Russ. on Cr. 572; Rosc. Cr. Ev. 324; 1 Breese, Rep. 269. In civil cases the declarations of an agent, made while acting for his principal, are admitted in evidence as explanatory of his acts, but his confessions after he has ceased to act, are not evidence. 4 S. & R. 321.

3. To prove a pedigree, the declarations of a deceased member of the family are admissible. Vide *Hearsay*, and the cases there cited.

4. The dying declarations of a man who has received a mortal injury, as to the fact itself, and the party by

whom it was committed, are good evidence; but the party making them must be under a full consciousness of approaching death. The declarations of a boy between ten and eleven years of age, made under a consciousness of approaching death, were received in evidence on the trial of a person for killing him, as being declarations in articulo mortis. 9 C. & P. 395; S. C. 38 E. C. L. R. 168. Evidence of such declarations is admissible only when the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declarations. 2 B. & C. 605; S. C. 9 E. C. L. R. 196; 2 B. & C. 608; S. C. 9 E. C. L. R. 198; 1 John. Rep. 159; 15 John. R. 286; 7 John. R. 95. But see contra, 2 Car. Law Repos. 102. Vide *Death bed or Dying declarations.*

DECLARATORY, is that which explains something, without containing any new provision or obligation, as, a declaratory law.

TO DECLARE. To make known or publish. By the constitution of the United States, congress have power to declare war. In this sense the word declare signifies, not merely to make it known that war exists, but also to make war and to carry it on. 4 Dall. 37; 1 Story, Const. § 428; Rawle on the Const. 109.

DECOCTION, *med. jurisp.* The operation of boiling certain ingredients in a fluid, for the purpose of extracting the parts soluble at that temperature. *Decoction* also means the product of this operation. In a case in which the indictment charged the prisoner with having administered to a woman a decoction of a certain shrub called savin, it appeared that the prisoner had administered an *infusion*, (q. v.) and not a decoction; the prisoner's counsel insisted that he was entitled to an acquittal, on the ground that the medicine was misdescribed, but it was held that infusion and decoction are *ejusdem generis*, and that the variance was immaterial. 3 Camp. R. 74, 75.

DECREE, *practice*, is the judgment or sentence of a court of equity. It is either interlocutory or final. The former is given on some plea, or issue arising in the cause, which does not decide the main question; the latter settles the matter in dispute, and a final decree, has the same effect as a judgment at law. 2 Madd. Ch. 462; 1 Chan. Cas. 27; 2 Vern. 89; 4 Bro. P. C. 287. Vide 7 Vin. Ab. 394; 7 Com. Dig. 445; 1 Supp. to Ves. Jr. 223.

DECREE, *legislation.* In some countries, as in France, some acts of the legislature, or by the sovereign, which have the force of law, are called *decrees;* as, the Berlin and Milan decrees.

DECRETALS, *eccles. law.* The decretals were letters written by the sovereign pontiffs, who answered questions propounded to them by the bishops, and even by private individuals on points of discipline. These letters decided those points, and were called decretals, because they had the force of law or decrees in the church.

DEDI, *conveyancing.* I have given. This word amounts to a warranty in law, when it is in a deed; for example, if in a deed it be said, I have *given*, &c. to A B, this is a warranty to him and his heirs. Co. Litt. 304. Vide *Concessi.*

DEDICATION. Solemn appropriation. It may be expressed or implied. An express dedication of property to public use is made by a direct appropriation of it to such use, and it will be enforced. 2 Peters, R. 566. But a dedication of property to public or pious uses may be implied from the acts of the owner. A permission to the public for the space of eight or even six years, to

use a street without bar or impediment, is evidence from which a dedication to the public may be inferred. 11 East, R. 376; 12 Wheat. R. 585. Sed vide 5 Taunt. R. 125. Vide *Street*, and the following authorities, 3 Kent, Com. 450; 5 Taunt. 125; 5 Barn. & Ald. 454; 4 Barn. & Ald. 447; Math. Pres. 333. As to what shall amount to a dedication of an invention to public use, see 1 Gallis. 482; 1 Paine's C. C. R. 345; 2 Pet. R. 1; 7 Pet. R. 292; 4 Mason, R. 108.

DEDIMUS, *practice*. The name of a writ to commission private persons to do some act in the place of a judge; as, to administer an oath of office to a justice of the peace, to examine witnesses, and the like. 4 Com. Dig. 319; 3 Com. Dig. 359; Dane's Ab. Index, h. t. Rey, in his Institutions Judiciaires, de l'Angleterre, tom. 2, p. 214, exposes the absurdity of the name given to this writ; he says it is applicable to every writ which emanates from the same authority; *dedimus*, we have given.

DEED, *conveyancing*, *contracts*, is a writing or instrument, under seal, containing some contract or agreement, and which has been delivered by the parties. Co. Litt. 171; 2 Bl. Com. 295; Shep. Touch. 50. This applies to all instruments in writing, under seal, whether they relate to the conveyance of lands, or to any other matter; a bond, a single bill, an agreement in writing, or any other contract whatever, when reduced to writing, which writing is sealed and delivered, is as much a deed as any conveyance of land. 2 Serg. & Rawle, 504; 1 Mood. Cr. Cas. 57. Deed, in its more confined sense, signifies a writing, by which lands, tenements, and hereditaments are conveyed, which writing is sealed and delivered by the parties.

The formal parts of a deed for the conveyance of land, are, 1, the premises; 2, the *habendum;* 3, the *tenendum;* 4, the *redendum;* 5, the conditions; 6, the warranty; 7, the covenants; and 8, the conclusion. The circumstances necessarily attendant upon a valid deed, are the following; 1. It must be written or printed on parchment or paper. Litt. 229, a; 2 Bl. Com. 297.—2. There must be sufficient parties.—3. A proper subject-matter, which is the object of the grant.—4. A sufficient consideration.—5. An agreement properly set forth.—6. It must be read, if desired.—7. It must be signed and sealed.—8. It must be delivered.—9. And attested by witnesses.—10. It should be properly acknowledged before a competent officer.—11. It ought to be recorded. A deed may be avoided, 1. By alterations made in it subsequent to its execution, when made by the party himself, whether they be material or immaterial; and by any material alteration, made even by a stranger. Vide *Erasure; Interlineation.* 2. By the disagreement of those parties whose concurrence is necessary; for instance, in the case of a married woman by the disagreement of her husband. 3. By the judgment of a competent tribunal.

According to Sir William Blackstone, 2 Com. 313, deeds may be considered as (1), conveyances at common law, original and derivative. 1st. The original are, 1, Feoffment; 2, Gift; 3, Grant; 4, Lease; 5, Exchange; and 6, Partition.—2dly. Derivative, which are, 7, Release; 8, Confirmation; 9, Surrender; 10, Assignment; 11, Defeasance. (2), Conveyances which derive their force by virtue of the statute of uses; namely, 12, covenant to stand seised to uses; 13, Bargain and sale of lands; 14, Lease and release; 15, Deed to lead and declare uses; 16, Deed of revocation of uses.

The deed of bargain and sale, is the most usual in the United States. Vide *Bargain and Sale*. Chancellor Kent is of opinion that a deed would be perfectly competent in any part of the United States, to convey the fee, if it was to be to the following effect; "I, A B, in consideration of one dollar to me paid, by C D, do bargain and sell, (or in some of the states, grant) to C D, and his heirs, (in New York, Virginia, and some other states, the words, *and his heirs* may be omitted,) the lot of land, (describing it,) witness my hand and seal," &c. 4 Kent, Com. 452. Vide generally, Vin. Abr. Fait; Com. Dig. Fait; Shep. Touch. ch. 4; Dane's Ab. Index, h. t.; 4 Cruise's Dig. *passim*.

Title deeds are considered as part of the inheritance, and pass to the heir as real estate. A tenant in tail is, therefore, entitled to them, and chancery will enable him to get possession of them. 1 Bro. R. 206; 1 Ves. jr. 227; 11 Ves. 277; 15 Ves. 173. See Hill. Ab. c. 25; 1 Bibb, R. 333; 3 Mass. 487; 5 Mass. 472.

DEED POLL, *contracts*. A deed made by one party only is not indented, but polled or shaved quite even, and is, for this reason, called a *deed-poll* or single deed. Co. Litt. 299, a. A deed poll is not, strictly speaking, an agreement between two persons; but a declaration of some one particular person, respecting an agreement made by him with some other person. For example, a feoffment from A to B by deed poll, is not an agreement between A and B, but rather a declaration by A addressed to all mankind, informing them that he thereby gives and enfeoffs B of certain land therein described. It was formerly called *charta de una parte*, and usually began with these words. Sciant præsentes et futuri quod ego A &c.; and now begins, "know all men by these presents, that I, A B, have given, granted, and enfeoffed, and by these presents do give, grant and enfeoff," &c. Cruise Real Prop. tit. 32, c. 1, s. 23.

DEFALCATION, *practice, contracts*. Is the reduction of the claim of one of the contracting parties against the other, by deducting from it a smaller claim due from the former to the latter. The law operates this reduction, for, if the parties die or are insolvent, the balance between them is the only claim. For the etymology of this word, see Bracken. Law Misc. 186; 1 Rawle's R. 291; 3 Binn. R. 135. Defalcation also signifies the act of a defaulter. The bankrupt act of 19 August 1841, declares that a person who owes debts which have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, shall not have the benefit of that law.

DEFAMATION, *tort*, is the speaking slanderous words of a person so as, *de bonis fama aliquid detrahere*, to hurt his good fame. V. *Slander*. In the United States, the remedy for defamation is by an action of slander where the words are slanderous. In England, besides the remedy by action, proceedings may be instituted in the ecclesiastical court for redress of the injury. The punishment for defamation, in this court, is payment of costs and penance enjoined at the discretion of the judge. When the slander has been privately uttered, the penance may be ordered to be performed in a private place; when publicly uttered, the sentence must be public, as in the church of the parish of the defamed party, in time of divine service, and the defamer may be required publicly to pronounce that by such words, naming them, as set forth in the sen-

tence, he had defamed the plaintiff, and, therefore, that he begs pardon, first, of God, and then of the party defamed, for uttering such words. Clerk's Assist. 225; 3 Burn's Eccl. Law, Defamation, pl. 14; 2 Chit. Pr. 471.

DEFAULT, is the neglect to perform a legal obligation or duty; but in technical language by default is understood the non-appearance of the defendant within the time prescribed by law, to defend himself; it also signifies the non-appearance of the plaintiff to prosecute his claim. When the plaintiff makes default, he may be non-suited, and when the defendant makes default, judgment by default is rendered against him. Com. Dig. Pleader, E 42; Ib. B 11. Vide article *Judgment by Default*, and 7 Vin. Ab. 429; Doct. Pl. 208; Grah. Pr. 631. See as to what will excuse or save a default, Co. Litt. 259 b.

DEFAULTER, *com. law*, one who is deficient in his accounts, or fails in making his accounts correct.

DEFEASANCE, *contracts, conveyancing*, is an instrument which defeats the force or operation of some other deed or estate. That, which in the *same deed* is called a condition, in *another* deed is a defeasance. Every defeasance must contain proper words, as that the thing shall be void. 2 Salk. 575; Willes, 108; and vide Carth. 64. A defeasance must be made *in eodem modo*, and by matter as high as the thing to be defeated; so that if one be by deed, the other must also be by deed. Touchs. 397. It is a general rule, that the defeasance shall be a part of the same transaction with the conveyance; though the defeasance may be dated after the deed. 12 Mass. R. 456; 13 Pick. R. 413; 1 N. H. Rep. 41; but see 4 Yerg. 57, contra. Vide Vin. Ab. h. t.; Com. Dig. h. t.; Ib. Pleader, 2 W 35, 2 W 37; Lilly's Reg. h. t.; Nels. Ab. h. t.; 2 Saund. 47 n, note (1); Cruise, Dig. tit. 32, c. 7, s. 25; 18 John. R. 45; 9 Wend. R. 538; 2 Mass. R. 493.

DEFENCE, *torts*, is a forcible resistance of an attack by force. A man is justified in defending his person, that of his wife, children, and servants, and for this purpose he may use as much force as may be necessary, even to killing the assailant, remembering that the means used must always be proportioned to the occasion, and an excess becomes, itself, an injury. A man may also repel force by force in defence of his personal property, and even justify homicide against one who manifestly intends or endeavours by violence or surprise to commit a known felony, as robbery. With respect to the defence or protection of the possession of real property, although it is justifiable even to kill a person in the act of attempting to commit a forcible felony, as burglary or arson, yet this justification can only take place when the party in possession is wholly without fault. 1 Hale, 440, 444; 1 East, P. C. 259, 277. When a forcible attack is made upon the dwelling-house of another, without any felonious intent but barely to commit a trespass, it is in general lawful to oppose force by force, when the former was clearly illegal. 7 Bing. 305; S. C. 20 Eng. C. L. Rep. 139. Vide, generally, Ham. N. P. 136, 151; 1 Chit. Pr. 589–616; Grot. lib. 2, c. 1; Rutherf. Inst. B. 1, c. 16.

DEFENCE, *pleading, practice*, is defined to be the denial of the truth or validity of the complaint, and does not signify a justification. It is a general assertion that the plaintiff has no ground of action, which assertion is afterwards extended and maintained in the plea. 3 Bl. Com. 296; Co. Litt. 127; it

is similar to the *contestatio litis* of the civilians. Defence is of two descriptions, first, half defence, which is as follows, "*venit et defendit vim et injuriam, et dicit*," &c. or secondly, full defence, "*venit et defendit vim et injuriam, quando*," &c. (meaning "*quando et ubi curia consideravit*," or when and where it shall behove him,) "*et damna et quicquid quod ipse defendere debet et dicit*," &c. Co. Litt. 127, b; Bac. Abr. Pleas, D; Willis, 41. In strictness the words *quando*, &c. ought not to be added when only half defence is to be made, and after the words "*venit et defendit vim et injuriam.*" the subject-matter of the plea should immediately be stated. Gilb. C. P. 188; 8 T. R. 632; 3 B. & P. 9, n. a. It has, however, now become the practice in all cases, whether half or full defence be intended, to state it as follows: "And the said C D, by M N his attorney, comes and defends the *wrong*, (or in trespass, force) and injury, when &c. and says," which will be considered only as half defence in cases where such defence should be made, and as full defence where the latter is necessary. 8 T. R. 633; Willis, 41; 3 B. & P. 9; 2 Saund. 209, c. If full defence were made expressly by the words "when and where it shall behove him," and "the damages and whatever else he ought to defend," the defendant would be precluded from pleading to the jurisdiction or in abatement, for by defending *when and where* it shall behove him, the defendant acknowledges the jurisdiction of the court, and by defending the *damages* he waives all exception to the person of the plaintiff. 2 Saund. 209, c.; 3 Bl. Com. 297; Co. Litt. 127, b; Bac. Abr. Pleas, D. Want of defence being only matter of form the omission is aided by general demurrer. 3 Salk. 271. See further 7 Vin. Abr. 497; 1 Chit. Pl. 410; Com. Dig. Abatement, I 16; Gould on Pl. c. 2, s. 6–15; Steph. Pl. 430.

In another sense, defence signifies a justification; as, the defendant has made a successful defence to the charge laid in the indictment. The act of Congress of April 30, 1790, 1 Story, L. U. S. 89, acting upon the principles adopted in perhaps all the states, enacts, § 28, that every person accused and indicted of the crime of treason, or other capital offence shall "be allowed and admitted to make his full defence by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall, and they are hereby authorized and required, immediately upon his request, to assign to such person such counsel, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all seasonable hours; and every such person or persons, accused or indicted of the crimes aforesaid, shall be allowed and admitted in his said defence, to make any proof that he or they can produce, by lawful witness or witnesses, and shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them."

Defences in equity may be classed in two divisions, namely, into *dilatory defences*, (q. v.) and into those which are peremptory. Matters of peremptory or permanent defences may be also divided into two sorts, first, those where the plaintiff never had any right to institute the suit; for example, 1, that the plaintiff had not a superior right to the defendant; 2, that the defendant has no interest; 3, that there is no privity between the plaintiff and defendant or any right to sustain the suit. Secondly, those

that insist that the original right, if any, is extinguished or determined; as, 1, when the right is determined by the act of the parties; or, 2, when it is determined by operation of law. 1 Montag. Eq. Pl. 89. See *Dilatory Defence; Merits.*

TO DEFEND. To forbid. This word is used in some old English statutes in the sense it has in French, namely, to forbid. 5 Ric. 2, c. 7. Lord Coke uses the word in this sense; "it is defended by law to distrain on the highway." Co. Litt. 160 b, 161 a. In pleading, to defend is to deny, and the effect of the word "defends," is that the defendant denies the right of the plaintiff, or the force and wrong charged. Steph. Pl. 432.

TO DEFEND, *contracts.* To guaranty; to agree to indemnify. In most conveyances of land the grantor covenants to warrant and defend. It is his duty then to prevent all persons against whom he defends from doing any act which would evict him; when there is a mortgage upon the land, and the mortgagee demands possession or payment of the covenantee and threatens suit, this is a breach of the covenant to defend and for quiet enjoyment. 17 Mass. R. 586.

DEFENDANT, a party who is sued in a personal action. Vide *Demandant; Parties to actions; Pursuer;* and Com. Dig. Abatement, F; Action upon the case upon assumpsit, E b.

DEFENDER, *canon law.* The name by which the defendant or respondent is known in the ecclesiastical courts.

DEFICIT. This Latin term signifies that something is wanting. It is used to express the deficiency which is discovered in the accounts of an accountant, or in the money which he has received.

DEFINITE NUMBER. An ascertained number; the term is usually applied in opposition to an indefinite number. When there is a definite number of corporators, in order to do a lawful act a majority of the whole must be present, but it is not necessary they should be unanimous, a majority of those present can, in general, perform the act. But when the corporators consist of an indefinite number, any number, consisting of a majority of those present, may do the act. 7 Cowen, R. 402; 9 B. & Cr. 648, 851; 7 S. & R. 517; Ang. & Am. on Corp. 281.

DEFINITION is an enumeration of the principal ideas of which a compound idea is formed, to ascertain and explain its nature and character; or it is that which denotes and points out the substance of a thing to us. Ayliffe's Pand. 59. A definition ought to contain every idea which belongs to the thing defined and exclude all others. Definitions are always dangerous, because it is always difficult to prevent their being inaccurate, or their becoming so; *omnis definitio in jure civili periculosa est, parum est enim, ut non subverti possit.*

DEFINITIVE, is that which terminates a suit; a definitive sentence or judgment is put in opposition to an interlocutory judgment; final, (q. v.)

DEFORCIANT, is one who wrongfully keeps the owner of lands and tenements out of the possession of them. 2 Bl. Com. 350.

DEFORCEMENT, *tort,* in its most extensive sense, signifies the holding of any lands or tenements to which another person has a right. Co. Litt. 277; so that this includes as well an abatement, an intrusion, a disseisin, or a discontinuance as any other species of wrong whatsoever, by which the owner of the freehold is kept out of possession. But as contradistinguished from the former, it is only such a detainer of the free-

hold, from him who has the right of property, as falls within none of the injuries above mentioned. 3 Bl. Com. 173; Archb. Civ. Pl. 13; Dane's Ab. Index, h. t.

DEFORCEMENT, *in the law of Scotland*, is the opposition given or resistance made, to messengers or other officers, while they are employed in executing the law. This crime is punished by confiscation of movables, the one half to the king, and the other to the creditor at whose suit the diligence is used. Ersk. Pr. L. Scot. 4, 4, 16.

DEFUNCT, a term used for one that is deceased or dead. In some acts of assembly in Pennsylvania, such deceased person is called a decedent (q. v.)

DEGRADATION, *punishment, in the ecclesiastical law*, is a censure by which a clergyman is deprived of his holy orders, which he had as a priest or deacon.

TO DEGRADE, DEGRADING. To sink or lower a person in the estimation of the public. As a man's character is of great importance to him, and it is his interest to retain the good opinion of all mankind, when he is a witness, he cannot be compelled to disclose any matter which would tend to disgrace or degrade him. 13 How. St. Tr. 17, 334; 16 How. St. Tr. 161. A question having that tendency, however, may be asked, and, in such case, when the witness chooses to answer it, the answer is conclusive. 1 Phil. Ev. 269; R. & M. 383.

DEGREE, *descents*. This word is derived from the French *degré*, which is itself taken from the Latin *gradus*, and signifies literally a step in a stair-way, or the round of a ladder. Figuratively applied and as it is understood in law, it is the distance between those who are allied by blood; it means the relations descending from a common ancestor from generation to generation, as by so many steps. Each generation lengthens the line of descent one degree, for the degrees are only the generations marked in a line by small circles or squares in which the names of the persons forming it are written. Vide *Consanguinity; Line;* and also Ayliffe's Parergon, 209; Toull. Dr. Civ. Fran. liv. 3, t. 1, c. 3, n. 158; Aso & Man. Inst. B. 2, t. 4, c. 3, § 1.

DEGREE, *measures*. In angular measures, a degree is equal to sixty minutes, or the thirtieth part of a sine. Vide *Measure*.

DEGREE, *persons*. By degree is understood the state or condition of a person. The ancient English statute of additions, for example, requires that in process for the better description of a defendant, his *estate*, *degree*, or *mystery*, shall be mentioned.

DEHORS. Out of; without. By this word is understood something out of the record; agreement, will, or other thing spoken of; something foreign to the matter in question.

DEL CREDERE; *contracts*. A *del credere* commission is one under which the agent, in consideration of an additional premium, engages to insure to his principal, not only the solvency of the debtor, but the punctual discharge of the debt; and he is liable in the first instance without any demand from the debtor. 6 Bro. P. C. 287; Beawes, 429; 1 T. Rep. 112; Paley on Agency, 39. If the agent receive the amount of sales and remit the amount to the principal by a bill of exchange he is not liable if it should be protested. 2 W. C. C. R. 378. See also, Com. Dig. Merchant, B; 4 M. & S. 574.

DELAPIDATION, *property*, is either the letting a building go to ruin, or the ruin and damage which accrues to the building in consequence

of such neglect. Harr. Dig. Ecclesiastical Law, VI.

DELAWARE. The name of one of the original states of the United States of America. For a considerable time prior to the revolution the counties of this state were connected with Pennsylvania, under the name of territories annexed to the latter. In 1703, a separation between them took place, and from that period down to the revolution, the territories were governed by a separate legislature of their own, pursuant to the liberty reserved to them by a clause of their original charter. 1 Story, Const. § 127. The constitution of this state was amended and adopted December 2, 1831. The powers of the government are divided into three branches, the legislative, the executive and the judicial. 1st. The *legislative* power of the state is vested in a general assembly, which consists of a senate and house of representatives. 1. The *senate* is composed of three senators from each county, the number may be increased by the general assembly, two-thirds of each branch concurring, but the number of senators shall never be greater than one-half, nor less than two-thirds of the number of representatives, Art. 2, s. 3. The senators are chosen for four years by the citizens residing in the several counties. 2. The *house of representatives* is composed of seven members from each county, but the general assembly, two-thirds of each branch concurring, may increase the number. The representatives are chosen for two years by the citizens residing in the several counties. Art. 2, s. 2.—2d. The supreme *executive* power of the state is vested in a governor, who is chosen by the citizens of the state. He holds his office during four years from the third Tuesday in January next ensuing his election; and is not eligible a second time to the said office. Art. 3. Upon the happening of a vacancy, the speaker of the senate exercises the office, until a governor elected by the people shall be duly qualified. Art. 3, s. 14.—3d. The judicial power is vested in a court of errors and appeals, a superior court, a court of chancery, an orphans' court, a court of oyer and terminer, a court of general sessions of the peace and gaol delivery, a register's court, justices of the peace, and such other courts as the general assembly, with the concurrence of two-thirds of all the members of both houses, shall from time to time establish. Art. 6.

DELAY, *civil law*, is the time allowed either by law or by agreement of the parties to do something. The law allows a delay, for a party who has been summoned to appear, to make defence, to appeal; it admits of a delay during which an action may be brought, certain rights exercised, and the like. By the agreement of the parties there may be a delay in the payment of a debt, the fulfilment of a contract, &c. Vide Code, 3, 11, 4; Nov. 69, c. 2; Merl. Rép. h. t.

DELEGATE, *government*. A person elected by the people of a territory of the United States to congress, who has a seat in congress, and a right of debating, but not of voting. Ordinance of July 13, 1787, 3 Story's L. U. S. 2076. The delegates from the territories of the United States are entitled to send and receive letters, free of postage, on the same terms and conditions as members of the senate and house of representatives of the United States; and also to the same compensation as is allowed to members of the senate and house of representatives. Act of Feb. 18, 1802, 2 Story, L. U. S. 828. A delegate is also a person elected to some deliberative assembly, usually one for the nomination of officers.

DELEGATION, *civil law*. It is

a kind of novation, by which the original debtor, in order to be liberated from his creditor, gives him a third person, who becomes obliged in his stead to the creditor, or to the person appointed by him. It results from this definition that a delegation is made by the concurrence of three parties, and that there may be a fourth. There must be a concurrence, 1, Of the party delegating, that is, the ancient debtor, who procures another debtor in his stead; 2, Of the party delegated, who enters into the obligation in the place of the ancient debtor, either to the creditor or to some other person appointed by him; 3, Of the creditor, who, in consequence of the obligation contracted by the party delegated, discharges the party delegating. Sometimes there intervenes a fourth party, namely, the person indicated by the creditor in whose favour the person delegated becomes obliged, upon the indication of the creditor, and by the order of the person delegating. Poth. Ob. part. 3, c. 2, art. 6. See Louis. Code, 2188, 2189; 3 Wend. 66; 5 N. H. Rep. 410; 20 John. R. 76; 1 Wend. 164; 14 Wend. 116.

DELEGATION, *contracts.* The transfer of authority from one person to another. It is a general rule that an agent cannot delegate any portion of his power requiring the exercise of discretion or judgment; but he may transfer to others powers or duties merely mechanical in their nature. 1 Hill's (N. Y.) Rep. 501; Bunb. 166; Sugd. Pow. 176; and the article *Authority.*

DELIBERATION, *legislation*, is the council which is held touching some business, in an assembly having the power to act in relation to it. In deliberative assemblies, it is presumed that each member will listen to the opinions and arguments of the others before he arrives at a conclusion.

DELICT, *civil law.* The act by which one person, by fraud or malignity, causes some damage or tort to some other. In its most enlarged sense, this term includes all kinds of crimes and misdemeanors, and even the injury which has been caused by another, either voluntarily or accidentally without evil intention; but more commonly by delicts are understood those small offences which are punished by a small fine or a short imprisonment. Delicts are either public or private; the public are those which affect the whole community by their hurtful consequences; the private is that which is directly injurious to a private individual. Inst. 4, 18; Ib. 4, 1; Dig. 47, 1-; Ib. 48, 1. A *quasi-delict*, quasi delictum, is the act of a person, who, without malignity, but by an inexcusable imprudence, causes an injury to another. Poth. Ob. n. 116; Ersk. Pr. Laws of Scotl. B. 4, t. 4, s. 1.

DELINQUENT, *civil law*, he who has been guilty of some delict.

DELIRIUM, *med. jur.*, is a disease of the mind produced by inflammations, particularly in fevers, and other bodily diseases, specially when approaching to a fatal termination. It is also occasioned by intoxicating agents. Delirium manifests its first appearance "by a propensity of the patient to talk during sleep, and a momentary forgetfulness of his situation, and of things about him, on waking from it. After being fully aroused, however, and his senses collected, the mind is comparatively clear and tranquil, till the next slumber, when the same scene is repeated. Gradually, the mental disorder becomes more intense, and the intervals between its returns, of shorter duration, until they are scarcely, or not at all perceptible. The patient lies on his back, his eyes, if open, presenting a dull and listless look, and is almost constantly talking to himself in a

low, muttering tone. Regardless of persons or things around him, and scarcely capable of recognising them when aroused by his attendants, his mind retires within itself to dwell upon the scenes and events of the past which pass before it in wild and disorderly array, while the tongue feebly records the varying impressions, in the form of disjointed, incoherent discourse, or of senseless rhapsody. In the delirium which occurs towards the end of chronic diseases, the discourse is often more coherent and continuous, though the mind is no less absorbed in its own reveries. As the disorder advances, the voice becomes more indistinct, the fingers are constantly picking at the bed-clothes, the evacuations are passed insensibly, and the patient is incapable of being aroused to any further effort of attention. In some cases, delirium is attended with a greater degree of nervous and vascular excitement which more or less modifies the above-mentioned symptoms. The eyes are open, dry, and bloodshot, intently gazing into vacancy, as if fixed on some object which is really present to the mind of the patient; the skin is hotter and dryer; and he is more restless and intractable. He talks more loudly, occasionally breaking out into cries and vociferations, and tosses about in bed, frequently endeavouring to get up, though without any particular object in view." Ray, Med. Jur. § 213.

"So closely does delirium resemble mania to the casual observer, and so important is it that they should be distinguished from each other, that it may be well to indicate some of the most common and prominent features of each. In mania, the patient recognises persons and things, and is perfectly conscious of and remembers what is passing around him. In delirium, he can seldom distinguish one person or thing from another, and, as if fully occupied with the images that crowd upon his memory, gives no attention to those that are presented from without. In delirium, there is an entire abolition of the reasoning power; there is no attempt at reasoning at all; the ideas are all and equally insane; no single train of thought escapes the morbid influence, nor does a single operation of the mind reveal a glimpse of its natural vigour and acuteness. In mania, however false and absurd the ideas may be, we are never at a loss to discover patches of coherence, and some semblance of logical sequence in the discourse. The patient still reasons, but he reasons incorrectly. In mania, the muscular power is not perceptibly diminished, and the individual moves about with his ordinary ability. Delirium is invariably attended with great muscular debility; the patient is confined to his bed, and is capable of only a momentary effort of exertion. In mania, sensation is not necessarily impaired, and in most instances, the maniac sees, hears, and feels with all his natural acuteness. In delirium, sensation is greatly impaired, and this avenue to the understanding seems to be entirely closed. In mania, many of the bodily functions are undisturbed, and the appearance of the patient might not, at first sight, convey the impression of disease. In delirium, every function suffers, and the whole aspect of the patient is indicative of disease. Mania exists alone and independent of any other disorder, while delirium is only an unessential symptom of some other disease. Being a symptom only, the latter maintains certain relations with the disease on which it depends; it is relieved when that is relieved, and is aggravated when that increases in severity. Mania, though it undoubtedly tends to shorten life, is not immediately dangerous, whereas the disease on which delirium depends,

speedily terminates in death, or restoration to health. Mania never occurs till after the age of puberty; delirium attacks all periods alike, from early childhood to extreme old age." Ib. § 216. In the inquiry as to the validity of testamentary dispositions, it is of great importance, in many cases, to ascertain whether the testator laboured under delirium, or whether he was of sound mind. Vide *Sound mind; Unsound mind;* 2 Addams, R. 441; 1 Addams, Rep. 229, 383; 1 Hagg. R. 577; 2 Hagg. R. 142; 1 Lee, Eccl. R. 130; 2 Lee, Eccl. R. 229; 1 Hagg. Eccl. Rep. 256.

DELIRIUM TREMENS, *med. jur.* A species of insanity which has obtained this name, in consequence of the tremour experienced by the delirious person, when under a fit of the disorder. The disease called *delirium tremens* or *mania a potu*, is beautifully described in his learned work on the Medical Jurisprudence of Insanity, by Dr. Ray, § 315, 316, of which the following is an extract.

"It may be the immediate effect of an excess, or series of excesses, in those who are not habitually intemperate, as well as in those who are; but it most commonly occurs in habitual drinkers, after a few days of total abstinence from spirituous liquors. It is also very liable to occur in this latter class when labouring under other diseases, or severe external injuries that give rise to any degree of constitutional disturbance. The approach of the disease is generally indicated by a slight tremor and faltering of the hands and lower extremities, a tremulousness of the voice, a certain restlessness and sense of anxiety which the patient knows not how to describe or to account for, disturbed sleep, and impaired appetite. These symptoms having continued two or three days, at the end of which time they have obviously increased in severity, the patient ceases to sleep altogether, and soon becomes delirious. At first, the delirium is not constant, the mind wandering during the night, but, during the day when its attention is fixed, capable of rational discourse. It is not long, however, before it becomes constant, and constitutes the most prominent feature of the disease. This state of watchfulness and delirum continues three or four days, when, if the patient recover, it is succeeded by sleep, which, at first, appears in uneasy and irregular naps, and lastly in long, sound, and refreshing slumbers. When sleep does not supervene about this period, the disease is fatal; and whether subjected to medical treatment, or left to itself, neither its symptoms nor duration are materially modified.

"The character of the delirium in this disease is peculiar, bearing a stronger resemblance to dreaming, than any other form of mental derangement. It would seem as if the dreams which disturb and harass the mind during the imperfect sleep that precedes the explosion of the disease, continue to occupy it when awake, being then viewed as realities, instead of dreams. The patient imagines himself, for instance, to be in some particular situation, or engaged in certain occupations, according to each individual's habits and profession, and his discourse and conduct will be conformed to this delusion, with this striking peculiarity, however, that he is thwarted at every step, and is constantly meeting with obstacles that defy his utmost efforts to remove. Almost invariably, the patient manifests, more or less, feelings of suspicion and fear, labouring under continual apprehension of being made the victim of sinister designs and practices. He imagines that certain people have conspired to rob or murder him, and insists that he can hear them in an adjoining apartment,

arranging their plans and preparing to rush into his room; or that he is in a strange place where he is forciby detained and prevented from going to his own home. One of the most common hallucinations, is, to be constantly seeing devils, snakes, vermin, and all manner of unclean things around him and about him, and peopling every nook and corner of his apartment with these loathsome objects. The extreme terror which these delusions often inspire, produces in the countenance, an unutterable expression of anguish; and, in the hope of escaping from his fancied tormentors, the wretched patient endeavours to cut his throat, or jump from the window. Under the influence of these terrible apprehensions, he sometimes murders his wife or attendant, whom his disordered imagination identifies with his enemies, though he is generally tractable and not inclined to be mischievous. After perpetrating an act of this kind, he generally gives some illusive reason for his conduct, rejoices in his success, and expresses his regret at not having done it before. So complete and obvious is the mental derangement in this disease, so entirely are the thoughts and actions governed by the most unfounded and absurd delusions, that if any form of insanity absolves from criminal responsibility, this certainly must have that effect.

DELIVERANCE, *practice*, a term used by the clerk in court to every prisoner who is arraigned and pleads *not guilty*, to whom he wishes a good *deliverance*. In modern practice this is seldom used.

DELIVERY, *conveyancing*, is the transferring of a deed from the grantor to the grantee: or the delivery may be made and accepted by an attorney. This is indispensably necessary to the validity of a deed. As to the form, the delivery may be by words without acts; as, if the deed be lying upon a table, and the grantor says to the grantee, "take that as my deed," it will be a sufficient delivery; or it may be by acts without words, and therefore a dumb man may deliver a deed. Co. Litt. 36 a, note; 6 Sim. Rep. 31; Gresl. Eq. Ev. 120; Wood. B. 2, c. 3. A delivery may be either *absolute*, as when it is delivered to the grantor himself; or it may be *conditional*, that is, to a third person to keep until some condition shall have been performed by the grantee, and then it is called an escrow, (q. v.) See 2 Bl. Com. 306; 4 Kent, Com. 446; Cruise, Dig. tit. 32, c. 2, s. 87; 5 Serg. & Rawle, 523; 8 Watts, R. 1; and articles *Assent; Deed.*

DELIVERY, *contracts*, is the transmitting the possession of a thing from one person into the power and possession of another. Originally delivery was a clear and unequivocal act of real possession, accomplished by placing the subject to be transferred in the hands of the buyer or his avowed agent, or in their respective warehouses, vessels, carts, and the like. This delivery was properly considered as the true badge of transferred property, as importing full evidence of consent to transfer; preventing the appearance of possession in the transferrer from continuing the credit of property unduly; and avoiding uncertainty and risk in the title of the acquirer. The complicated transactions of modern trade, however, render impossible a strict adherence to this simple rule. It often happens that the purchaser of a commodity cannot take immediate possession and receive the delivery. The bulk of the goods; their peculiar situation, as when they are deposited in public custody for duties, or in the hands of a manufacturer for the purpose of having some operation of his art performed upon them, to fit them for the market; the distance they are from

the house; the frequency of bargains concluded by correspondence between distant countries; and many other obstructions, frequently rendered it impracticable to give or to receive actual delivery. In these and such like cases, something short of actual delivery has been considered sufficient to transfer the property. In sales, gifts, and other contracts, where the party intends to transfer the property the delivery must be made with the intent to enable the receiver to obtain dominion over it. 3 Serg. & Rawle, 20; 4 Rawle, 260; 5 Serg. & Rawle, 275; 9 John. 337. The delivery may be actual, by putting the thing sold in the hands or possession of the purchaser; or it may be symbolical, as where a man buys goods in a room, the receipt of the keys will be sufficient. 1 Yeates, 529; 5 Johns. R. 335; 1 East, R. 192; 3 Bos. & Pull. 233; 10 Mass. 308. As to what will amount to a delivery of goods and merchandize, vide 1 Holt, 18; 4 Mass. 661; 8 Mass. 287; 14 Johns. R. 167; 15 Johns. R. 349; 1 Taunt. R. 318; 2 H. Black. R. 316, 504; 1 New R. 69; 6 East, R. 614.

There is sometimes considerable difficulty in ascertaining the particular period when the property in the goods sold passes from the vendor to the vendee; and what facts amount to an actual delivery of the goods. Certain rules have been established, and the difficulty is to apply the facts of the case. 1. Where goods are sold, if nothing remains to be done on the part of the seller, as between him and the buyer, before the article is to be delivered, the property has passed. East, R. 614; 4 Mass. 661; 8 Mass. 287; 14 Johns. 167; 15 Johns. 349; 1 Holt's R. 18; 3 Eng. C. L. R. 9.—2. Where a chattel is made to order, the property therein is not vested in the *quasi* vendee, until finished and delivered, though he has paid for it. 1 Taunt. 318.—3. The criterion to determine whether there has been a delivery on a sale, is to consider whether the vendor still retains, in that character, a right over the property. 2 H. Blackst. R. 316.—4. Where a part of the goods sold by an entire contract, has been taken possession of by the vendee, that shall be deemed a taking possession of the whole. 2 H. Bl. R. 504; 1 New Rep. 69. Such partial delivery is not a delivery of the whole so as to vest in the vendee the entire property in the whole, where some act other than the payment of the price is necessary to be performed in order to vest the property. 6 East, R. 614.—5. Where goods are sent to order to a carrier, the carrier receives them as the vendee's agent. Cowp. 294; 3 Bos. & Pull. 582; 2 N. R. 119.—6. A delivery may be made in a very slight manner; as where one buys goods in a room, the receipt of the key is sufficient. 1 Yeates, 529; 5 Johns. 335; 1 East, R. 192. See also 3 B. & P. 233; 7 East, Rep. 558; 1 Camp. 235.—7. The vendor of bulky articles is not bound to deliver them, unless he stipulated to do so, he must give notice to the buyer that he is ready to deliver them. 5 Serg. & Rawle, 19; 12 Mass. 300; 4 Shepl. Rep. 49; and see 3 Johns. 399; 13 Johns. 294; 19 Johns. 218; 1 Dall. 171.—8. A sale of bricks in a brick yard, accompanied with a lease of the yard until the bricks should be sold and removed, was held to be valid against the creditors of the vendor, without an actual removal. 10 Mass. 308.—9. Where goods were contracted to be sold upon condition that the vendee should give security for the price, and they are delivered without security being given, but with the declaration on the part of the vendor, that the transaction should not be deemed a sale, until

the security should be furnished; it was held that the goods remained the property of the vendor notwithstanding the delivery. But, it seems, that in such cases, the goods would be liable for the debts of the vendee's creditors, originating after the delivery; and that the vendee may, for a *bona fide* consideration, sell the goods while in his possession. 4 Mass. 405.—10. Where goods are sold to be paid for on delivery, if on delivery the vendee refuses to pay for them, the property is not divested from the vendor. 13 Johns. 434; 1 Yeates, 529.—11. If the vendor rely on the promises of the vendee to perform the conditions of the sale, and deliver the goods accordingly, the right of property is changed; but where performance and delivery are understood to be simultaneous, possession obtained by artifice will not vest a title in the vendee. 3 Serg. & Rawle, 20.—12. Where on the sale of a chattel, the purchase money is paid, the property is vested in the vendee, and if he permit it to remain in the custody of the vendor, he cannot call upon the latter for any subsequent loss or deterioration not arising from negligence. 2 Johns. 13; 2 Caines's R. 38; 3 Johns. 394.

In order to make a good *donatio mortis causâ*, it is requisite that there should be a delivery of the subject to or for the donee, where such delivery can be made. 3 Binn. R. 370; 2 Ves. jr. 120; 9 Ves. jr. 1. The delivery of the key of the place where bulky goods are deposited, is, however, a sufficient delivery of such goods. 2 Ves. sen. 445. Vide 3 P. Wms. 357; 2 Bro. C. C. 612; 4 Barn. & A. 1; 3 Barn. & C. 45.

See *Sale; Stoppage in transitu; Tender;* and Domat, Lois Civiles, Liv. 1, tit. 2, s. 2; Harr. Dig. Sale, II. 3.

DELIVERY, *med. jur.*, is the act of a woman giving birth to her offspring. It is frequently of great importance to ascertain whether or not a delivery has taken place, and the time when it took place. Delivery may be considered with regard, 1, to pretended delivery; 2, to concealed delivery; and, 3, to the usual signs of delivery.

1. In pretended delivery the female declares herself to be a mother, without being so in reality. It owes its origin to cupidity, when the woman wishes to impose a suppositious heir to an estate, or to a culpable desire of imposing upon the husband and of relieving herself from a reproach of sterility. Pretended delivery may present itself in three points of view;—1. When the female who feigns has never been pregnant. When thoroughly investigated, this may always be detected. There are signs which must be present and cannot be feigned. An enlargement of the orifice of the uterus, and a tumefaction of the organs of generation, should always be present, and if absent, are conclusive against the fact. Annales d'Hygiène, tome ii. p. 227.—2. When the pretended pregnancy and delivery have been preceded by one or more deliveries. In this case attention should be given to the following circumstances; the mystery (if any) which has been affected with regard to the situation of the female—her age—that of her husband, and particularly whether aged or decrepid.—3. When the woman has been actually delivered, and substitutes a living for a dead child. But little evidence can be obtained on this subject from a physical examination.

2. Concealed delivery generally takes place when the woman either has destroyed her offspring, or it was born dead. In suspected cases the following circumstances should be attended to: 1. The proofs of pregnancy which arise in conse-

quence of the examination of the mother. When she has been pregnant and has been delivered, the usual signs of delivery, mentioned below, will be present. A careful investigation as to the woman's appearance before and since the delivery will have some weight, though such evidence is not always to be relied upon, as such appearances are not unfrequently deceptive. 2. The proofs of recent delivery. 3. The connexion between the supposed state of parturition, and the state of the child that is found; for if the age of the child do not correspond to that time, it will be a strong circumstance in favour of the mother's innocence. A redness of the skin and an attachment of the umbilical cord to the navel, indicate a recent birth. Whether the child was living at its birth, belongs to the subject of infanticide, (q. v.)

3. The usual signs of delivery are very well collected in Beck's excellent treatise on Medical Jurisprudence, and are here extracted:

If the female be examined within three or four days after the occurrence of delivery, the following circumstances will generally be observed; greater or less weakness, a slight paleness of the face, the eye a little sunken, and surrounded by a purplish or dark-brown coloured ring, and a whiteness of the skin, like a person convalescing from disease. The belly is soft, the skin of the abdomen is lax, lies in folds, and is traversed in various directions by shining reddish and whitish lines, which especially extend from the groins and pubis, to the navel. These lines have sometimes been termed *lineæ albicantes*, and are particularly observed near the umbilical region, where the abdomen has experienced the greatest distention. The breasts become tumid and hard, and on pressure emit a fluid, which at first is serous, and afterwards gradually becomes whiter; and the presence of this secretion is generally accompanied with a full pulse and soft skin, covered with a moisture of a peculiar and somewhat acid odour. The areolæ round the nipples are dark coloured. The external genital organs and vagina are dilated and tumefied throughout the whole of their extent, from the pressure of the fœtus. The uterus may be felt through the abdominal parietes, voluminous, firm, and globular, and rising nearly as high as the umbilicus. Its orifice is soft and tumid, and dilated so as to admit two or more fingers. The fourchette or anterior margin of the perinæeum is sometimes torn, or it is lax, and appears to have suffered considerable distention. A discharge, (termed the lochial) commences from the uterus, which is distinguished from the menses by its pale colour, its peculiar and well known smell, and its duration. The lochia are at first of a red colour, and gradually become lighter until they cease.

These signs may generally be relied upon as indicating the state of pregnancy, yet it requires much experience in order not to be deceived by appearances.

1. The lochial discharge might be mistaken for menstruation, or fluor albus, were it not for its peculiar smell; and this it has been found impossible, by any artifice, to destroy.

2. Relaxation of the soft parts arises as frequently from menstruation as from delivery; but in these cases the os uteri and vagina are not so much tumefied, nor is there that tenderness and swelling. The parts are found pale and flabby when all signs of contusion disappear after delivery; and this circumstance does not follow menstruation.

3. The presence of milk, though a

usual sign of delivery, is not always to be relied upon, for this secretion may take place independent of pregnancy.

4. The wrinkles and relaxations of the abdomen which follow delivery may be the consequence of dropsy, or of lankness following great obesity. This state of the parts is also seldom striking after the birth of the first child, as they shortly resume their natural state.

Vide, generally, 1 Beck's Med. Jur. c. 7, p. 206; 1 Chit. Med. Jur. 411; Ryan's Med. Jur. ch. 10, p. 133; 1 Briand, Méd. Lég. 1ere partie, c. 5.

DELUSION, *med. jurisp.* That state of the mind of an individual who conceives something extravagent to exist, which has no existence, and who is incapable of being reasoned out of that absurd conception. The individual is of course insane or an idiot. For example, should a parent unjustly persist without the least ground in attributing to his daughter a continued course of propensities and vices, and use her with uniform unkindness, there not being the slightest pretence or colour of reason for the supposition, a just inference of insanity or delusion is presented to the minds of a jury, because a supposition long entertained and persisted in, after argument to the contrary, and against the natural affections of a parent, suggests that he must labour under some morbid mental delusion. 3 Addams's R. 90, 91; Ib. 180; Hagg. R. 27; and see Dr. Connolly's Inquiry into Insanity, 384. Ray, Med. Jur. Prel. Views, § 20, p. 41, and § 22, p. 47; 3 Addams, R. 79; 1 Litt. R. 371; Annales d' Hygiène publique, tom. 3, p. 370.

DEMAND, *contracts.* A claim; a legal obligation. Lord Coke says that *demand* is a word of art, and of an extent, in its signification, greater than any other word except claim. Litt. sect. 508; Co. Litt. 291; 2 Hill, R. 220. Hence a release of all demands is, in general, a release of all covenants, real and personal, conditions, whether broken or not, annuities, recognizances, obligations, contracts, and the like. 3 Tho. Co. Litt. 427; 3 Penna. 120; 2 Hill, R. 228. But a release of all demands does not discharge rent before it is due, if it be a rent incident to the reversion; for the rent was not only not due, but the consideration—the future enjoyment of the lands—for which the rent was to be given, was not executed. 1 Sid. 141; 1 Lev. 99; 3 Lev. 274; Bac. Ab. Release, I.

DEMAND, *practice*, is a request by one individual to another to do a particular thing. Demands are either express or implied. In many cases an express demand must be made before the commencement of an action, some of which will be considered below; in other cases an implied demand is all that the law requires, and the bringing of an action is a sufficient demand in those cases. 1 Saund. 33, note 2.

A demand is frequently necessary to secure to a man all his rights, both in actions arising on contracts and those which are founded on some tort. It is requisite also when it is intended to bring the party into contempt for not performing an order which has been made a rule of court.

1. Whether a demand is requisite before the plaintiff can commence an action arising on contract, depends upon the express or implied stipulations of the parties. In case of the sale of property, for example, to be paid for on delivery, a demand of it must be made before the commencement of an action for non-delivery, and proved on the trial, unless it can be shown that the seller has incapacitated himself by a resale and delivery of the property to another

person. 1 East, R. 204; 5 T. R. 409; 10 East, R. 359; 5 B. & Ald. 712; 2 Bibb, 280; Hardin, 79; 1 Verm. 25; 5 Cowen, 516; 16 Mass. 453; 6 Mass. 61; 4 Mass. 474; 3 Bibb, 85; 3 Wend. 556; 5 Munf. R. 1; 2 Greenl. 308; 9 John. 361. On the same principles, a request on a general promise to marry is requisite, unless it be dispensed with by the party's marrying another person, which puts it out of his power to fulfil his contract, or that he refuses to marry at any time. 2 Dow. & Ry. 55; 1 Chit. Pr. 57, note (n), and 438, note (e). A demand of rent must always be made before a re-entry for the non-payment of rent. Vide *Re-entry*. When a note is given and no time of payment is mentioned it is payable immediately. 8 John. R. 374; 5 Cowen, R. 516; 1 Conn. R. 404; 1 Bibb, R, 164; 1 Blackf. R. 233. There are cases where a demand was not originally necessary, but has become so by the act of the obligor. On a promissory note no express demand of payment is requisite before bringing an action, but if the debtor has tendered the amount due to the creditor on the note, it becomes necessary before bringing an action, that a demand should be made of the debtor for payment; and this should be of the very sum tendered. 1 Campb. 181; Ib. 474; 1 Stark. R. 323; 2 E. C. L. R. 409.

When a debt or obligation is payable, and no day of payment is fixed, it is payable on demand. In omnibus obligationibus in quibus dies non ponitur, presenti die debitur. Jac. Introd. 62; 7 T. R. 427; 2 Barn. & Cr. 157.

When demand of the payment of a debt, secured by note or other instrument, is made, the party making it, should be ready to deliver up such note or instrument, on payment; or when it has been lost or destroyed, an indemnity should be offered. 2 Taunt. 61; 3 Taunt. 397; 5 Taunt. 30; 6 Mass. R. 524; 7 Mass. R. 483; 13 Mass. R. 557; 11 Wheat. R. 171; 4 Verm. R. 313; 7 Gill & Johns. 78; 3 Whart. R. 116; 12 Pick. R. 132; 17 Mass. 449.

2. It is requisite in some cases arising *ex delicto*, to make a demand of restoration of some right, before the commencement of an action. The following are examples.—1. When the wife, apprentice, or servant of one person, has been harboured by another, the proper course is to make a demand of restoration before an action brought, in order to constitute the party a wilful wrong-doer, unless the plaintiff can prove an original illegal enticing away. 2 Lev. 63; Willes, 582; 1 Peake's C. N. P. 55; 5 East, 39; 6 T. R. 652; 4 Moore's R. 12; 16 E. C. L. R. 357.—2. In cases where the taking of goods was lawful, but their subsequent detention became illegal, it is absolutely necessary, in order to secure sufficient evidence of a conversion on the trial, to give a formal notice of the owner's right to the property and possession, and to make a formal demand in writing of the delivery of such possession to the owner. The refusal to comply with such a demand, unless justified by some right which the possessor may have in the thing detained, will in general afford sufficient evidence of a conversion. 2 Saund. 47, note (e); 1 Chit. Pl. 179, 180; 1 Chit. Pr. 566.—3. When a nuisance has been erected or continued by a man on his own land, it is advisable, particularly in the case of a private nuisance, to give the party notice and request him to remove it, either before an entry is made for the purpose of abating it, or an action is commenced against the wrong-doer; and a demand is always indispensable in cases of a continuer of such nuisance. 2 B. & C. 302; S. C. 9 E. C. L. R. 96; Cro. Jac. 555;

5 Co. 100, 101; 2 Phil. Ev. 8, 18, n.; 119; 1 East, 111; 7 Vin. Ab. 506; 1 Ayl. Pand. 497; Bac. Ab. Rent, I. Vide articles *Abatement of Nuisance*, and *Nuisance*. For the allegation of a demand or request in a declaration, see article *Licet sæpius requisitus;* and Com. Dig. Pleader, C 70; 2 Chit. Pl. 84; 1 Saund. 33, note 2; 1 Chit. Pl. 322.

3. When an order to pay money, or to do any other thing, has been made a rule of court, a demand for the payment of the money, or performance of the thing, must be made before an attachment will be issued for a contempt. 2 Dowl. P. C. 338, 448; 1 C. M. & R. 88, 459; 4 Tyr. 369; 2 Scott, 193; 4 Dowl. P. C. 114; 1 Hodges, 197; 1 Har. & Woll. 216; 1 Hodges, 157; Id. 337; 4 Dowl. P. C. 86.

DEMAND IN RECONVENTION, in Louisiana, this term is used to signify the demand which the defendant institutes in consequence of that which the plaintiff has brought against him. Code of Pr. art. 374. Vide *Cross action.*

DEMANDANT, *practice.* He who brings a real action, who, in personal actions, is called plaintiff. Co. Litt. 127; 1 Com. Dig. 85.

DEMENCY, *dementia, med. jur.*, is a defect, hebetude, or imbecility of the understanding, general or partial, but confined to individual faculties of the mind, particularly those concerned in associating and comparing ideas, whence proceeds great confusion and incapacity in arranging the thoughts. 1 Chit. Med. Jur. 351; Cyclop. Practical Med. tit. Insanity; Ray, Med. Jur. ch. 9; 1 Beck's Med. Jur. 547. Demency is attended with a general enfeeblement of the moral and intellectual faculties in consequence of age or disease, which were originally well developed and sound, and is characterised by forgetfulness of the past; indifference to the present and future, and a childish disposition. It differs from idiocy and imbecility. In these latter, the powers of the mind were never possessed, while in demency, they have been lost. Demency may also be distinguished from mania, with which it is sometimes confounded. In the former the mind has lost its strength, and thereby the reasoning faculty is impaired; while in the latter, the madness arises from an exaltation of vital power, from a morbid excess of activity.

Demency is divided into acute and chronic. The former is a consequence of temporary errors of regimen, fevers, hemorrhages, &c. and is susceptible of cure; the latter, or chronic demency, may succeed mania, apoplexy, epilepsy, masturbation and drunkenness, but is generally that decay of the mind which occurs in old age, which is incurable.

When demency in its last stages has been fully established, the acts of the individual of a civil nature will be void, because the party had no consenting mind. Vide *Contracts; Wills;* 2 Phillim. R. 449. Having no legal will or intention, he cannot of course commit a crime. Vide *Insanity; Mania.*

DEMESNE AS OF FEE. A man is said to be seised *in his demesne as of fee* of a corporeal inheritance because he has a property *dominicum* or *demesne* in the *thing* itself. 2 Bl. Com. 106.

DEMIDIETAS. This word is used in ancient records for a moiety or one half.

DEMIES, in some universities and colleges this term is synonymous with *scholars.* Boyle on Charities, 129.

DEMISE, *contracts*, in its most extended signification is a conveyance either in fee, for life, or for years. In its more technical meaning, it is a lease or conveyance for a term of years. Vide Com. L. &

T. Index, h. t.; Ad. Eject. Index, h. t.; 2 Hill. Ab. 130; Com. Dig. h. t.; and the heads there referred to. According to Chief Justice Gibson, the term demise strictly denotes a posthumous grant, and no more. 5 Whart. R. 278. See 4 Bing. N. C. 678; S. C. 33 Eng. C. L. R. 492.

DEMOCRACY, *government*, is that form of government in which the sovereign power is exercised by the people in a body, as was the practice in some of the states of Ancient Greece; the term *representative democracy* has been given to a republican government like that of the United States.

DEMONSTRATION, is whatever is said or written to designate a thing or person; for example, a gift of so much money, with a fund particularly referred to for its payment, so that if the fund be not the testator's property at his death, the legacy will not fail, is called a demonstrative legacy. 4 Ves. 751; Lownd. Leg. 85; Swinb. 485. A legacy given to James, who married my cousin, is demonstrative; these expressions present the idea of a demonstration, there are many James, but only one who married my cousin. Vide Ayl. Pand. 130. Dig. 12, 1, 6; Ib. 35, 1, 34. Inst. 2, 20, 30.

DEMURRAGE, *mar. law*. The freighter of a ship is bound not to detain it, beyond the stipulated or usual time, to load, or to deliver the cargo, or to sail. The extra days beyond the lay days (being the days allowed to load and unload the cargo,) are called the days of *demurrage*; and that term is likewise applied to the payment for such delay, and it may become due, either by the ship's detention, for the purpose of loading or unloading the cargo, either before, or during, or after the voyage, or in waiting for convoy. 3 Kent, Com. 159; 2 Marsh, 721; Abbott on Ship. 192; 5 Com. Dig. 94, n., 505; 4 Taunt. 54, 55; 3 Chit. Comm. Law, 426; Harr. Dig. Ship and Shipping, VII.

DEMURRER, (from the Latin *demorari* or old French demorrer, to wait or stay,) in pleading, imports, according to its etymology, that the objecting party *will not proceed* with the pleading, because no sufficient statement has been made on the other side; but will wait the judgment of the court whether he is bound to answer, 5 Mod. 232; Co. Litt. 71, b; Steph. Pl. 61.

A demurrer may be for insufficiency either in substance or in form; that is, it may be either on the ground that the case shown by the opposite party is essentially insufficient, or on the ground that it is stated in an inartificial manner; for the law requires in every plea, and all other pleadings, two things; the one that it be in matter sufficient; the other that it be deduced and expressed according to the forms of law; and if either the one or the other of these be wanting, it is cause of demurrer. Hob. 164. A demurrer, as in its nature, so also in its form, is of two kinds; it is either general or special.

With respect to the effect of a demurrer, it is, first, a rule, that a demurrer admits all such matters of fact as are sufficiently pleaded. Bac. Abr. Pleas N 3; Com. Dig. Pleader, Q 5. Again it is a rule that, on a demurrer, the court will consider the whole record, and give judgment for the party who, on the whole, appears to be entitled to it. Com. Dig. Pleader, M 1, M 2; Bac. Abr. Pleas, A, N 3; 5 Rep. 29 a; Hob. 56; 2 Wils. 150; 4 East, 502; 1 Saund. 285, n. 5. For example, on a demurrer to the replication, if the court think the replication bad, but perceive a substantial fault in the plea, they will give

judgment, not for the defendant, but for the plaintiff, 2 Wils. R. 150, provided the declaration be good; but if the declaration also be bad in substance, then upon the same principle, judgment would be given for the defendant. 5 Rep. 29 a. For, when judgment is to be given, whether the issue be in law or fact, and whether the cause have proceeded to issue or not, the court is always to examine the whole record, and adjudge for the plaintiff or defendant, according to the legal right, as it may on the whole appear. It is, however, subject to the following exceptions: first, if the plaintiff demur to a plea in abatement, and the court decide against the plea, they will give judgment of respondeat ouster, without regard to any defect in the declaration. Lutw. 1592, 1667; 1 Salk. 212; Carth. 172; secondly, the court will not look back into the record, to adjudge in favour of an apparent right in the plaintiff, unless the plaintiff have himself put his action upon that ground. 5 Barn. & Ald. 507; lastly, the court, in examining the whole record, to adjudge according to the apparent right, will consider the right in matter of substance, and not in respect of mere form such as should have been the subject of a special demurrer. 2 Vent. 198–222.

There can be no demurrer to a demurrer; for a demurrer upon a demurrer, or pleading over when an issue in fact is offered, is a discontinuance. Salk. 219; Bac. Abr. Pleas, N 2.

See in general as to demurrers, Bac. Abr. Pleas, N; Com. Dig. Pleader, Q; Saund. Rep. Index, tit. demurrers; Lawes Civ. Pl. ch. 8; 1 Chit. Pl. 639–649.

DEMURRER, SPECIAL, *in pleading*. A special demurrer is one which excepts to the sufficiency of the pleadings on the opposite side, and shows specifically the nature of the objection and the particular ground of exception. Co. Litt. 72, a; Bac. Abr. Pleas, N 5. A special demurrer is necessary, where it turns on matter of form only; that is where notwithstanding such objections, enough appears to entitle the opposite party to judgment, as far as relates to the merits of the cause. For by two statutes, 27 Eliz. ch. 5, and 4 Ann, ch. 16, passed in a view to the discouragement of merely formal objections, it is provided in nearly the same terms, that the judges "shall give judgment according to the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect or want of form, except those only which the party demurring shall specifically and particularly set down and express, together with his demurrer, as the causes of the same." Since these statutes, therefore, no mere matter of form can be objected on a general demurrer; but the demurrer must be in the special form, and the objection specifically stated. But, on the other hand, it is to be observed, that, under a special demurrer, the party may, on the argument, not only take advantage of the particular faults which his demurrer specifies, but also of all objections in substance, or regarding the very right of the cause, (as the statute expresses it) as do not require, under those statutes, to be particularly set down. It follows, therefore, that unless the objection be clearly of this substantial kind, it is the safer course, in all cases, to demur specially. Yet, where a general demurrer is plainly sufficient, it is more usually adopted in practice; because the effect of the special form being to apprise the opposite party more distinctly of the nature of the objection, it is at-

tended with the inconvenience of enabling him to prepare to maintain his pleading by argument, or of leading to apply the earlier to amend. With respect to the degree of particularity, with which, under these statutes, the special demurrer must assign the ground of objection, it may be observed, that it is not sufficient to object, in general terms, that the pleading is "uncertain, defective, and informal," or the like, but it is necessary to show in what respect, uncertain, defective, and informal. 1 Saund. 161, n. 1; 337 b, n. 3; Steph. Pl. 159–161; 1 Chit. Pl. 642.

DEMURRER, GENERAL, *in pleading*. A general demurrer is one which excepts to the sufficiency of some previous pleadings in general terms, without showing specifically the nature of the objection; and such demurrer is sufficient, when the objection is on matter of substance. Steph. Pl. 159; 1 Chit. Pl. 639; Lawes, Civ. Pl. 167; Bac. Abr. Pleas, N 5; Co. Lit. 72 a.

DEMURRER TO EVIDENCE, *in practice*. A demurrer to evidence is 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, by the opposite party, the jury are, in general, discharged from giving any verdict, 1 Arch. Pr. 186; and the demurrer being entered on record, is afterwards argued and decided in the court in banc; and the judgment there given upon it, may ultimately be brought before a court of error. See 2 H. Bl. 187; 4 Chit. Pr. 15.

DEMURRER TO INTERROGATORIES. By this phrase is understood the reasons which a witness tenders for not answering a particular question in interrogatories. 2 Swanst. R. 194. Strictly speaking, this is not a demurrer, which is an instrument that admits facts stated, for the purpose of taking the opinion of the court; but by an abuse of the term, the witness's objection to answer is called a demurrer, in the popular sense. Gresl. Eq. Ev. 61. The court are judicially to determine their validity. The witness must state his objection very carefully, for these demurrers are held to strict rules, and are readily overruled if they cover too much. 2 Atk. 524; 1 Y. & J. 32.

DEMY SANKE or SANGUE, this is a barbarous corruption of demi sang, *half-blood*, (q. v.)

DENARII. An ancient general term for any sort of *pecunia numerata*, or ready money. The French use the word *denier* in the same sense: payer de ses propres deniers.

DENARIUS DEI, a term used in some countries to signify a certain sum of money which is given by one of the contracting parties to the other, as a sign of the completion of the contract. It does not however bind the parties; he who received it may return it in a limited time, or the other may abandon it, and avoid the engagement. It differs from *arrhæ* in this, that the latter is a part of the consideration, while the *denarius dei* is no part of it.

DENIZEN, *English law*, is an alien born and who has obtained, *ex donatione legis*, letters-patent to make him an English subject. He is intermediate between a natural born subject and an alien. He may take lands by purchase or devise, which an alien cannot, but he is incapable of taking by inheritance. 1 Bl. Com. 374. In the United States there is no such condition among the people.

DENUNCIATION, *crim. law*. This term is used by the civilians to signify the act by which an individual informs a public officer, whose

duty it is to prosecute offenders, that a crime has been committed. It differs from a complaint, (q. v.) Vide 1 Bro. C. L. 447; 2 Ib. 389; Ayl. Parer. 210; Poth. Proc. Cr. sect. 2, § 2.

DEODAND, *English law.* This word is derived from *Deo dandum*, to be given to God; and is meant to designate any unhappy instrument, whether it be an animal or inanimate thing which has caused the death of a man or mischance without the will or fault of himself or of any other man. 3 Inst. 57; Hawk. bk. 1, c. 8. The deodand is forfeited to the king and was formerly applied to pious uses.

DEPARTMENT. A portion of a country. In France the country is divided into departments, which are somewhat similar to the counties in this country. The United States have been divided into military departments including certain portions of the country. 1 Pet. 293.

DEPARTMENT OF THE NAVY, *government.* The act of the 30th of April, 1798, 1 Story's Laws, 498, establishes an executive department under the denomination of the department of the navy, the chief officer of which shall be called the *secretary of the navy*, (q. v.) A principal clerk, and such other clerk as he shall think necessary, shall be appointed by the secretary of the navy, who shall be employed in such manner as he shall deem most expedient. In case of vacancy in the office of the secretary, by removal or otherwise, it shall be the duty of the principal clerk to take charge and custody of all books, records, and documents of said office. Ib. s. 2.

DEPARTMENT OF STATE, *government.* The laws of the United States provide that there shall be an executive department, denominated the *department of state*; and a principal officer therein, called the *secretary of state*, (q. v.) Acts of 27th July, 1789; 15th Sept. 1789, s. 1; there shall be in such department an inferior officer, to be appointed by the secretary, and employed therein, as he shall deem proper, to be called the *chief clerk of the department of state*, (q. v.) Act of 27th July, 1789, s. 2. He may employ besides one chief clerk, whose compensation shall not exceed two thousand dollars per annum, two clerks, whose compensation shall not exceed one thousand and six hundred dollars each; four clerks, whose compensation shall not exceed one thousand four hundred dollars each; one clerk, whose compensation shall not exceed one thousand dollars; two clerks, whose compensation shall not exceed eight hundred dollars each; one messenger and assistant, at a compensation not exceeding one thousand and fifty dollars per annum; one superintendent of the patent office, whose compensation shall not exceed one thousand five hundred dollars; and, in the patent office, one clerk, whose compensation shall not exceed one thousand dollars; one machinist, at a compensation not exceeding seven hundred dollars; and one messenger at a compensation not exceeding four hundred dollars per annum. Act of 26th May, 1824; Act of 20th April, 1818, s. 2. By the act of 2d March, 1827, 3 Story's Laws, 2061, he is authorised to employ in the state department, one additional clerk, whose compensation shall not exceed sixteen hundred dollars; two additional clerks, whose compensation shall not exceed one thousand dollars each; and one additional clerk for the patent office, whose compensation shall not exceed eight hundred dollars.

DEPARTMENT OF THE TREASURY OF THE UNITED STATHS, *government.* The department of the treasury is constituted of the following officers, namely,

the *secretary of the treasury*, (q. v.) the head of the department, two comptrollers, five auditors, a treasurer, a register, and a commissioner of the land office. Each of these officers is required to perform certain appropriate duties, in which they are assisted by numerous clerks. They are prohibited from carrying on the business of trade or commerce, from being the owners or part owners of any sea vessel, from buying any public lands, from disposing or purchasing any securities of any state or of the United States, from receiving or applying to their own use any emolument or gain in transacting business in this department, other than what shall be allowed by law, under the penalty of three thousand dollars, and of being removed from office, and being thereafter incapable of holding any office under the United States. Gord. Dig. art. 228 to 248.

DEPARTMENT OF WAR, *government*. The act of the 7th of August, 1789, 1 Story's Laws, 31, creates an executive department, to be denominated the department of war; and there shall be a principal officer therein, to be called the *secretary for the department of war*, (q. v.) There shall be in the said department, an inferior officer, to be appointed by the secretary, to be employed therein, and to be called the chief clerk in the department of war, and who, whenever the said principal officer shall be removed by the president, or in any other case of vacancy, shall, during such vacancy, have the charge and custody of all records, books and papers, appertaining to the said department. Ib.

DEPARTURE, *pleading*, is said to be when a party quits or departs from the case or defence which he has first made, and has recourse to another; it is when his replication or rejoinder contains matter not pursuant to the declaration or plea, and which does not support and fortify it. Co. Litt. 304, a; 2 Saund. 84, a, n. (1); 2 Wils. 98; 1 Chit. Pl. 619. A departure in pleading is never allowed, for the record would, by such means, be spun out into endless prolixity; for he who has departed from and relinquished his first plea, might resort to a second, third, fourth, or even fortieth defence; pleading would, by such means, become infinite. He who had a bad cause, would never be brought to issue, and he who had a good one, would never obtain the end of his suit. Summary on Pleading, 92; 2 Saund. 84, a. n.(1); 16 East, R. 39; 1 M. & S. 395; Com. Dig. Pleader, (F 7), (F 11); Bac. Abr. Pleas, L; Vin. Abr. Departure; 1 Archb. Civ. Pl. 247, 253; 1 Chit. Pl. 618.

DEPENDENCY, is a territory distinct from the country in which the supreme sovereign power resides, but belonging rightfully to it, and subject to the laws and regulations which the sovereign may think proper to prescribe; it differs from a *colony*, because it is not settled by the citizens of the sovereign or mother state, and from *possession*, because it is held by other title than that of mere conquest; for example, Malta was considered a dependency of Great Britain in the year 1813. 3 Wash. C. C. R. 286. Vide Act of Congress of 1st March, 1809, commonly called non-importation law.

DEPONENT, *witness*, one who gives information on oath or affirmation, respecting some facts known to him, before a magistrate; he who makes a deposition.

DEPOPULATION. In its most proper signification, is the destruction of the people of a country or place. This word is, however, taken rather in a passive than an active sense; we say depopulation, to de-

signate the diminution of its inhabitants, arising either from violent causes, or the want of multiplication. Vide 12 Co. 30.

DEPORTATION, *civil law*, was among the Romans, a perpetual banishment, depriving the banished of his rights as a citizen; it differed from relegation, (q. v.) and exile, (q. v.) 1 Bro. Civ. Law, 125 note; Inst. 1, 12, 1 and 2; Dig. 48, 22, 14, 1.

DEPOSIT, *contracts*, is usually defined to be a naked bailment of goods to be kept for the bailor, without reward, and to be returned when he shall require it. Jones's Bailm. 36, 117; 1 Bell's Comm. 257. See also Dane's Abr. ch. 17, art. 1, § 3. Story on Bailm. c. 2, § 41. Pothier, defines it to be a contract, by which one of the contracting parties gives a thing to another to keep, who is to do so gratuitously, and obliges himself to return it, when he shall be requested. Traité du Depôt. See Code Civ. tit. 11, c. 1, art. 1915; Louisiana Code, tit. 13, c. 1, art. 2897.

Deposits, in the civil law, are divisible into two kinds; necessary and voluntary. A necessary deposit is such as arises from pressing necessity, as, for instance, in case of a fire, a shipwreck, or other overwhelming calamity; and thence it is called *miserabile depositum*. Louis. Code, 2935. A voluntary deposit is such as arises without any such calamity, from the mere consent or agreement of the parties. Dig. lib. 16, tit. 3, § 2. This distinction was material in the civil law, in respect to the remedy, for in voluntary deposits the action was only *in simplum*; in the other *in duplum*, or two-fold, whenever the depositary was guilty of any default. The common law has made no such distinction, and, therefore, in a necessary deposit, the remedy is limited to damages co-extensive with the wrong. Jones's Bailm. 48.

Deposits are again divided by the civil law into simple deposits, and sequestrations; the former is when there is but one party depositor, (of whatever number composed,) having a common interest; the latter is where there are two or more depositors, having each a different and adverse interest. See *Sequestration*. These distinctions give rise to very different considerations in point of responsibility and rights. Hitherto they do not seem to have been incorporated in the common law, though if cases should arise, the principles applicable to them would scarcely fail of receiving general approbation, at least, so far as they affect the rights and the responsibilities of the parties. Cases of judicial sequestration and deposits, especially in courts of chancery and admiralty, may hereafter require the subject to be fully investigated. At present, there have been few cases, in which it has been necessary to consider upon whom the loss should fall when the property has perished in the custody of the law. Story on Bailm. § 41–46.

There is another class of deposits noticed by Pothier, and called by him *irregular deposit*. This arises, when a party having a sum of money which he does not think safe in his own hands, confides it to another, who is to return him, not the same money, but a like sum when he shall demand it. Poth. Traité du Depôt, ch. 3, § 3. The usual deposit made by a person dealing with a bank is of this nature. The depositor, in such case, becomes merely a creditor of the depositary for the money or other thing which he binds himself to return. This species of deposit is also called an *improper deposit*, to distinguish from one that is *regular* and *proper*, and which latter is some-

times called a *special deposit*. 1 Bell's Com. 257, 8. See 4 Blackf. R. 395.

There is a kind of deposit, which may, for distinction's sake, be called a *quasi deposit*, which is governed by the same general rule as common deposits. It is when a party comes lawfully to the possession of another person's property by finding. Under such circumstances, the finder seems bound to the same reasonable care of it, as any voluntary depositary *ex contractu*. Doct. & Stu. Dial. 2, ch. 38. Story on Bailm. § 85; and see Bac. Abr. Bailm. D.

See further on the subject of deposits, Louis. Code, tit. 13; Bac. Abr. Bailment; Digeste, *depositi vel contra*; Code, lib. 4, tit. 34; Inst. lib. 3, tit. 15, § 3; Nov. 73 and 78; Domat, liv. 1, tit. 7; et tom. 2, liv. 3, tit. 1, s. 5, n. 26.

DEPOSITARY, *contracts*. He with whom a deposit is confided or made. It is of the essence of the contract of deposit, that it should be gratuitous on the part of the depositary. 9 M. R. 470. Being a bailee without reward, the depositary is bound to slight diligence only, and he is not therefore answerable except for gross neglect. 1 Dane's Abr. ch. 17, art. 2. But in every case good faith requires, that he should take reasonable care; and what is reasonable care, must materially depend upon the nature and quality of the thing, the circumstances under which it is deposited, and sometimes upon the character and confidence, and particular dealing of the parties. See 14 Serg. & Rawle, 275. The degree of care and diligence is not altered by the fact, that the depositary is the joint owner of the goods with the depositor; for in such a case, if the possessor is guilty of gross negligence, he will still be responsible, in the same manner as a common depositary, having no interest in the thing. Jones's Bailm. 82, 83. As to the care which a depositary is bound to to use, see 2 Ld. Raym. 909, 914; 1 Ld. Raym. 655; 2 Kent's Comm. 438; 17 Mass. R. 479, 499; 4 Burr. 2298; 14 Serg. & Rawle, 275; Jones's Bailm. 8; Story on Bailm. § 63, 64.

The depositary is bound to return the deposit *in individuo*, and in the same state in which he received it; if it is lost, or injured, or spoiled by his fraud, or gross negligence, he is responsible to the extent of the loss or injury. Jones's Bailm. 36, 46, 120; 17 Mass. R. 479; 2 Hawk. N. Car. R. 145; 1 Dane's Abr. ch. 17, art. 1 and 2. He is also bound to restore, not only the thing deposited, but any increase or profits, which may have accrued from it; if an animal deposited brings young, the latter are to be delivered to the owner. Story on Bailm. § 99.

In general it may be laid down that a depositary has no right to use the thing deposited. Bac. Abr. Bailm. D; Jones's Bailm. 81, 82; 1 Dane's Abr. ch. 17, art. 11, § 2. But this proposition must be received with many qualifications. There are certain cases, in which the use of the thing may be necessary for the due preservation of the deposit. There are others, again, where it would be mischievous; and others, again, where it would be, if not beneficial, at least indifferent. Jones's Bailm. 81. 82; Owen's R. 123, 124; 2 Salk. 522; 2 Kent's Comm. 450. The best general rule on the subject is to consider, whether there may or may not be an implied consent, on the part of the owner to the use. If the use would be for the benefit of the deposit, the assent of the owner may well be presumed; if to his injury or perilous, it ought not to be presumed; if the use would be indifferent, and other circumstances do not incline either way, the use may

be deemed not allowable. Jones's Bailm. 80, 81; Story on Bailm. § 90.

DEPOSITION, *evidence*, is the testimony of a witness reduced to writing in due form of law, taken by virtue of a commission or other authority of a competent tribunal. Before it is taken the witness ought to be sworn or affirmed to declare the truth, the whole truth, and nothing but the truth. It should properly be written by the commissioner appointed to take it, or by the witness himself; 3 Penna. R. 41; or by one not interested in the matter in dispute, who is properly authorised by the commissioner. 8 Watts's R. 406, 524. It ought to answer all the interrogatories, and be signed by the witness when he can write, and by the commissioner: when the witness cannot write it ought to be so stated, and he should make his mark or cross. Depositions in criminal cases cannot be taken without the consent of the defendant. Vide, generally, 1 Phil. Ev. 286; 1 Vern. 413, note; Ayl. Pand. 206; 2 Supp. to Ves. jr. 309; 7 Vin. Ab. 553; 12 Vin. Ab. 107; Dane's Ab. Index, h. t.; Com. Dig. Chancery, P 8, T 4, T 5; Com. Dig. Testmoigne, C 4.

The act of September 24, 1789, s. 30, 1 Story's L. U. S. 64, directs that when the testimony of any person shall be necessary in any civil cause depending in any district, in any court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient, or very infirm, the deposition of such person may be taken, de bene esse, before any justice or judge of any of the courts of the United States, or before any chancellor, justice, or judge of a supreme or superior court, mayor, or chief magistrate of a city, or judge of a county court or court of common pleas of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause; provided that a notification from the magistrate before whom the deposition is to be taken to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party, or his attorney, as either may be nearest, if either is within one hundred miles of the place of such caption, allowing time for their attendance after being notified, not less than at the rate of one day, Sundays exclusive, for every twenty miles travel. And in causes of admiralty and maritime jurisdiction, or other causes of seizure, when a libel shall be filed, in which an adverse party is not named, and depositions of persons, circumstanced as aforesaid, shall be taken before a claim be put in, the like notification, as aforesaid, shall be given to the person having the agency or possession of the property libelled at the time of the capture or seizure of the same, if known to the libellant. And every person deposing as aforesaid, shall be carefully examined and cautioned, and sworn or affirmed to testify *the whole truth*, and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the deposition, so taken shall be retained by such magistrate, until he deliver the same with his own hand into the court for which they are taken, or shall, together with a certificate of the reasons as aforesaid, of their being taken, and of the notice, if any given, to

the adverse party, be by him, the said magistrate, sealed up and directed to such court, and remain under his seal until opened in court. And any person may be compelled to appear and depose as aforesaid, in the same manner as to appear and testify in court. And in the trial of any cause of admiralty or maritime jurisdiction in a district court, the decree in which may be appealed from, if either party shall suggest to and satisfy the court, that probably it will not be in his power to produce the witnesses, there testifying, before the circuit court, should an appeal be had, and shall move that their testimony shall be taken down in writing, it shall be so done by the clerk of the court. And if an appeal be had, such testimony may be used on the trial of the same, if it shall appear to the satisfaction of the court, which shall try the appeal, that the witnesses are then dead, or gone out of the United States, or to a greater distance than as aforesaid, from the place where the court is sitting; or that, by reason of age, sickness, bodily infirmity, or imprisonment, they are unable to travel and appear at court, but not otherwise. And unless the same shall be made to appear on the trial of any cause, with respect to witnesses whose depositions may have been taken therein, such depositions shall not be admitted or used in the cause. *Provided*, That nothing herein shall be construed to prevent any court of the United States from granting a dedimus protestatem, to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice; which power they shall severally possess; nor to extend to depositions taken in perpetuam rei memoriam, which, if they relate to matters that may be cognizable in any court of the United States, a circuit court, on application thereto made as a court of equity, may, according to the usages in chancery, direct to be taken.

The act of January 24, 1827, 3 Story's L. U. S. 2040, authorises the clerk of any court of the United States within which a witness resides or where he is found, to issue a subpœna to compel the attendence of such witness, and a neglect of the witness to attend may be punished by the court whose clerk has issued the subpœna as for a contempt. And when papers are wanted by the parties litigant the judge of the court within which they are, may issue a subpœna duces tecum, and enforce obedience by punishment as for a contempt.

For the form and style of depositions, see Gresl. Eq. Ev. 77.

DEPOSITOR, *contracts*, is he who makes a deposit. He is generally entitled to receive the deposit from the depositary, but to this rule there are exceptions; as when the depositor at the time of making the deposit had no title to the property deposited, and the owner claims it from the depositary, the depositor cannot recover it; and for this reason, that he can never be in a better situation than the owner. 1 Barn. & Ald. 450; 5 Taunt. 759. As to the place where the depositor is entitled to receive his deposit, see Story on Bailm. § 117—120.

DEPREDATION, *French law*, is the pillage which is made of the goods of a decedent. Ferr. Mod. h. t.

DEPRIVATION, *ecclesiastical punishment*, is a censure by which a clergyman is deprived of his parsonage, vicarage, or other ecclesiastical promotion or dignity. Vide Ayliffe's Parerg. 206; 1 Bl. Com. 393.

DEPUTY, one authorised by an officer to exercise the office or right which the officer possesses, for and in place of the latter. In general ministerial officers can appoint deputies, Com. Dig. Officer, D 1, unless

the office is to be exercised by the ministerial officer in person; and where the office partakes of a judicial and ministerial character, although a deputy may be made of ministerial acts, one cannot be made to authorise the performance of a judicial act; a sheriff cannot therefore make a deputy to hold an inquisition, under a writ of inquiry, though he may appoint a deputy to serve a writ. In general a deputy has power to do every act which his principal might do; but a deputy cannot make a deputy. A deputy should always act in the name of his principal. The principal is liable for the deputy's acts performed by him as such, and for the neglect of the deputy. Dane's Ab. vol. 3, c. 76, a. 2; and the deputy is liable himself to the person injured for his own tortious acts. Dane's Ab. Index, h. t.; Com. Dig. Officer, D;—Viscount, B; Vide 7 Vin. Ab. 556; Arch. Civ. Pl. 68; 16 John. R. 108.

DEPUTY ATTORNEY GENERAL, an officer appointed by the attorney-general, who is to hold his office during the pleasure of the latter, and whose duty it is to perform, within a specified district, the duties of the attorney-general. He must be a member of the bar.

DEPUTY DISTRICT ATTORNEYS. The act of congress of March 3, 1815, 2 Story L. U. S. 1530, authorises and directs the district attorneys of the United States to appoint by warrant, an attorney as their substitute or deputy in all cases when necessary to sue or prosecute for the United States, in any of the state or county courts, by that act invested with certain jurisdiction, within the sphere of whose jurisdiction the said district attorneys do not themselves reside or practice; and the said substitute or deputy shall be sworn or affirmed to the faithful execution of his duty.

DERELICT, *common law*. This term is applied in the common law in a different sense from what it bears in the civil law. In the former it is applied to lands left by the sea. When so left by degrees the derelict land belongs to the owner of the soil adjoining, but when the sea retires suddenly, it belongs to the government. 2 Bl. Com. 262; 1 Bro. Civ. Law, 239.

DERELICTO, *civil law*, are goods voluntarily abandoned by their owner; he must, however, leave them, not only *sine spe revertendi*, but also *sine animo revertendi;* his intention to abandon them may be inferred by a great length of time during which he may have been out of possession, without any attempt to regain it. 1 Bro. Civ. Law, 239; 2 Bro. Civ. Law, 51; Wood's Civ. Law, 156; 19 Amer. Jur. 219, 221, 222; Dane's Ab. Index, h. t.; 1 Ware's R. 41.

DEROGATION, *civil law*, is the partial abrogation of a law; to derogate from a law is to enact something which is contrary to it; to abrogate a law is to abolish it entirely. Dig. lib. 50, t. 17, l. 102.

DESCENDANTS are the posterity, or those who have issued from an individual, and include his children, grandchildren, and their children to the remotest degree. Ambl. 327; 2 Bro. C. C. 30; Ib. 230; 3 Bro. C. C. 367; 1 Rop. Leg. 115. The descendants form what is called the direct descending line. Vide *Line*. The term is opposed to that of ascendants, (q. v.) There is a difference between the number of ascendants and descendants which a man may have; every one has the same order of ascendants, though they may not be exactly alike as to numbers, because some may be descended from a common ancestor. In the line of descendants they fork differently according to the number

of children, and continue longer or shorter as generations continue or cease to exist. Many families become extinct for want of descendants while others will last to the remotest ages; the line of descendants is therefore diversified in each family.

DESCENDER. Vide *Formedon.*

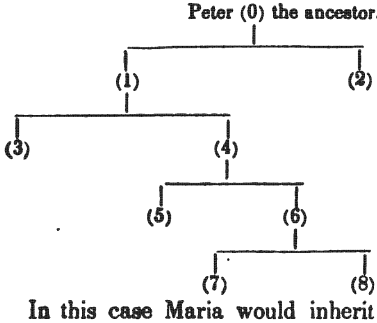
DESCENT. Hereditary succession. Descent is the title, whereby a person, upon the death of his ancestor, acquires the estate of the latter, as his heir at law. This manner of acquiring title is directly opposed to that of purchase, (q. v.) It will be proper to consider 1, what kind of property descends; and, 2, the general rules of descent.

§ 1. All real estate, and all freehold interest in land descend to the heir. And, as being accessory to the land and making a part of the inheritance, fixtures, and emblements, and all things annexed to, or connected with the land descend with it to the heir. Terms for years and other estates less than freehold, pass to the executor, and are not subjects of descent. It is a rule at common law that no one can inherit real estate unless he was heir to the person *last seised.* This does not apply as a general rule in the United States. Vide article *Possessio fratris.*

§ 2. The general rules of the law of descents.

1. It is a general rule in the law of inheritance, that if a person owning real estate, dies seised, or as owner without devising the same, the estate shall descend to his descendants in the direct line of lineal descent, and if there be but one person, then to him or her alone; and if more than one person, and all of equal degree of consanguinity to the ancestor, then the inheritance shall descend to the several persons as tenants in common in equal parts, however remote from the intestate the common degree of consanguinity may be. This rule is in favour of the equal claims of the descending line, in the same degree, without distinction of sex, and to the exclusion of all other claimants. The following example will illustrate it; it consists of three distinct cases: 1. Suppose Paul should die seised of real estate, leaving two sons and a daughter, in this case the estate would descend to them in equal parts; but suppose, 2, that instead of children, he should leave several grandchildren, two of them the children of his son Peter, and one the son of his son John, these will inherit the estate in equal proportions; or, 3, instead of children and grandchildren, suppose Paul left ten great grandchildren, one the lineal descendant of his son John, and nine the descendants of his son Peter, these, like the others, would partake equally of the inheritance as tenants in common. According to Chancellor Kent, this rule prevails in all the United States, with this variation, that in Vermont the male descendants take double the share of females; and in South Carolina, the widow takes one-third of the estate in fee; and in Georgia, she takes a child's share in fee, if there be any children, and, if none, she then takes in each of those states, a moiety, of the estate. In North and South Carolina, the claimant takes in all cases, *per stirpes*, though standing in the same degree. 4 Kent, Com. 371; Reeves's Law of Desc. *passim;* Griff. Law Reg., answers to the 6th interr. under the head of each state. In Louisiana the rule is, that in all cases in which representation is admitted, the partition is made by roots; if one root has produced several branches, the subdivision is also made by root in each branch, and the members of the branch take between them by heads. Civil Code, art. 895.

2. It is also a rule that if a person dying seised, or as owner of the land, leaves lawful issue of different degrees of consanguinity, the inheritance shall descend to the children and grand-children of the ancestor, if any be living, and to the issue of such children and grand-children as shall be dead, and so on to the remotest degree, as tenants in common; but such grand-children and their descendants, shall inherit only such share as their parents respectively would have inherited if living. This rule may be illustrated by the following example: 1. Suppose Peter, the ancestor, had two children, John, dead, (represented in the following diagram by figure 1,) and Maria, living, (fig. 2,) John had two children, Joseph, living, (fig. 3,) and Charles, dead, (fig. 4,); Charles had two children, Robert, living, (fig. 5,) and James, dead, (fig. 6,); James had two children, both living, Ann, (fig. 7,) and William, (fig. 8.)



In this case Maria would inherit one half; Joseph the son of John, one half of the half, or quarter of the whole; Robert, one eighth of the whole; and Ann and William, each one-sixteenth of the whole, which they would hold as tenants in common in these proportions. This is called inheritance *per stirpes*, by roots, because the heirs take in such portions only as their immediate ancestors would have inherited, if living.

3. When the owner of land dies without lawful issue, leaving parents, it is the rule in some of the states, that the inheritance shall *ascend* to them, first to the father, and then to the mother, or jointly to both, under certain regulations prescribed by statute.

4. When the intestate dies without issue or parents, the estate descends to his brothers and sisters, and their representatives. When there are such relations, and all of equal degree of consanguinity to the intestate, the inheritance descends to them in equal parts, however remote from the intestate the common degree of consanguinity may be. When all the heirs are brothers and sisters, or all of them nephews and nieces, they take equally. When some are dead who leave issue, and some are living, then those who are living take the share they would have taken if all had been living, and the descendants of those who are dead inherit only the share which their immediate parents would have received if living. When the direct lineal descendants stand in equal degrees, they take *per capita*, by the head, each one full share; when on the contrary, they stand in different degrees of consanguinity to the common ancestor, they take *per stripes*, by roots, by right of representation. It is nearly a general rule that the ascending line, after parents, is postponed to the collateral line of brothers and sisters. Considerable difference exists in the laws of the several states when the next of kin are nephews and nieces, and uncles and aunts claim as standing in the same degree. In many of the states all these relations take equally as being next of kin; this is the rule in the states of New Hampshire, Vermont, (subject to the claim of the males to a double portion as above stated,) Rhode Island, North Caro-

lina and Louisiana. In Alabama, Connecticut, Delaware, Georgia, Indiana, Illinois, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Tennessee, and Virginia, on the contrary, nephews and nieces take in exclusion of uncles and aunts, though they be of equal degree of consanguinity to the intestate. In Alabama, Connecticut, Georgia, Maryland, New Hampshire, Ohio, Rhode Island, and Vermont, there is no representation among collaterals after the children of brothers and sisters; in Delaware, none after the grand-children of brothers and sisters. In Louisiana the ascending line must be exhausted before the estate passes to collaterals. Code, art. 910. In North Carolina, claimants take *per stripes* in every case, though they stand in equal degree of consanguinity to the common ancestor. As to the distinction between whole and half blood, vide *Half blood*.

5. Chancellor Kent lays it down as a general rule in the American law of descent, that when the intestate has left no lineal descendants, nor parents, nor brothers, nor sisters, or their descendants, that the grandfather takes the estate, before uncles and aunts, as being nearest of kin to the intestate.

6. When the intestate dies leaving no lineal descendants, nor parents, nor brothers, nor sisters, nor any of their descendants, nor grand-parents, as a general rule, it is presumed, the inheritance descends to the brothers and sisters of both the intestate's parents, and to their descendants, equally. When they all stand in equal degree to the intestate, they take *per capita*, and when in unequal degree, *per stripes*. To this general rule, however, there are slight variations in some of the states, as, in New York, grand-parents do not take before collaterals.

7. When the inheritance came to the intestate on the part of the father, then the brothers and sisters of the father and their descendants shall have the preference, and, in default of them, the estate shall descend to the brothers and sisters of the mother, and their descendants; and where the inheritance comes to the intestate on the part of his mother, then her brothers and sisters, and their descendants, have a preference, and in default of them the brothers and sisters on the side of the father, and their descendants, inherit. This is the rule in Connecticut, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, and Virginia. In some of the states there is perhaps no distinction as to the descent whether they have been acquired by purchase or by descent from an ancestor.

8. When there is a failure of heirs under the preceding rules, the inheritance descends to the remaining next of kin of the intestate, according to the rules in the statute of distribution of the personal estate, subject to the doctrine in the preceding rules in the different states as to the half blood, to ancestral estates, and as to the equality of distribution. This rule prevails in several states, subject to some peculiarities in the local laws of descent, which extend to this rule.

It is proper before closing this article, to remind the reader, that in computing the degrees of consanguinity, the civil law is followed generally in this country, except in North Carolina, where the rules of the common law in their application to descents are adopted, to ascertain the degree of consanguinity. Vide the articles *Branch; Consanguinity; Degree; Line*.

DESCRIPTION is a written account of the state and condition of personal property, titles, papers, and the like. It is a kind of inventory (q. v.) but is more particular in as-

certaining the exact condition of the property, and is without any appraisement of it. When goods are found in the possession of a person accused of stealing them, a description ought to be made of them. Merl. Rép. h. t. A description is less perfect than a definition, (q. v.) It gives some knowledge of the accidents and qualities of a thing; for example, plants, fruits, and animals, are described by their shape, bulk, colour, and the like accidents. Ayl. Pand. 60. Description may also be of a person, as description of a legatee. 1 Roper on Leg. chap. 2.

DESERTER. One who abandons his post; as, a soldier who abandons the public service without leave; or a sailor who abandons a ship when he has engaged to serve.

DESERTION, *crim. law*, is an offence which consists in the abandonment of the public service, in the army or navy, without leave. The act of March 16, 1802, s. 19, enacts that if any non-commissioned officer, musician, or private, shall desert the service of the United States, he shall, in addition to the penalties mentioned in the rules and articles of war, be liable to serve for and during such period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment; and such soldier shall and may be tried by a court martial and punished, although the term of his enlistment may have elapsed previous to his being apprehended or tried. By the articles of war it is enacted that "any non-commissioned officer or soldier who shall, without leave from his commanding officer, absent himself from his troop, company, or detachment, shall, upon being convicted thereof, be punished according to the nature of his offence, at the discretion of a court martial." Art. 21. By the articles for the government of the navy, art. 16, it is enacted that "if any person in the navy shall desert to an enemy or rebel, he shall suffer death;" and by art. 17, "if any person in the navy shall desert or shall entice others to desert, he shall suffer death, or such other punishment as a court martial shall adjudge."

DESERTION, *torts*, is the act by which a man abandons his wife and children, or either of them. On proof of desertion, the courts possess the power to grant the wife, or such children as have been deserted, alimony, (q. v.)

DESERTION, MALICIOUS.—Vide *Abandonment, malicious*.

DESERTION OF SEAMEN,—*contracts*, is the abandonment by a sailor of a ship or vessel in which he engaged to perform a voyage, before the expiration of his time, and without leave. Desertion without just cause renders the sailor liable, on his shipping articles, for damages, and will, besides, work a forfeiture of his wages previously earned. 3 Kent, Com. 155. It has been decided in England, that leaving the ship before the completion of the voyage is not desertion, in the case, 1, of the seaman's entering into the public service, either voluntarily or by impress; and, 2, when he is compelled to leave it by the inhuman treatment of the captain. 2 Esp. R. 269; 1 Bell's Com. 514, 5th ed.; 2 Rob. Adm. R. 232.

DESIGNATION, *wills*, is the expression used by a testator instead of the name of the person or the thing he is desirous to name; for example, a legacy to the eldest son of such a person, would be a designation of the legatee. Vide 1 Rop. Leg. ch. 2. A bequest of the farm which the testator bought of such a person; or of the picture he owns painted by such an artist, would be a designation of the thing devised or bequeathed.

DESPACHEURS. The name given in some countries to persons appointed to settle cases of average. Ord. Hamb. t. 21, art. 10.

DESPOTISM, *in government*, is that abuse of government, where the sovereign power is not divided, but united in the hands of a single man, whatever may be his official title. It is not properly a form of government. Toull. Dr. Civ. Fr. tit. prel. n. 32; Rutherf. Inst. b. 1, c. 20, § 1. Vide *Tyranny; Tyrant.*

DESSEISED, *pleading*. This is a word with a technical meaning, which when inserted in an indictment for forcible entry and detainer has all the force of the words *expelled* or *unlawfully*, for the last is superfluous, and the first is implied in the word desseised. 8 T. R. 357; Cro. Jac. 32; vide 3 Yeates's R. 39; S. C. 4 Dall. Rep. 212.

DESTINATION, is the application which the testator directs shall be made of the legacy he gives; for example, when a testator gives to a hospital a sum of money, to be applied in erecting buildings, he is said to give a destination to the legacy. Destination also signifies the intended application of a thing. Mill stones, for example, taken out of a mill to be picked, and intended to be returned, have a destination, and are considered as real estate, although detached from the freehold. Heir looms, (q. v.) although personal chattels, are, by their destination, considered real estate; and money agreed or directed to be laid out in land, is treated as real property. Newl. on Contr. ch. 3; Fonbl. Eq. B. 1, c. 6, § 9; 3 Wheat. R. 577. Vide *Mill.* When the owner of two adjoining houses uses, during his life, the property in such a manner as to make one property subject to the other, and devises one property to one person, and the other to another, this is said not to be an easement or servitude, but a destination by the former owner. Lois des Bât. partie 1, c. 4, art. 3, § 3.

DESUETUDE. This term is applied to laws which have become obsolete, (q. v.)

DETAINER. 1. The act of keeping a person against his will, or of keeping goods or property. All illegal detainers of the person amount to false imprisonment, may be remedied by habeas corpus. 2. A detainer or detention of goods is either lawful or unlawful; when lawful the party having possession of them cannot be deprived of it. The detention may be unlawful although the original taking was lawful; as when goods were distrained for rent, and the rent was afterwards paid; or when they were pledged, and the money borrowed and interest was afterwards paid; in these and the like cases, the owner should make a demand, (q. v.) and if the possessor refuse to restore them, trover, detinue, or replevin will lie, at the option of the plaintiff. 3. A writ or instrument issued or made by a competent officer, authorising the keeper of a prison to keep in his custody a person therein named; a detainer may be lodged against one within the walls of a prison, on what account soever he is there. Com. Dig. Process, E 3 b.

DETERMINATION, is the end, the conclusion of a right or authority; as, the determination of a lease, Com. Dig. Estates by grant, G 10, 11, and 12. The determination of an authority, is the end of the authority given, the end of the return day of a writ determines the authority of the sheriff; the death of the principal determines the authority of a mere attorney.

DETINET. Vide *Debet et Detinet*, and *Detinuit.*

DETINUE, *remedies*, is the name of an action for the recovery of a personal chattel in specie. 3

Bl. Com. 152. This action may be considered 1, with reference to the nature of the thing to be recovered; 2, the plaintiff's interest therein; 3, the injury; 4, the pleadings; 5, the judgment.

1. The goods which it is sought to recover, must be capable of being distinguished from all others, as, a particular horse, a cow, &c. but not for a bushel of grain. Com. Dig. Detinue, B, C; 3 Bl. Com. 152; Co. Litt. 286 b.

2. To support this action, the plaintiff must have a right to immediate possession, although he never had actual possession, a reversioner cannot, therefore, maintain it. And a bailee, who has only a special property may nevertheless support it when he delivered the goods to the defendant, or they were taken out of the bailee's custody. 2 Saund. 47, b, c, d; Bro. Ab. h. t.

3. The gist of the action is the wrongful detainer, and not the original taking. The possession must have been acquired by the defendant by lawful means, as by delivery, bailment, or finding, and not tortiously.

4. In the pleadings in this action much certainty is requisite in the description of the chattels. The general issue is *non detinet*, and under it special matter may be given in evidence. Co. Litt. 283.

5. The verdict and judgment must be such, that a special remedy may be had for the recovery of the goods detained, or a satisfaction in value for each parcel, in case they or either of them cannot be returned. The judgment is in the alternative, that the plaintiff recover the goods or the value thereof, if he cannot have the goods themselves, and his damages for the detention and full costs. Vide, generally, 1 Chit. Pl. 117; 3 Bl. Com. 152; 2 Reeve's Hist. C. L. 261, 333, 336; 3 Ib. 66, 74; Bull. N. P. 50. This action has yielded to the more practical and less technical action of trover. 3 Bl. Com. 152.

DETINUIT, *practice*, he detained. Where an action of replevin is instituted for goods which the defendant had taken but which he afterwards restored, it is said to be brought in the *detinuit;* in such case the judgment is that the plaintiff recover the damages assessed by the jury for the taking and unjust detention, or for the latter only where the former was justifiable, and his costs. When the replevin is in the *detinet*, that he retains the goods, the jury must find in addition to the above, the value of the chattels, (assuming they are still detained) not in a gross sum, but each separate article must be separately valued, for perhaps the defendant may restore some of them, in which case the plaintiff is to recover the value of the remainder. Vide *Debet et Detinet.*

DEVASTAVIT. A devastavit is a mismanagement and waste by an executor, administrator or other trustee, of the estate and effects trusted to him as such, by which a loss occurs. It takes place by direct abuse, by mal-administration, and by neglect.

§ 1. *By direct abuse.* This takes place when the executor, administrator or trustee, sells, embezzles, or converts to his own use, the goods entrusted to him. Com. Dig. Administration, I 1; releases a claim due to the estate, 3 Bac. Ab. 78; and vide 5 Bac. Ab. 700; Hob. 266; Cro. Eliz. 43; 7 John. R. 404; 9 Mass. 352; or surrenders a lease below its value. 2 John. Cas. 376; 3 P. Wms. 330. These instances sufficiently show that any wilful waste of the property will be considered as a direct *devastavit.*

§ 2. *By mal-administration.* De-

vastavit by mal-administration most frequently occurs by the payment of claims which were not due nor owing; or by paying others out of the order in which they ought to be paid; or by the payment of legacies before all the debts have been satisfied. 4 Serg. & Rawle, 394.

§ 3. *By neglect.* Negligence on the part of an executor, administrator or trustee, may equally tend to the waste of the estate, as the direct destruction or mal-administration of the assets, and render him guilty of a *devastavit*. The neglect to sell the goods at a fair price within a reasonable time, or, if they are perishable goods, before they are wasted, will be a *devastavit*. And a neglect to collect a doubtful debt, which by proper exertion, might have been collected, will be so considered. Bac. Ab. Executors, L.

The law requires from trustees, good faith and due diligence, the want of which is punished by making them responsible for the losses which may be sustained by the property entrusted to them; when, therefore, a party has been guilty of a *devastavit*, he is required to make up the loss out of his own estate. Vide Com. Dig. Administration, I; 11 Vin. Ab. 306; 1 Supp. to Ves. Jr. 209; 1 Vern. 328; 7 East, R. 257; 1 Binn. 194; 1 Serg. & Rawle, 241; 1 John. R. 396; 1 Caines's Cas. 96; Bac. Ab. Executor, L.

DEVIATION, *insurance, contracts*, is a voluntary departure, without necessity, or any reasonable cause, from the regular and usual course of the voyage insured. From the moment this happens, the voyage is changed, the contract determined, and the insurer discharged from all subsequent responsibility. By the contract the insurer only runs the risk of the contract agreed upon, and no other; and it is therefore a condition implied in the policy, that the ship shall proceed to her port of destination by the shortest and safest course, and on no account to deviate from that course but in cases of necessity. The effect of a deviation is not to vitiate or avoid the policy, but only to determine the liability of the underwriters from the time of the deviation. If, therefore, the ship or goods, after the voyage has commenced, receive damage, then the ship deviates, and afterwards a loss happen, there, though the insurer is discharged from the time of the deviation, and is not answerable for the subsequent loss, yet he is bound to make good the damage sustained previous to the deviation. 2 Lord Raym. 842; 2 Salk. 444. But though he is thus discharged from subsequent responsibility, he is entitled to retain the whole premium. Dougl. 271; 1 Marsh. Ins. 183; Park, Ins. 294. See 2 Phil. Ev. 60, n. (b), where the American cases are cited.

What amounts to a deviation is not easily defined, but a departure from the usual course of the voyage, or remaining at places where the ship is authorised to touch, longer than necessary, or doing there what the insured is not authorised to do, as if the ship have merely liberty to touch at a port, and the insured stay there to trade or break bulk, it is a deviation. 4 Dall. 274; 1 Peters's C. C. R. 104; Marsh. Ins. B. 1, c. 6, s. 2. By the course of the voyage, is not meant the shortest course the ship can take from her port of departure to her port of destination, but the regular and customary track, if such there be, which long usage has proved to be the safest and most convenient. 1 Marsh. Ins. 185. See 3 Johns. Cas. 352; 7 T. R. 162.

A deviation that will discharge the insurer, must be a voluntary departure from the usual course of the voyage insured, and not warranted

by any necessity. If a deviation can be justified by necessity, it will not affect the contract; and necessity will justify a deviation, though it proceed from a cause not insured against. The cases of necessity which are most frequently adduced to justify a departure from the direct or usual course of the voyage, are, 1st. Stress of weather; 2d. The want of necessary repairs; 3d. Joining convoy; 4th. Succouring ships in distress; 5th. Avoiding capture or detention; 6th. Sickness of the master or mariners; 7th. Mutiny of the crew.

See Park, Ins. ch. 17; 2 John. Cas. 296; 11 Johns. R. 241; Pet. C. C. R. 98; 2 Johns. Rep. 89; 14 Johns. R. 315; 2 Johns. R. 138; 9 Johns. R. 192; 8 Johns. Rep. 491; 13 Mass. 68; 13 Mass. 539; Ib. 118; 14 Mass. 12; 1 Johns. Cas. 313; 11 Johns. R. 241; 3 Johns. R. 352; 10 Johns. R. 83; 1 Johns. R. 301; 9 Mass. 436, 447; 3 Binn. 457; 7 Mass. 349; 5 Mass. 1; 8 Mass. 308; 6 Mass. 102, 121; 6 Mass. 122; 7 Cranch, 26; Ib. 487; 3 Wheat. 159; 7 Mass. 365; 10 Mass. 21; Ib. 347; 7 Johns. Rep. 363; 3 Johns. R. 352; 4 Dall. R. 274; 5 Binn. 403; 2 Serg. & Raw. 309; 2 Cranch, 240.

DEVIATION, *contracts.* When a plan has been adopted for a building, and in the progress of the work a change has been made from the original plan, the change is called a deviation. When the contract is to build a house according to the original plan, and a deviation takes place, the contract shall be traced as far as possible, and the additions, if any have been made, shall be paid according to the usual rate of charging. 3 Barn. & Ald. 47; and see 1 Ves. jr. 60; 10 Ves. jr. 306; 14 Ves. 413; 13 Ves. 73; Id. 81; 6 Johns. Ch. R. 38; 3 Cranch, 270; 5 Cranch, 262; 3 Ves. 693; 7 Ves. 274; Chit. Contr. 168.

The Civil Code of Louisiana, art. 2734, provides, that when an architect or other workman has undertaken the building of a house by the job, according to a plot agreed on between him and the owner of the ground, he cannot claim an increase of the price agreed on, on the plea of the original plot having been changed and extended, unless he can prove that such changes have been made in compliance with the wishes of the proprietor.

DEVISAVIT VEL NON, *practice*, the name of an issue sent out of a court of chancery, or one which exercises chancery jurisdiction, to a court of law, to try the validity of a paper asserted and denied to be a will, to ascertain whether or not the testator did devise, or whether or not that paper was his will. 7 Bro. P. C. 437; 2 Atk. 424.

DEVISE. A devise is a disposition of real property by a person's last will and testament, to take effect after the testator's death. Its form is immaterial provided the instrument is to take effect after the death of the party; and a paper in the form of an indenture, which is to have that effect, is considered as a devise. Finch, 195; 6 Watts, 522; 3 Rawle, 15; 4 Dessaus. 617, 313; 1 Mod. 117; 1 Black. R. 345. The term devise, properly and technically, applies only to real estate, the object of the devise must therefore be that kind of property. 1 Hill. Ab. ch. 36, n. 62 to 74. Devise is also improperly applied to a bequest of personal estate, the proper terms being bequest or legacy, (q. v.) Vide 4 Kent, Com. 489; 8 Vin. Ab. 41; Com. Dig. Estates by Devise.

DEVISEE. A person to whom a devise has been made. All persons who are in *rerum natura*, and even embryos may be devisees, unless excepted by some positive law. In general he who can acquire property by

his labour and industry, may receive a devise.

DEVISOR. A testator; one who devises his real estate. As a general rule all persons who may sell the estate may devise it. The disabilities of devisors may be classed in three divisions. 1. Infancy. In some of the United States this disability is partially removed; in Illinois, Maryland, Mississippi and Ohio, an unmarried woman at the age of eighteen years may devise. 2. Coverture. In general a married woman cannot devise, but in Connecticut and Ohio she may devise her lands; and in Illinois, her separate estate. In Louisiana, she may devise without the consent of her husband. Code, art. 132. 3. Idiocy and non sane memory. It is evident that a person non compos can make no devise, because he has no will. The removal of the disability which existed at the time of the devise does not, of itself, render it valid. For example, when the husband dies, and the wife becomes a feme sole; when one non compos is restored to his sense; and when an infant becomes of age; these several acts do not make a will good, which at its making was void. 11 Mod. 123, 157; 2 Vern. 475; Comb. 84; 4 Rawle, R. 336. Vide *Testament* or *Will*.

DI COLONNA, *mar. contracts.* This contract takes place between the owner of a ship, the captain and the mariners, who agree that the voyage shall be for the benefit of all. This is a term used in the Italian law, Targa, ch. 36, 37; Emerigon, Mar. Loans, s. 5. The New England *whalers* are owned and navigated in this manner, and under this species of contract. The captain and his mariners are all interested in the profits of the voyage in certain proportions, in the same manner as the captain and crew of a privateer, according to the agreement between them. Such agreement, being very common in former times; all the mariners and the master being interested in the voyage. It is necessary to know this in order to understand many of the provisions of the laws of Oleron, Wisbuy, the Consolato del Mare, and other ancient codes of maritime and commercial law. Hall, on Mar. Loans, 42.

TO DICTATE is to pronounce word for word what is destined to be at the same time written by another. Merlin. Rép. mot Suggestion, p. 500; Toull. Dr. Civ. Fr. liv. 3, t. 2, c. 5, n. 410.

DICTATOR, *civil law.* A magistrate at Rome invested with absolute power. His authority over the lives and fortunes of the citizens was without bounds. His office continued but for six months. Hist. de la Jur. h. t.; Dig. 1, 2, 18; Id. 1, 1, 1.

DICTUM, *practice.* Dicta are judicial opinions expressed by the judges on points that do not necessarily arise in the case. Dicta are regarded as of little authority, on account of the manner in which they are delivered; it frequently happening that they are given without much reflection, at the bar, without previous examination. "If," says Huston, J. in Frants v. Brown, 17 Serg. & Rawle, 292, "general dicta in cases turning on special circumstances are to be considered as establishing the law, nothing is yet settled, or can be long settled." "What I have said or written, out of the case trying," continues the learned judge, "or shall say or write, under such circumstances, may be taken as my opinion at the time, without argument or full consideration; but I will never consider myself bound by it, when the point is fairly trying and fully argued and considered. And I protest against any person considering such *obiter dicta* as my deliberate opinion." And it was con-

sidered by another learned judge, Mr. Baron Richards, to be a "great misfortune that dicta are taken down from judges, perhaps incorrectly, and then cited as absolute propositions." 1 Phillim. Rep. 406; S. C. 1 Eng. Ecc. R. 129; Ram on Judgm. ch. 5, p. 36; Willes's Rep. 666; 1 H. Bl. 53—63; 2 Bos. & P. 375; 7 T. R. 287. In the French law, the report of a judgment made by one of the judges who has given it, is called the *dictum*. Poth. Proc. Civ. Partie 1, c. 5, art. 2.

DIES. A day. There are four sorts of days: 1, a natural day; as, the morning and the evening made the first day; 2, an artifical day, that is from day-break until twilight in the evening; 3, an astrological day, *dies astrologicus*, from sun to sun; 4, a legal day, which is dies juridicus, and dies non juridicus. 1. Dies juridici, are all days given in term to the parties in court. Dies non juridici are those which are not appointed to do business in court, as Sundays, and the like. Vide *Day*, and 3 Com. Dig. 358.

DIES DATUS, *practice*, is a day or time of respite given to a defendant in a suit.

DIFFERENCE. A dispute; contest. As the differences of the parties have been settled by a compromise.

DIGEST, *civil law*. The name sometimes given to the Pandects of Justinian; it is so called because this compilation is reduced to order, *quasi digestiæ*. It is an abridgment of the decisions of the prætors and the works of the learned and ancient writers on the law. It was made by order of the Emperor Justinian who, in 530, published an ordinance entitled *De conceptione Digestorum*, which was addressed to Tribonian, and by which he was required to select some of the most distinguished lawyers to assist him in composing a collection of the best decisions of the ancient lawyers, and compile them in fifty books, without confusion or contradiction. The work was immediately commenced, and completed on the 16th of December, 533.

The Digest is divided in two different ways, the first, into fifty books, each book in several titles, and each title in several laws; at the head of each of them is the name of the lawyer from whose work it was taken.

1. The first book contains twenty-two titles, the subject of the first is *De justicia et jure;* of the division of person and things; of magistrates, &c.

2. The second, divided into fifteen titles, treats of the power of magistrates and their jurisdiction; the manner of commencing suits; of agreements and compromises.

3. The third, composed of six titles, treats of those who can and those who cannot sue; of advocates and attorneys and syndics; and of calumny.

4. The fourth, divided into nine titles, treats of causes of restitution; of submissions and arbitrations; of minors, carriers by water, innkeepers and others who have the care of the property of others.

5. In the fifth there are six titles, which treat of jurisdiction, inofficious testaments.

6. The subject of the sixth, in which there are three titles, is actions.

7. The seventh, in nine titles, embraces whatever concerns usufructs, personal servitudes, habitations, the uses of real estate, and its appurtenances, and of the sureties required of the usufructuary.

8. The eighth book, in six titles, regulates urban and rural servitudes.

9. The ninth book, in four titles, explains certain personal actions.

10. The tenth, in four titles, treats of mixed actions.

11. The object of the eleventh book, containing eight titles, is to regulate interrogatories, the cases of which the judge was to take cognizance, fugitive slaves, of gamblers, of surveyors who made false reports, and of funerals and funeral expenses.

12. The twelfth book, in seven titles, regulates personal actions in which the plaintiff claims the title of a thing.

13. The thirteenth, treats of certain particular actions, in seven titles.

14. This, like the last, regulates certain actions: it has six titles.

15. The fifteenth, in four titles, treats of actions for which a father or master is liable, in consequence of the acts of his children or slaves, and those to which he is entitled; of the peculium of children and slaves, and of the actions on this right.

16. The sixteenth, in three titles, contains the law relating to the senatus consultum valleianum, of compensation or set-off, and of the action of deposit.

17. The seventeenth, in two titles, expounds the law of mandates and partnership.

18. The eighteenth book, in seven titles, explains the contract of sale.

19. The nineteenth, in five titles, treats of the actions which arise on a contract of sale.

20. The law relating to pawns, hypothecation, the preference among creditors, and subrogation, occupy the twentieth book, which contains six titles.

21. The twenty-first book explains, under three titles, the edict of the ediles relating to the sale of slaves and animals; then what relates to evictions and warranties.

22. The twenty-second treats of interest, profits and accessories of things, proofs, presumptions, and of ignorance of law and fact. It is divided in six titles.

23. The twenty-third, in five titles, contains the law of marriage, and its accompanying agreements.

24. The twenty-fourth, in three titles, regulates donations between husband and wife, divorces, and their consequence.

25. The twenty-fifth is a continuation of the subject of the preceding. It contains seven titles.

26 and 27. These two books, each in two titles, contain the law relating to tutorship and curatorship.

28. The twenty-eighth, in eight titles, contains the law on last wills and testaments.

29. The twenty-ninth, in seven titles, is a continuation of the twenty-eighth book.

30, 31, and 32. These three books, each divided in two titles, contain the law of trusts and specific legacies.

33, 34, and 35. The first of these, divided in ten titles; the second, in nine titles, and the last in three titles, treat of various kinds of legacies.

36. The thirty-sixth, containing four titles, explains the senatus consultum trebellianum, and the time when trusts become due.

37. This book, containing fifteen titles, has two objects, first, to regulate pretorian successions; and, secondly, the respect which children owe their parents, and freedmen their patrons.

38. The thirty-eighth book, in seventeen titles, treats of a variety of subjects; of successions, and of the degree of kindred in successions; of possession; and of heirs.

39. The thirty-ninth explains the means the law and the pretor take to prevent a threatened injury; and donations *inter vivos* and *mortis causâ*.

40. The fortieth, in sixteen titles, treats of the state and condition of persons and of what relates to freedmen and liberty.

41. The different means of acquiring and losing title to property, are explained in the forty-first book, in ten titles.

42. The forty-second, in eight titles, treats of the *res judicata*, and of the seizure and sale of the property of a debtor.

43. Interdicts or possessory actions are the object of the forty-third book, in three titles.

44. The forty-fourth contains an enumeration of defences which arise in consequence of the *res judicata*, from the lapse of time, prescription, and the like. This occupies six titles; the seventh treats of obligations and actions.

45. This speaks of stipulations, by freedmen, or by slaves. It contains only three titles.

46. This book, in eight titles, treats of securities, novations, delegations, payments, releases, and acceptilations.

47. In the forty-seventh book are explained the punishments inflicted for private crimes, *de privatis delictis*, among which are included larcenies, slander, libels, offences against religion, and public manners, removing boundaries and other similar offences.

48. This book treats of public crimes, among which are enumerated those of *læsæ magistatis*, adultery, murder, poisoning, parricide, extortion, and the like, with rules for procedure in such cases.

49. The forty-ninth, in eighteen titles, treats of appeals, of the rights of the public treasury, of those who are in captivity, and of their repurchase.

50. The last book, in seventeen titles, explains the rights of municipalities, and then treats of a variety of public officers.

Besides this division, Justinian made another, in which the fifty books were divided in seven parts: The first contains the first four books; the second, from the fifth to the eleventh book inclusive; the third, from the twelfth to the nineteenth inclusive; the fourth, from the twentieth to the twenty-seventh inclusive; the fifth, from the twenty-eighth to the thirty-sixth inclusive; the sixth, commenced with the thirty-seventh and ended with the forty-fourth book; and the seventh or last was composed of the last six books.

A third division, which however is said not to have been made by Justinian, is in three parts. The first called *digestum vetus*, because it was the first printed. It commences with the first book, and includes the work to the end of the second title of the twenty-fourth book. The second, called *digestum infortiatum*, because it is supported or fortified by the other two, it being in the middle; it commences with the beginning of the third title of the twenty-fourth book and ends with the thirty-eighth. The third, which begins with the thirty-ninth book and ends with the work, is called *digestum novum*, because it was last printed.

The Digest although compiled in Constantinople, was originally written in Latin and afterwards translated into Greek.

DIGNITIES, *English law*, are titles of honour. They are considered as incorporeal hereditaments. The genius of our government forbids their admission in the republic.

DILATORY. That which is intended for delay. It is a maxim that delays in law are odious, *dilationes in lege sunt odiosæ*. Plowd. 75.

DILATORY DEFENCE, *in chancery practice*. A dilatory defence is one, the object of which, is to dismiss, suspend, or obstruct the suit, without touching the merits, until the impediment or obstacle insisted

on shall be removed. These defences are of four kinds: 1st, to the jurisdiction of the court; 2, to the person of the plaintiff or defendant; 3, to the form of proceedings, as that the suit is irregularly brought, or it is defective in its appropriate allegation of parties; and, 4, to the propriety of maintaining the suit itself, because of the pendency of another suit for the same controversy, Montag. Eq. Pl. 88; Story, Eq. Pl. § 434. Vide *Defence; Plea, Dilatory.*

DILATORY PLEAS. Vide *Plea, Dilatory.*

DILIGENCE, *contracts*, is the doing things in proper time. It may be divided into three degrees, namely, ordinary diligence, extraordinary diligence, and slight diligence. It is the reverse of negligence, (q. v.); under that article is shown what degree of negligence or want of diligence will make a party to a contract responsible to the other. Vide Story, Bailm. Index, h. t.; Ayl. Pand. 113.

DILIGENCES, in Scotland, are certain forms of law whereby a creditor endeavours to make good his payment, either by affecting the person of his debtor, or by securing the subjects belonging to him from alienation, or by carrying the property of these subjects to himself. They are either real or personal.

Real diligence is that which is proper to heritable or real rights, and of this kind there are two sorts; 1, inhibitions; 2, adjudication, which the law has substituted in the place of apprising.

Personal diligence is that by which the person of the debtor may be secured, or his personal estate affected. Ersk. Pr. L. Scot. B. 2, t, 11, s. 1.

DIME, *money*, is a silver coin of the United States of the value of one-tenth part of a dollar or ten cents. It weighs forty-one and a quarter grains. Of one thousand parts, nine hundred are of pure silver and one hundred of alloy. Act of January 18, 1837, s. 8 and 9, 4 Sharsw. cont. of Story's L. U. S. 2523, 4.

DIMINUTION, *practice*, an omission in the record, or in some part of the proceedings, which is certified on a writ of error on the part of either plaintiff or defendant. Co. Ent. 232; 8 Vin. Ab. 552; 1 Lilly's Ab. 245; 1 Nels. Ab. 658; Cro. Jac. 597; Cro. Car. 91. When the diminution has been established, a *certiorari* will be granted, for the purpose of completing the record. Minor, R. 20; 4 Dev. R. 575; 1 Dev. & Bat. 382; 1 Munf. R. 119. Vide *Certiorari.*

DIOCESE, *eccl. law.* The district over which a bishop exercises his spiritual functions. 1 Bl. Com. 111.

DIPLOMA. An instrument of writing executed by a corporation or society, certifying that a certain person therein named is entitled to a certain distinction therein mentioned. It is usually granted by learned institutions to their members, or to persons who have studied in them. Proof of the seal of a medical institution and of the signatures of its officers thereto affixed, by comparison with the seal and signatures attached to a diploma received by the witness from the same institution, has been held to be competent evidence of the genuineness of the instrument, although the witness never saw the officers write their names. 25 Wend. R. 469.

DIPLOMACY, is the science which teaches of the relations and interests of nations with nations.

DIRECT. Straight forward; not collateral. The direct line of descent, for example, is formed by a series or degrees between persons who descend one from another. Civ. Code of Lo. art. 886.

DIRECTION. The order and government of an institution; the per-

sons who compose the board of directors are jointly called the direction. Direction, in another sense, is nearly synonymous with instruction, (q. v.)

DIRECTORS, are persons appointed or elected according to law, authorised to manage and direct the affairs of a corporation, or company. The whole of the directors collectively form the board of directors. They are generally invested with certain powers by the acts of the legislature, to which they owe their existence. In modern corporations created by statutes, it is generally contemplated by the charter, that the business of the corporation shall be transacted exclusively by the directors. 2 Caines's R. 381, and the acts of such a board, evidenced by a legal vote, are as completely binding upon the corporation, and as complete authority to their agents as the most solemn acts done under the corporate seal. 8 Wheat. R. 357, 8. To make a legal board of directors, they must meet at a time when, and a place where, every other director has the faculty of attending to consult and be consulted with; and there must be a sufficient number present to constitute a quorum. 3 L. R. 574; 13 L. R. 527; 6 L. R. 759. See 11 Mass. 288; 5 Litt. R. 45; 12 S. & R. 256; 1 Pet. S. C. R. 46. Vide Dane's Ab. h. t. Directors of a corporation are trustees, and as such are required to use due diligence and attention to its concerns, and are bound to a faithful discharge of the duty which the situation imposes. They are liable to the stockholders whenever there has been gross negligence or fraud; but not for unintentional errors. 1 Edw. Ch. R. 513; 8 N. S. 80; 3 L. R. 575.

DIRECTOR OF THE MINT, is an officer whose duties are prescribed by the act of congress of January 18, 1837, 4 Sharsw. Cont. of Story L. U. S. 2524, as follows: The director shall have the control and management of the mint, the superintendence of the officers and persons employed therein, and the general regulation and surpervision of the business of the several branches. And in the month of January of every year he shall make report to the President of the United States of the operation of the mint and its branches for the year preceding. And also to the secretary of the treasury, from time to time, as said secretary shall require, setting forth all the operations of the mint subsequent to the last report made upon the subject.

The director is required to appoint, with the approbation of the president, assistants to the assayer, melter and refiner, chief coiner, and engraver, and clerks to the director and treasurer, whenever, on representation made by the director to the president, it shall be the opinion of the president that such assistants or clerks are necessary. And bonds may be required from such assistants and clerks in such sums as the director shall determine, with the approbation of the secretary of the treasury. The salary of the director of the mint, for his services, including travelling expenses incurred in visiting the different branches and all other charges whatever, is three thousand five hundred dollars.

DISABILITY. The want of legal capacity to do a thing. In the acts of limitation it is provided that persons lying under certain disability, such as being *non compos*, an infant, in prison, or under coverture, shall have the right to bring actions after the disability shall have been removed. In the construction of this saving in the acts, it has been decided that two disabilities shall not be joined when they occur in *different persons;* as, if a right of entry accrue to a

feme covert, and during the coverture she die, and the right descends to her infant son. But the rule is otherwise when there are several disabilities in the *same person;* as, if the right accrues to an infant, and before he has attained his full age, he becomes *non compos mentis;* in this case he may establish his right after the removal of the last disability, 2 Prest. Abs. of Tit. 341; Shep. To. 31; 3 Tho. Co. Litt. pl. 18, note (L); 2 H. Bl. 584; 5 Whart. R. 377. Vide *Incapacity.*

DISBURSEMENT. Literally to take money out of a purse; figuratively, to pay out money, to expend money; and sometimes it signifies to advance money. A master of a ship makes disbursements, whether with his own money or that of the owner, when he defrays expenses for the ship. An executor, guardian, trustee, or other accountant, is said to have made disbursements when he expended money on account of the estate which he holds. These, when properly made, are always allowed in the settlement of the accounts.

DISCHARGE OF A CONTRACT. The act of making a contract or agreement null. Contracts may be discharged by, 1, payment;—2, accord and satisfaction, 8 Com. Dig. 917; 1 Nels. Abr. 18; 1 Lilly's Reg. 10, 16; Hall's Dig. 7; 1 Poth. Ob. 345;—3, Release, 8 Com. Dig. 906; 3 Nels. Ab. 69; 18 Vin. Ab. 294; 1 Vin. Abr. 192; 2 Saund. 48, a; Gow on Partn. 225, 230; 15 Serg. and Rawle, 441; 1 Poth. Ob. 397;—4, Set-off, 8 Vin. Ab. 556, Discount; Hall's Dig. 226, 496; 7 Com. Dig. 335, Pleader, 2 G 17; 1 Poth. Ob. 408;—5, The rescision of the contract, 1 Com. Dig. 289, note (x); 8 Com. Dig. 349; Chit. on Contr. 275;—6, Extinguishment, 7 Vin. Abr. 367; 14 Serg. & Rawle, 209, 290; 8 Com. Dig. 394; 2 Nels. Abr. 818; 18 Vin. Abr. 493 to 515; 11 Vin. Abr. 461;—7, Confusion, where the duty to pay and the right to receive unite in the same person, 8 Serg. & Rawle, 24—30; 1 Poth. 425;—8, Extinction or the loss of the subject-matter of the contract, Bac. Abr. 49; 8 Com. Dig *349; 1 Poth. Ob. 429;—9, Defeasance, 2 Saund. 47, n. note 1;—10, The inability of one of the parties to fulfil his part, Hall's Dig. 40;—11, The death of the contractor, as where he undertook to teach an apprentice;—12, Bankruptcy;—13, By the act of limitations;—14, By lapse of time. Angell on Adv. Enjoym. *passim;* 15 Vin. Abr. 52, ‡99; 2 Saund. 63, n. b; Ib. 66 n. 8; Ib. 67 n. 10; Gow on Partn. 235; 1 Poth. 443, 449;—15, By neglecting to give notice to the person charged, Chit. on Bills. 245;—16, By releasing one of two partners, see *Receipt;*—17, By neglecting to sue the principal at the request of the surety, the latter is discharged. 8 Serg. & Rawle, 110;—18, By the discharge of a defendant, who has been arrested under a *capias ad satisfaciendum.* 8 Cowen, R. 171.—19, By a certificate and discharge under the bankrupt laws. Act of congress of August 1841.

DISCHARGE, *practice,* is the act by which a person in confinement under some legal process, or held on an accusation of some crime or misdemeanor, is set at liberty; the writing containing the order for his being so set at liberty is also called a discharge. The discharge of a defendant in prison under a ca. sa., when made by the plaintiff, has the operation of satisfying the debt, the plaintiff having no other remedy; 4 T. R. 526; but when the discharge is in consequence of the insolvent laws, or the defendant dies in prison, the debt is not satisfied; in the first place the plaintiff has a remedy against the property of the

defendant, acquired after his discharge, and, in the last case, against the executors or administrators of the debtor. Bac. Ab. Execution, D; Bingh. on Execu. 266.

DISCHARGE OF A JURY, *practice.* The dismissal of a jury who had been charged with the trial of a cause. Questions frequently arise, whether the court discharge a jury before they render a verdict; in a criminal case, the prisoner can again be tried. In cases affecting life or member, the general rule is, that when a jury have been sworn and charged, they cannot be discharged by the court, or any other, but ought to give a verdict. But to this rule there are many exceptions; for example, when the jury are discharged at the request or with the consent of the prisoner and for his benefit, when ill practices have been used; when the prisoner becomes insane, or becomes suddenly ill so that he cannot defend himself, or instruct others in his defence; when a juror or witness is taken suddenly ill; when a juror has absented himself, or, on account of his intoxication, he is incapable to perform his duties as a juror: these and many similar cases, which may be readily imagined, render the discharge of the jury a matter of necessity, and under such very extraordinary and striking circumstances, it is impossible to proceed with the trial with justice to the prisoner or to the state. The exception to the rule, then, is grounded on *necessity*, and not merely because the jury cannot agree. 6 Serg. & Rawle, 577; 3 Rawle's Rep. 501. In all these cases the court must exercise a just discretion in deciding what is and what is not a case of necessity. This is the law as to the exceptions in Pennsylvania. In other states, and some of the courts of the United States, it has been ruled that the authority of the court to discharge the jury rests in the *sound discretion of the court.* 4 Wash. C. C. R. 409; 18 Johns. 187; 2 Johns. Cas. 301; 2 Gall. 364; 9 Mass. 494; 1 Johns. Rep. 66; 2 Johns. Cas. 275. Vide 4 Taunt. 309. A distinction has been made between capital cases and other criminal cases, not capital. In cases of misdemeanors and in civil cases, the right to discharge rests in the sound discretion of the court, which is to be exercised with great caution. 9 Mass. 494. In Pennsylvania this point seems not to be settled. 6 Serg. & Rawle, 599. The reader is referred to the word *Jeopardy*, and Story on the Const. § 1781; 9 Wheat. R. 579; Rawle on the Const. 132, 133; 1 Chit. Cr. Law, 629.

DISCLAIMER. This word signifies to abandon, to renounce; also the act by which the renunciation is made. For example, a disclaimer is the act by which a patentee renounces a part of his title of invention.

DISCLAIMER, *chancery pleading*, is the renunciation of the defendant to all claims to the subject of the demand made by the plaintiff's bill. A disclaimer is distinct in substance from an answer, though sometimes confounded with it, but it seldom can be put in without an answer, for if the defendant has been made a party by mistake, having had an interest which he has parted with, the plaintiff may require an answer sufficient to ascertain whether that is the fact or not. Mitf. Pl. 11, 14, 253; Coop. Eq. Pl. 309; Story, Eq. Pl. c. 17, § 838 to 844.

DISCLAIMER, *estates*, is the act of a party by which he refuses to accept of an estate which has been conveyed to him. Vide *Assent; Dissent.* It is said, that a disclaimer of a freehold estate must be in a court of record, because a freehold shall not be divested by bare words, *in pais.* Cruise, Dig. tit. 32, c. 26, s.

1, 2. A disclaimer of tenancy is the act of a person in possession, who denies holding the estate from the person claiming to be the owner of it. 2 Nev. & M. 672. Vide 8 Vin. Ab. 501; Coote, L. & T. 348, 375; F. N. B. 179 k; Bull. N. P. 96; 16 East, R. 99; 1 Man. & Gran. 135; S. C. 39 Eng. C. L. Rep. 380, 385; 10 B. & Cr. 816; Gow, N. P. Cas. 180; 2 Nev. & Man. 673; 1 C. M. & R. 398; Co. Litt. 102, a.

DISCONTINUANCE, *pleading*, is a chasm or interruption in the pleading. It is a rule, that every pleading must be an answer to the whole of what is adversely alleged, Com. Dig. Pleader, E 1, F 4; 1 Saund. 28, n. 3; 4 Rep. 62, a. If, therefore, in an action of trespass for breaking a close, and cutting three hundred trees, the defendant pleads, as to cutting down all but two hundred trees, some matter of justification or title, and as to the two hundred trees says nothing, the plaintiff is entitled to sign judgment, as by nil dicet against him, in respect of the two hundred trees, and to demur, or reply to the plea, as to the remainder of the trespasses. On the other hand, if he demurs or replies to the plea, without signing judgment for the part not answered, the whole action is said to be discontinued. For the plea, if taken by the plaintiff as an answer to the whole action, it being, in fact, a partial answer only, is in contemplation of law, a mere nullity, and a *discontinuance* takes place. And such discontinuance will amount to error on the record; such error is cured, however, after verdict, by the statute of Jeofails, 32 H. 8, c. 30; and after judgment by *nil dicit*, confession, or *non sum informatus*, by stat. 4 Ann. c. 16. It is to be observed, that as to the plaintiff's course of proceeding, there is a distinction between a case like this, where the defendant does not profess to answer the whole, and a case where, by the commencement of his plea, he professes to do so, but, in fact, gives a defective and partial answer, applying to part only. The latter case amounts merely to insufficient pleading, and the plaintiff's course, therefore, is not to sign judgment for the part defectively answered, but to demur to the whole plea. 1 Saund. 28, n. 3. It is to be observed, also, that where the part of the pleading to which no answer is given, is immaterial, or such as requires no separate or specific answer, for example, if it be mere matter of allegation, the rule does not, in that case, apply. Ib. See Com. Dig. Pleader, W; Bac. Abr. Pleas, P.

DISCONTINUANCE, *estates*, is an alienation made or suffered by the tenant in tail, or other tenant seised in *auter droit*, by which the issue in tail, or heir or successor, or those in reversion or remainder are driven to their action, and cannot enter. The term discontinuance is used to distinguish those cases where the party whose freehold is ousted, can restore it only by action, from those in which he may restore it by entry. Co. Litt. 325 a; 3 Bl. Com. 171; Ad. Ej. 35 to 41; Com. Dig. h. t.; Bac. Ab. h. t.; Vin. Ab. h. t.; Cruise's Dig. Index, h. t.; 2 Saund. Index, h. t.

DISCONTINUANCE, *of action*, in practice, takes place when a plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day, and time to time, as he ought. 3 Bl. Com. 296; see *Continuance*. A discontinuance also, is an entry upon the record that the plaintiff discontinues his action. The plaintiff cannot discontinue his action after a demurrer joined and entered, or after a verdict or a writ of inquiry, without leave of court. Cro. Jac. 35; 1 Lilly's Abr. 473. The plaintiff is, on discontinuance, generally liable

for costs. But in some cases, he is not so liable. See 3 Johns. R. 249; 1 Caines's R. 116; 1 Johns. R. 143; 6 Johns. R. 333; 18 Johns. R. 252; 2 Caines's Rep. 380; Com. Dig. Pleader, W 5; Bac. Abr. Pleas, P.

DISCOUNT, *practice*, is set-off, or defalcation in an action. Vin. Ab. h. t.

DISCOUNT, *contracts*, is an allowance made upon prompt payment in the purchase of goods; it is also the interest allowed in advancing money upon bills of exchange, or other negociable securities due at a future time. And *to discount* signifies the act of buying a bill of exchange or promissory note for a less sum than that which upon its face, is payable. Among merchants the term used when a bill of exchange is transferred, is, that the bill is *sold* and not that it is *discounted*. See Poth. De l'Usure, n. 128; 3 Pet. R. 40.

DISCOVERT, not covert, unmarried; the term is applied to a woman unmarried or widow; one not within the bonds of matrimony.

DISCOVERY, *intern. law*. The act of finding an unknown country. The nations of Europe adopted the principle that the discovery of any part of America gave title to the government by whose subjects, or by whose authority it was made, against all European governments. This title was to be consummated by possession. 8 Wheat. 543.

DISCOVERY, *practice, pleading*, is the act of disclosing or revealing by a defendant, in his answer to a bill filed against him in a court of equity. Vide *Bill of Discovery*; 8 Vin. Ab. 537; 8 Com. Dig. 515.

TO DISCREDIT, *practice, evidence*, is to deprive one of credit or confidence. In general a party may discredit a witness who testifies against him, by proving that his character is such as not to entitle him to credit or confidence, or any other fact which shows he is not entitled to belief. It seems not to be clearly settled whether a party can be allowed to discredit his own witness. 1 Moo. & Rob. 414; 3 B. & Cress. 746; S. C. 10 Eng. Com. Law R. 220. When, however, a party calls a witness, who turns out unfavourably, he may call another to prove the same point. 2 Campb. R. 556; 2 Stark. R. 334; S. C. 3 E. C. L. R. 371; 1 Nev. & Man. 34; 4 B. & Adolph. 193; S. C. 24 E. C. L. R. 47; 1 Phil. Ev. 229; Rosc. Civ. Ev. 96.

DISCRETION, *practice*. 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. Louis. Code, art. 3522, No. 13; 2 Inst. 50, 298; 4 Serg. & Rawle, 265; 3 Burr. 2539. The discretion of a judge is said to be the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly and passion, to which human nature is liable. 1 Day's Cas. 80, n; 1 Pow. Mortg. 247, a; 2 Supp. to Ves. Jr. 391; Toull. liv. 3, n. 338; 1 Lill. Ab. 447. There is a species of discretion which is authorised by express law, and, without which, justice cannot be administered; for example, an old offender, a man of much intelligence and cunning, whose talents render him dangerous to the community, induces a young man of a weak intellect to commit a larceny in company with himself, they are both liable to be punished for the offence. The law foreseeing such a case has provided that the punishment should be proportioned, so as to do justice, and it has left such apportionment to the discretion of the judge. It is evident that without such discretion justice could not be administered, for

one of these parties assuredly deserves a much more severe punishment than the other.

DISCRETION, *crim. law*, is the ability to know and distinguish between good and evil; between what is lawful and what is unlawful. The age at which children are said to have discretion, is not very accurately ascertained. Under seven years, it seems that no circumstances of mischievous discretion can be admitted to overthrow the strong presumption of innocence, which is raised by an age so tender. 1 Hale, P. C. 27, 8; 4 Bl. Com. 23. Between the ages of seven and fourteen, the infant is, *prima facie*, destitute of criminal design, but this presumption diminishes as the age increases, and even during this interval of youth, may be repelled by positive evidence of vicious intention, for a tenderness of years will not excuse a maturity in crime, the maxim in these cases being *malitia supplet ætatem*. At fourteen, children are said to have acquired legal discretion. 1 Hale, P. C. 25.

DISFRANCHISEMENT, is the act of depriving a member of a corporation of his right as such, by expulsion. It differs from amotion (q. v.) which is applicable to the removal of an officer from office, leaving him his rights as a member. Willc. on Corp. n. 708; Ang. & Ames on Corp. 237; and see *Expulsion*.

DISGRACE. Vide *Crimination; To Degrade*.

DISHERISION, disinheritance; depriving one of an inheritance. Obsolete. Vide *Disinherision*.

DISHERITOR, one who disinherits or puts another out of his freehold. Obsolete.

TO DISHONOUR, *contr.* This term is applied to the non-fulfilment of commercial engagements. To dishonour a bill of exchange or a promissory note, is to refuse or neglect to pay it at maturity. The holder is bound to give notice to the parties to such instrument of its dishonour, and his laches will discharge the indorsers. Chit. on Bills, 394, 395, 256 to 278.

DISINHERISION, *civil law*, is the act of depriving a forced heir of the inheritance which the law gives him. In Louisiana forced heirs may be deprived of their legitime, or legal portion and of the seisin granted them by law, for just cause. The disinherision must be made in proper form, by name and expressly, and for a just cause, otherwise it is null. The just causes for which parents may disinherit their children, are ten in number; 1. If the child has raised his or her hand to strike the parent, or, if he or she has actually struck the parent; but a mere threat is not sufficient. 2. If the child has been guilty, towards a parent, of cruelty, or of a crime or grievous injury. 3. If the child has attempted to take away the life of either parent. 4. If the child has accused either parent of any capital crime, except, however, that of high treason. 5. If the child has refused sustenance to a parent, having the means to afford it. 6. If the child has neglected to take care of a parent, become insane. 7. If a child has refused to ransom them, when detained in captivity. 8. If the child used any act of violence or coercion to hinder a parent from making a will. 9. If the child has refused to become security for a parent, having the means, in order to take him out of prison. 10. If the son or daughter, being a minor, marries without the consent of his or her parents. Civil Code, art. 1609–1613. The ascendants may disinherit their legitimate descendants, coming to their succession, for the first nine causes above expressed, when the acts of ingratitude there mentioned have been committed towards them, instead of towards their

parents; but they cannot disinherit their descendants for the last cause. Art. 1614. Legitimate children, dying without issue, and leaving a parent, cannot disinherit him or her, unless for the seven following causes, to wit: 1. If the parent has accused the child of a capital crime, except however, the crime of high treason. 2. If the parent has attempted to take the child's life. 3. If the parent has, by any violence or force, hindered the child from making a will. 4. If the parent has refused sustenance to the child in necessity, having the means of affording it. 5. If the parent has neglected to take care of the child, when in a state of insanity. 6. If the parent has neglected to ransom the child when in captivity. 7. If the father or mother have attempted the life the one of the other, in which case the child or descendant, making a will, may disinherit the one who has attempted the life of the other. Art. 1615. The testator must express in the will for what reason he disinherited his forced heirs, or any of them, and the other heirs of the testator are moreover obliged to prove the facts on which the disinherision is founded, otherwise it is null. Art. 1616. Vide Nov. 115; Ayl. Pand. B. 2, t. 29.

DISJUNCTIVE TERM, is one which is placed between two contraries, by the affirming of one of which, the other is taken away: it is usually expressed by the word *or*. Vide 3 Ves. 450; 7 Ves. 454; 2 Rop. Leg. 290; 1 P. Wms. 433; 2 Cox, Rep. 213; 2 P. Wms. 283; 2 Atk. 643; 6 Ves. 341; 2 Ves. Sr. 67; 2 Str. 1175; Cro. Eliz. 525; Pollexf. 645; 1 Bing. 500; 3 T. R. 470; 1 Ves. Sr. 409; 3 Atk. 83, 85; Ayl. Pand. 56. In the civil law when a legacy is given to Caius *or* Titius, the word *or*, is considered *and*, and both Caius and Titius are entitled to the legacy in equal parts. 6 Toull. n. 704. See *Copulative term; Construction*, subdivision, *And; Or*. Also Bac. Ab. Conditions, P, 5.

DISMES. Another name for tithes. Dime, (q. v.) a piece of federal money is sometimes written disme.

TO DISMISS A CAUSE, *practice*, a term used in courts of chancery for removing a cause out of court without any further hearing.

DISOBEDIENCE is the want of submission to the orders of a superior. In the army, disobedience is a misdemeanor. For disobedience to parents, children may be punished; and apprentices may be imprisoned for disobedience to the lawful commands of their master. Vide *Correction*.

DISORDERLY HOUSE, *crim. law*, is a house the inmates of which behave so badly as to become a nuisance to the neighbourhood. The keeper of such house may be indicted for keeping a public nuisance. Hawk. b. 1, c. 78, s. 1 & 2; Bac. Ab. Inns, A; 1 Russ. on Cr. 298; 1 Wheel. C. C. 290; 1 Serg. & Rawle, 342; 2 Serg. & Rawle, 298; Bac. Ab. Nuisances, A; 4 Chit. Bl. Com. 167, 8, note. Vide *Bawdy house; Ill fame*.

TO DISPAUPER, *Engl. law*, is to deprive a person of the privilege of suing in *forma pauperis* (q. v.) When a person has been admitted to sue in *forma pauperis*, and before the suit is ended, it appears that the party has become the owner of a sufficient estate real or personal, or has been guilty of some wrong, he may be *dispaupered*.

TO DISPONE, *Scotch law*. This is a technical word, which implies, it is said, a transfer of feudal property by a particular deed, and is not equivalent to the term *alienate*; but Lord Eldon says, "with respect to the word *dispone*, if I collect the opinions of a majority of the judges

rightly, I am of opinion that the word dispone, would have the same effect as the word *alienate*." (q. v.) Sanford on Entails, 179, note.

DISPOSITION, *French law*. This word has several acceptations; sometimes it signifies the effective marks of the will of some person; and at others the instrument containing those marks. The dispositions of man make the dispositions of the law to cease, for example, when a man bequeaths his estate, the disposition he makes of it, renders the legal disposition of it if he had died intestate, to cease.

DISSEISEE, *torts*, one who is wrongfully put out of possession of his lands,

DISSEISIN, *torts*, is the wrongful putting one who is seised, and has actual possession, out of his possession, and depriving him of his freehold. Lord Coke says, that every entry is not a disseisin, for it does not take place unless there is an ouster of the freehold. Co. Litt. 277. To make a disseisin the entry must, in the commencement, be made under colour of title, as any other entry is a mere trespass; it is the intention which fixes its character. It must also have been unlawful. Disseisin may be effected either in corporeal inheritances, or incorporeal. Disseisin of things corporeal, as of houses, lands, &c., must be by entry and actual dispossession of the freehold; as if a man enters, by force or fraud, into the house of another, and turns, or at least, keeps him or his servants out of possession. Disseisin of incorporeal hereditaments cannot be an actual dispossession, for the subject itself is neither capable of actual bodily possession nor dispossession. 3 Bl. Com. 169, 170. See 15 Mass. 495; 6 John. R. 197; 2 Watts, 23; 6 Pick. 172; 1 Verm. 155; 11 Pet. R. 41; 10 Pet. R. 414; 14 Pick. 374; 1 Dana's R. 279; 2 Fairf. 408; 11 Pick. 193; 8 Pick. 172; 8 Vin. Ab. 79; 1 Swift's Dig. 504; 1 Cruise, *65; Arch. Civ. Pl. 12; Bac. Ab. h. t.; 2 Supp. to Ves. jr. 343; Dane's Ab. Index, h. t.; 1 Chit. Pr. 374, note (r).

DISSEISOR, *torts*, one who puts another out of the possession of his lands wrongfully.

DISSENT, *contracts*, is a disagreement to something which has been done. It is express or implied. The law presumes that every person to whom a conveyance has been made has given his assent to it, because it is supposed to be for his benefit. To rebut the presumption his dissent must be expressed. Vide 4 Mason, R. 206; 11 Wheat. R. 78; 1 Binn. R. 502; 2 Binn. R. 174; 6 Binn. R. 338; 12 Mass. R. 456; 17 Mass. R. 552; 3 John. Ch. R. 261; 4 John. Ch. R. 136, 529; and *Assent*, and the authorities there cited.

DISSOLUTION, *contracts*. The dissolution of a contract, is the annulling its effects between the contracting parties. This dissolution of a partnership, is the destruction of the partnership. Its dissolution does not affect the contracts which were made between the partners and others; so that they are entitled to all their rights, and they are liable on their obligations, as if the partnership had not been dissolved. Vide article *Partnership*, and 3 Kent, Com. 27; Dane's Ab. h. t.; Gow on Partn. Index, h. t.; Wats. on Partn. Index, h. t.

DISSOLUTION, *practice*. It is the act of rendering a legal proceeding null, or changing its character; as, a foreign attachment in Pennsylvania is dissolved by entering bail to the action. Injunctions are dissolved by the court.

TO DISSUADE, *crim. law*, to induce a person not to do an act. To dissuade a witness from giving evidence against a person indicted, is

an indictable offence at common law. Hawk. B. 1, c. 21, s. 15. The mere attempt to stifle evidence, is also criminal, although the persuasion should not succeed, on the general principle that an incitement to commit a crime, is in itself criminal. 1 Russ. on Cr. 44; 6 East, R. 464; 2 East, R. 5, 21; 2 Str. 904; 2 Leach, 925. Vide *To Persuade*.

DISTRACTED PERSON. This term is used in the statutes of Illinois, Rev. Laws of Ill. 1833, p. 332, and New Hampshire, Dig. Laws of N. H. 1830, p. 339, to express a state of insanity.

TO DISTRAIN, is to take and keep any personal chattel in custody, as a distress. (q. v.)

DISTRESS, *remedies*. A distress is defined to be the taking of a personal chattel, without legal process from the possession of the wrong doer, into the hands of the party grieved, as a pledge for the redress of an injury, the performance of a duty, or the satisfaction of a demand. 3 Bl. Com. 6. The remedy by distress for the recovery of arrears of rent, is perhaps more frequently adopted by landlords than any other. Co. Lit. 162, b.

[2] For this reason, a considerable space will be dedicated to this article. It will be convenient to consider, 1, the several kinds of rent for which a distress may be made; 2, the persons who may make it; 3, the goods which may be distrained; 4, the time when a distress may be made; 5, in what place it may be made; 6, the manner of making it, and disposing of the goods distrained; 7, when a distress will be a waiver of a forfeiture of the lease.

[3] §. 1. *Of the rents for which a distress may be made.* 1. A distress may generally be taken for any kind of rent in arrear, the detention of which, beyond the day of payment, is an injury to him who is entitled to receive it. 3 Bl. Com. 6. The rent must be reserved out of a corporeal hereditament, and must be certain in its quantity, extent, and time of payment, or at least be capable of being reduced to certainty. Co. Lit. 96, a; 13 Serg. & Rawle, 64; 3 Penna. R. 30. An agreement that the lessee pay no rent, provided he make repairs, and the value of the repairs is uncertain, would not authorise the landlord to distrain. Addis. 347. Where the rent is a *certain* quantity of grain, the landlord may distrain for so many bushels in arrear, and name the value, in order that if the goods should not be replevied, or the arrears tendered, the officer may know what amount of money is to be raised by the sale, and in such case the tenant may tender the arrears in grain. 13 Serg. & Rawle, 52. But where the tenant agreed instead of rent, to render "one-half part of all the grain of every kind, and of all hemp, flax, potatoes, apples, fruit, and other produce of whatever kind that should be planted, raised, sown or produced, on or out of the demised premises, within and during the terms," the landlord cannot, perhaps, distrain at all; he cannot, certainly, distrain for a sum of money, although he, and the tenant may, afterwards have settled their accounts, and agreed that the half of the produce of the land should be fixed in money, for which the tenant gave his note, which was not paid. 13 Serg. & Rawle, 52. But in another case it was held, that on a demise of a grist mill, when the lessee is to render one-third of the toll, the lessor may distrain for rent. 2 Rawle, 11.

[4] 2. With respect to the *amount* of the rent, for which a lessor may in different cases be entitled to make a distress, it may be laid down as a general rule, that whatever can pro-

perly be considered as a part of the rent, may be distrained for, whatever be the particular mode in which it is agreed to be paid. So that where a person entered into possession of certain premises, subject to the approbation of the landlord, which was afterwards obtained, by agreeing to pay in advance, rent from the time he came into possession, it was, in England, determined that the landlord might distrain for the whole sum accrued before and after the agreement, Cowp. 784. For on whatever day the tenant agrees that the rent shall be due, the law gives the landlord the power of distraining for it at that time. 2 T. R. 600. But see 13 S. & R. 60. In New York, it was determined, that an agreement that the rent should be paid in advance, is a personal covenant on which an action lies, but not distress. 1 Johns. R. 384. The supreme court of Pennsylvania, declined deciding this point, as it was not necessarily before them. 13 Serg. & Rawle, 60. Interest due on rent, cannot, in general, be distrained for; 2 Binn. 146; but may be recovered from the tenant by action, unless under particular circumstances. 6 Binn. 159.

[5] § 2. *Of the persons entitled to make a distress.* 1. When the landlord is sole owner of the property out of which rent is payable to him, be may, of course distrain in his own right.

[6] 2. Joint-tenants have each of them, an estate in every part of the rent, each may, therefore, distrain alone for the whole, although he must afterwards account with his companions for their respective shares of the rent. 3 Salk. 17. They may all join in making the distress, which is the better way.

[7] 3. Tenants in common do not, like joint-tenants, hold by one title and by one right, but by different titles, and have several estates. Therefore they should distrain separately, each for his share, Co. Lit. s. 317, unless the rent be of an entire thing, as to render a horse, in which case, the thing being incapable of division, they must join. Co. Lit. 197, a. Each tenant in common is entitled to receive, from the terre-tenant, his proportion of the rent; and therefore, when a person holding under two tenants in common, paid the whole rent to one of them, after having received a notice to the contrary from the other, it was held, the party who gave the notice, might afterwards distrain. 5 T. R. 246. As tenants in common have no original privity of estate between them, as to their respective shares, one may leave his part of the land to the other, rendering rent, for which a distress may be made, as if the land had been demised to a stranger. Bro. Ab. tit. Distress, pl. 65.

[8] 4. It may be, perhaps, laid down as a general rule, that for rent due in right of the wife, the husband may distrain alone. 2 Saund. 195; even if it accrue to her in the character of executrix or administratrix. Ld. Raym. 369. With respect to the remedies for the recovery of the arrears of a rent accruing in right of his wife, a distinction is made between rent due for land, in which the wife has a chattel interest, and rent due on land in which she has an estate of freehold and inheritance. And in some cases, a further distinction must be made between a rent accruing before and rent accruing after the coverture. See on this subject, Co. Lit. 46, b, 300, a, 351, a; 1 Roll. Abr. 350; stat. 32 Hen. VIII. c. 37, s. 3.

[9] 5. A tenant by the curtesy, has an estate of freehold in the lands of his wife, and in contemplation of law, a reversion on all land of the wife leased for years or lives, and

may distrain at common law for all rents reserved thereon.

[10] 6. A woman may be endowed of a rent as well as of land; if a husband, therefore, tenant in fee, make a lease for years, reserving rent, and die, his wife shall be endowed of one-third part of the reversion by metes and bounds, together with a third part of the rent. Co. Lit. 32, a. The rent in this case is apportioned by the act of law, and therefore if a widow be endowed of a third part of a rent in fee, she may distrain for a third part thereof, and the heir shall distrain for the other part of the rent. Bro. Abr. tit. Avowry, pl. 139.

[11] 7. A tenant for his own life or that of another, has an estate of freehold, and if he make a lease for years, reserving rent, he is entitled to distrain upon the lessee. It may here be proper to remark, that at common law, if a tenant for life made a lease for years, if he should so long live, at a certain rent, payable quarterly, and died before the quarter-day, the tenant was discharged of that quarter's rent by the act of God. 10 Rop. 128. But the 11 Geo. II. c. 19, s. 15, gives an action to the executors or administrators of such tenant for life.

[12] 8. By the statute 32 Henry VIII. c. 37, s. 1, "the personal representatives of tenants in fee, tail, or for life, of rent-service, rent-charge, and rents-seck, and fee farms, may distrain for arrears upon the land charged with the payment, so long as the lands continue in seisin or possession of the tenant in demesne, who ought to have paid the rent or fee farm, or some person claiming under him by purchase, gift or descent." By the words of the statute, the distress must be made on the lands while in possession of the "tenant in demesne," or some person claiming under him, by purchase, gift or descent; and therefore it extends to the possession of those persons only who claim under the tenant, and the statute does not comprise the tenant in dower or by the curtesy, for they come in, not under the party, but by act of law. 1 Leon. 302.

[13] 9. The heir entitled to the reversion may distrain for rent arrear which becomes due after the ancestor's death; the rent does not become due till the last minute of the natural day, and if the ancestor die between sunset and midnight, the heir, and not the executor, shall have the rent. 1 Saund. 287. And if rent be payable at either of two periods, at the choice of the lessee, and the lessor die between them, the rent being unpaid, it will go to the heir. 10 Rep. 128, b.

[14] 10. Devisees, like heirs, may distrain in respect of their reversionary estate; for by a devise of the reversion the rent will pass with its incidents. 1 Ventr. 161.

[15] 11. Trustees who have vested in them legal estates, as trustees of a married woman, or assignees of an insolvent, may of course distrain in respect of their legal estates, in the same manner as if they were beneficially interested therein.

[16] 12. Guardians may make leases of their ward's lands in their own names, which will be good during the minority of the ward, and, consequently, in respect of such leases, they possess the same power of distress as other persons granting leases in their own rights. Cro. Jac. 55, 98.

[17] 13. Corporations aggregate should generally make and accept leases or other conveyances of lands or rent, under their common seal. But if a lease be made by an agent of the corporation, not under their common seal, although it may be invalid as a lease, yet if the tenant hold under it, and pay rent to the bailiff or agent

of the corporation, that is sufficient to constitute a tenancy at least from year to year, and to entitle the corporation to distrain for rent. 2 New Rep. 247. But see *Corporation.*

[18] § 3. *Of the things which may or may not be distrained.* Goods found upon the premises demised to a tenant, are generally liable to be distrained by a landlord for rent, whether such goods in fact belong to the tenant or other persons. Com. Dig. Distress, B 1. But such goods are sometimes privileged from distress, first, absolutely; and secondly, conditionally.

[19] First, Those of the first class are privileged, 1, in respect of the owner of them; 2, because no one can have property in them; 3, because they cannot be restored to the owner in the same plight as when taken; 4, because they are fixed to the freehold; 5, because it is against the policy of law they should be distrained; 6, because they are in the custody of the law; 7, because they are protected by some special act of the legislature.

[20] 1. The goods of a person who has some interest in the land jointly with the distrainer, as those of a joint tenant although found upon the land, cannot be distrained. The goods of executors and administrators, or of the assignee of an insolvent regularly discharged according to law, cannot, in Pennsylvania, be distrained for more than one year's rent. The goods of a former tenant, rightfully on the land, cannot be distrained for another's rent. For example, a tenant at will, if quitting upon notice from his landlord, is entitled to the emblements or growing crops; and therefore even after they are reaped, if they remain on the land for the purpose of husbandry, they cannot be distrained for rent due by the second tenant. Willes, 131. And they are equally protected in the hands of a vendee. Ibid. They cannot be distrained although the purchaser allow them to remain uncut an unreasonable time after they are ripe. 2 B. & B. 362; 5 Moore, 97, S. C.

[21] 2. As every thing which is distrained is presumed to be the property of the wrongdoer, it will follow that such things wherein no man can have an absolute and valuable property, as cats, dogs, rabbits, and all animals feræ naturæ, cannot be distrained. Yet, if deer, which are of a wild nature are kept in a private enclosure, for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandise, that they may be distrained for rent. 3 Bl. Com. 7.

[23] 3. Such things as cannot be restored to the owner in the same plight as when they were taken, as milk, fruit, and the like, cannot be distrained. 3 Bl. Com. 9.

[24] 4. Things affixed or annexed to the freehold, as furnaces, windows, doors, and the like, cannot be distrained, because they are not personal chattels, but belonging to the realty. Co. Litt. 47, b. And this rule extends to such things as are essentially a part of the freehold, although for a time removed therefrom, as a mill-stone removed to be picked; for this is matter of necessity, and it still remains in contemplation of law, a part of the freehold. For the same reason an anvil fixed in a smith's shop cannot be distrained. Bro. Abr. Distress, pl. 23; 4 T. R. 567; Willis, Rep. 512; 6 Price's R. 3; 2 Chitty's R. 167.

[25] 5. Goods are privileged in cases where the proprietor is either compelled from *necessity* to place his goods upon the land, or where he does so for *commercial* purposes. In the first case the goods are exempt because the owner has no option,

hence the goods of a traveller in an inn are exempt from distress. 7 H. 7, M. 1, p. 1; Hamm. N. P. 380, a. In the other the interests of the community require that commerce should be encouraged, and adventurers will not engage in speculations, if the property embarked is to be made liable for the payment of debts they never contracted. Hence goods landed at a wharf, or deposited in a warehouse on storage, cannot be distrained. 17 Serg. & Rawle, 138; 5 Whart. R. 9, 14. Valuable things in the way of trade are not liable to distress; as a horse standing in a smith's shop to be shod, or in a common inn, or cloth at a tailor's house to be made into a coat, or corn sent to a mill to be ground, for these are privileged and protected for the benefit of trade. 3 Bl. Com. 8. On the same principle it has been decided that the goods of a boarder are not liable to be distrained for rent due by the keeper of a boarding-house. 5 Whart. R. 9.

[26] 6. Goods taken in execution cannot be distrained. The law in some states gives the landlord the right to claim payment out of the proceeds of an execution for rent not exceeding one year, and he is entitled to payment up to the day of seizure, though it be in the middle of a quarter. 2 Yeates, 274; 5 Binn. 505; but he is not entitled to the day of sale. 5 Binn. 505. See 18 Johns. R. 1. The usual practice is to give notice to the sheriff that there is a certain sum due to the landlord as arrears of rent; which notice ought to be given to the sheriff, or person who takes the goods in execution upon the premises; for the sheriff is not bound to find out whether rent is due, nor is he liable to an action, unless there has been a demand of rent before the removal. 1 Str. 97, 214; 3 Taunt. 400; 2 Wils. 140; Com. Dig. Rent, D 8; 11 Johns. R. 185. This notice can be given by the immediate landlord only, a ground landlord is not entitled to his rent out of the goods of the under-tenant taken in execution. 2 Str. 787. And where there are two executions, the landlord is not entitled to a year's rent on each. See Str. 1024. Goods distrained and replevied may be distrained by another landlord for subsequent rent. 2 Dall. 68.

[27] 7. By some special acts of the legislature it is provided that tools of a man's trade, some designated household furniture, school books, and the like, shall be exempted from distress, execution, or sale.

[28] Secondly; Besides the above mentioned goods and chattels, which are absolutely privileged from distress, there are others which are conditionally so, but which may be distrained under certain circumstances. These are 1, Beasts of the plough, which are exempt if there be a sufficient distress besides on the land whence the rent issues. Co. Litt. 47, a; Bac. Abr. Distress, B.—2. Implements of trade, as, a loom in actual use, and there is a sufficient distress besides. 4 T. R. 565.—3. Other thing in actual use, as a horse whereon a person is riding, an axe in the hands of a person cutting wood, and the like. Co. Litt. 47, a.

[29] § 4. *The time when a distress may be made.* 1. The distress cannot be made till the rent is due by the terms of the lease; as rent is not due until the last minute of the natural day, on which it is reserved, it follows that a distress for rent cannot be made on that day. 1 Saund. 287; Co. Lit. 47, b. n. 6. A previous demand is not generally necessary, although there is a clause in the lease that the lessor may distrain for rent, "being lawfully demanded," Bradb. 124; Bac. Abr. Rent, I; the making of the distress being a demand; though it is advisable to make such a demand. But where a lease

provides for a special demand; as if the clause were that if the rent should happen to be behind it should be demanded at a particular place *not on the land;* or be demanded *of the person of the tenant;* then such special demand is necessary to support the distress. Plowd. 69; Bac. Abr. Rent, I.

[30] 2. A distress for rent can only be made during the day time. Co. Lit. 142, a.

[31] 3. At common law a distress could not be made after the expiration of the lease; to remedy this evil the legislature of Pennsylvania passed an act making it "lawful for any person having any rent in arrear or due upon any lease for life or years or at will, ended or determined, to distrain for such arrears after the determination of the said respective leases, in the same manner as they might have done, if such lease had not been ended; provided that such distress be made during the continuance of such lessor's title or interest. Act of 21st March, 1772, s. 14, 1 Smith's Laws of Penna. 375.—4. In the city and county of Philadelphia the landlord may, under certain circumstances apportion his rent, and distrain before it becomes due. See act of 25th March, 1825, s. 1. Pamph. L. 114.

[32] § 5. *In what place a distress may be made.* The distress may be made upon the land, or off the land. 1. Upon the land. A distress generally follows the rent, and is consequently confined to the land out of which it issues. If two pieces of land, therefore, are let by two separate demises, although both be contained in one lease, a joint distress cannot be made for them, for this would be to make the rent of one issue out of the other. Rep. Temp. Hardw. 245; S. C. Str. 1040. But where lands lying in different counties are let together by one demise, at one entire rent, and it does not appear that the lands are separate from each other, one distress may be made for the whole rent. Ld. Raym. 55; S. C. 12 Mod. 76. And where rent is charged upon land, which is afterwards held by several tenants, the grantee or landlord may distrain for the whole upon the land of any of them; because the whole of the rent issues out of every part of the land. Roll. Abr. 671. If there be a house on the land, the distress may be made in the house; if the outer door or window be open, a distress may be taken out of it. Roll. Abr. 671. And if an outer door be open, an inner door may be broken open for the purpose of taking a distress. Comb. 47; Cas. Temp. Hard. 168. Barges on a river attached to the leased premises (a wharf) by ropes, cannot be distrained. 6 Bingh. 150; 19 Eng. Com. Law R. 36.

[33] 2. *Off the land.* By the 5th and 6th sections of the Pennsylvania act of assembly of the 21st March, 1772, copied from the 11 Geo. II. c. 19, it is enacted, that if any tenant for life, years, at will, or otherwise, shall fraudulently or clandestinely convey his goods off the premises to prevent the landlord from distraining the same, such person, or any person by him lawfully authorised, may within thirty days after such conveyance, seize the same, wherever they shall be found, and dispose of them in such manner as if they had been distrained on the premises. Provided, that the landlord shall not distrain any goods which shall have been previously sold, *bona fide*, and for a valuable consideration, to one not privy to the fraud. To bring a case within the act, the removal must take place *after* the rent becomes due, and must be *secret*, not made in open day, for such removal cannot be said to be clandestine within the meaning of the act. 3 Esp.

N. P. C. 15; 12 Serg. & Rawle, 217; 7 Bing. 423; 1 Moody & Malkin, 535. It has, however, been made a question whether goods are protected that were fraudulently removed on the night before the rent had became due. 4 Camp. 135. The goods of a stranger cannot be pursued; they can be distrained only while they are on the premises. 1 Dall. 440.

[34] § 6. *Of the manner of making a distress.* 1. A distress for rent may be made either by the person to whom it is due, or, which is the preferable mode, by a constable or other officer properly authorised by him.

[35] 2. If the distress be made by a constable, it is necessary that he should be properly authorised to make it; for which purpose the landlord should give him a written authority, or as it is usually called, a warrant of distress; but a subsequent assent and recognition given by the party for whose use the distress has been made, is sufficient. Hamm. N. P. 382.

[36] 3. When the constable is thus provided with the requisite authority to make a distress by seizing the tenant's goods, or some of them in the name of the whole, and declaring that he takes them as a distress for the sum expressed in the warrant to be due by the tenant to the landlord, and that he takes them by virtue of the said warrant; which warrant he ought, if required, to show. 1 Leon. 50.

[37] 4. When making the distress it ought to be made for the whole rent; but if goods cannot be found at the time sufficient to satisfy the rent, or the party mistake the value of the thing distrained, he may make a second distress. Bradb. 129, 30; 2 Tr. & H. Pr. 155.

[38] 5. As soon as a distress is made, an inventory of the goods distrained should be made, and a copy of it delivered to the tenant, together with a notice of taking such distress, with the cause for taking the same. This notice of taking a distress is not required by the statute to be in writing; and, therefore, parol or verbal notice may be given either to the tenant on the premises or to the owner of the goods distrained. 12 Mod. 76. And although such notice is directed by the act to specify the cause of taking, it is not material whether it accurately state the period of the rent's becoming due, Dougl. 279; or even whether the true cause of taking the goods be expressed therein. 7 T. R. 654. If the notice be not personally given, it should be left in writing at the tenant's house, or according to the directions of the act, at the mansion-house or other most notorious place on the premises charged with the rent distrained for.

[39] 6. The distrainor may leave or impound the distress on the premises for the five days mentioned in the act, but becomes a trespasser after that time. 2 Dall. 69. As in many cases it is desirable for the sake of the tenant that the goods should not be sold as soon as the law permits, it is usual for him to sign an agreement or consent to their remaining on the premises for a longer time, in the custody of the distrainor, or of a person by him appointed for that purpose. While in his possession, the distrainor cannot use or work cattle distrained, unless it be for the owner's benefit, as to milk a cow, or the like. 5 Dane's Abr. 34.

[40] 7. Before the goods are sold they must be appraised by two reputable freeholders, who shall take an oath or affirmation to be administered by the sheriff, under-sheriff, or coroner, in the words mentioned in the act.

[41] 8. The next requisite is to give six days' public notice of the

time and place of sale of the things distrained; after which, if they have not been replevied, they may be sold by the proper officer, who may apply the proceeds to the payment and satisfaction of the rent, and the expenses of the distress, appraisement and sale. The overplus, if any, is to be paid to the tenant.

[42] § 7. *When a distress will be a waiver of a forfeiture of the lease.* On this subject, see 1 B. & Adol. 428.

The right of distress, it seems, does not exist in the New England states. 4 Dane's Ab. 126; 7 Pick. R. 105; 3 Griff. Reg. 404; 4 Griff. Reg. 1143; Aik. Dig. 357; nor in Alabama, Mississippi, North Carolina nor Ohio; and in Kentucky, the right is limited to a distress for a pecuniary rent. 1 Hill. Ab. 156. Vide, generally, Gilb. on Distr. by Hunt; Bradb. on Distr.; Com. Dig. h. t.; Bac. Ab. h. t.; Vin. Ab. h. t.; 2 Saund. Index, h. t.; Wilk. on Repl.; 3 Chit. Bl. Com. 6, note.

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DISTRESS INFINITE, *English practice*, is a process commanding the sheriff to distrain a person from time to time, and continually afterwards, by taking his goods by way of pledge, to enforce the performance of something due from the party distrained upon. In this case no distress can be immoderate, because whatever its value may be, it cannot be sold, but is to be immediately restored on satisfaction being made. 3 Bl. Com. 231.

DISTRIBUTION. By this term is understood the division of an intestate's estate according to law. The English statute of 22 and 23. Car. 2, c. 10, which was itself probably borrowed from the 118th Novel of Justinian, is the foundation of, perhaps, most acts of distribution in the several states. Vide 2 Kent, Com. 343, note; 8 Com. Dig. 522; 11 Vin. Ab. 189, 202; Com. Dig. Administion, H.

DISTRICT, is a certain portion of the country, separated from the rest for some special purposes. The United States are divided into judicial districts, in each of which is established a district court; they are also divided into election districts; collection districts, &c.

DISTRICT ATTORNEYS OF THE UNITED STATES. There shall be appointed in each judicial district, a meet person, learned in the law, to act as attorney of the United States in such district, who shall be sworn or affirmed to the faithful execution of his office. Act of 24 Sept. 1789, s. 35, 1 Story's Laws, 67. His duty is 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 in the supreme court, in the district in which that court shall be holden. Ib. Their salaries vary in different districts; vide Gordon's Dig. art. 403. By the act of March 3, 1815, 2 Story's L. U. S. 1530, district attorneys are authorised to appoint deputies in certain cases to sue in the state courts. See *Deputy District Attorney.*

DISTRICT COURT. Vide *Courts of the United States.*

DISTRICT OF COLUMBIA. The name of a district of country ten miles square, situate between the states of Maryland and Virginia, over which the national government has exclusive jurisdiction. By the constitution, congress may "exercise exclusive jurisdiction in all cases whatsoever, over such district, not exceeding ten miles square, as may, by cession of particular states, and the acceptance of congress, become the seat of government of the United States." In pursusnce of this authority, the states of Maryland and Virginia ceded to the United States, a small territory on the banks of the Potomac, and congress, by the act of July 16, 1790, accepted the same for the permanent seat of the government of the United States. The act provides for the removal of the seat of government from the city of Philadelphia to the District of Columbia, on the first Monday of December, 1800. It is also provided, that the laws of the state within such district, shall not be affected by the acceptance, until the time fixed for the removal of the government thereto, and until congress shall otherwise by law provide.

Is seems that the District of Columbia, and the territorial districts of the United States, are not states within the meaning of the constitution, and of the judiciary act, so as to enable a citizen thereof to sue a citizen of one of the states in the federal courts. 2 Cranch, 445; 1 Wheat. 91.

DISTRINGAS, *remedies*, is a writ directed to the sheriff commanding him to distrain one of his goods and chattels, to enforce his compliance of what is required of him, as for his appearance in a court on such a day, and the like. Com. Dig. Process, D 7; Chit. Pr. Index, h. t.; Sellon's Pr. Index, h. t.; Tidd's Pr. Index, h. t.; 11 East, 353.

DISTURBANCE, *torts*, is a wrong done to an incorporeal hereditament, by hindering or disquieting the owner in the enjoyment of it. Finch, L. 187; 3 Bl. Com. 235; 1 Swift's Dig. 522; Com. Dig. Action upon the case for a disturbance. Pleader, 3 I 6; 1 Serg. & Rawle, 298.

DIVIDEND, is a portion of the principal or profits divided among several owners of a thing. The term is usually applied to the division of the profits arising out of

bank or other stocks; or to the division among the creditors of the effects of an insolvent estate.

DIVISIBLE. The power or ability of being separated. A contract cannot in general be divided in such a manner that an action may be brought or a right accrue on a part of it. 2 Penna. R. 454. But when it is to do several things, at several times, an action will lie upon every default. 15 Pick. R. 409. See 1 Greenl. R. 316; 6 Mass. 344. See *Entire*.

DIVISION OF OPINION. When in a company or society, the parties having a right to vote are so divided that there is not a plurality of the whole, in favour of any particular proposition, or when the voters are equally divided, it is said there is division of opinion. In such a case the Roman law, which seems founded in reason and common sense, directs that when the division relates to the quantity of things included, as in the case of a judgment, if one of three judges votes for condemning a man to a fine of one hundred dollars, another, to one of fifty dollars, and the third to twenty-five, the opinion or vote of the last shall be the rule for the judgment; because the votes of all the others include that of the lowest; this is the case when unanimity is required. But when the division of opinions does not relate to the quantity of things, then it is always to be in favour of the defendant. It is provided by the act of congress of April 29, 1802, s. 6, that whenever any question shall occur before a circuit court, upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen, shall, during the same term, upon the request of either party, or their counsel, be stated under the direction of the judges, and certified, under the seal of the court, to the supreme court, at their next session to be held thereafter; and shall, by the said court, be finally decided. And the decision of the supreme court, and their order in the premises, shall be remitted to the circuit court, and be there entered of record; and shall have effect according to the nature of the said judgment and order: *Provided*, That nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits: *And provided also*, That imprisonment shall not be allowed, nor punishment in any case be inflicted, where the judges of the said court are divided in opinion upon the question touching the said imprisonment or punishment.

DIVORCE is the dissolution of a marriage contracted between a man and a woman, by the judgment of a court of competent jurisdiction, or by an act of the legislature. Divorces are of two kinds; 1, *à vinculo matrimonii*, (q. v.) which dissolves and totally severs the marriage tie; and, 2, *à mensa et thoro*, (q. v.) which merely separates the parties.

1. The divorce *a vinculo* was never granted by the ecclesiastical law, except for the most grave reasons. These according to Lord Coke, Co. Litt. 235 a, are *causa præcontractus, causa metus, causa impotentia, seu frigiditatis, causa affinitatis, et causa consanguinitatis.* When the marriage was dissolved for canonical causes of impediment existing previous to its taking place, it was declared void *ab initio*.

In the United States divorces *à vinculo* are granted by the state legislatures for such causes as may be sufficient to induce the members to vote in favour of granting them; and they are granted by the courts to which such jurisdiction is given for certain causes particularly provided for by law.

The courts in nearly all the states have power to decree divorces *à vinculo* for, first, causes which existed and which were a bar to a lawful marriage, as, precontract, or the existence of a marriage between one of the contracting parties and another person, at the time the marriage sought to be dissolved took place; consanguinity, or that degree of relationship forbidden by law; affinity in some states, as Vermont, Rev. Stat. tit. 16, c. 63, s. 1; impotence, (q. v.); idiocy, lunacy, or other mental imbecility, which renders the party subject to it incapable of making a contract; when the contract was entered into in consequence of fraud. Secondly, the marriage may be dissolved by divorce for causes which have arisen since the formation of the contract. The principal of which are adultery; cruelty; wilful and malicious desertion for a period of time specified in the acts of the several states; to these are added in some states, conviction of felony or other infamous crime, Ark. Rev. Stat. c. 50, s. 1, p. 333; being a fugitive from justice, when charged with an infamous crime. Laws of Lo. Act of April 2, 1832. In Tennessee the husband may obtain a divorce when the wife was pregnant at the time of marriage with a child of colour; and also when the wife refuses for two years to follow her husband, who has gone, *bona fide*, to Tennessee to reside. Act of 1819, c. 20, and Act of 1835, c. 26; Carr. Nich. & Comp. 256, 257. In Kentucky and Maine where one of the parties has formed a connexion with certain religionists, whose opinions and practices are inconsistent with the marriage duties. And, in some states, as Rhode Island and Vermont, for neglect and refusal on the part of the husband, (he being of sufficient ability) to provide necessaries for the subsistence of his wife. In others habitual drunkenness is a sufficient cause.

In some of the states divorces *à mensa et thoro* are granted for cruelty, desertion, and such like causes, while in others the divorce is *à vinculo*.

When the divorce is prayed for on the ground of adultery, in some and perhaps in most of the states, it is a good defence, 1st, that the other party has been guilty of the same, offence; 2, that the husband has prostituted his wife, or connived at her amours; 3, that the offended party has been reconciled to the other by either express or implied condonation, (q. v.); 4, that there was no intention to commit adultery, as when the party supposing his or her first husband or wife dead, married again; 5, that the wife was forced or ravished.

The effects of a divorce *à vinculo*, on the property of the wife are various in the several states. When the divorce is for the adultery or other criminal acts of the husband, in general the wife's lands are restored to her; when it is caused by the adultery or other criminal act of the wife, the husband has in general some qualified right of curtesy to her lands; when the divorce is caused by some pre-existing cause, as consanguinity, affinity or impotence, in some states, as Maine and Rhode Island, the lands of the wife are restored to her. 1 Hill. Ab. 51, 2. See 2 Ashm. 455.

When a divorce *à vinculo* takes place, it is, in general, a bar to dower; but in Connecticut, Illinois, New York, and, it seems, in Michigan, dower is not barred by a divorce for the fault of the husband. In Kentucky when a divorce takes place for the fault of the husband, the wife is entitled as if he were dead. 1 Hill. Ab. 61, 2.

2. Divorces *à mensa et thoro*, are a mere separation of the parties for a time for causes arising since the marriage; they are pronounced by tribunals of competent jurisdiction. The effects of the sentence continue

for the time it was pronounced, or until the parties are reconciled. Children born after a divorce *à mensa et thoro* are not presumed to be the husband's, unless he afterwards cohabited with his wife. Bac. Ab. Marriage, &c., E.

Vide, generally, 1 Bl. Com. 440, 441; 3 Bl. Com. 94; 4 Vin. Ab. 205; 1 Bro. Civ. Law, 86; Ayl. Parerg. 225; Com. Dig. Baron and Feme, C; Poynt. on Marr. & Divorce, Index, h. t.; Merl. Rép. h. t.; Clef des Lois Rom. h. t.; as to the effect of the laws of a foreign state, where the divorce was decreed, see Story's Confl. of Laws, ch. 7, § 200. With regard to the ceremony of divorce among the Jews, see 1 Mann. & Gran. 228; S. C. 39 Eng. C. L. R. 425, 428.

DOCKET, *practice*, is a formal record of judicial proceedings. The docket should contain the names of the parties, and a minute of every proceeding in the case. It is kept by the clerk or prothonotary of the court. Docket is also said to be a brief writing, on a small piece of paper or parchment containing the substance of a larger writing.

DOCTORS COMMONS. A building in London used for a college of civilians in that city. Here the judge of the court of arches, the judge of the admiralty, and the judge of the court of Canterbury, with other eminent civilians reside. It is called Doctors Commons because the persons residing there live in a collegiate commoning together.

DOCUMENTS, *evidence*, are all the deeds, agreements, title papers, letters, receipts, and all other written instruments which are used to prove a fact.

DOG. A well known domestic animal. By an extension this word includes as well the female as the male of the species. A dog is said at common law to have no intrinsic value, and he cannot therefore be the subject of larceny. 4 Bl. Com. 236; 8 Serg. & Rawle, 571. But the owner has such property in him, that he may maintain trespass for an injury to his dog; "for a man may have property in some things which are of so base nature that no felony can be committed of them, as of a blood-hound or mastiff." 12 H. 8, 3; 18 H. 8, 2; 7 Co. 18 a; Com. Dig. Biens, F; 2 Bl. Com. 397; Bac. Ab. Trover, (D); F. N. B. 86; Bro. Trespass, pl. 407; Hob. 283; Cro. Eliz. 125; Cro. Jac. 463; 2 Bl. Rep. 1117. As dogs are very dangerous animals they may lawfully be killed, when their ferocity is known to their owner, or in self-defence, 13 John. R. 312; 10 John. R. 365; and when he has been bitten by a rabid animal, a dog may be lawfully killed by any one. 13 John. R. 312. When a dog in consequence of his vicious habits becomes a common nuisance, the owner may be indicted. And when he commits an injury, if the owner had a knowledge of his mischievous propensity, he is liable to an action on the case. Bull. N. P. 77; 2 Str. 1264; Lord Raym. 110; 1 B. & A. 620; 4 Camp. R. 198; 2 Esp. R. 482. Vide *Animal; Knowledge; Scienter.*

DOGMA, *civil law.* This word is used in the first chapter, first section, of the second Novel, and signifies an ordinance of the senate. See also Dig. 27, 1, 6.

DOLLAR, *money*, a silver coin of the United States of the value of one hundred cents, or tenth part of an eagle. It weights four hundred and twelve and a half grains. Of one thousand parts nine hundred are of pure silver and one hundred of alloy. Act of January 18, 1837, s. 8 and 9, 4 Sharsw. Cont. of Story's L. U. S. 2523, 4.

DOLUS, *civil law.* A fraudulent address or trick used to deceive some

one; a fraud. Dig. 4, 3, 1; Code, 2, 21.

DOMAIN, is the right to dispose of a thing which belongs to us. A distinction has been made between property and domain. The former is said to be that quality which is conceived to be in the thing itself, as it is considered as belonging to such or such person, exclusively of all others. By the latter is understood that right which the owner has of disposing of the thing. Hence domain and property are said to be correlative terms; the one is the active right to dispose, the other a passive quality which follows the thing, and places it at the disposition of the owner. 3 Toull. n. 83. But this distinction is too subtle for practical use. Puff. Droit de la nature et des gens, loi 4, c. 4, § 2. Vide 1 Bl. Com. 105, 106; Clef des Lois Rom. h. t.; Domat, h. t.; 1 Hill. Ab. 24; 2 Hill. Ab. 237; and *Demesne as of fee; Property; Things.*

DOME-BOOK, DOOM-BOOK, or DOM-BEC, was a book in which Alfred the Great, of England, after uniting the Saxon heptarchy, collected the various customs dispersed through the kingdom, and digested them into one uniform code. 4 Bl. Com. 411.

DOMESDAY or DOMESDAY-BOOK. An ancient record made in the time of William the Conqueror, and now remaining in the English exchequer, consisting of two volumes of unequal sizes, containing surveys of the lands in England.

DOMESTICS are those who reside in the same house with the master they serve; and the term does not extend to workmen or labourers employed out of doors. 5 Binn. R. 167; Merl. Rép. h. t. The act of congress of April 30th, 1790, s. 25, uses the word domestic in this sense. Formerly this word was used to designate those who resided in the house of another, however exalted their station, and who performed services for him. Voltaire in writing to the French queen, in 1748, says, "deign to consider, madam, that I am one of the domestics of the king, and consequently yours, my companions the gentlemen of the king," &c. Librarians, secretaries, and persons in such honourable employments, would not probably be considered domestics, although they might reside in the house of their respective employers. Pothier, to point out the distinction between a domestic and a servant, gives the following example: A literary man who lives and lodges with you, solely to be your companion, that you may profit by his conversation and learning, is your domestic; for all who live in the same house and eat at the same table with the owner of the house, are his domestics, but they are not *servants.* On the contrary, your valet de chambre, to whom you pay wages, and who sleeps out of your house, is not, properly speaking, your domestic, but your servant. Poth. Proc. Cr. sect. 2, art. 5, § 5; Poth. Ob. 710, 828; 9 Toull. n. 314. In modern language preceptors, librarians, secretaries, and other persons in such honourable employments, would not probably be considered domestics, though they might reside in the houses of their employers. Vide *Operative; Servant.*

DOMICIL, is the place where a person has fixed his ordinary dwelling, without a present intention of removal. 10 Mass. 488; 8 Cranch, 278; Ersk. Pr. of Law of Scotl. B. 1, tit. 2, s. 9; Denisart, tit. Domicile, 1, 7, 18, 19; Voet, Pandect, lib. 5, tit. 1, 92, 97; 5 Madd. Ch. R. 379; Merl. Réper. tit. Domicile. In order to constitute a domicil, two circumstances must unite, namely, actual residence, and an intention to remain.

The original domicil of every person is the place of his birth, and this adheres to him till another is

acquired by his act. When he changes it, he acquires a new domicil in the new place of his residence, and loses his original domicil. But upon a return with an intention to reside, his original domicil is restored. 3 Rawle's Rep. 312; 1 Gallis. R. 274, 284; 5 Rob. Adm. R. 99. As it requires an intention in order to change one's domicil, it follows that where a party removes with an intention of returning, he does not lose his domicil, as he can have acquired one no where else. Therefore public ministers sent out in the public service; the president of the United States, the secretaries and such other officers whose public duties require a temporary residence at the capital, retain their domicils. So do officers, soldiers, and marines in the army and navy.

The domicil of children is the same as that of their parents, until after they have attained their full age, they change it. The wife's is that of the husband. 2 L. R. 35; 15 S. & R. 90.

How far a settlement in a foreign country will impress a hostile character on a merchant, see Chitty's Law of Nations, 31 to 50; 1 Kent, Com. 74 to 80; 13 L. R. 296; 8 Cranch, 363; 7 Cranch 506; 2 Cranch, 64; 9 Cranch, 191; 1 Wheat. 46; 2 Wheat. 76; 3 Wheat. 14; 2 Gall. R. 268; 2 Pet. Adm. Dec. 438; 1 Gall. R. 274. As to its effect in the administration of the assets of a deceased non-resident, see 3 Rawle's R. 312; 3 Pick. R. 128; 2 Kent, Com. 348; 10 Pick. R. 77. The law of Louisiana relating to the "domicil and the manner of changing the same" will be found in the Civil Code of Louisiana, tit. 2, art. 42 to 49. See also 8 M. R. 709; 4 N. S. 51; 6 N. S. 467; 2 L. R. 35; 4 L. R. 69; 5 N. S. 385; 5 L. R. 332; 8 L. R. 315; 13 L. R. 297; 11 L. R. 178; 12 L. R. 190.

See on the subject generally, 2 Bos. & Pul. 230, note; 1 Mason's Rep. 411; Toullier, Droit Civil Français, liv. 1, tit. 3, n. 362 à 378; Domat, tome 2, liv. 1, s. 3; Pothier, Introduction générale aux coutumes, n. 8 à 20; 1 Ashm. R. 126; Merl. Rép. tit. Domicile; 3 Meriv. R. 79; 5 Ves. 786; 1 Crompt. & J. 151; 1 Tyrwh. R. 91; 2 Tyrwh. R. 475; 2 Crompt. & J. 436.

DOMINANT, *estates.* In the civil law, this term is used to signify the estate to which a servitude or easement is due from another estate; for example, where the owners of the estate, Blackacre, have a right to a way or passage over the estate, Whiteacre, the former is called the dominant, and the latter the servient estate.

DOMINION. The right of the owner of a thing to use it or dispose of it at his pleasure. See *Domain;* 1 White's New Coll. 85; Jacob's Intr. 39.

DOMO REPARANDO. The name of an ancient writ in favour of a party who was in danger of being injured by the fall of his neighbour's house.

DONATIO MORTIS CAUSA, *contracts, legacies,* a gift in prospect of death; is when a person in his last sickness, apprehending his dissolution near, delivers, or causes to be delivered to another, the possession of any personal goods, to keep in case of his decease. 2 Bl. Com. 514; see Civ. Code of Lou. art. 1455. The civil law defines it to be a gift under apprehension of death, as when any thing is given upon condition that if the donor dies, the donee shall possess it absolutely, or return it if the donee should survive, or should repent of having made the gift, or if the donee should die before the donor. Donations mortis causâ, are now reduced, as far as possible, to the similitude of legacies. Inst.

t. 7, De Donationibus. See 2 Ves. jr. 119. Smith v. Casen, mentioned by the reporter at the end of Drury v. Smith, 1 P. Wms. 406; 2 Ves. sen. 434; 3 Binn. 366.

With respect to the nature of a donatio mortis causâ, this kind of amphibious gift so far resembles a legacy, that it is ambulatory and incomplete during the donor's life, it is, therefore, revocable by him, 7 Taunt. 231; 3 Binn. 366, and subject to his debts upon a deficiency of assets, 1 P. Wms. 405. But in the following particulars it differs from a legacy; it does not fall within an administration, nor require any act in the executors to constitute a title in the donee. Rop. Leg. 26.

The following circumstances are required to constitute a good donatio mortis causâ; 1st. That the thing given be personal property, 3 Binn. 370; a bond, 3 Binn. 370; 3 Madd. R. 184; bank notes, 2 Bro. C. C. 612; and a check offered for payment during the life of the donor, will be so considered; 4 Bro. C. C. 286. 2dly. That the gift be made by the donor in peril of death, or during his last illness, and to take effect only in case the giver die. 3 Binn. 370; 4 Burn's Ecc. Law, 110. 3dly. That there be an actual delivery of the subject to, and for the donee, in cases where such delivery can be made. 3 Binn. 370; 2 Ves. jr. 120. See 9 Ves. 1; 7 Taunt. 224. But such delivery can be made to a third person for the use of the donee. 3 Binn. 370. It is an unsettled question whether such kind of gift appearing in writing, without delivery of the subject, can be supported; 2 Ves. jr. 120. By the Roman and civil law, a gift mortis causâ, might be made in writing. Dig. lib. 39, t. 6, l. 28; 2 Ves. sen. 440; 1 Ves. sen. 314.

See in general, 1 Fonb. Tr. Eq. 288, n. (p); Coop. Just. 474; Civ. Code of Lo. B. 3, t. 2, c. 1 and 6. No disposition, mortis causâ, shall henceforth be made otherwise than by last will or testament. All other form is abrogated. Civ. Code of Lo. art. 1563; Vin. Abr. Executors, Z 4; Bac. Abr. Legacies, A; Supp. to Ves. jr. vol. 1, p. 143, 170; vol. 2, 97, 215; Rop. Leg. ch. 1; Swinb. pt. 1, s. 7.

DONATION, *contracts*, is the act by which the owner of a thing, voluntarily transfers the title and possession of the same, from himself to another person, without any consideration; a gift (q. v.) A donation is never perfected, until it has been accepted, for the acceptance, (q. v.) is requisite to make the donation complete. Vide *Assent*, and Ayl. Pand. tit. 9; Clef des Lois Rom. h. t.

DONATION INTER VIVOS, *contracts*, is a contract which takes place by the mutual consent of the giver, who divests himself of the thing given in order to transmit the title of it to the donee gratuitously, and the donee who accepts the thing and acquires a legal title to it. This donation takes place when the giver is not in any immediate apprehension of death, which distinguishes it from a *donatio mortis causâ*, (q. v.) And see Civ. Code of Lo. art. 1453.

DONEE. He to whom a gift is made, or a bequest given.

DONIS, STATUTE DE, the stat. West. 2, namely, 13 Edw. 1, c. 1, called the statute *de donis conditionalibus*. This statute revives, in some sort, the ancient feudal restraints, which were originally laid on alienations. 2 Bl. Com. 12.

DONOR, he who makes a gift. (q. v.)

DOOR. The place of usual entrance in a house, or into a room in the house. Doors are distinguished into outer doors and inner doors. To authorise the breach of an outer

door in order to serve process, the process must be of a criminal nature; and even then a demand of admittance must first have been refused. 5 Co. 93; 4 Leon. 41; T. Jones, 234; 1 N. H. Rep. 346; 10 John. 263; 1 Root, 83, 134; 21 Pick. R. 156; the outer door may also be broken open for the purpose of executing a writ of *habere facias*. 5 Co. 93; Bac. Ab. Sheriff, N 3. An outer door cannot in general be broken for the purpose of serving civil process, 13 Mass. 520; but after the defendant has been arrested, and he takes refuge in his own house, the officer may justify breaking an outer door to take him. Foster, 320; 1 Roll. R. 138; Cro. Jac. 555; 10 Wend. 300. When once an officer is in the house, he may break open an inner door to make an arrest. Kirby, 386; 5 John. 352; 17 John. 127.

DOTAL PROPERTY. By the civil law and in Louisiana, by this term is understood that property which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment. Civil Code of Lo. art. 2315. Vide *Extradotal property*.

DOTATION, *French law*. Is the act by which the founder of a hospital, or other charity, endows it with property to fulfil its destination.

DOTE, *Span. law*, is the property which the wife gives to the husband on account of marriage. It is divided into *adventitia* and *profecticia;* the former is the dote which the father or grandfather, or other of the ascendants in the direct paternal line, give of their own property to the husband; the latter (*adventitia*) is that property which the wife gives to the husband, or that which is given to him for her by her mother, or her collateral relations, or a stranger. Aso & Man. Inst. B. 1, t. 7, c. 1, § 1.

DOTE ASSIGNANDO, *Eng. law*. The name of a writ which lay in favour of a widow, when it was found by office that the king's tenant was seised of tenements in fee or fee tail at the time of his death, and that he held of the king in chief.

DOTE UNDE NIHIL HABET. The name of a writ of dower which a widow sues against the tenant, who bought land of her husband in his life-time, and in which her dower remains, of which he was seised solely in fee simple or fee tail. F. N. B. 147; Booth, Real Act. 166.

DOUBLE COSTS, *practice*. According to the English law, when double costs are given by the statute, the term is not to be understood, according to its literal import, twice the amount of single costs, but in such case the costs are thus calculated; 1, the common costs, and, 2, *half* of the common costs. Bac. Ab. Costs, E; 2 Str. 1048. This is not the rule in New York, nor in Pennsylvania. 2 Dunl. Pr. 731; 2 Rawle's R. 201. In all cases where double or treble costs are claimed, the party must apply to the court for them before he can proceed to the taxation, otherwise the proceedings will be set aside as irregular. 4 Wend. R. 216. Vide *Costs;* and *Treble Costs*.

DOUBLE INSURANCE, *contracts*, is where the insured makes two insurances on the same risk, and the same interest. It differs from re-insurance in this, that it is made by the insured, with a view of receiving a double satisfaction in case of loss; whereas a re-insurance is made by a former insurer, his executors or assigns, to protect himself and his estate from a risk to which they were liable by the first insurance. The two policies are considered as making but one insurance. They are good to the extent of the value of the effects put in risk; but the insured shall not be permitted to

recover a double satisfaction. He can sue the underwriters on both the policies, but he can only recover the real amount of his loss, to which all the underwriters on both shall contribute in proportion to their several subscriptions. Marsh. Ins. B. 1, c. 4, s. 4.

DOUBLE PLEA. Vide *Duplicity.*

DOUBT, is the uncertainty which exists in relation to a fact, a proposition, or other thing; or it is an equipoise of the mind arising from an equality of contrary reasons. Ayl. Pand. 121. The embarrassing position of a judge is that of being in doubt, and it is frequently the lot of the wisest and most enlightened to be in this condition; those who have little or no experience usually find no difficulty in deciding the most problematical questions. Some rules, not always infallible, have been adopted in doubtful cases, in order to arrive at the truth. 1. In civil cases, the doubt ought to operate against him, who having it in his power to prove facts to remove the doubt has neglected to do so. In cases of fraud when there is a doubt, the presumption of innocence (q. v.) ought to remove it. 2. In criminal cases, whenever a reasonable doubt exists as to the guilt of the accused, that doubt ought to operate in his favour.

No judge is presumed to have any doubt on a question of law, and he cannot therefore refuse to give a judgment on that account. 9 M. R. 355; Merlin, Répert. h. t.; Ayliffe's Pand. b. 2, t. 17; Dig. lib. 34, t. 5; Code, lib. 6, t. 38. Indeed, in some counties, in China, for example, ignorance of the law in a judge is punishable with blows. Penal Laws of China, B. 2, s. 61.

DOVE. The name of a well-known bird. Doves are animals *feræ naturæ*, and not the subject of larceny, unless they are in the owner's custody, as, for example, in a dove-house, or when in the nest before they can fly. 9 Pick. 15. See *Whelp.*

DOWAGER. A widow endowed; one who has a jointure. In England, this is a title or addition given to the widows of princes, dukes, earls, and other noblemen.

DOWER is the right of a woman in a third part of all the lands and tenements in fee simple, fee tail general, or as heir in special tail, of which her deceased husband was seised, either in deed or in law, at any time during the coverture, and of which any issue she might have had, might by possibility have been heir. Litt. § 36. Vide *Estate in Dower.* This is dower at common law. Besides this, in England there are three other species of dower now subsisting; namely, dower by custom, which is, where a widow becomes entitled to a certain portion of her husband's lands in consequence of some local or particular custom: thus by the custom of gavelkind, the widow is entitled to a moiety of all the lands and tenements, which her husband held by that tenure.—Dower *ad ostium ecclesiæ*, is, when a man of full age comes to the church door to be married, after troth plighted, endows his wife of a certain portion of his lands.—Dower *ex assensu patris*, was only a species of dower *ad ostium ecclesiæ*, made when the husband's father was alive, and the son, with his consent expressly given, endowed his wife, at the church door, of a certain part of his father's lands.—There was another kind, *de la plus belle*, to which the abolition of military tenures has put an end. Vide Cruise's Dig. t. 6, c. 1; 2 Bl. Com. 129; 15 Serg. & Rawle, 72; Poth. Du Douaire.

In the United States, the estate which the wife takes in the lands of her deceased husband, varies essen-

tially from the right of dower at common law. In some of the states, she takes one-third of the profits, or in case of there being no children, one half. In others she takes the same right in fee, when there are no lineal descendants; and in one she takes two-thirds in fee, when there are no lineal ascendants or descendants, or brother or sister of the whole or half blood. 1 Hill. Ab. 57, 8.

DOWRESS. A woman entitled to dower. In order to entitle a woman to the rights of a dowress at common law, she must have been lawfully married, her husband must be dead, he must have been seised, during the coverture, of an estate subject to dower. Although the marriage may be voidable, if it is not absolutely void at his death, it is sufficient to support the rights of the dowress. The husband and wife must have been of sufficient age to consent. At common law an alien could not be endowed, but this rule has been changed in several states. 2 John. Cas. 29; 1 Harr. & Gill, 280; 1 Cowen, R. 89; 8 Cowen, R. 713. The dowress's right may be defeated when her husband was not *of right* seised of an estate of inheritance; as, for example, dower will be defeated upon the restoration of the seisin under the prior title in the case of defeasible estates, as in case of re-entry for a condition broken, which abolishes the intermediate seisin. Perk. s. 311, 312, 317. Dower is barred in various ways; 1. By the adultery of the wife, unless it has been condoned. 2. By a jointure settled upon the wife. 2 Paige, R. 511. 3. By the wife joining her husband in a conveyance of the estate. 4. By the husband and wife levying a fine, or suffering a common recovery. 10 Co. 49, b; Plowd. 504. 5. By a divorce *à vinculo matrimonii*. 6. By an acceptance, by the wife of a collateral satisfaction, consisting of land, money, or other chattel interest, given instead of it by the husband's will, and accepted after the husband's death. In these cases she has a right to elect whether to take her dower or the bequest or devise. 4 Monr. R. 265; 5 Monr. R. 58; 4 Desaus. R. 146; 2 M'Cord, Ch. R. 280; 7 Cranch, R. 370; 5 Call, R. 481; 1 Edw. R. 435; 3 Russ. R. 192; 2 Dana, R. 342.

DOWRY, was 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. Vide Co. Litt. 31; Civ. Code of Lo. art. 2317; Dig. 23, 3, 76; Code, 5, 12, 20.

DRAGOMAN, an interpreter employed in the east, and particularly at the Turkish court. The act of Congress of August 26, 1842, c. 201, s. 8, declares that it shall not be lawful for the president of the United States to allow a dragoman at Constantinople, a salary of more than two thousand five hundred dollars.

DRAIN. Conveying the water from one place to another, for the purpose of drying the former. The right of draining water through another man's land. This is an easement or servitude acquired by grant or prescription. Vide 3 Kent, Com. 436; *Jus aquæductus; Rain water; Stillicidium.*

DRAWBACK, *comm. law*, is an allowance made by the government to merchants on the re-exportation of certain imported goods liable to duties, which in some cases consists of the whole, in others of a part of the duties which had been paid upon the importation. For the various acts of congress which regulated drawbacks, see Story, L. U. S. Index, h. t.

DRAWEE. A person to whom a bill of exchange is addressed, and

who is requested to pay the amount of money therein mentioned. The drawee may be only one person, or there may be several persons. The drawee may be a third person, or a man may draw a bill on himself. 18 Ves. Jr. 69; Carth. 509; 1 Show. 163; Burr. 1077. The drawee should accept or refuse to accept the bill at furthest within twenty-four hours after presentment. 2 Smith's R. 243; 1 Ld. Raym. 281; Com. Dig. Merchant, F 6; Marius, 15; but it is said the holder is entitled to a definite answer if the mail go out in the mean time. Marius, 62. In case the bill has been left with the drawee for his acceptance, he will be considered as having accepted it, if he keep the bill a great length of time, or do any other act which gives credit to the bill, and induces the holder not to protest it; or is intended as a surprise upon him, and to induce him to consider the bill as accepted. Chit. on Bills, 227. When he accepts it, it is his duty to pay it at maturity.

DRAWER, *contracts.* The party who makes a bill of exchange. The obligations of the drawer to the drawee and every subsequent holder lawfully entitled to the possession, that the person on whom he draws is capable of binding himself by his acceptance; that he is to be found at the place where he is described to reside, if that description be mentioned in the bill; that if the bill be duly presented to him, he will accept in writing on the bill itself, according to its tenor, and that he will pay it when it becomes due, if presented in proper time for that purpose; and that if the drawee fail to do either, he, the drawer, will pay the amount provided he have due notice of the dishonour. The engagement of the drawer of a bill is in all its parts absolute and irrevocable. 2 H. Bl. 378; 3 B. & P. 291; Poth. Contr. de Change, n. 58; Chit. Bills, 214; Dane's Ab. h. t.

DRAWING. A representation on paper, card, or other substance, of something. The act of congress of July 4, 1836, section 6, requires all persons who apply for letters-patent for an invention to accompany their petitions or specifications with a drawing or drawings of the whole, and written references, when the nature of the case admits of drawings.

DREIT. The same as *Droit*, (q. v.)

DRIFTWAY. A road or way over which cattle are driven. 1 Taunt. R. 279; Selw. N. P. 1037; Wool. on Ways, 1.

DRIP. The right of drip is an easement by which the water which falls on one house is allowed to fall upon the land of another. Unless the owner has acquired the right by grant or prescription, he has no right so to construct his house as to let the water drip over his neighbour's land. 1 Roll. Ab. 107. Vide *Rain water; Stillicidium;* and 3 Kent, Com. 436; Dig. 43, 23, 4 et 6; 11 Ad. & Ell. 40; S. C. 39 E. C. L. R. 21.

DRIVER. One employed in conducting a coach, carriage, wagon or other vehicle, with horses, mules or other animals. Frequent accidents occur in consequence of the neglect or want of skill of drivers of public stage-coaches, for which the employers are responsible. The law requires that drivers should possess reasonable skill and be of good habits for the journey; if therefore he is not acquainted with the road he undertakes to drive, 3 Bingh. Rep. 314, 321; drives with reins so loose that he cannot govern his horses, 2 Esp. R. 533; does not give notice of any serious danger on the road, 1 Campb. R. 67; takes the wrong side of the road, 4 Esp. R. 273; incau-

tiously comes in collision with another carriage, 1 Stark. R. 423; 1 Campb. R. 167; or does not exercise a sound and reasonable discretion in travelling on the road, to avoid dangers and difficulties, and any accident happens by which any passenger is injured, both the driver and his employers will be responsible. 2 Stark. R. 37; 3 Engl. C. L. Rep. 233; 2 Esp. R. 533; 11 Mass. 57; 6 T. R. 659; 1 East, R. 106; 4 B. & A. 590; 6 Eng. C. L. R. 528. Vide *Common Carriers; Negligence; Quasi Offence.*

DROIT, a French word, in which that language signifies the whole collection of laws, written and unwritten, and is synonymous to our word law. It also signifies a right, il n'existe point de droits sans devoirs, et *vice versâ*. 1 Toull. n. 96; Poth. h. t. With us it means right, jus. Co. Litt. 158. A person was said to have *droit droit*, *plurimum juris*, and *plurimum possessionis*, when he had a freehold, the fee, and the property in him. Ib. 266; Crabb's H. Eng. L. 400.

DROIT D'AUBAINE, *jus albinatus*, was a rule by which all the property of a deceased foreigner, whether movable or immovable, was confiscated to the use of the state, to the exclusion of his heirs, whether claiming *ab intestato*, or under a will of the deceased. As the darkness of the middle ages wore away, and the light of civilization appeared, this barbarous and inhospitable usage was by degrees discontinued, and is now nearly abolished in the civilized world. Vide *Albinatus jus.*

DRUNKENNESS, intoxication with strong liquor. This is an offence generally punished by local regulations, more or less severely. Although drunkenness reduces a man to a temporary insanity, it does not excuse him or palliate his offence, when he commits a crime during a fit of intoxication, and which is the immediate result of it. When the act is a remote consequence, superinduced by the antecedent drunkenness of the party, as in cases of *delirium tremens* or *mania a potu*, the insanity excuses the act. 5 Mason's R. 28; Amer. Jurist, vol. 3, p. 5–20; Martin & Yeager's R. 133, 147; Dane's Ab. Index, h. t.; 1 Russ. on Cr. 7; Ayliffe's Parerg. 231; 4 Bl. Com. 26. As there must be a will and intention in order to make a contract, it follows that a man who is in such a state of intoxication as not to know what he is doing, may avoid a contract entered into by him while in this state. 2 Aik. Rep. 167; 1 Green, R. 233; 2 Verm. 97; 1 Bibb, 168; 3 Hayw. R. 82; 1 Hill, R. 313; 1 South. R. 361; Bull. N. P. 172; 1 Ves. 19; 18 Ves. 15; 3 P. Wms. 130, n. (a); Sugd. Vend. 154; 1 Stark. 126; 1 South. R. 361; 2 Hayw. 394; but see 1 Bibb, R. 406; Ray's Med. Jur. ch. 23, 24; Fonbl. Eq. B. 1, c. 2, § 3; 22 Am. Jur. 290. Vide *Ebriosity; Habitual drunkard.*

DRY EXCHANGE, *contracts.*—A term invented for disguising and covering usury; in which something was pretended to pass on both sides, when in truth nothing passed on one side, whence it was called *dry*. Stat. 3 Hen. 7, c. 5.

DRY RENT, *contracts*, rent-seck, was a rent reserved without a clause of distress.

DUCES TECUM, *practice, evidence*, i. e. bring with thee. A writ, commonly called a *subpœna duces tecum*, commanding the person to whom it is directed to bring with him some writings, papers, or other things therein specified and described, before the court. 1 Phil. Ev. 386. In general all papers in the possession of the witness must be produced; but to this general rule there are exceptions, among which are the following.

1. That a party is not bound to exhibit his own title deeds, 1 Stark. Ev. 87; 3 C. & P. 591; 2 Stark. R. 203; 9 B. & Cr. 288.—2. One who has advanced money on a lease and holds it as his security, is not bound to produce it, 6 C. & P. 728.—3. Attorneys and solicitors, who hold the papers of their clients cannot be compelled to produce them, unless the client could have been so compelled. 6 Carr. & P. 728. See 5 Cowen, R. 153, 419; Esp. R. 405; 11 Price, R. 455; 1 Adol. & Ell. 31; 1 C. M. & R. 38; 1 Hud. & Brooke, 749.

DUCKING STOOL, *punishment*, an instrument used in dipping women in the water as a punishment on conviction of being common scolds. It is sometimes confounded with tumbrel (q. v.) This barbarous punishment was never in use in Pennsylvania. 12 Serg. & Rawle, 220.

DUELLING, *crim. law*, is the fighting of two persons one against the other, at an appointed time and place, upon a precedent quarrel. It differs from an affray in this, that the latter occurs on a sudden quarrel, while the former is always the result of design. When one of the parties is killed, the survivor is guilty of murder. 1 Russ. on Cr. 443; 1 Yerger's R. 228; fighting a duel, even where there is no fatal result is of itself a misdemeanor. Vide 2 Com. Dig. 252; Roscoe's Cr. Ev. 610; 2 Chit. Cr. Law, 728; Ib. 848; Com. Dig. Battel, B; 3 Inst. 157; 6 East, 464; Hawk. B. 1, c. 31, s. 21; 3 East, R. 581; 3 Bulst. 171; 4 Bl. Com. 199; Prin. Pen. Law, c. 19, p. 245. For cases of mutual combat upon a sudden quarrel, vide 1 Russ. on Cr. 495.

DUMB. Vide *Mute*.

DUMB BIDDING, *contracts*. In sales at auction, when the amount which the owner of the thing sold is willing to take for the article, is written and placed by the owner under a candlestick or other thing, and it is agreed that no bidding shall avail unless equal to that, this is called dumb bidding. Babingt. on Auct. 44.

DUNG. Vide *Manure*.

DUNNAGE, *mer. law*, pieces of wood placed against the sides and bottom of the hold of a vessel to preserve the cargo from the effect of leakage, according to its nature and quality. 2 Magens, 101, art. 125, 126; Abbott on Shipp. 227.

DUPLICATA. It is the double of letters-patent, letters of administration or other instrument.

DUPLICATE, is the double of any thing. It is usually applied to agreements, letters, receipts, and the like, when two originals are made of either of them. Each copy has the same effect. In the English law, it also signifies the certificate of discharge given to an insolvent debtor, who takes the benefit of the act for the relief of insolvent debtors.

DUPLICITY, *pleading*. Duplicity, or double pleading, consists in alleging, for one single purpose or object, two or more distinct grounds of complaints or defence, when one of them would be as effectual in law, as both or all. This the common law does not allow, because it produces useless prolixity, and always tends to confusion, and to the multiplication of issues. Co. Litt. 304, a; Finch's Law, 393; 3 Bl. Com. 311; Bac. Ab. Pleas, K 1. Duplicity may be in the declaration, or the subsequent proceedings. Duplicity in the declaration consists in joining, in one and the same count, different grounds of action, of different natures. Cro. Car. 20; or of the same nature, 2 Co. 4 a; 1 Saund. 58, n. 1; 2 Ventr. 198; Steph. Pl. 266; to enforce only a single right of recovery. This is a fault in pleading, only because it tends to useless prolixity and

confusion, and is, therefore, only a fault in form. The rule forbidding double pleading "extends," according to Lord Coke, "to pleas perpetual or peremptory, and not to pleas dilatory; for in their time and place a man may use divers of them." Co. Litt. 304, a. But by this is not meant that any dilatory plea may be double, or, in other words, that it may consist of different matters, or answers to one and the same thing; but merely, that as there are several kinds or classes of dilatory pleas, having distinct offices or effects, a defendant may use "divers of them" successively, (each being in itself single,) in their proper order. Steph. Pl. App. note 56. The inconveniences which were felt in consequence of this strictness were remedied by the statute 4 Ann, c. 16, s. 4, which provides that "it shall be lawful, for any defendant, or tenant in any action or suit, or for any plaintiff in replevin, in any court of record, with leave of the court to plead as many several matters thereto as he shall think necessary for his defence." This provision, or a similar one, is in force probably in most of the states of the American Union. Under this statute, the defendant may, with leave of court, plead as many different pleas in bar, (each being in itself single,) as he may think proper; but although this statute allows the defendant to plead several distinct and substantive matters of defence, in several distinct pleas, to the whole, or one and the same part of the plaintiff's demand; yet, it does not authorise him to allege more than one ground of defence in one plea. Each plea must still be single, as by the rules of the common law. Lawes, Pl. 131; 1 Chit Pl. 512. This statute extends only to pleas to the declaration, and does not embrace replications, rejoinders, nor any of the subsequent pleadings. Lawes, Pl. 132; 2 Chit. Pl. 421; Com. Dig. Pleader, E 2; Story's Pl. 72, 76. Vide, generally; 1 Chit. Pl. 230, 512; Steph. Pl. c. 2, s. 3, rule 1; Gould on Pl. c. 8, p. 1; Archb. Civ. Pl. 191; Doct. Pl. 222; 5 John. 240; 8 Vin. Ab. 183.

DURANTE, a term equivalent to during, which is used in some law phrases, as *durante absentia*, during absence; *durante minore ætate*, during minority; *durante bene placito*, during our good pleasure.

DURANTE ABSENTIA. When the executor is out of the jurisdiction of the court or officer to whom belongs the probate of wills and granting letters of administration, letters of administration will be granted to another *during the absence* of the executor; and the person thus appointed is called the *administrator durante absentia*.

DURESS, is an actual or a threatened violence or restraint of a man's person contrary to law, to compel him to enter into a contract, or to discharge one. Sir William Blackstone divides duress into two sorts; *first*, duress of imprisonment, where a man actually loses his liberty. If a man is illegally deprived of his liberty until he signs and seals a bond or the like, he may allege this duress and avoid the extorted bond. But if a man be legally imprisoned, and either to procure his discharge, or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it. 2 Inst. 482; 3 Caines's R. 168; 6 Mass. R. 511; 1 Lev. 69; 1 Hen. & Munf. 350; 5 Shipl. R. 338. Where the proceedings at law are a mere pretext, the instrument may be avoided. Aleyn, 92; 1 Bl. Com. 136. *Secondly*, Duress per minas, which is either for fear of loss of life, or else for fear of mayhem, or

loss of limb; and this must be upon a sufficient reason. 1 Bl. Com. 131. In this case a man may avoid his own act. Ib. Lord Coke enumerates four instances in which a man may avoid his own act by reason of menaces; 1st, for fear of loss of life; 2dly, of member; 3dly, of mayhem; 4thly, of imprisonment. 2 Inst. 483; 2 Roll. Abr. 124; Bac. Ab. Duress; Id. Murder, A; 2 Str. R. 856; Fost. Cr. Law, 322; 2 St. R. 884; 2 Ld. Raym. 1578.

In Louisiana consent to a contract is void if it be produced by violence or threats, and the contract is invalid. Civ. Code of Louis. art. 1844. It is not every degree of violence or any kind of threats, that will invalidate a contract; they must be such as would naturally operate on a person of ordinary firmness, and inspire a just fear of great injury to person, reputation or fortune. The age, sex, state of health, temper and disposition of the party, and other circumstances calculated to give greater or less effect to the violence or threats, must be taken into consideration. Ib. art. 1845. A contract by violence or threats, is void, although the party in whose favour the contract is made, did not exercise the violence or make the threats, and although he were ignorant of them. Ib. 1846. Violence or threats are cause of nullity, not only where they are exercised on the contracting party, but when the wife, the husband, the descendants or ascendants of the party are the object of them. Ib. 1847. If the violence used be only a legal constraint, or the threats only of doing that which the party using them had a right to do, they shall not invalidate the contract. A just and legal imprisonment, or threats of any measure authorised by law, and the circumstances of the case, are of this description. Ib. 1850. But the mere forms of law to cover coercive proceedings for an unjust and illegal cause, if used or threatened in order to procure the assent to a contract, will invalidate it; an arrest without cause of action or a demand of bail in an unreasonable sum, or threat of such proceeding, by this rule invalidate a contract made under their pressure. Ib. 1851. All the above articles relate to cases where there may be some other motive besides the violence or threats for making the contract. When, however, there is no other cause for making the contract, any threats, even of slight injury, will invalidate it. Ib. 1853.

DUTIES. In its most enlarged sense, this word is nearly equivalent to taxes, embracing all impositions or charges levied on persons or things; in its more restrained sense, it is often used as equivalent to *customs*, (q. v.) or *imposts*, (q. v.) Story Const. § 949. Vide for the rate of duties payable on goods and merchandize, Gord. Dig. B. 7, t. 1, c. 1; Story's L. U. S. Index, h. t.; Act of August 30, 1842.

DUTY, *natural law*, is a human action which is exactly conformable to the laws which require us to obey them. It differs from a legal obligation, because a duty cannot always be enforced by the law; it is our duty, for example, to be temperate in eating, but we are under no legal obligation to be so; we ought to love our neighbours, but no law obliges us to love them. Duties may be considered in the relation of man towards God, towards himself, and towards mankind. 1. We are bound to obey the will of God as far as we are able to discover it, because he is the sovereign Lord of the universe who made and governs all things by his almighty power, and infinite wisdom. The general name of this duty is piety; which consists partly in entertaining just opinions

concerning him, and partly in such affections towards him, and such worship of him, as is suitable to these opinions. 2. A man has a duty to perform towards himself; he is bound by the law of nature to protect his life and his limbs; it is his duty, too, to avoid all intemperance in eating and drinking, and in the unlawful gratification of all his other appetites. 3. He has duties to perform towards others. He is bound to do others the same justice which he would have a right to expect them to do to him.

DWELLING HOUSE. A building inhabited by man. A mansion. (q. v.) A part of a house, is in one sense, a dwelling house; for example, where two or more persons rent of the owner different parts of a house, so as to have among them the whole house, and the owner does not reserve or occupy any part, the separate portion of each will, in cases of burglary, be considered the dwelling house of each. 1 Mood. Cr. Cas. 23. At common law in cases of burglary, under the term dwelling house are included the out-houses within the curtilage or common fence with the dwelling house. 3 Inst. 64; 4 Bl. Com. 225; and vide Russ. & Ry. Cr. Cas. 170; Id. 186; 16 Mass. 105; 16 John. 203; 18 John. 115; 4 Call, 109; 1 Moody, Cr. Cas. 274; *Burglary; Door; House; Jail; Mansion.*

DYING DECLARATION. Vide *Death; Declarations.*

DYSPEPSIA, *med. jur., contracts.* A state of the stomach, in which its functions are disturbed, without the presence of other diseases; or when, if other diseases are present, they are of minor importance. Dunglisson's Med. Dict. h. t. Dyspeptia is not, in general, considered as a disease which tends to shorten life, so as to make a life uninsurable; unless the complaint has become organic dyspepsia, or it was of such a degree at the time of the insurance as, by its excess, it tended to shorten life. 4 Taunt. 763.

DYVOUR in the Scotch law, is a bankrupt.

DYVOUR'S HABIT, in Scotland, is a habit which debtors who are set free on a *cessio bonorum*, are obliged to wear, unless in the summons and process of *cessio*, it be libelled, sustained, and proved that the bankruptcy proceeds from misfortune. And bankrupts are condemned to submit to the habit, even where no suspicion of fraud lies against them, if they have been dealers in an illicit trade. Ersk. Pr. L. Scot. 4, 3, 13.

E.

E PLURIBUS UNUM, one of many. The motto of the arms of the United States.

EAGLE, *money*, a gold coin of the United States, of the value of ten dollars. It weighs two hundred and fifty-eight grains. Of one thousand parts, nine hundred are of pure gold, and one hundred of alloy. Act of January 18th, 1837, 4 Sharsw. cont. of Story's L. U. S. 2523, 4. Vide *Money.*

EARL, in the English law, is a title of nobility next below a marquis and above a viscount. Earls were anciently called *comites*, because they were wont *comitari regem*, to wait upon the king for council and advice. He was also called *shireman*, because each earl had the civil government of a shire. After the Norman conquest they were called *counts*, whence the shires ob-

tained the names of counties. They have now nothing to do with the government of counties, which has entirely devolved on the sheriff, the earl's deputy, or *vice-comes*.

EARNEST, *contracts*, is the payment of a part of the price of goods sold, or the delivery of part of such goods, for the purpose of binding the contract. The effect of earnest is to bind the goods sold, and upon their being paid for without default, the buyer is entitled to them. But notwithstanding the earnest the money must be paid upon taking away the goods, because no other time for payment is appointed; earnest only binds the bargain, and gives the buyer a right to demand, but a demand without payment of the money is void; after earnest given the vendor cannot sell the goods to another, without a default in the vendee, and therefore if the latter does not come and pay, and take the goods, the vendor ought to go and request him, and then if he does not come, pay for the goods and take them away in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person. 1 Salk. 113; 2 Bl. Com. 447; 2 Kent, Com. 389; Ayl. Pand. 450; 3 Campb. R. 426.

EASEMENTS, *estates*. An easement is defined to be a liberty, privilege or advantage, which one man may have in the lands of another, without profit; it may arise by deed or prescription. Vide 1 Serg. & Rawle, 298; 5 Barn. & Cr. 221; 3 Barn. & Cr. 339; 3 Bing. R. 118; 3 McCord, R. 131, 194; 2 McCord, R. 451; 14 Mass. R. 49; 3 Pick. R. 408. This is an incorporeal hereditament, and corresponds nearly to the servitudes or services of the civil law. Vide Lilly's Reg. h. t.; 3 Kent, Com. 344; Cruise, Dig. t. 31, c. 1, s. 17; 2 Hill. Ab. c. 5; 9 Pick. R. 251; 1 Bail. R. 56; 5 Mass. R. 129; 4 McCord's R. 102; Whatl. on Eas. *passim;* and the article *Servitude*.

EAT INDE SINE DIE. Words used on an acquittal, or when a prisoner is to be discharged, *that he may go without day*, that is, that he be dismisssed. Dane's Abr. Index, h. t.

EAVES-DROPPERS, *crim. law*, are such persons as wait under walls or windows or the eaves of a house, to listen after discourses, and thereupon to frame mischievous tales. The common law punishment for this offence is fine, and finding sureties for good behaviour. 4 Bl. Com. 167; Burn's Just. h. t.; Dane's Ab. Index, h. t.; 1 Russ. Cr. 302.

EBRIOSITY. This word is used by the Germans to describe that condition of a man which gradually results from the excessive use of intoxicating liquors, and is characterised by certain abiding effects. When insanity is produced by a long continued use of intoxicating drinks, it excuses those acts which would otherwise be considered crimes. 5 Mason's R. 28; 1 Russ. on Crimes, 7. Vide *Drunkenness*.

ECCHYMOSIS, *med. jur.* Blackness. It is an extravasation of blood by rupture of capillary vessels, and hence it follows contusion, but it may exist, as in cases of scurvy, and other morbid conditions without the latter. Ryan's Med. Jur. 172.

ECCLESIASTICAL. Belonging to, or set apart for the church; as distinguished from civil or secular. Vide *Church*.

ECCLESIASTICAL COURTS, *English law*, are courts held by the king's authority as supreme governor of the church, for matters which chiefly concern religion. There are ten courts which may be ranged under this class; 1. The Archdeacon's court; 2. The Consistory court; 3. The Court of Arches; 4. The Court

of Peculiars; 5. The Prerogative court; 6. The Court of Delegates, which is the great court of appeals in all ecclesiastical causes; 7. The Court of Convocation; 8. The Court of Audience; 9. The Court o Faculties; 10. The Court of Commissioners of Review.

ECCLESIASTICAL LAW.—Vide *Law*, *Canon*.

ECCLESIASTICS, *canon law*, are those persons who compose the hierarchial state of the church. They are regular and secular. Aso & Man. Inst. B. 2, t. 5, c. 4, § 1.

ECLAMPSIA PARTURIENTIUM, *med. jur.* The name of a disease accompanied by apoplectic convulsions, and which produces aberration of mind at child-birth. An ordinary person, it is said, would scarcely observe it, and it requires the practised and skilled eye of a physician to discover that the patient is acting in a total unconsciousness of the nature and effect of her acts. There can be but little doubt that many of the tragical cases of infanticide proceed from this cause. The criminal judge and lawyer cannot inquire with too much care in order to discover the guilt of the mother, where it exists, and to ascertain her innocence, where it does not. The innocent should not suffer for the guilty; and what, in the eye of science is a mere misfortune, should not, when it can be avoided, be punished as a crime. See two well reported cases of this kind in the Boston Medical Journal, vol. 27, No. 10, p. 161.

EDICT, in some countries, is a law ordained by the sovereign, by which he forbids or commands something, and extends either to the whole country, or only to some particular provinces. Edicts are somewhat similar to the president's proclamation; their difference consists in this, that the former have authority and force of law in themselves, whereas the latter are only declarations of a law, which has been before enacted by congress.

Among the Romans this word sometimes signified a *citation* to appear before a judge. The edicts of the emperors, also called *constituiones principum*, were new laws which they made of their own motion, either to decide cases which they had foreseen, or to abolish or change some ancient laws. They were different from their rescripts or decrees. These edicts were the sources which contributed to the formation of the Gregorian, Hermogenian, Theodorian, and Justinian codes. Vide Dig. 1, 4, 1, 1; Inst. 1, 2, 7; Code, 1, 1; Nov. 139.

EDICT, PERPETUAL, is the title of a compilation of all the edicts. This collection was made by Salvius Julianus, a jurist who was selected by the emperor Adrian for the purpose, and who performed his task with credit to himself.

EDICTS OF JUSTINIAN, are thirteen constitutions or laws of that prince, found, in most editions of the *corpus juris civilis*, after the Novels. Being confined to matters of police in the provinces of the empire, they are of little use.

EE, in the termination of words, has a passive signification, usually denoting the person to whom an act is done; as the grantee, he to whom a grant is made; the donee, he to whom a gift is made; the lessee, he to whom a lease is made. Vide Litt. s. 57; 2 Bl. Com. 140.

EFFECT. The operation of a law; an agreement, or an act, is called its effect. What is null produces no effect.

EFFECTS. This word used *simpliciter* is equivalent to *property* or *worldly substance*, and may carry the whole personal estate, when used in a will. 5 Madd. Ch. Rep. 72; Cowp. 209; 15 Ves. 507; 6 Madd.

Ch. R. 119. But when it is preceded and connected with words of a narrower import, and the bequest is not residuary, it will be confined to species of property *ejusdem generis* with those previously described. 13 Ves. 39; 15 Ves. 326; Roper on Leg. 210.

EFFIGY, *crim. law*, is the figure or representation of a person. To make the effigy of a person with an intent to make him the object of ridicule is a libel, (q. v.) Hawk. b. 1, c. 73, s. 2; 14 East, 227; 2 Chit. Cr. Law, 866.

EIGNE, *persons*. This is a corruption of the French word *aîné*, eldest or first born. It is frequently used in our old law books; *bastard eigne* signifies an elder bastard when spoken of two children one of whom was born before the marriage of his parents, and the other after; the latter is called *mulier puisne*. Litt. sect. 399.

EIRE or EYRE, *English law*, signifies a journey. Justices in eire, were itinerant judges, who were sent once in seven years with a general commission in divers counties, to hear and determine such causes as were called pleas of the crown. Vide *Justices in eyre*.

EJECTMENT, *remedies*, is the name of an action which lies for the recovery of the possession of real property, and of damages for the unlawful detention. This subject may be considered with reference, 1st, to the form of the proceedings; 2d, to the nature of the property or thing to be recovered; 3d, to the right to such property; 4th, to the nature of the ouster or injury; 5th, to the judgment.

1. In the English practice, which is still adhered to in some states, in order to lay the foundation of this action, the party claiming title enters upon the land, and then gives a lease of it to a third person, who being ejected by the other claimant, or some one else for him, brings a suit against the ejector in his own name; to sustain the action the lessee must prove a good title in the lessor, and, in this collateral way, the title is tried. To obviate the difficulty of proving these forms, this action has been made substantially, a fictitious process. The defendant agrees, and is required to confess that a lease was made to the plaintiff, that he entered under it, and has been ousted by the defendant; or, in other words, to admit lease, entry, and ouster, and that he will rely only upon his title. An actual entry, however, is still supposed, and therefore, an ejectment will not lie, if the right of entry is gone. 3 Bl. Com. 199 to 206. In Pennsylvania, New York, Arkansas, and perhaps other states, these fictions have all been abolished, and the writ of ejectment sets forth the possession of the plaintiff, and an unlawful entry on the part of the defendant.

2. This action is in general sustainable only for the recovery of the possession of property upon which an entry might in point of fact be made, and of which the sheriff could deliver actual possession; it cannot, therefore, in general, be sustained for the recovery of property which in legal consideration is not tangible, as, for a rent, or other incorporeal hereditaments, a water-course, or for a mere privilege of a landing held in common with other citizens of a town. 2 Yeates, 331; 3 Bl. Com. 206; Yelv. 143; Run. Eject. 121 to 136; Ad. Eject. c. 2; 9 John. 298; 16 John. 284.

3. The title of the party having a right of entry may be in fee-simple, fee-tail or for life or years; and if it is the *best* title to the property the plaintiff will succeed. The plaintiff must recover on the strength of his title, and not on the deficiency of that of the defendant. Addis. Rep.

390; 2 Serg. & Rawle, 65; 3 Serg. & Rawle, 288; 4 Burr. 2487; 1 East, R. 246; Run. Eject. 15; 5 T. R. 110.

4. The injury sustained must in fact or in point of law have amounted to an ouster or dispossession of the lessor of the plaintiff, or of the plaintiff himself, where the fictions have been abolished; for if there be no ouster, or the defendant be not in possession at the time of bringing the action, the plaintiff must fail. 7 T. R. 327; 1 B. & P. 573; 2 Caines's R. 335.

5. The judgment is that the plaintiff do recover his term, of and in the tenements, and, unless the damages be remitted, as is most usual, the damages assessed by the jury with the costs of increase.

Vide, generally, Adams on Ej.; Run. Ej.; Com. Dig. h. t.; Dane's Ab. h. t.; 1 Chit. Pl. 188 to 193; 18 E. C. L. R. 158; Woodf. L. & T. 354 to 417; 2 Phil. Ev. 169; 8 Vin. Ab. 323; Arch. Civ. Pl. 503; 2 Sell. Pr. 85; Chit. Pr. Index, h. t.; Bac. Ab. h. t.; Doct. Pl. 227; Am. Dig. h. t.

ELECTION. This term, in its most usual acceptation, signifies the choice which several persons collectively make of a person to fill an office or place; in another sense, it means the choice which is made by a person having the right, of selecting one of two alternative contracts, or rights. Elections, then, are of men or of things.

§ 1. Of men. These are either public elections or elections by companies or corporations.

1. Public elections. These should be free and uninfluenced either by hope or fear. They are, therefore, generally made by ballot, (though there are exceptions, as in Virginia, where elections to any office of honour, trust, or profit, are *viva voce*, Const. of Virg. art. 3, s. 15;) except those by persons in their representative capacities, which are *viva voce*. And to render this freedom as perfect as possible, electors are generally exempted from arrest in all cases, except treason, felony, or breach of the peace, during their attendance on elections, and in going to and returning from them. And provisions are made by law in several states to prevent the interference or appearance of the military on the election-ground.

One of the cardinal principles on the subject of elections is, that the person who receives a majority or plurality of votes is the person elected. Generally a plurality of the votes of the electors present is sufficient, but in some states, as in Maine, Const. art. 4, part 1, § 5, a majority of *all* the votes is required. Each elector has one vote.

2. Elections by corporations or companies are made by the members in such a way as their respective constitutions or charters direct. It is usual in these cases to vote a greater or lesser number of votes in proportion as the voter has a greater or less amount of the stock of the company or corporation, if such corporation or company be a pecuniary institution. And the members are frequently permitted to vote by proxy. See 7 John. 287; 9 John. 147; 5 Cowen, 426; 7 Cowen, 153; 8 Cowen, 387; 6 Wend. 509; 1 Wend. 98.

§ 2. The election of things. 1. In contracts when a debtor is obliged, in an alternative obligation, to do one of two things, as to pay one hundred dollars or deliver one hundred bushels of wheat, he has the choice to do the one or the other, until the time of payment; he has not the choice, however, to pay a part in each. Poth. Obl. part 2, c. 3, art. 6, No. 247; 11 John. 59. Or if a man sell or agree to deliver one of two articles, as a horse or an ox, he has the elec-

tion till the time of delivery. It being a rule that "in case an election be given of two several things, always he, which is the first agent, and which ought to do the first act, shall have the election." Co. Litt. 145, a; 7 John. 465; 2 Bibb, R. 171. On a failure on the part of the person who has the right to make his election in proper time, the right passes to the opposite party. Co. Litt. 145, a.; Viner, Abr. Election, B, C; Poth. Obl. No. 247; Bac. Ab. h. t. (B); 1 Desaus. 460; Hopk. R. 337. It is a maxim of law that an election once made and pleaded, the party is concluded, *electio semel facta, et placitum testatum, non patitur regressum.* Co. Litt. 146; 11 John. 241.

2. Courts of equity have adopted the principle, that a person shall not be permitted to claim under any instrument, whether it be a deed or will, without giving full effect to it, in every respect, so far as such person is concerned. This doctrine is called into exercise when a testator gives what does not belong to him, but to some other person, and gives to that person some estate of his own; by virtue of which gift a condition is implied, either that he shall part with his own estate or shall not take the bounty. 9 Ves. 515; 10 Ves. 609; 13 Ves. 220. In such a case, equity will not allow the first legatee to insist upon that by which he would deprive another legatee under the same will of the benefit to which he would be entitled, if the first legatee permitted the whole will to operate, and therefore compels him to make his election between his right independent of the will, and the benefit under it. This principle of equity does not give the disappointed legatee the right to detain the thing itself, but gives a right to compensation out of something else. 2 Ron. Leg. 378, ch. 23, s. 1. In order to impose upon a party claiming under a will the obligation of making an election, the intention of the testator must be expressed, or clearly implied in the will itself, in two respects; first, to dispose of that which is not his own; and, secondly, that the person taking the benefit under the will should take under the condition of giving effect thereto. 6 Dow. P. C. 179; 13 Ves. 174; 15 Ves. 390; 1 Bro. C. C. 492; 3 Bro. C. C. 255; 3 P. Wms. 315; 1 Ves. Jr. 172, 335; S. C. 2 Ves. Jr. 367, 371; 3 Ves. Jr. 65; Amb. 533; 3 Bro. P. C. by Toml. 277; 1 B. & Beat. 1; M'Clel. R. 424, 439, 541. See generally, on this doctrine, Roper's Legacies, ch. 23; and the learned notes of Mr. Swanston to the case Dillon v. Parker, 1 Swanst. R. 394, and 381; Com. Dig. Appendix, tit. Election; 3 Desaus. R. 504; 3 Leigh, R. 389; Jacob, R. 505; 1 Clark & Fin. 303; 1 Sim. R. 105; 13 Price, R. 607; 1 M'Clel. R. 439; 1 Y. & C. 66.

There are many other cases where a party may be compelled to make an election, which it does not fall within the plan of this work to consider. The reader will easily inform himself by examining the works above referred to.

3. The law frequently gives several forms of action to the injured party to enable him to recover his rights. To make a proper election of the proper remedy is of great importance. To enable the practitioner to make the best election, Mr. Chitty, in his valuable Treatise on Pleadings, p. 207 et seq. has very ably examined the subject and given rules for forming a correct judgment; as his work is in the hands of every member of the profession a reference to it here is all that is deemed necessary to say on this subject. See also Hammond on Parties to Actions. U. S. Dig. Actions IV.

ELECTION OF ACTIONS, *in practice*. It is frequently at the choice of the plaintiff what kind of an action to bring; a skilful practitioner will naturally select that in which his client can most easily prove what is his interest in the matter affected; may recover all his several demands against the defendant; may preclude the defendant from availing himself of a defence, which he might otherwise establish; may most easily introduce his own evidence; may not be embarrassed by making too many or too few persons parties to the suit; may try it in the county most convenient to himself; may demand bail where it is for the plaintiff's interest; may obtain a judgment with the least expense and delay; may entitle himself to costs; and may demand bail in error. 1 Chit. Pl. 207 to 214. It may be laid down as a general rule, that when a statute prescribes a new remedy, the plaintiff has his election either to adopt such remedy, or proceed at common law. Such statutory remedy is cumulative, unless the statute expressly, or by necessary implication, takes away the common law remedy. 1 S. & R. 32; 6 S. & R. 20; 5 John. 175; 10 John. 389; 16 John. 220; 1 Call, 243; 2 Greenl. 404; 5 Greenl. 38; 6 Harr. & John. 383; 4 Halst. 384; 3 Chit. Pr. 130.

ELECTION OF A DEVISE OR LEGACY. It is an admitted principle, that a person shall not be permitted to claim under any instrument, whether it be a deed or a will, without giving full effect to it in every respect, so far as such person is concerned. When a testator, therefore, gives what belongs to another and not to him, and gives to the owner some estate of his own; this gift is under an implied condition either that he shall part with his own estate, or not take the bounty. 9 Ves. 515; 10 Ves. 609; 13 Ves. 220; 2 Ves. 697; 1 Suppl. to Ves. jr. 222; Ib. 55; Ib. 340. If, for example, a testator undertakes to dispose of an estate belonging to B, and devise to B other lands, or bequeath to him a legacy by the same will, B will not be permitted to keep his own estate, and enjoy at the same time the benefit of the devise or bequest made in his favour, but must elect whether he will part with his own estate, and accept the provisions in the will, or continue in possession of the former and reject the latter. See 2 Vern. 581; Forr. 176; 1 Swanst. 436, 447; 1 Bro. C. C. 480.

The foundation of the equitable doctrine of election, is the intention, explicit or presumed, of the author of the instrument to which it is applied, and such is the import of the expression by which it is described as proceeding, sometimes on a tacit, implied or constructive condition, sometimes on equity. See Cas. Temp. Talb. 183; 2 Vern. 582; 2 Ves. 14. 1 Eden, R. 536; 1 Ves. 306. See, generally, 1 Swan. 380 to 408, 414, 425, 432, several very full notes.

As to what acts of acceptance or acquiescence will constitute an implied election, see 1 Swan. R. 381, n. a; and the cases there cited.

ELECTOR, *government*, one who has the right to make choice of public officers; one who has a right to vote. The qualifications of electors, are generally the same as those required in the person to be elected; to this, however, there is one exception, a naturalized citizen may be an elector of president of the United States, although he could not constitutionally be elected to that office.

ELECTORS OF PRESIDENT, are persons elected by the people, whose sole duty is to elect a president and vice-president of the U. S. The constitution provides, Am. art. 12, that "the electors shall meet in their

respective states, and vote by ballot for president and vice-president, one of whom at least shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president; and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each; which list they shall sign and certify, and transmit, sealed, to the seat of the government of the United States, directed to the president of the senate; the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for president, shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose, shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president.

2. The person having the greatest number of votes as vice-president, shall be the vice-president, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice-president: a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president, shall be eligible to that of vice-president of the United States." Vide 3 Story, Const. § 1448 to 1470.

ELEEMOSYNARY, charitable, alms-giving. Eleemosynary corporations are confined to colleges, schools and hospitals. 1 Woodd. Lect. 474; Skinn. 447; 1 Lord Raym. 5; 2 T. R. 346.

ELEGIT, *Eng. practice, remedies*, a writ of execution directed to the sheriff, commanding him to make delivery of a moiety of the party's land, and all his goods, beasts of the plough only excepted. The sheriff, on the receipt of the writ, holds an inquest to ascertain the value of the lands and goods he has seized, and then they are delivered to the plaintiff, who retains them until the whole debt and damages have been paid and satisfied; during that term he is called tenant by eligit. Co. Litt. 289. Vide Pow. Mortg. Index, h. t.; Wats. Sher. 206. As to the law of the several states on the subject of seizing land and extending it, see 1 Hill. Ab. 555, 6.

ELIGIBILITY, capacity to be elected. Citizens are in general eligible to all offices, the exceptions arise from the want of those qualifications which the constitution requires; these are such as regard his person, his property, or relations to the state. 1. In general, no person is eligible to *any* office, until he has attained the full age of twenty-one years; no one can be elected a sen-

ator of the United States, who shall not have attained the age of thirty years, been a citizen of the United States nine years, and who shall not be an inhabitant of the state for which he shall be chosen. Const. art. 1, s. 3. No person, except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution, is eligible to the office of president, and no person shall be eligible to that office, who shall not have attained the age of thirty-five years, and been fourteen years a resident within the United States. Const. art. 2, s. 1. —2. A citizen may be ineligible in consequence of his relations to the state, for example, holding an office incompatible with the office sought. Vide *Ineligibility*. Because he has not paid the taxes the law requires; because he has not resided a sufficient length of time in the state.—3. He may be ineligible for want of certain property qualifications required by the constitution of the state. Const. of Virginia, art. 3, s. 7.

ELISORS, *practice*, are two persons appointed by the court to return a jury, when the sheriff and the coroner have been challenged as incompetent; in this case the elisors return the writ of venire directed to them, with a panel of the jurer's names, and their return is final, no challenge being allowed to their array. 3 Bl. Com. 355; 3 Cowen, 296; 1 Cowen, 32.

ELOIGNE, *practice*, this word signifies, literally, to remove at a great distance; to remove afar off. It is used as a return to a writ of replevin, when the chattels have been removed out of the way of the sheriff. Vide *Elongata*.

ELONGATA, *practice*, is the return made by the sheriff to a writ of replevin, when the goods have been removed to places unknown to him. See the form of this return, Wats. Sher. Appx. c. 18, s. 3, p. 454; 3 Bl. Com. 148. On this return the plaintiff is entitled to a capias in withernam. Vide *Withernam*, and Wats. Sher. 300, 301. The word *eloigné*, (q. v.) is sometimes used as synonymous with elongata.

ELOPEMENT, is the departure of a married woman from her husband, and dwelling with an adulterer. While the wife resides with her husband, and cohabits with him, however exceptionable her conduct may be, yet he is bound to provide her with necessaries, and to pay for them; but when she elopes, the husband is no longer liable for her alimony, and is not bound to pay debts of her contracting, when the separation is notorious; and whoever gives her credit under these circumstances, does so at his peril. Chit. Contr. 49; 4 Esp. R. 42; 3 Pick. R. 289; 1 Str. R. 647, 706; 6 T. R. 603; 11 John. R. 281; 12 John. R. 293; Bull. N. P. 135; Stark. Ev. part 4, p. 699.

ELSEWHERE, in another place. 1. Where one devises all his lands in A, B, and C, three distinct towns, and *elsewhere*, and had lands of much greater value than those in A, B, and C, in another county, the lands in the other county were decreed to pass by the word elsewhere; and by Lord Chancellor King, assisted by Raymond, Ch. J., and other judges, the word elsewhere, was 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. 3 P. Wms. 56. See also Prec. Chan. 202; 2 Vern. 461; 2 Vern. 560; 3 Atk. 492; Cowp. 360; Id. 808; 2 Burr. 912; 5 Bro, P. C. 496, S. C., 1 East, 456: 1 Vern. 4 n.—2. As to the effect of the word elsewhere, in the case of lands not purchased at the time of making the

will, see 3 Atk. 254; 2 Vent. 351. Vide *Alibi*.

EMANCIPATION, is an act by which a person who was once in the power of another is rendered free. By the laws of Louisiana, minors may be emancipated. Emancipation is express or implied.

Express emancipation. The minor may be emancipated by his father, or if he has no father, by his mother, when she shall have arrived at the age of fifteen years. This emancipation takes place by the declaration to that effect of the father or mother, before a notary public. in the presence of two witnesses. The orphan minor, may likewise be emancipated by the judge, but not before he has arrived at the full age of eighteen years, if the family meeting called to that effect, be of opinion that he is able to administer his property. The minor may be emancipated against the will of his father and mother when they ill treat him excessively, refuse him support, or give him corrupt example.

The marriage of the minor is an implied emancipation.

The minor who is emancipated, has the full administration of his estate, and may pass all acts which may be confined to such administration; grant leases, receive his revenues and moneys which may be due him, and give receipts for the same. He cannot bind himself legally by promise or obligation, for any sum exceeding the amount of one year of his revenue. When he is engaged in trade, he is considered as having arrived to the age of majority, for all acts which have any relation to such trade.

The emancipation, whatever be the manner in which it may have been effected, may be revoked, whenever the minor contracts engagements which exceed the limits prescribed by law.

See Civil Code of Louisiana, B. 1, tit. 8, c. 3; Code Civ. B. 1, tit. 10, c. 2; Dict. de Droit, par Ferrière, Dict. de Jurisp. art. Emancipation.

By the English law, filial emancipation is recognized chiefly in relation to the parochial settlement of paupers. See 3 T. R. 355; 6 T. R. 247; 8 T. R. 479; 2 East, 276; 10 East, 88; 11 Verm. R. 258; 477. See *Manumission*.

EMBARGO, *in maritime law*, is a proclamation or order of state, usually issued in time of war, or threatened hostilities, prohibiting the departure of ships or goods from some or all the ports of such state until further order. The detention of ships by an embargo is such an injury to the owner as to entitle him to recover on a policy of insurance against "arrests or detainments." And whether the embargo be legally or illegally laid, the injury to the owner is the same; and the insurer is equally liable for the loss occasioned by it. Marsh. Ins. B. 1, c. 12, s. 5; 1 Kent, Com. 60; 1 Bell's Com. 517, 5th ed. An embargo, detaining a vessel at the port of departure, or in the course of the voyage, does not, of itself, work a dissolution of a charter party, or the contract with the seamen. It is only a temporary restraint, imposed by authority, by legitimate political purposes, which suspends, for a time, the performance of such contracts, and leaves the rights of parties untouched. 1 Bell's Com. 517; 8 T. R. 259; 5 Johns. R. 308; 7 Mass. R. 325; 3 B. & P. 405—434; 4 East, R. 546—566.

EMBEZZLEMENT, *crim. law*, is the fraudulently removing and secreting of personal property, with which the party has been entrusted, for the purpose of applying it to his own use.

The act of April 30, 1790, s. 16, 1 Story, L. U. S. 86, provides that

if any person within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas, shall take and carry away, with an intent to steal or purloin, the personal goods of another; or if any person or persons, having, at any time hereafter, the charge or custody of any arms, ordnance, munition, shot, powder, or habiliments of war, belonging to the United States, or of any victuals provided for the victualling of any soldiers, gunners, marines or pioneers, shall, for any lucre or gain, or wittingly, advisedly, and of purpose to hinder or impede the service of the United States, embezzle, purloin or convey away, any of the said arms, ordnance, munition, shot or powder, habiliments of war, or victuals, that then and in every of the cases aforesaid, the person or persons so offending, their counsellors, aiders and abettors (knowing of and privy to the offences aforesaid) shall, on conviction, be fined not exceeding the fourfold value of the property so stolen, embezzled or purloined; the one moiety to be paid to the owner of the goods, or the United States, as the case may be, and the other moiety to the informer and prosecutor, and be publicly whipped, not exceeding thirty-nine stripes.

The act of April 20, 1818, 3 Story, 1715, directs that wines and distilled spirits shall, in certain cases be deposited in the public warehouses of the United States, and then it is enacted, s. 5, that if any wines, or other spirits, deposited under the provisions of this act, shall be embezzled, or fraudulently hid or removed, from any store or place wherein they shall have been deposited, they shall be forfeited, and the person or persons so embezzling, hiding, or removing, the same, or aiding or assisting therein, shall be liable to the same pains and penalties as if such wines or spirits had been fraudulently unshipped or landed without payment of duty.

By the 21st section of the act to reduce into one the several acts establishing and regulating the post-office, passed March 3, 1825, 3 Story, 1991, the offence of embezzling letters, is punished with fine and imprisonment. Vide *Letter*.

The act more effectually to provide for the punishment of certain crimes against the United States and for other purposes, passed March 3, 1825, s. 24, 3 Story, 2006, enacts that, if any of the gold or silver coins which shall be struck or coined at the mint of the United States, shall be debased, or made worse, as to the proportion of fine gold or fine silver therein contained, or shall be of less weight or value than the same ought to be, pursuant to the several acts relative thereto, through the default or with the connivance of any of the officers or persons who shall be employed at the said mint, for the purpose of profit or gain, or otherwise, with a fraudulent intent; and if any of the said officers or persons shall embezzle any of the metals which shall, at any time, be committed to their charge for the purpose of being coined; or any of the coins which shall be struck or coined, at the said mint; every such officer, or person who shall commit any, or either, of the said offences, shall be deemed guilty of felony, and shall be sentenced to imprisonment and hard labour for a term not less than one year, nor more than ten years, and shall be fined in a sum not exceeding ten thousand dollars.

When an embezzlement of a part of the cargo takes place on board of a ship either from the fault, fraud, connivance or negligence of any of the crew, they are bound to contribute to the reparation of the loss, in proportion to their wages. When the embezzlement is fixed on any

individual, he is solely responsible; when it is made by the crew or some of the crew, but the particnlar offender is unknown, and from the circumstances of the case, strong presumptions of guilt apply to the whole crew, all must contribute. The presumption of innocence is always in favour of the crew, and the guilt of the parties must be established beyond all reasonable doubt, before they can be required to contribute. 1 Mason's R. 104; 4 B. & P. 347; 3 Johns. Rep. 17; 1 Marsh. Ins. 241; Dane's Ab. Index, h. t.; Wesk. Ins. 194; 3 Kent, Com. 151.

EMBLEMENTS, *rights.* By this term is understood the crops growing upon the land. By crops is here meant the products of the earth which grow yearly and are raised by annual expense and labour, or "great manurance and industry," such as grain; but not fruits which grow on trees which are not to be planted yearly, grass, and the like, though they are annual. Co. Litt. 55, b; Com. Dig. Biens, G. It is a general rule that when the estate is terminated by the act of God in any other way than by the death of the tenant for life he is entitled to the emblements, whether such termination arise by the act of God or by the act of law; and when he dies before harvest time, his executors shall have the emblements, as a return for the labour and expense of the deceased in tilling the ground. 9 Johns. R. 112; 1 Chit. P. 91; 8 Vin. Ab. 364; Woodf. L. & T. 237; Toll. Ex. book 2, c. 4; Bac. Ab. Executors, H 3; Co. Litt. 55; Com. Dig. Biens, G; Dane's Ab. Index, h. t.; 1 Penna. R. 471; 3 Penna. Rep. 496; Ang. Wat. Co. 1.

EMBRACEOR, *criminal law*, he who, when a matter is on trial between party and party, comes to the bar with one of the parties, and being bribed thereto, endeavours to corrupt the judge. Co. Litt. 369.

EMBRACERY, *crim. law*, is an an attempt to corrupt or influence a jury, or any way incline them to be more favourable to the one side than the other, by money, promises, threats, or persuasions; whether the juror on whom such attempt is made give any verdict or not, or whether the verdict be true or false. Hawk. 259; Bac. Ab. Juries, M 3; Co. Litt. 157, b, 369, a; Hob. 294; Dy. 84, a, pl. 19; Noy, 102; 1 Str. 643; 11 Mod. 111, 118; Com. 601; 5 Cowen, 503.

EMENDALS, *Engl. law.* This ancient word is said to be used in the accounts of the Inner Temple, where so much in emendals at the foot of an account signifies so much in bank, in stock, for the supply of emergencies. Cunn. Law Dict.

EMIGRANT, one who quits his country for any lawful reason, with a design to settle elsewhere, and who takes his family and property with him. Vatt. b. 1, c. 19, § 224.

EMIGRATION, the act of removing from one place to another. It is sometimes used in the same sense as expatriation, (q. v.) but there is some difference in the signification. Expatriation is the act of abandoning one's country, while emigration is, perhaps not strictly, applied to the act of removing from one part of the country to another. Vide 2 Kent, Com. 36.

EMINENT DOMAIN, is the right which the people or government retain over the estates of individuals, to resume the same for public use. It belongs to the legislature to decide what improvements are of sufficient importance to justify the exercise of the right of eminent domain. See 2 Hill. Ab. 568; 1 U. S. Dig. 560; 1 Am. Eq. Dig. 312; 3 Toull. n. 30, p. 23.

EMISSION, *med. jur.* The act by which any matter whatever is thrown from the body; thus it is usual to say, emission of urine, emis-

sion of semen, &c. In cases of rape when the fact of penetration is proved, it may be left to the jury whether emission did or did not take place. Proof of emission would perhaps be held to be evidence of penetration. Addis. R. 143; 2 So. Car. Const. R. 351; 2 Chitty, Crim. Law, 810; 1 Beck's Med. Jur. 140; 1 Russ. C. & M. 560; 1 East, P. C. 437.

TO EMIT. To put out; to send forth. The tenth section of the first article of the constitution contains various prohibitions, among which is the following: No state shall emit bills of credit. To emit bills of credit is to issue paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. 4 Pet. R. 410, 432; Story on Const. § 1358. Vide *Bills of credit.*

EMMENAGOGUES, *med. jur.*, the name of a class of medicines which are believed to have the power of favouring the discharge of the menses. These are *black hellebore*, *savine*, (vide *Juneperius Sabina*,) *madder*, *mercury*, *polygala senega*, and *pennyroyal*. They are sometimes used for the criminal purpose of producing abortion, (q. v.) They always endanger the life of the woman. 1 Beck's Medical Jur. 316; Dungl. Med. Dict. h. t.; Parr's Med. Dict. h. t.; 3 Paris and Fonbl. Med. Jur. 88.

TO EMPANEL, *practice*, is to make a list or roll, by the sheriff or other authorised officer, of the names of jurors who are summoned to appear for the performance of such service as jurors are required to perform.

EMPEROR, *an officer*. This word is synonymous with the Latin *imperator*, they are both derived from the verb *imperare*. Literally it signifies, *he who commands*. Under the Roman republic, the title of emperor was the generic name given to the commanders-in-chief in the armies. But even then the application of the word was restrained to the successful commander who was declared emperor by the acclamations of the army, and was afterwards honoured with the title by a decree of the senate. It is now used to designate some sovereign prince who bears this title. Ayl. Pand. tit. 23.

EMPHYTEOSIS, *civil law*. The name of a contract by which the owner of an uncultivated piece of land granted it to another either in perpetuity, or for a long time, on condition that he should improve it, by building, planting or cultivating it, and to pay for it an annual rent; with a right to the grantee to alienate it or transmit it by descent to his heirs, and under a condition that the grantor shall never re-enter as long as the rent is paid to him by the grantee or his assigns. Inst. 3, 25, 3; 18 Toull. n. 144. This has a striking resemblance to a ground-rent, (q. v.) See Nouveau Denisart, mot Emphytéose; Merl. Réper. mot Emphytéose; Faber, De jure emphyt. Definit. 36; Code, 4, 66, 1.

EMPLOYER, *in contracts*, is he who hires another to perform labour or services for him. As to his duties towards those whom he has hired, see Story on Bailm. § 425.

ENCEINTE, *med. jur.*, a French word which signifies pregnant; when a woman is pregnant, and is convicted of a capital crime she cannot be punished till after her delivery. In the English law where a widow is suspected to feign herself with child, in order to produce a suppositious heir to the estate, the presumptive heir may have a writ *de ventre inspiciendo*, to examine whether she be with child or not. Cro. Eliz. 566; 4 Bro. C. C. 90. As to the signs of pregnancy, see 1 Beck's Med. Jur. 157. See, generally, 4 Bl. Com.

394; 2 P. Wms. 591; 1 Cox, C. C. 297; and *Pregnancy; Privement enceinte.*

ENCLOSURE, is an artificial fence put around one's estate. Vide *Close.*

ENCROACHMENT, an unlawful gaining upon the right or possession of another; as when a man sets his fence beyond his line, in this case the proper remedy for the party injured is an action of ejectment, or an action of trespass.

ENCUMBRANCE, is an embarrassment of an estate or property, so that it cannot be disposed of without being subject to it. A mortgage, a judgment, a lien for taxes, are examples of encumbrances. These do not affect the possession of the grantee, and may be removed or extinguished by a definite pecuniary value. See 2 Greenl. R. 22; 5 Greenl. R. 94. There are encumbrances of another kind which cannot be so removed; such as easements; for example, a highway, or a pre-existing right to take water from the land. 5 Conn. R. 497; 10 Conn. R. 422; 15 John. R. 483; and see 8 Pick. R. 349; 2 Wheat. R. 45.

ENDEAVOUR, *crim. law*, is an attempt, (q. v.) Vide *Revolt.*

ENDORSEMENT. V. *Indorsement.*

ENDOWMENT. The bestowing or assuring of dower to a woman. It is sometimes used metaphorically for the setting a provision for a charitable institution, as the endowment of a hospital.

ENEMY, *international law.* By this term is understood the whole body of a nation at war with another, hence we say the enemy. It also signifies a citizen or subject of such a nation, as when we say an alien enemy. In a still more extended sense, the word enemy includes any of the subjects or citizens of a state in amity with the United States, who have commenced, or have made preparations for commencing hostilities against the United States; and also the citizens or subjects of a state in amity with the United States who are in the service of a state at war with them. Salk. 635; Bac. Ab. Treason, G. An enemy cannot, as a general rule, enter into any contract which can be enforced in the courts of law; but the rule is not without exceptions; as for example, when a state permits expressly its own citizens to trade with the enemy; and perhaps a contract for necessaries, or for money to enable the individual to get home, might be enforced. 7 Pet. R. 586. An alien enemy cannot, in general, sue during the war a citizen of the United States either in the courts of the United States or those of the several states. 1 Kent, Com. 68; 15 John. R. 57; S. C. 16 John. R. 438. Vide Marsh. Ins. c. 2, s. 1; Park. Ins. Index, h. t.; Wesk. Ins. 197; Phil. Ins. Index, h. t.; Chit. Common Law, Index, h. t.; Chit. Law of Nations, Index, h. t.

TO ENFEOFF. To make a gift of any corporeal hereditaments to another. Vide *Feoffment.*

TO ENFRANCHISE, to make free; to incorporate a man in a society or body politic. Cunn. L. D. h. t. Vide *Disfranchise.*

ENGAGEMENT. This word is frequently used in the French law to signify not only a contract, but the obligations arising from a *quasi contract.* The terms *obligations* (q. v.) and *engagements* are said to be synonymous, 17 Toull. n. 1; but the Code seems specially to apply the term engagement to those obligations which the law imposes on a man without the intervention of any contract, either on the part of the obligor or the obligee. Art. 1370.

TO ENGROSS, *practice, conveyancing*, to copy the rude draught

of an instrument in a fair and large hand.

ENITIA PARS. The part of the eldest. Co. Litt. 166; Bac. Ab. Coparceners, (C). When partition is voluntarily made among coparceners in England, the eldest has the first choice, or *primer election*, (q. v.) and the part which she takes is called the *enitia pars*. This right is purely personal, and descends; it is also said that even her assignee shall enjoy it; but this has been doubted. The word *enitia* is said to be derived from the old French, *eisne*, the eldest. Bac. Ab. Coparceners, C; Kielw. 1, a, 49 a; 2 And. 21; Cro. Eliz. 18.

ENJOYMENT, is the right which a man possesses of receiving all the product of a thing for his necessity, his use or his pleasure.

TO ENROLL, to register; to enter on the rolls of chancery, or other courts; to make a record.

ENROLLMENT, *Eng. law*, is the registering or entering in the rolls of chancery, king's bench, common pleas, or exchequer, or by the clerk of the peace in the records of the quarter sessions, of any lawful act; as a recognizance, a deed of bargain and sale, and the like. Jacob, L. D.

ENTRY, *estates, rights*, is the taking possession of lands by the legal owner. When another person has taken possession of lands or tenements, and the owner does peaceably make an entry thereon, and declare that he thereby takes possession of the same, he shall by this notorious act of ownership which is equal to a feodal investiture, be restored to his original right. 3 Bl. Com. 174. A right of entry was not assignable at common law, and statutes were made to punish such as bought such titles. Co. Litt. 214 a. V. *Buying of titles*, as to the law on this subject in the United States, and 4 Kent, Com. 439; 2 Hill. Ab. c. 33, § 42 to 52; also article *Reentry;* Bac. Ab. Descent, G; 8 Vin. Ab. 441.

In another sense entry signifies the going upon another man's lands or his tenements. An entry in this sense may be justifiably made on another's land or house, first, when the law confers an authority; and secondly, when the party has authority in fact. First, 1. An officer may enter the close of one against whose person or property he is charged with the execution of a writ; in a civil case the officer cannot open (even by unlatching) the outer inlet to a house, as a door or window opening into the street, 18 Edw. 4, Easter, 19, pl. 4; Moore, pl. 917, p. 668; Cooke's case, Wm. Jones, 429; although it has been closed for the purpose of excluding him. Cowp. 1. But in a criminal case a constable may break open an outer door to arrest one within suspected of felony. 13 Edw. 4, Easter, 4, p. 9. If the outer door or window be open he may enter through it to execute a civil writ, Palm. 52; 5 Rep. 91; and, having entered, he may, in every case, if necessary, break open an inner door. 1 Brownl. 50.—2. The lord may enter to distrain, and go into the house for this purpose, the outer door being open. 5 Rep. 91.—3. The proprietor of goods or chattels may enter the land of another upon which they are placed, and remove them, provided they are there without his default; as where his tree has blown down into the adjoining close by the wind, or his fruit has fallen from a branch which overhung it. 20 Vin. Abr. 418.—4. If one man is bound to repair a bridge, he has a right of entry given him by law for that purpose. Moore, 889.—5. A creditor has a right to enter the close of his debtor to demand the duty owing, though it is

not to be rendered there. Cro. Eliz. 876.—6. If trees are excepted out of a demise, the lessor has the right of entering to prune or fell them. Cro. Eliz. 17; 11 Rep. 53.—7. Every traveller has by law the privilege of entering a common inn, at all seasonable times, provided the host has sufficient accommodation, which, if he has not, it is for him to declare.—8. Every man may throw down a public nuisance, and a private one may be thrown down by the party grieved, and this before any prejudice happens, but only from the probability that it may happen. 5. Rep. 102; and see 1 Brownl. 212; 12 Mod. 510; Wm. Jones, 221; 1 Str. 683. To this end the abator has authority to enter the close in which it stands. See *Nuisance*.—9. An entry may be made on the land of another to exercise therein an incorporeal right or hereditament to which he is entitled. Hamm. N. P. 172.

ENTRY, *commercial law*, the act of setting down the particulars of a sale or other transaction in a merchant or tradesman's account books; such entries are in general *prima facie* evidence of the sale and delivery and of work done; but unless the entry be an original one, it is not evidence. Vide *Original entry*.

ENTRY OF GOODS, *commer. law*. An entry of goods at the custom-house is the submitting to the officers appointed by law, who have the collection of the customs, goods imported into the United States, together with a statement or description of such goods and the original invoices of the same.

The act of March 2, 1799, s. 36, 1 Story, L. U. S. 606, and the act of March 1, 1823, 3 Story, L. U. S. 1881, regulate the manner of making entries of goods.

ENTRY, WRIT OF. Vide *Writ of Entry*.

TO ENURE. To be available or for the benefit of a person. A release to the tenant for life, *enures* to him in reverson; that is, it has the same effect for him as for the tenant for life. A discharge of the principal enures to the benefit of the surety.

ENVOY, *international law*. In diplomatic language an envoy is a minister of the second rank, on whom his government has conferred a degree of dignity and respectability, which without being on a level with an ambassador, immediately follows, and among ministers yields the preeminence to him alone. Envoys are either ordinary or extraordinary; by custom the latter is held in greater consideration. Vattel, liv. 4, c. 6. § 72.

EPILEPSY, *med. jur.*, is a disease of the brain, which occurs in paroxisms with uncertain intervals between them. These paroxisms are characterised by the loss of sensation and convulsive motions of the muscles. When long continued and violent, this disease is very apt to end in dementia, (q. v.) It gradually destroys the memory and impairs the intellect, and is one of the causes of an unsound mind. 8 Ves. 87. Vide Dig. 50, 16, 123; Id. 21, 1, 4, 5.

EQUALITY. Possessing the same rights and being liable to the same duties. Persons are all equal before the law, whatever adventitious advantages some may possess over others. All persons are protected by the law, and obedience to it is required from all. Judges in court, while exercising their functions, are all upon an equality, it being a rule that *inter pares non est potestas;* a judge cannot, therefore, punish another judge of the same court for using any expression in court, although the words used might have been a contempt in any other person, Bac. Ab., Of the court of sessions, of justices of the peace.

In contracts, the law presumes the parties act upon a perfect equality; when therefore, one party uses any fraud or deceit to destroy this equality, the party grieved may avoid the contract. In case of a grant to two or more persons jointly, without designating what each takes, they are presumed to take in equal proportions. 4 Day, 395. It is a maxim that when the equity of the parties is equal, the law must prevail. 3 Call, R. 259; and that as between different creditors equality is equity. 1 Page, R. 181. See Kames on Eq. 75. Vide *Deceit; Fraud.*

EQUINOX, the name given to two periods of the year when the days and nights are equal: that is, when the space of time between the rising and setting of the sun is one of a natural day. Dig. 43, 13, 1, 8. Vide *Day.*

EQUITY. In the early history of the law, the sense affixed to this word was exceedingly vague and uncertion. This was owing in part to the fact that the chancellors of those days were either statesmen or ecclesiastics, perhaps not very scrupulous in the exercise of power. It was then asserted that equity was bounded by no certain limits or rules, and that it was alone controlled by conscience and natural justice. 3 Bl. Com. 433, 440, 441.

In a moral sense that is called equity which is founded in natural justice, in honesty, and in right, *ex æquo et bono.* In an enlarged legal view, "equity, in its true and genuine meaning, is the soul and spirit of the law; positive law is construed and rational law is made by it. In this, equity is made synonymous with justice; in that, to the true and sound interpretation of the rule." 3 Bl. Com. 429. This equity is said to be a supplement to the laws; and nothing is perhaps more correct and just, but it must be directed by science, without which the magistrate must tremble to set in the temple of justice, and without which his mind will wander in pursuit of a phantom of equity purely imaginary. The Roman law will furnish him with the surest guides, and the safest rules; here will be found fully developed the first principles and the most consequences of natural right. "From the moment when principles of decision came to be acted upon in chancery," says Mr. Justice Story, "the Roman law furnished abundant materials to erect a superstructure, at once solid, convenient and lofty, adapted to human wants, and enriched by the aid of human wisdom, experience and learning." Com. on Eq. Jur. § 23.

But eqnity has a more restrained and qualified meaning. The remedies for the redress of wrongs and for the enforcement of rights, are distinguished into two classes; first those which are administered in courts of common law; and, secondly, those which are administered in courts of equity. Rights which are recognised and protected, and wrongs which are redressed by the former courts, are called legal rights and legal injuries. Rights which are recognized and protected, and wrongs which are redressed by the latter courts only, are called equitable rights and equitable injuries. The former are said to be rights and wrongs at common law, and the remedies, therefore are remedies at common law; the latter are said to be rights and wrongs in equity, and the remedies, therefore, are remedies in equity. Equity jurisprudence may, therefore, properly be said to be that portion of remedial justice, which is exclusively administered by a court of equity, as contradistinguished from that remedial justice, which is exclusively administered by a court of law. Story, Eq. § 25.

Vide *Chancery*, and the authorities there cited; and 3 Chit. Bl. Com. 425 n. 1; Dane's Ab. h. t.; Ayl. Pand. 37; Fonbl. Eq. b. 1, c. 1; Woddes. Lect. 114.

EQUITY, COURT OF. Vide *Chancery*.

EQUITY OF REDEMPTION, is a right which the mortgagee of an estate has of redeeming it, after it has been forfeited at law by the non-payment at the time appointed of the money secured by the mortgage to be paid, by paying the amount of the debt, interest and costs. An equity of redemption is a mere creature of a court of equity, founded on this principle, that as a mortgage is nothing more than a pledge for securing the repayment of a sum of money to the morgagee, it is but natural justice to consider the ownership of the land as still vested in the mortgagor, subject only to the legal title of the mortgagee, so far as such legal title is necessary to his security. In Pennsylvania, however, redemption is a legal right. 11 Serg. & Rawle, 223. The phrase equity of redemption is indiscriminately, though perhaps not correctly applied, to the right of the mortgagor to regain his estate, both *before* and *after* breach of condition. In North Carolina by statute the former is called a *legal right of redemption;* and the latter the *equity of redemption*, thereby keeping a just distinction between these estates. 1 N. C. Rev. St. 266; 4 McCord, 340.

Once a mortgage always a mortgage, is a universal rule in equity. The right of redemption is said to be as inseparable from a mortgage, as that of replevying from a distress, and every attempt to limit this right must fail. 2 Chan. Cas. 22; 1 Vern. 33, 190; 2 John. Ch. R. 30; 7 John. Ch. R. 40; 7 Cranch, R. 218; 2 Cowen, 324; 1 Yeates, R. 584; 2 Chan. R. 221; 2 Sumner, R. 487.

The right of redemption exists, not only in the mortgagor himself, but in his heirs, and personal representatives, and assignee, and in every other person who has an interest in, or a legal or equitable lien upon the lands; and therefore a tenant in dower, a jointress, a tenant by the curtesy, a remainder-man and a reversioner, a judgment-creditor, and every other incumbrancer, unless he be an incumbrancer *pendente lite* may redeem. 4 Kent, Com. 156; 5 Pick. R. 149; 9 John. R. 591, 611; 9 Mass. R. 422; 2 Litt. R. 334; 1 Pick. R. 485; 14 Wend. R. 233; 5 John. Ch. R. 482; 6 N. H. Rep. 25; 7 Vin. Ab. 52. Vide generally, Cruise, Dig. tit. 15, c. 3; 4 Kent, Com. 148; 1 Pow. on Mortg. ch. 10 and 11; 2 Black. Com. 158; 13 Vin. Ab. 458; 2 Supp. to Ves. Jr. 368; 2 Jac. & Walk. 194, n.; 1 Hill. Ab. c. 31; and article *Stellionate*.

EQUIVOCAL. What has a double sense. In the construction of contracts, it is a general rule that when an expression may be taken in two senses, that shall be preferred which gives it effect. Vide *Ambiguity; Construction; Interpretation;* and Dig. 22, 1, 4; Id. 45, 1, 80; Id. 50, 17, 67.

ERASURE, *contracts*, *evidence*, is the obliteration of a writing; it will render it void or not under the same circumstances as an interlineation, (q. v.) Vide 5 Pet. S. C. R. 560; 11 Co. 88; 4 Cruise, Dig. 369; 13 Vin. Ab. 41; Fitzg. 207; 5 Bing. R. 183; 3 C. & P. 55; 2 Wend. R. 555; 11 Conn. R. 531; 5 M. R. 190; 2 L. R. 291; 3 L. R. 56; 4 L. R. 270.

EROTIC MANIA, *med. jur.* A name given to a morbid activity of the sexual propensity. It is a disease or morbid affection of the mind which fills it with a crowd of voluptuous images, and hurries its victim to acts

of the grossest licentiousness, in the absence of any lesion of the intellectual powers. Vide *Mania*.

ERROR, is the non-conformity or opposition of our ideas to the nature or state of things. It differs from ignorance, (q. v.) which is the want of knowledge. Error is also a mistake made in the trial of a cause, to correct which a writ of error (q. v.) may be sued out of a superior court. Vide *Marriage; Mistake*.

ERROR, WRIT OF. Vide *Writ of Error*.

ESCAPE. An escape is the deliverance of a person out of prison, who is lawfully imprisoned, before such person is entitled to such deliverance by law. Escapes are either negligent or voluntary, in civil or criminal cases.

It is not necessary that the party should be held in actual imprisonment within a gaol; if he be in custody of a proper officer he may escape as much as if he were in prison. 3 Bl. Com. 290, 415; 1 Hal. P. C. 590; 2 Hawk. P. C. 134; 4 Bl. Com. 130.

The prisoner's being out of prison for any or the shortest time, is an escape, although he afterwards return. 2 Bl. Rep. 1048; 1 Rolle's Abr. 806; and though he has a keeper with him, 3 Co. 44 a; Plowd. Com. 37; Hob. 202; 1 Bos. & Pull. 24; 2 Bl. R. 1048. See also 5 Mass. R. 310; 7 Mass. R. 98; 4 Mass. R. 391; 2 Mass. R. 549; 9 Johns. R. 329; 13 Johns. R. 366; 9 Johns. R. 146; 5 Johns. R. 115; 15 Johns. R. 152; 3 Binn. R. 404; 13 Johns. R. 503; 6 Johns. R. 62; 10 Johns. R. 220; 14 Johns. R. 263; 10 Johns. R. 420; 18 Johns. R. 48; Com. Dig. Escape, C; Bac. Abr. Escape; Vin. Abr. Escape.

ESCAPE, CONSTRUCTIVE.—Where the prisoner still remains in prison, but owing to some act of the keeper he is not in the same strict confinement in which he ought to be, it is a constructive escape; as if a man marries his prisoner, Plowd. 17; Bac. Abr. Escape, B 3; or if an underkeeper of the gaol be taken in execution, and delivered at the gaol house, and neither the sheriff nor any authorised person is there to receive him. 5 Mass. R. 310.

ESCAPE, VOLUNTARY. Voluntary escapes are such as are by the consent of the keeper.

In civil cases, when the prisoner is confined under a *ca. sa.* after a voluntary escape, the sheriff can never retake his prisoner, and he must answer for the debt. Carter, 212. But the plaintiff, having been in no default, may retake him by virtue of stat. 8 & 9 W. 3, c. 26; and independently of the statute, he might have a new action of debt, or scire facias quare executionem non, against the prisoner. Bac. Abr. Escape in civil cases, C.

ESCAPE WARRANT. A warrant issued in England against a person who being charged in custody in the king's bench or Fleet prison, in execution, or mesne process, escapes and goes at large. Jacob's L. D. h. t.

ESCHEAT, *title to lands*. According to the English law, escheat denotes an obstruction of the course of descent, and a 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. 244. All escheats, under the English law, are declared to be strictly feudal, and to import the extinction of tenure. Wright on Ten. 115 to 117; 1 Wms. Bl. R. 123. But as the feudal tenures do not exist in this country, there are no private persons who succeed to the inheritance by escheat. The state steps in, in the place of the feudal lord, by

virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction. 4 Kent, Com. 420. It seems to be the universal rule of civilized society, that when the deceased owner has left no heirs it should vest in the public, and be at the disposal of the government. Code, 10, 10, 1; Domat, Droit Pub. liv. 1, t. 6, s. 3, n. 1. Vide 10 Vin. Ab. 139; 1 Bro. Civ. Law, 250; 1 Swift's Dig. 156; 2 Tuck. Blacks. 244, 245, n.; 5 Binn. R. 375; 3 Dane's Ab. 140, sect. 24.

ESCHEATOR. The name of an officer whose duties are generally to ascertain what escheats have taken place, and to prosecute the claim of the commonwealth for the purpose of recovering the escheated property. Vide 10 Vin. Ab. 158.

ESCROW, *conveyancing, contracts*, is a conditional delivery of a deed to a stranger, and not to the grantee himself, until certain conditions shall be performed, and then it is to be delivered to the grantee. Until the condition be performed and the deed delivered over, the estate does not pass, but remains in the grantor. 2 Johns. R. 248; Perk. 137, 138. Generally, an escrow takes effect from the second delivery, and is to be considered as the deed of the party from that time; but this general rule does not apply when justice requires a resort to fiction. The relation back to the first delivery, so as to give the deed effect from that time, is allowed in cases of necessity, to avoid injury to the operation of the deed, from events happening between the first and second delivery. For example when a feme sole makes a deed and delivers it as an escrow, and then marries before the second delivery, the relation back to the time when she was sole, is necessary to render the deed valid. Vide 2 Bl. Com. 307; 4 Kent, Com. 446; Cruise, Dig. t. 32, c. 2, s. 87 to 91; Com. Dig. Fait, (A 3); 13 Vin. Ab. 29; 5 Mass. R. 60; 2 Root, R. 81; 5 Conn. R. 113; 1 Conn. R. 375; 6 Paige's R. 314; 2 Mass. R. 452; 10 Wend. R. 310; 4 Greenl. R. 20; 2 N. H. Rep. 71; 2 Watts, R. 359; 13 John. R. 285; 4 Day's R. 66; 9 Mass. R. 310; 1 John. Cas. 81; 6 Wend. R. 666; 2 Wash. R. 58; 8 Mass. R. 238; 4 Watts, R. 180.

ESNECY. Eldership. In the English law, this word signifies the right which the eldest coparcener of lands has to choose one of the parts of the estate after the estate has been divided.

ESPLEES, are the products which the land or ground yields, as the hay of the meadows, the herbage of the pasture, corn or other produce of the arable, rents and services. Termes de la Ley; Dane's Ab. Index, h. t.

ESPOUSALS, *contracts*, a mutual promise between a man and a woman to marry each other, at some other time: it differs from a marriage, because then the contract is completed. Wood's Inst. 57; vide Dig. 23, 1, 1; Code, 5, 1, 4; Novel. 115, c. 3, s. 11; Ayliffe's Parerg. 245; Aso & Man. Inst. B. 1, t. 6, c. 1, § 1.

ESQUIRE, a title applied by courtesy to officers of almost every description, to members of the bar, and others. No one is entitled to it by law, and, therefore, it confers no distinction in law. In England it is a title next above that of a gentleman and below a knight. Camden reckons up four kinds of esquires, particularly regarded by the heralds: 1. The eldest sons of knights and their eldest sons, in perpetual succession; 2, the eldest sons of the younger sons of peers, and their eldest sons in like perpetual succession; 3, Esquires created by the

king's letters-patent, or other investiture, and their eldest sons; 4, Esquires by virtue of their office, as justices of the peace, and others who bear any office of trust under the crown.

ESSOIN, *practice*, is an excuse which a party bound to be in court on a particular day, offers for not being there. 1 Sell. Pr. 4; Lee's Dict. h. t. Essoin-day is the day on which the writ is returnable. It is considered for many purposes as the first day of the term. 1 T. R. 183. See 2 T. R. 16 n.; 4 Moore's R. 425. Vide *Exoine*.

ESTABLISH. This word occurs frequently in the Constitution of the United States, and it is there used in different meanings. 1. To settle firmly, to fix unalterably; as, to establish justice, which is the avowed object of the Constitution. 2. To make or form; as, to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies, which evidently does not mean that these laws shall be unalterably established as justice. 3. To found, to create, to regulate; as, congress shall have power to establish post roads and post offices. 4. To found, recognize, confirm or admit; as, congress shall make no law respecting an establishment of religion. 5. To create, to ratify, or confirm; as, we, the people, &c. do ordain and establish this constitution. 1 Story, Const. § 454.

ESTATE. This word has several meanings; 1, in its most extensive sense it is applied to signify every thing of which riches or fortune may consist, and includes personal and real property; hence we say personal estate, real estate. 8 Ves. 504. 2. In its more limited sense the word estates is applied to lands. An estate in land means such an interest as the tenant has therein. In Latin it is called *status*, because it signifies the condition or circumstance in which the owner stands with regard to his property. To ascertain this with precision and accuracy, estates in lands may be considered in a three-fold view; first, with regard to the quantity of interest which the tenant has in his tenement; secondly, with regard to the time at which that quantity of interest is to be enjoyed; thirdly, with regard to the number and connexion of the tenants.

I. The quantity of interest which the tenant has in his tenement is measured by its duration and extent; this occasions the first division of estates into such as are of freehold, and such as are less than freehold. 1. Freehold estates are of inheritance and not of inheritance. 1st. Estates of inheritance, are absolute, as fee simple; and limited, which are qualified, as where an estate is granted to A B, tenant of the manor of Dale; or conditional, as fee tail, and the like. 2d. Freehold estates not of inheritance, are estates for life. These are either conventional, or such as are created by deed: or legal, which arise by operation of law. The estates of tenant in tail after the possibility of issue extinct, tenant by the curtesy, and tenant in dower, are of this description. 2. Estates less than freehold. These are estates for years, estates at will, and estates by sufferance.

Both estates of freehold and less than freehold may be, 1, equitable, namely, to the use, or in trust; 2, upon condition, expressed or implied; 3, as a pledge or security, as a mortgage.

II. The time of their enjoyment. Estates are either in possession, or expectancy; the latter are either remainders, created by the act of the parties, which are vested or contingent; or reversions created by act of law.

III. The tenants may hold an estate. 1st. In severalty, when only one tenant holds the estate in his own right, without any other person being joined or connected with him, in point of interest, during the continuance of his estate. 2d. Joint-tenancy, which must be created by deed, and have the unities of interest, time, title and possession. A joint-tenancy may be destroyed by the severance of any of its unities. At common law, the survivor among joint-tenants is entitled to the whole of the property by virtue of the *jus accrescendi*. This has been altered by acts of assembly in Pennsylvania, and perhaps some other states. 3d. Coparcenary, which arises at common law, and by particular custom, as, gavel-kind; it must have the unities of interest, title, and possession. It may be destroyed by partition, which may be by consent or by compulsion. Coparcenaries are always created by descent. The technical distinction between coparcenaries and estates in common, may be considered as essentially extinguished in the United States. 4th. In common. Estates in common are created by, first, the destruction of a joint-tenancy or coparcenary estate if they sever the possession; and, secondly, by the proper limitation in a deed; they must have such incidents which arise from the unity of possession; they may be destroyed by uniting the title and interest in one tenant, or by partition. V. generally, 10 Vin. Ab. 201; Bac. Ab. Estate in fee simple; Com. Dig. Estates; Wood's Inst. 119; 4 Dane's Ab. 498; 2 Bl. Com. 107 to 197; 2 Supp. to Ves. jr. 48, 96, 109, 407; 1 Hist. Law. Tracts, 222. As to the effect of the word *estate* in a devise, see 3 Cranch, R. 97; 3 Yeates, R. 187; 6 Binn. R. 97; 2 Binn. R. 20; 6 Johns. R. 185; see also 1 Wash. R. 96; 1 Call, R. 127; 3 Call, 306; 2 Nott & M'Cord, R. 380; Com. Dig. App. tit. Estates; Chit. Pract. Index, h. t.

ESTATE IN COMMON, is one which is held by two or more persons by unity of possession. They may acquire their estate by purchase and hold by several and distinct titles, or by title derived at the same time, by the same deed or will; or by descent. In this respect the American law differs from the English common law. This tenancy, according to the common law, is created by deed or will, or by change of title from joint-tenancy or coparcenary, or it arises, in many cases, by construction of law. Litt. sec. 292, 294, 298, 302; 2 Bl. Com. 192; 2 Prest. on Abstr. 75. In this country it may be created by descent, as well as by deed or will. 4 Kent, Com. 363. Vide Cruise, Dig. tit. 20; Com. Dig. Estates by Grant, K 8. Estates in common can be dissolved in two ways only; first, by uniting all the titles and interests in one tenant; secondly, by making partition. In the first case the tenant will be one in severalty of the whole; in the latter each will hold his share in severalty.

ESTATE UPON CONDITION, is such an one as has a qualification annexed to it, by which it may, upon the happening of a particular event, be created, or enlarged, or destroyed, These estates are divided into estates upon condition implied or in law, and estates upon condition express or in deed. 1. Estates upon condition in law are such as have a condition impliedly annexed to them, without any condition being specified in the deed or will. Litt. sec. 378, 380; Co. Litt. 215, b; 233, b; 234, b.—2. The express conditions are particularly mentioned in the contract between the parties. Litt. s. 325; 4 Kent, Com. 117; Cruise, Dig. tit. 13. Vide *Condition*.

ESTATE IN COPARCENARY, is an estate of lands of inheritance which descend from the ancestor to two or more persons who are called coparceners or parceners. This is usually applied, in England, to cases where lands descend to females, when there are no male heirs. As in the several states, estates generally descend to all the children equally, there is no substantial difference between coparceners and tenants in common. The title inherited by more persons than one, is, in some of the states, expressly declared to be a tenancy in common, as in New York and New Jersey, and where it is not so declared the effect is the same; the technical distinction between coparcenary and estates in common may be considered as essentially extinguished in the United States. 4 Kent, Com. 363. Vide *Estates*.

ESTATE BY THE CURTESY, is an estate for life, created by act of law, which is defined as follows. When a man marries a woman, seised at any time during the coverture of the estate of inheritance, in severalty, in coparcenary, or in common, and has issue by her born alive, and which might by possibility inherit the same estate as heir to the wife, and the wife dies in the life-time of the husband, he holds the lands during his life by the curtesy of England, and it is immaterial whether the issue be living at the time of the seisin, or at the death of the wife, or whether it was born before or after the seisin. Litt. s. 35; Co. Litt. 29, b; 8 Co. 34. There are four requisites indispensably necessary to the existence of this estate; 1, marriage; 2, seisin of the wife, which must have been seisin in deed, and not merely seisin in law; it seems, however, that the rigid rules of the common law, have been relaxed, in this respect, as to what is sometimes called waste or wild lands; 1 Pet. 505; 3, issue; and 4, death of the wife.

This estate is generally prevalent in the United States; in some of them it has received a modification. In Vermont, the title by curtesy has been laid under the equitable restriction of existing only in the event that the children of the wife entitled to inherit, died within age and without children. In South Carolina, tenancy by the curtesy, *eo nomine*, has ceased by the provisions of an act passed in 1791, relative to the distribution of intestates' estates, which gives to the husband surviving his wife, the same share of her real estate, as she would have taken out of his, if left a widow, and that is one moiety, or one-third of it in fee, according to circumstances. In Georgia, tenancy by the curtesy does not exist, because since 1785, all marriages vest the real, equally with the personal, estate in the husband. 4 Kent, Com. 29. In Louisiana, where the common law has not been adopted in this respect, this estate is unknown.

This estate is not peculiar to the English law, as Littleton erroneously supposes; Litt. s. 35; for it is to be found, with some modifications, in the ancient laws of Scotland, Ireland, Normandy and Germany. In France there were several customs, which gave a somewhat similar estate to the surviving husband, out of the wife's inheritances. Merlin, Répert. mots Linotte, et Quarte de Conjoint pauvre.

Vide, generally, Bac. Ab. Curtesy of England; Bac. Ab. h. t.; Com. Dig. Estates by grant, D; Cruise, Dig. t. 5, c. 1; 2 Bl. Com. 126.

ESTATE IN DOWER, is the right of a woman in a third part of all the lands and tenements, in fee simple, fee tail, general, or as heir in special tail, of which her deceased husband was seised, either in deed or

in law, at any time during the coverture, and of which any issue she might have had, might by possibility have been heir. Litt. § 36. To create a title to dower, three things are indispensably requisite, 1. Marriage. This must be a marriage not absolutely void, and existing at the death of the husband; a wife *de facto*, whose marriage is voidable by decree, as well as a wife *de jure*, is entitled to it; and the wife shall be endowed, though the marriage be within the age of consent, and the husband dies within that age. Co. Litt. 33, a; 7 Co. 42; Doct. & Stud. 22; Cruise, Dig. t. 6, c. 2, s. 2, et seq.—2. Seisin. The husband must have been seised, some time during the coverture of the estate of which the wife is dowable. Co. Litt. 31, a. An actual seisin is not indispensable, a seisin in law is sufficient. As to the effect of a transitory seisin, see 4 Kent, Com. 38; 2 Bl. Com. 132; Co. Litt. 31, a.—3. Death of the husband. This must be a natural death; though there are authorities which declare that a civil death shall have the same effect. Cruise, Dig. tit. 6, ch. 2, § 22. Vide, generally, 8 Vin. Ab. 210; Bac. Ab. Dower; Com. Dig. Dower; Ib. App. tit. Dower; 1 Supp. to Ves. Jr. 173, 189; 2 Ib. 49; 1 Vern. R. by Raithby, 218, n. 358, n; 1 Salk. R. 291; 2 Ves. jr. 572; 5 Ves. 130; Arch. Civ. Pl. 469; 2 Sell. Pr. 200; 4 Kent, Com. 35; Amer. Dig. h. t.; Pothier, Traité du Douaire; 1 Swift's Dig. 85; Perk. 300, et seq.

ESTATE IN JOINT-TENANCY, is where the lands or tenements are granted to two or more persons, to hold in fee simple, fee tail, for life, for years, or at will. 2 Bl. Com. 179; the creation of the estate depends upon the expression in the deed or devise, by which the tenants hold, for it must be created by the acts of the parties, and does not result from the operation of law. Thus an estate given to a number of persons, without any restriction or explanation, will be construed a joint-tenancy; for every part of the grant can take effect only, by considering the estate equal in all, and the union of their names gives them a name in every respect. The properties of this estate arise from its unities; these are, 1. Unity of title; the estate must have been created and derived from one and the same conveyance. 2. There must be a unity of time; the estate must be created and vested at the same period. 3. There must be a unity of interest, the estate must be for the same duration and for the same quantity of interest. 4. There must be a unity of possession; all the tenants must possess and enjoy at the same time, for each must have an entire possession of every parcel, as of the whole. One has not possession of one-half, and another of the other half, but each has an undivided moiety of the whole, and not the whole of an undivided moiety. The distinguishing incident of this estate, is the right of survivorship, or *jus accrescendi*; at common law, the entire tenancy or estate, upon the death of any of the joint-tenants, went to the survivors, and so on to the last survivor, who took an estate of inheritance. The right of survivorship, except perhaps in estates held in trust, is abolished in Pennsylvania, New York, Virginia, Kentucky, Indiana, Missouri, Tennessee, North and South Carolina, Georgia, and Alabama. Griffith's Register, h. t. In Connecticut it never was recognised. 1 Root, Rep. 48; 1 Swift's Digest, 102. Joint tenancy may be destroyed by destroying any of its constituent unities except that of time. 4 Kent, Com. 359. Vide Cruise, Dig. tit. 18; 1 Swift's Dig. 102; 14 Vin. Ab. 470; Bac. Ab. Joint tenants, &c.; 3 Saund. 319, n. 4;

1 Vern. 353; Com. Dig. Estates by Grant, K 1; 4 Kent, Com. 353; 2 Bl. Com. 181; 1 Litt. sec. 304; 2 Woodd. Lect. 127; 2 Preston on Abst. 67; 5 Binn. Rep. 18. *Joint-tenant; Survivor.*

ESTATE FOR LIFE. An estate for life is a freehold interest in lands, the duration of which is confined to the life or lives of some particular person or persons, or to the happening or not happening of some uncertain event. Estates for life are divided into conventional or legal estates. The first created by the act of the parties, and the second by operation of law. 1. Life estates may be created by express words, as, if A conveys land to B, for the term of his natural life; or they may arise by construction of law, as, if A conveys land to B, without specifying the term or duration, and without words of limitation. In the last case, B cannot have an estate in fee, according to the English law, and according to the law of those parts of the United States which have adopted and not altered the common law in this particular, but he will take the largest estate which can possibly arise from the grant, and that is an estate for life. Co. Litt. 42, a. The life estate may be either for a man's own life, or for the life of another person, and in this last case, it is termed an estate *pur autre vie*. There are some estates for life, which may depend upon future contingencies, before the deaths of the persons to whom they are granted; for example, an estate given to a woman *dum sola fuerit*, or *durante viduitate*, or to a man and woman during coverture, or as long as the grantee shall dwell in a particular house, is determinable upon the happening of the event. In the same manner, a house usually worth one hundred dollars a year, may be granted to a person till he shall have received one thousand dollars, this will be an estate for life, for as the profits are uncertain, and may rise or fall, no precise time can be fixed for the determination of the estate. On the contrary, where the time is fixed, although it may extend far beyond any life, as a term for five hundred years, this does not create a life estate.—2. The estates for life created by operation of law, are, 1st. Estates tail after possibility of issue extinct; 2d. Estate by the curtesy; 3d. Dower; 4th. Jointure. Vide Cruise, Dig. tit. 3; 4 Kent, Com. 23; 1 Brown's Civ. Law, 191; 2 Bl. Com. 103. The estate for life is somewhat similar to the usufruct (q. v.) of the civil law.

The incidents to an estate for life are principally the following:—1. Every tenant for life, unless restrained by covenant or agreement, may of common right take upon the land demised to him reasonable estovers or botes. Co. Litt. 41.—2. The tenant for life, or his representatives, shall not be prejudiced by any sudden determination of his estate, because such determination is contingent or uncertain. Co. Litt. 55.—3. Under-tenants or lessees of an estate for life, have the same, and even greater indulgences than the lessors, the original tenants for life; first, the same; for the law of estovers and emblements with regard to the tenant for life, is also law with regard to his under-tenants; secondly, greater; for when the tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee, who is a third person. 1 Roll. Ab. 727; 2 Bl. Com. 122.

ESTATE AT SUFFRANCE. It is the right of a tenant who comes into possession of land by lawful title, but holds over by wrong after the determination of his interest. Co. Litt. 57, b. He has a bare naked possession, but no estate which he

can transfer or transmit, or which is capable of enlargement by release, for he stands in no privity to his landlord. There is a material distinction between the cases of a person coming to an estate by act of the party, and afterwards holding over, and by act of the law and then holding over. In the first case he is regarded as a tenant at suffrance; and in the other, as an intruder, abator and trespasser. Co. Litt. 57, b; 2 Inst. 134; Cruise, Dig. t. 9, c. 2; 4 Kent, Com. 115; 13 Serg. & Rawle, 60; 8 Serg. & Rawle, 459; 4 Rawle's R. 126.

ESTATE TAIL AFTER POSSIBILITY OF ISSUE EXTINCT. By this awkward, but perhaps necessary paraphrasis, justified by Sir William Blackstone, 2 Com. 124, is meant the estate which is thus described by Littleton, § 32: "when tenements are given to a man and his wife in special tail, if one of them die without issue, the survivor is tenant in tail after possibility of issue extinct." This estate, though, strictly speaking, not more than an estate for life, partakes in some circumstances of the nature of an estate tail. For a tenant in tail after possibility of issue extinct, has eight qualities or privileges in common with a tenant in tail. 1. He is dispunishable for waste; 2, he is not compellable to attorn; 3, he shall not have aid of the person in reversion; 4, upon his alienation no writ of entry *in consimili casu* lies; 5, after his death, no writ of intrusion lies; 6, he may join the mise in a writ of right in a special manner; 7, in a præcipe brought by him, he shall not name himself tenant for life; 8, in a præcipe brought against him, he shall not be named barely tenant for life. There are however four qualities annexed to this estate, which prove it to be in fact only an estate for life. 1. If this tenant makes a feoffment in fee it is a forfeiture; 2, if an estate tail or in fee descends upon him, the estate tail after possibility of issue extinct is merged; 3, if he is impleaded, and makes default, the person in reversion shall be received, as upon default of any other tenant for life; 4, an exchange between this tenant, and a bare tenant for life, is good; for, with respect to duration their estates are equal. Cruise, Dig. tit. 4; Tho. Co. Litt. B. 2, c. 17; Co. Litt. 28, a. Nothing but absolute impossibility of having issue can give rise to this estate. Thus if a person gives lands to a man and *his* wife, and to the heirs of their two bodies, and they live to a hundred years, without having issue, yet they are tenants in tail; for the law sees no impossibility of their having issue, until the death of one of them. Co. Litt. 28, a. See *Tenant in tail after possibility of issue extinct.*

ESTATE AT WILL. An estate at will is that which a man has in consequence of a lease of land made to him to hold at the will of the lessor. Co. Litt. sec. 68. Estates at will have become almost extinguished under the operation of judicial decisions. Where no certain term is agreed on, they are now construed to be tenancies from year to year, and each party is bound to give reasonable notice of an intention to terminate the estate. When the tenant holds over by consent given, either expressly or by implication, after the determination of a lease for years, it is held evidence of a new contract, without any definite period, and is construed to be a tenancy from year to year. 4 Kent, Com. 210; Cruise, Dig. tit. 9, c. 1.

ESTATE FOR YEARS, is one which is created by a lease for years, which is a contract for the possession and profits of land for a determinate period, with the recompense of rent; and it is deemed an estate

for years, though the number of years should exceed the ordinary limits of human life: and it is deemed an estate for years though it be limited to less than a single year. An estate for life is higher than an estate for years, though the latter should be for a thousand years. Co. Litt. 46, a; 2 Kent, Com. 278; 1 Brown's Civ. Law, 191; 4 Kent, Com. 85; Cruise's Dig. tit. 8; 4 Rawle's R. 126; 8 Serg. & Rawle, 459; 13 Ib. 60; 10 Vin. Ab. 295, 318 to 325.

ESTER EN JUGEMENT,—*French law. Stare in judicio.* It is to appear before a tribunal either as plaintiff or defendant.

ESTOPPEL, *in pleading.* An estoppel is a preclusion, in law, which prevents a man from alleging or denying a fact, in consequence of his own previous act, allegation or denial of a contrary tenor. Steph. Pl. 239. Lord Coke says, "an estoppel is, when a man is concluded by his own act or acceptance, to say the truth." Co. Litt. 352, a. And Blackstone defines "an estoppel to be a special plea in bar, which happens where a man hath done some act, or executed some deed, which estops or precludes him from averring any thing to the contrary." 3 Com. 308. An estoppel may arise either from matter of *record*; from the *deed* of the party; or from matter *in pays*, that is, matter of *fact*. Thus, any confession or admission made in pleading, in a court of record, whether it be express, or implied from pleading over without a traverse, will forever preclude the party from afterwards contesting the same fact, in any subsequent suit with his adversary. Com. Dig. Estoppel, A 1. This is an estoppel by matter of record. As an instance of an estoppel by *deed*, may be mentioned the case of a bond reciting a certain fact. The party executing that bond, will be precluded from afterwards denying in any action brought upon that instrument, the fact so recited. 5 Barn. & Ald. 682. An example of an estoppel by matter *in pays* occurs when one man has accepted rent of another. He will be estopped from afterwards denying, in any action with that person, that he was, at the time of such acceptance, his tenant. Com. Dig. Estoppel, A 3; Co. Litt. 352, a.

This doctrine of law gives rise to a kind of pleading that is neither by way of traverse, nor confession and avoidance: viz. a pleading, that, waiving any question of fact, relies merely on the estoppel, and, after stating the previous act, allegation, or denial, of the opposite party, prays judgment, if he shall be received or admitted to aver to what he before did or said. This pleading is called a pleading by way of estoppel. Steph. 240.

Every estoppel ought to be reciprocal, that is, to bind both parties: and this is the reason that regularly a stranger shall neither take advantage or be bound by an estoppel. Com. Dig. Estoppel, C; 3 Johns. Cas. 101; 2 Johns. R. 382. Privies in blood, privies in estate, and privies in law, are bound by, and may take advantage of estoppels. Co. Litt. 352; 2 Serg. & Rawle, 508; 5 Day, R. 88.

See the following cases relating to estopels by—

Matter of record: 4 Mass. R. 625; 10 Mass. R. 155; Munf. R. 466; 3 East, R. 354; 2 Barn. & Ald. 362, 971; 17 Mass. R. 365; Gilm. R. 235; 5 Esp. R. 58; 1 Show. 47; 3 East, R. 346.

Matter of writing: 12 Johns. R. 357; 5 Mass. R. 395; Ib. 286; 6 Mass. R. 421; 3 John. Cas. 174; 5 John. R. 489; 2 Caines's R. 320; 3 Johns. R. 331; 14 Johns. R. 193; Ib. 224; 17 Johns. R. 161; Willes,

R. 9, 25; 6 Binn. R. 59; 1 Call, R. 429; 6 Munf. R. 120; 1 Esp. R. 89; Ib. 159; Ib. 217; 1 Mass. R. 219.

Matter in pays: 4 Mass. R. 181; Ib. 273; 15 Mass. R. 18; 2 Bl. R. 1259; 1 T. R. 760, n.; 3 T. R. 14; 6 T. R. 62; 4 Munf. 124; 6 Esp. R. 20; 2 Ves. 236; 2 Camp. R. 344; 1 Stark. R. 192.

And see, in general, 10 Vin. Abr. 420, tit. Estoppel; Bac. Abr. Pleas, I 11; Com. Dig. Estoppel; Ib. Pleader, S 5; Arch. Civ. Pl. 218; Doct. Pl. 255; Stark. Ev. pt. 2, p. 206, 302; pt. 4, p. 30; 2 Smith's Lead. Cas. 417—460. Vide *Term.*

ESTOVERS, *estates*, is the right of taking necessary wood for the use or furniture of a house or farm, from off another's estate. The word *bote* is used synonymously with the word stovers. 2 Bl. Com. 35; Dane's Ab. Index, h. t.; Woodf. L. & T. 232.

ESTRAYS, are cattle whose owner is unknown. In the United States generally it is presumed by local regulations, they are subject to being sold for the benefit of the poor or some other public use of the place where found, after certain formalities of advertising, &c., have been performed.

ESTREAT. This term is used to signify a true copy or note of some original writing or record, and specially of fines and amercement imposed by a court, and *extracted* from the record, and certified to a proper officer or officers authorised and required to collect them. Vide F. N. B. 57, 76.

ESTEPE. This word is derived from the French, *estropier*, to cripple. It signifies an injury to lands to the damage of another, as a reversioner. This is prevented by a writ of estrepement.

ESTREPEMENT. The name of a writ which lay at common law to prevent a party in possession from committing waste on an estate the title to which is disputed, after judgment obtained in any real action, and before possession was delivered by the sheriff. But as waste might be committed, in some cases, pending the suit, the statute of Gloucester gave another writ of estrepement pendente placito, commanding the sheriff firmly to inhibit the tenant "ne faciat vastum vel strepementum pendente placito dicto indiscusso." By virtue of either of these writs the sheriff may resist those who commit waste or offer to do so; and he may use sufficient force for the purpose. 3 Bl. Com. 225, 226. In Pennsylvania by legislative enactment the remedy by estrepement is extended for the benefit of any owner of lands leased for years or at will, at any time during the continuance or after the expiration of such demise, and due notice given to the tenant to leave the same, agreeably to law, or for any purchaser at sheriff or coroner's sale of lands, &c., after he has been declared the highest bidder by the sheriff or coroner; or for any mortgagee or judgment creditor, after the lands bound by such judgment or mortgage, shall have been condemned by inquisition, or which may be subject to be sold by a writ of venditioni exponas or levari facias. Vide 10 Vin. Ab. 497; Woodf. Landl. & Ten. 447; Archb. Civ. Pl. 17; 7 Com. Dig. 659.

ET CÆTERA, a Latin phrase which has been adopted in English; it signifies, *and the like, and so of the rest;* it is commonly abbreviated, *&c.* Formerly the pleader was required to be very particular in making his defence, (q. v.) By making full defence, he impliedly admitted the jurisdiction of the court, and the competency of the plaintiff to sue; and half defence was used when the defendant intended to plead to the ju-

risdiction, or disability. To prevent the inconveniences which might arise by pleading full or half defence, it became the practice to plead in the following form; "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, &c., and says," which was either for full or half defence. 2 Saund. 209, c.; Steph. Pl. 432; 2 Chit. Pl. 455. In practice the *&c.* is used to supply the place of words which have been omitted. In taking a recognizance, for example, it is usual to make an entry on the docket of the clerk of the court as follows: A B, tent, *&c.* in the sum of $1000, to answer, *&c.*

EUNUCH, is a male whose organs of generation have been so far removed or disorganized, that he is rendered incapable of reproducing his species. Domat, Lois Civ. liv. prel. tit. 2, s. 1, n. 10.

EVASION, a subtle device to set aside the truth, or escape the punishment of the law; as if a man should tempt another to strike him first, in order that he might have an opportunity of returning the blow with impunity. He is nevertheless punishable because he becomes himself the agressor in such a case.

EVICTION, *contracts*, is the loss or deprivation of the buyer of the thing he has bought in consequence of the right of a third person established in a competent tribunal. Vide Bac. Ab. Rent, L.; 1 Saund. R. 204, n. 2; Ib. 322, a, n. 2; Poth. Vente, n. 82. As to damages on eviction, 4 Kent, Com. 462, et seq. Poth. Vente, n. 119.

EVIDENCE, is that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue; 3 Bl. Com. 367; or it is whatever is exhibited to a court or jury, whether it be by matter of record, or writing, or by the testimony of witnesses, in order to enable them to pronounce with certainty concerning the truth of any matter in dispute; Bac. Ab. Evidence, *in pr.*; or it is that which is legally submitted to a jury, to enable them to decide upon the questions in dispute or issue, as pointed out by the pleadings and distinguished from all comment or argument. 1 Stark. Ev. 8. Evidence may be considered with reference to, 1, the *nature* of the evidence; 2, the *object* of the evidence; 3, the *instruments* of evidence; and, 4, the *effect* of evidence.

[2] § 1. As to its *nature*, evidence may be considered with reference to its being, 1, primary evidence; 2, secondary evidence; 3, positive; 4, presumptive; 5, hearsay; and, 6, admissions.

[3] 1. *Primary evidence.* The law generally requires that the best evidence the case admits of should be given; B. N. P. 293; 1 Stark. Ev. 102, 390; for example; when a written contract has been entered into, and the object is to prove what it was, it is requisite to produce the original writing if it is to be attained, and in that case no copy or other inferior evidence will be received. To this general rule there are several exceptions. 1. As it refers to the *quality* rather than to the *quantity* of evidence, it is evident, that the fullest proof that every case admits of, is not requisite; if, therefore, there are several eye witnesses to a fact it may be sufficiently proved by one only.—2. It is not always requisite, when the matter to be proved has been reduced to writing, that the writing should be produced; as if the narrative of a fact to be proved has been committed to writing, it may yet be proved by parol evidence. A receipt for the payment of money, for example, will not exclude parol evidence of payment. 4 Esp. R. 213; and see 7 B. & C. 611; S. C.

14 E. C. L. R. 101; 1 Campb. R. 439; 3 B. & A. 566; 5 E. C. L. 377.

[4] 2. *Secondary evidence* is that species of proof which is admissible on the loss of primary evidence, and which becomes, by that event, the best evidence. Before such secondary evidence can be received, proof must be made that the primary evidence cannot be had, and all the proper sources from which it can be obtained must be exhausted before the secondary evidence can be received.

The person who possesses it must be applied to, whether he be a stranger or the opposite party; in the case of a stranger, a subpœna and attachment, when proper, must be taken out and served, and, in the case of a party, notice to produce such primary evidence must be proved before the secondary evidence will be admitted. 7 Serg. & Rawle, 116; 6 Binn. R. 228; 4 Binn. R. 295, note; 6 Binn. R. 478; 7 East, R. 66; 8 East, R. 278; 3 B. & A. 296; S. C. 5 E. C. L. R. 291.

[5] 3. *Positive* evidence is that which, if believed, establishes the truth of a fact in issue, and does not arise from any presumption. Evidence is direct and positive, when the very facts in dispute are communicated by those who have the actual knowledge of them by means of their senses. 1 Phil. Ev. 116; 1 Stark. 19. In one sense there is but little direct or positive proof, or such proof as is acquired by means of one's own sense, all other evidence is presumptive, but, in common acceptation, direct and positive evidence is that which is communicated by one who has actual knowledge of the fact.

[6] 4. *Presumptive* evidence is that which is not direct, but where, on the contrary, a fact which is not positively known, is presumed or inferred from one or more other facts or circumstances which are known. Vide article *Presumption*, and Rosc. Civ. Ev. 13; 1 Stark. Ev. 18.

[7] 5. *Hearsay*, is the evidence of those who relate, not what they know themselves, but what they have heard from others. Vide *Hearsay*.

[8] 6. *Admissions*, are the declarations, which a party by himself, or those who act under his authority, make of the existence of certain facts. Vide *Admissions*.

[9] § 2. The *object* of evidence is next to be considered. It is to ascertain the truth between the parties. It has been discovered by experience that this is done most certainly by the adoption of the following rules which are now binding as law: 1. The evidence must be confined to the point in issue;—2. The substance of the issue must be proved, but only the substance is required to be proved;—3. The affirmative of the issue must be proved.

[10] 1. It is a general rule, both in civil and criminal cases, that the evidence shall be confined to the point in issue. Justice and convenience require the observance of this rule, particularly in criminal cases, for when a prisoner is charged with an offence, it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction, which forms the subject of the indictment, and, which alone, he has come prepared to answer. 2 Russ. on Cr. 694; 1 Phil. Ev. 166. To this general rule there are several exceptions, and a variety of cases which do not fall within the rule. 1. In general, evidence of collateral facts is not admissible; but when such a fact is material to the issue joined between the parties, it may be given in evidence, as, for example, in order to prove that the acceptor of a bill knew the payee to be a fictitious person; or that the drawer had general authority from

him to fill up bills with the name of a fictitious payee, evidence may be given to show that he had accepted similar bills before they could from their date, have arrived from the place of date. 2 H. Bl. 288.—2. Although when special damage sustained by the plaintiff is not stated in the declaration, it is not one of the points in issue, and evidence of it cannot be received; yet a damage which is the necessary result of the defendant's breach of contract, may be proved, notwithstanding it is not in the declaration. 11 Price's Rep. 19.—3. In general, evidence of the character of either party to a suit is inadmissible, yet in some cases such evidence may be given. Vide article *Character*.—4. When evidence incidentally applies to another person or thing not included in the transaction in question, and with regard to whom or to which it is inadmissible; yet if it bear upon the point in issue, it will be received. 8 Bingh. Rep. 376; S. C. 21 Eng. C. L. R. 325; and see 1 Phil. Ev. 158; 2 East, P. C. 1035; 2 Leach, 985; S. C. 1 New Rep. 92; Russ. & Ry. C. C. 376; 2 Yeates, 114; 9 Conn. Rep. 47.—5. The *acts* of others, as in the case of conspirators, may be given in evidence against the prisoner, when referable to the issue; but *confessions* made by one of several conspirators after the offence has been completed, and when the conspirators no longer act in concert, cannot be received. Vide article *Confession*, and 10 Pick. 497; 2 Pet. Rep. 364; 1 Brec. R. 269; 3 Serg. & Rawle, 9; 1 Rawle, 362, 458; 2 Leigh's R. 745; 2 Day's Cas. 205; 3 Serg. & Rawle, 220; 3 Pick. 33; 4 Cranch, 75; 2 B. & A. 573, 4; S. C. 5 E. C. L. R. 381 —6. In criminal cases when the offence is a cumulative one, consisting itself in the commission of a number of acts, evidence of those acts is not only admissible, but essential to support the charge. On an indictment against a defendant for a conspiracy, to cause himself to be believed a man of large property, for the purpose of defrauding tradesmen; after proof of a representation to one tradesman, evidence may therefore be given of a representation to another tradesman at a different time. 1 Campb. Rep. 399; 2 Day's Cas. 205; 1 John. R. 99; 4 Rogers's Rec. 143; 2 Johns. Cas. 193.—7. To prove the guilty knowledge of a prisoner, with regard to the transaction in question, evidence of other offences of the same kind, committed by the prisoner, though not charged in the indictment, is admissible against him. As in the case where a prisoner had passed a counterfeit dollar, evidence that he had other counterfeit dollars in his possession is evidence to prove the guilty knowledge. 2 Const. R. 758; Ib. 776; 1 Bailey, R. 300; 2 Leigh's R. 745; 1 Wheeler's Cr. Cas. 415; 3 Rogers's Rec. 148; Russ. & Ry. 132; 1 Campb. Rep. 324; 5 Randolph's R. 701.

[11] 2. The substance of the issue joined between the parties must be proved. 1 Phil. Ev. 190. Under this rule will be considered the *quantity* of evidence required to support particular averments in the declaration or indictment. And, *first*, of civil cases. 1. It is a fatal variance in a contract, if it appear that a party who ought to have been joined as plaintiff has been omitted. 1 Saund. 291 h, (n.); 2 T. R. 282; but it is no variance to omit a person who might have been joined as defendant, because the non-joinder ought to have been pleaded in abatement. 1 Saund. 291 d, (n.)—2. The consideration of the contract must be proved; but it is not necessary for the plaintiff to set out in his declaration, or prove on the trial, the several parts of a contract consisting

of distinct and collateral provisions; it is sufficient to state so much of the contract as contains the entire consideration of the act, and the entire act to be done in virtue of such consideration, including the time, manner, and other circumstances of its performance. 6 East, R. 568; 4 B. & A. 387; 6 E. C. L. R. 455. ***Secondly***, In criminal cases it may be laid down, 1. That it is in general sufficient to prove what constitutes an offence. It is enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified. 2 Campb. R. 585; 1 Harr. & John. 427. If a man be indicted for robbery, he may be found guilty of larceny, and not guilty of the robbery. 2 Hale, P. C. 302. The offence of which the party is convicted must, however, be of the same class with that of which he is charged. 1 Leach, 14; 2 Stra. 1133.—2. When the intent of the prisoner furnishes one of the ingredients in the offence, and several intents are laid in the indictment, each of which, together with the act done, constitutes an offence, it is sufficient to prove one intent only. 3 Stark. R. 35; 14 E. C. L. R. 154, 163.—3. When a person or thing, necessary to be mentioned in an indictment, is described with circumstances of greater particularity than is requisite, yet those circumstances must be proved. 3 Rogers's Rec. 77; 3 Day's Cas. 283. For example, if a party be charged with stealing a ***black*** horse, the evidence must correspond with the averment, although it was unnecessary to make it. Roscoe's Cr. Ev. 77; 4 Ohio, 350.—4. The name of the prosecutor or party injured must be proved as laid, and the rule is the same with reference to the name of a third person introduced into the indictment, as descriptive of some person or thing.

[12] 3. The affirmative of the issue must be proved. The general rule with regard to the onus of proving the issue requires that the party who asserts the affirmative should prove it. But this rule ceases to operate the moment the presumption of law is thrown in the other scale. When the issue is on the legitimacy of a child, therefore, it is incumbent on the party asserting the illegitimacy to prove it. 2. Selw. N. P. 709. Vide ***Onus Probandi; Presumption;*** 2 Gall. R. 485; and 1 McCord, 573.

[13] § 3. The consideration of the ***instruments*** of evidence will be the subject of this head. These consist of records, private writings, or witnesses.

[14] 1. Records are to be proved by an exemplification duly authenticated, vide ***Authentication***, in all cases where the issue is ***nul tiel record***. In other cases an examined copy, duly proved will, in general, be evidence. Foreign laws as proved in the mode pointed out under the article ***Foreign laws***.

[15] 2. Private writings are proved by producing the attesting witness, or in case of his death, absence, or other legal inability to testify, as, if after attesting the paper, he becomes infamous, his hand-writing may be proved. When there is no witness to the instrument, it may be proved by evidence of the hand-writing of the party, by a person who has seen him write, or in a course of correspondence has become acquainted with his hand. See ***Comparison of hand-writing***, and 5 Binn. R. 349; 10 Serg. &. Rawle, 110; 11 Serg. & Rawle, 333; 3 W. C. C. R. 31; 11 Serg. & Rawle, 347; 6 Serg. & Rawle, 12, 312; 1 Rawle, R. 223; 3 Rawle, R. 312; 1 Ashm. R. 8; 3 Penna. R. 136. Books of original entry, when duly proved, are ***prima facie*** evidence of goods sold and delivered and of work and labour done. Vide ***Original entry***.

[16] 3. Proof by witnesses. Vide article *Witness.*

[17] § 4. The *effect* of evidence. Under this head will be considered, 1st, the effect of judgments rendered in the United States, and of records lawfully made in this country; and, 2dly, the effect of foreign judgments and laws.

[18] 1. As a general rule a judgment rendered by a court of competent jurisdiction, directly upon the point in issue is a bar between the same parties. 1 Phil. Ev. 242; and privies in blood, as an heir, 3 Mod. 141, or privies in estate, 1 Ld. Raym. 730, B. N. P. 232, stand in the same situation as those they represent; the verdict and judgment may be used for or against them, and is conclusive. Vide *Res Judicata.* The constitution the United States, art. 4, s. 1, declares, that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And congress may by general laws prescribe the manner in which such acts, records, and proceedings, shall be proved, and the effect thereof." Vide article *Authentication*, and 7 Cranch, 481; 3 Wheat. R. 234; 10 Wheat. R. 469; 17 Mass. R. 546; 9 Cranch, 192; 2 Yeates, 532; 7 Cranch, 408; 3 Bibb's R. 369; 5 Day's R. 563; 2 Marsh. (Kty.) R. 293.

[19] 2. As to the effect of foreign laws, see article *Foreign Laws.* For the force and effect of foreign judgments, see article *Foreign Judgments.*

Vide, generally, the Treatises on evidence of Gilbert, Phillips, Starkie, Roscoe, Swift, Bentham, Macnally, and Peake; the various Digests, h. t.

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EVIDENCE, BEST, *in practice;* by the best evidence is understood that proof which most certainly exhibits the true state of facts to which it relates. The law requires the best evidence to be adduced which the case admits of; or perhaps more properly speaking, it rejects secondary or inferior evidence, when it is attempted to be substituted for evidence of a higher and superior nature. This is a rule of policy, grounded upon a reasonable suspicion, that the substitution of inferior for better evidence arises from sinister motives; and an apprehension that the best evidence, if produced, would alter the case to the prejudice of the party. This rule relates not to the measure and quantity of evidence, but to its quality when compared with some other evidence of superior degree. It is not necessary in point of law, to give the fullest proof that every case may admit of. If, for example, there be several eye-witnesses to a fact, it may be proved by the testimony of one only.

EVIDENCE, HEARSAY, *in practice.* The mere declarations of third persons as to a fact, are called hearsay evidence. Such mere recitals or assertions cannot be received

in evidence, for many reasons, but principally for the following: first, that the party making such declarations is not on oath; and, secondly, because the party against whom it operates, has no opportunity of cross-examination. 1 Phil. Ev. 185. See for other reasons 1 Stark. Ev. 4, pt. p. 44. The general rule excluding hearsay evidence does not apply to those declarations to which the party is privy, or to admissions which he himself has made. See *Admissions.*

'Many facts, from their very nature, either absolutely, or usually, exclude direct evidence to prove them, being such as are either necessarily or usually, imperceptible by the senses, and therefore incapable of the ordinary means of proof. These are questions of pedigree or relationship, character, prescription, custom, boundary, and the like; as also questions which depend upon the exercise of particular skill and judgment. Such facts, some from their nature, and others from their antiquity, do not admit of the ordinary and direct means of proof by living witnesses; and, consequently, resort must be had to the best means of proof which the nature of the cases afford. See *Boundary; Custom; Opinion; Pedigree; Prescription.*

EVIDENCE, PAROL, *in practice.* Parol evidence is that which is given by witnesses, viva voce, in contradistinction to that which is written or documentary. It is a general rule that oral evidence shall in no case be received as equivalent to, or as a substitute for a written instrument, where the latter is required by law; or to give effect to a written instrument which is defective in any particular which by law is essential to its validity; or to contradict, alter or vary a written instrument, either appointed by law, or by the contract of the parties, to be the appropriate and authentic memorial of the particular facts it recites; for by doing so, oral testimony would be admitted in usurpation of a species of evidence decidedly superior in degree. 1 Serg. & Rawle, 464; Ib. 27; Addis. R. 361; 2 Dall. 172; 1 Yeates, 140; 1 Binn. 616; 3 Marsh. (Ken.) R. 333; 4 Bibb, R. 473; 1 Bibb, R. 271; 11 Mass. R. 30; 13 Mass. R. 443; 3 Conn. 9; 20 Johns. 49; 12 Johns. R. 77; 3 Camp. 57; 1 Esp. C. 53; 1 M. & S. 21; Bunb. 175.

But parol evidence is admissible to defeat a written instrument on the ground of fraud, mistake, &c., or to apply it to its proper subject-matter; or, in some instances, as ancillary to such application, to explain the meaning of doubtful terms, or to rebut presumptions arising extrinsically. In these cases the parol evidence does not usurp the place or arrogate the authority of written evidence, but either shows that the instrument ought not to be allowed to operate at all, or is essential in order to give to the instrument its legal effect. 1 Murph. R. 426; 4 Desaus. R. 211; 1 Desaus. R. 345; 1 Bay, R. 247; 1 Bibb, R. 271; 11 Mass. R. 30; see 1 Pet. C. C. R. 85; 1 Binn. R. 610; 3 Binn. R. 587; 3 Serg. & Rawle, 340; Poth. Obl. Pt. 4, c. 2.

EVIDENCE, SECONDARY, *in practice.* Secondary evidence is the proof of certain facts by such testimony as admits that there is or was other evidence of a more satisfactory nature on the same subject, within the power of the party offering the same as the proof of the contents of a writing, when the original has been lost or destroyed, or is in the possession of the opposite party. Gresl. Eq. Ev. 174. It is that proof which is not the best to exhibit the true state of the facts to which it relates, but when such primary evidence cannot be had, the best in the power of the party offering it. After

proof of the due execution of the original, the contents should be proved by a counterpart, if there be one, for this is the next best evidence; and it seems that no evidence of a mere copy is admissible until proof has been given that the counterpart cannot be produced. 6 T. R. 236. If there be no counterpart a copy may be proved in evidence by any witness who knows that it is a copy, from having compared it with the original. Bull. N. P. 254; 1 Keb. 117; 6 Binn. R. 234; 2 Taunt. R. 52; 1 Campb. R. 469; 8 Mass. R. 273. If there be no copy, the party may produce an abstract, or even give parol evidence of the contents of a deed. 10 Mod. 8; 6 T. R. 556. But it has been decided that there are no degrees in secondary evidence; and when a party has laid the foundation for such evidence, he may prove the contents of a deed by parol, though it appear that an attested copy is in existence. 6 C. & P. 206; 8 C. & P. 389. Before secondary evidence can be given of the contents of a paper which is in the possession of the opposite party, notice must be given to such party to produce it on the trial. 3 T. R. 306; 2 T. R. 201. And the service of such notice must be proved. 2 T. R. 201, n.; Gresl. Eq. Ev. pt. 2, c. 3, s. 2. Vide *Notice to produce papers.*

EVOCATION, *French law*, is the act by which a judge is deprived of cognizance of a suit over which he had jurisdiction, for the purpose of conferring on other judges the power of deciding it. This is done with us by writ of *certiorari.*

EX CONTRACTU. This term is applied to such things as arise *upon a contract;* as, an action which arises *ex contractu.* Vide *Action.*

EX DELICTO, which arises in consequence of a crime, misdemeanor, fault or tort; actions arising *ex delicto*, are case, replevin, trespass, trover. See *Action.*

EX MERO MOTU, from mere motion. To prevent injustice, the courts will, *ex mero motu*, make rules and orders which the parties would not strictly be entitled to ask for.

EX PARTE, of the one part. Many things may be done *ex parte*, when the opposite party has had notice; an affidavit, or deposition is said to be taken *ex parte*, when only one of the parties attends to taking the same.

EX POST FACTO, *contracts, crim. law.* This is a technical expression which signifies, that something has been after another thing, in relation to the latter. An estate granted may be made good or avoided by matter ex post facto, when an election is given to the party to accept or not to accept. 1 Co. 146. The constitution of the United States, art. 1, s. 10, forbids the states to pass any *ex post facto law;* which has been defined to be one which renders the act punishable in a manner in which it was not punishable when it was committed. 6 Cranch, 138. This definition extends to laws passed after the act, and affecting a person by way of punishment of that act, either in his person or estate. 3 Dall. 386; 1 Blackf. Ind. R. 193; 2 Pet. U. S. Rep. 413; 1 Kent, Com. 408; Dane's Ab. Index, h. t. This prohibition in the constitution against passing *ex post facto* laws, applies exclusively to criminal or penal cases, and not to civil cases. Serg. Const. Law, 356. Vide 2 Pick. R. 172; 11 Pick. R. 28; 2 Root, R. 350; 5 Monr. R. 133; 9 Mass. R. 363; 3 N. H. Rep. 475; 7 John. R. 488; 6 Binn. R. 271; 1 J. J. Marsh. 563; 2 Pet. R. 681; and the article *Retrospective.*

EXACTION, *torts*, a wilful wrong done by an officer, or by one who, under colour of his office, takes more fee or pay for his services than what the law allows. Between *extortion* and *exaction* there is this difference;

that in the former case the officer extorts more than his due, when something is due to him; in the latter he exacts what is not his due, when there is nothing due to him. Co. Litt. 368.

EXAMINATION, *practice*, is the interrogation of a witness, in order to ascertain his knowledge as to the facts in dispute between parties. When the examination is made by the party who called the witness, it is called an *examination in chief*. When it is made by the other party, it is known by the name of *cross-examination*, (q. v.) The examination is to be made in open court, when practicable, but when on account of age, sickness or other cause the witness cannot be so examined, then it may be made before authorised commissioners. In the examination in chief the counsel cannot ask leading questions, except in particular cases. Vide *Cross Examination; Leading Question.*

The laws of the several states require the private examination of a feme covert before a competent officer in order to pass her title to her own real estate or the interest she has in that of her husband: as to the mode in which this is to be done, see *Acknowledgment.* See also 3 Call, R. 394; 5 Mason's R. 59; 1 Hill, R. 110; 4 Leigh, R. 498; 2 Gill & John. 1; 3 Rand. R. 468; 1 Monr. R. 49; 3 Monr. R. 397; 1 Edw. R. 572; 3 Yerg. R. 548; 1 Yerg. R. 413; 3 J. J. Marsh. R. 241; 2 A. K. Marsh. R. 67; 6 Wend. R. 9; 1 Dall. 11, 17; 3 Yeates, R. 471; 8 S. & R. 299; 4 S. & R. 273.

EXAMINERS, *practice*, are persons appointed to question students of law, in order to ascertain their qualifications before they are admitted to practice. Officers in the courts of chancery whose duty it is to examine witnesses, are also called examiners. Com. Dig. Chancery, P. 1. For rules as to the mode of taking examinations, see Gresl. Eq. Ev. pt. 1, c. 3, s. 2.

EXAMPLE. An example is a case put to illustrate a principle. Examples illustrate but do not restrain or change the laws; *illustrunt non restringunt legem.* Co. Litt. 24 a.

EXCAMBIATOR, the name of an exchange of lands; a broker. This term is now obsolete.

EXCEPTION, *Eng. Eq. Practice.* Re-interrogation, 2 Benth. Ev. 208, n.

EXCEPTION, *legislation, construction.* Exceptions are rules or laws which bound the extent of others; they limit the extent of the rule to which they apply, and render that just and proper, which would be, on account of its generality, unjust and improper; for example, it is a general rule that parties competent may make contracts, the rule that they shall not make any contrary to equity, or *contra bonos mores*, is the exception.

EXCEPTION, *in contracts.* An exception is a clause in a deed, by which the lessor excepts something, out of that which he granted before by the deed. To make a valid exception, these things must concur; 1, the exception must be by apt words, as, saving and excepting, &c.; 2, it must be of part of the thing demised, and not of some other thing; 3, it must be part of the thing only, and not of all, the greater part, or the effect of the thing granted; an exception, therefore, in a lease, which extends to the whole thing demised, is void; 4, it must be of such thing as is severable from the demised premises, and not of an inseparable incident; 5, it must be of such a thing as he that accepts may have, and which properly belongs to him; 6, it must be of a particular thing out of a general, and not of a particular thing out of a particular thing; 7, it must be particularly described and set forth; a

lease of a tract of land, except one acre, would be void, because that acre was not particularly described. Woodf. Landl. & Ten. 10; Co. Litt. 47 a; Touchs. 77; 1 Shepl. R. 337; Wright's R. 711; 3 John. R. 375; 8 Conn. R. 369; 6 Pick. R. 499; 6 N. H. Rep. 421. An exception differs from a *reservation;* the former is always part of the thing granted; the latter is of a thing not in esse but newly created or reserved. An exception differs also from an explanation, which by the use of a *videlicit, proviso*, &c., is allowed only to explain doubtful clauses precedent, or to separate and distribute generals into particulars 3 Pick. R. 272.

EXCEPTION, *practice, pleading.* This term is used in the civil, nearly in the same sense that the word *plea* has in the common law. Merl. Répert, h. t.; Ayl. Parerg. 251. In chancery practice, it is the allegation of a party in writing, that some pleading or proceeding in a cause is insufficient. 1 Harr. Ch. Pr. 228. Exceptions are dilatory or peremptory. Bract. lib. 5, tr. 5; Britton, cap. 91, 92; 1 Lilly's Ab. 559. Dilatory exceptions are such as do not tend to defeat the action, but only to retard its progress. Poth. Proc. civ. partie, 1, c. 2, s. 2, art. 1; Code of Pract. of Lo. art. 332. Declinatory exceptions have this effect, as well as the exception of discussion opposed by a third possessor, or by a surety in an hypothecary action, or the exception taken in order to call in the warrantor. Id.; 7 N. S. 282; 1 L. R. 38, 420. These exceptions must in general be pleaded *a limine litis* before issue joined. Civ. Code of Lo. 2260; 1 N. S. 703; 2 N. S. 389; 4 L. R. 104; 10 L. R. 546. A declinatory exception is a species of dilatory exception; which merely declines the jurisdiction of the judge before whom the action is brought. Code of Pr. of L. art. 334. Peremptory exceptions are those which tend to the dismissal of the action. Some relate to forms, others arise from the law. Those which relate to forms tend to have the cause dismissed, owing to some nullities in the proceedings. These must be pleaded *in limine litis.* Peremptory exceptions founded on law, are those which, without going into the merits of the cause, show that the plaintiff cannot maintain his action, either because it is prescribed, or because the cause of action has been destroyed or extinguished. These may be pleaded at any time previous to definitive judgment. Id. art. 343-346; Poth. Proc. Civ. partie, 1, c. 2, s. 1, 2, 3. These in the French law, are called *Fins de non recevoir*, (q. v.)

EXCHANGE, *comm. law.* This word has several significations.

1. Exchange is a negociation by which one person transfers to another, funds which he has in a certain place, either at a price agreed upon, or which is fixed by commercial usage. This transfer is made by means of an instrument which represents such funds, and is well known by the name of bill of exchange.

2. The price which is paid in order to obtain such transfer, is also known among merchants by the name of exchange; as, exchange on England is five per cent. See 4 Wash. C. C. R. 307.

3. Barter, (q. v.) or the transfer of goods and chattles for other goods and chattels, is also known by the name of exchange, though the term barter is more commonly used.

4. The French writers on commercial law, denominate the profit which arises from a maritime loan, exchange, when such profit is a per centage on the money lent, considering it in the light of money lent in one place to be returned in another, with a difference in amount in the sum borrowed and that paid, arising from

the difference of time and place. Hall on Mar. Loans, 56, n.; and the articles, *Interest; Maritime; Premium.*

5. By exchange is also meant, the place where merchants, captains of vessels, exchange agents and brokers, assemble to transact their business. Code de Comm. art. 71.

Vide the articles *Bills of Exchange; Damages on Bills of Exchange*, and *Re-exchange*. Also Civ. Code of Lo. art. 2630.

EXCHANGE, *conveyancing*. An exchange is a mutual grant of equal interests in land, the one in consideration of the other. 2 Bl. Com. 323; Litt. s. 62; Touchs. 289; there are five circumstances necessary to an exchange; 1. That the estates given be equal. 2. That the word *escambium* or exchange be used, which cannot be supplied by any other word, or described by circumlocution. 3. That there be an execution by entry or claim in the life of the parties. 4. That if it be of things which lie in grant, it be by deed. 5. That if the lands lie in several counties, it be by deed indented; or if the thing lie in grant, though they be in one county. In practice this mode of conveyance is obsolete. Vide Cruise, Dig. tit. 32; Perk. ch. 4; 10 Vin. Ab. 125; Com. Dig. h. t.; Nels. Ab. h. t.; Co. Litt. 51; Hardin's R. 593; 1 N. H. Rep. 65; 3 Har. & John. 361; 1 Rolle's Ab. 813; 3 Wils. R. 489. Vide Horsman, 362; 3 Wood, 243, for forms.

EXCHEQUER, *Eng. law*, is an ancient court of record, set up by William the conqueror. It is called exchequer from the chequered cloth, resembling a chess board, which covers the table there; 3 Bl. Com. 43; it consists of two divisions; the receipt of the exchequer, which manages the royal revenue; and the court, or judicial part of it, which is again divided into a court of equity, and a court of common law. Ib. 44. In this court all personal actions may be brought, and suits in equity commenced, the plaintiff in both (fictitiously for the most part,) alleging himself to be the king's debtor, in order to give the court jurisdiction of the cause. Wooddes. Lect. 69. But by stat. 2 Will., 4, c. 39, s. 1, a change has been made in this respect.

EXCHEQUER CHAMBER,—*Eng. law*, is a court erected by statute 31 Ed. 3, c. 12, to determine causes upon writs of error from the common law side of the court of exchequer. 3 Bl. Com. 55. Another court of exchequer chamber was created by the stat. 27 El. c. 8, consisting of the justices of the common bench, and the barons of the exchequer. It has authority to examine by writ of error the proceedings of the king's bench, not so generally as that erected by the statute of Edw. 3, but in certain enumerated actions.

EXCISES. This word is used to signify an inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale. 1 Bl. Com. 318; 1 Tuck. Bl. Com. Appx. 341; Story, Const. § 950.

EXCLUSIVE, *rights*. The act of preventing one from participating in a thing. An exclusive right or privilege, is one granted to a person to do a thing, and forbidding all others to do the same. A patent-right or copy-right, are of this kind.

EXCLUSIVE, *construction*, when an act is to be done within a certain time, as ten days from a particular time, one day is to be included and the other excluded. Vide Hob. 139; Cowp. 714; Lofft. 276; Dougl. 463; 2 Mod. 280; Sav. 124; 3 Penna. Rep. 200; 1 Serg. & Rawle, 43; 3 B. & A. 581; Com. Dig. Temps, A; 3 East, 407; Com. Dig. Estates, G 8; 2 Chit. Pr. 69, 147.

EXCOMMUNICATION, *eccles. law*. Is an ecclesiastical censure or

sentence pronounced by a spiritual judge against a Christian, by which he is excluded from the body of the church, and disabled to bring any action, or sue any person in the common law courts. Bac. Ab. h. t.; Co. Litt. 133.

EXCUSABLE HOMICIDE, *crim. law*, is the killing of a human being, when the party killing is not altogether free from blame, but the necessity which renders it excusable, may be said to be partly induced by his own act. 1 East, P. C. 220.

EXCUSE. A reason alleged for the doing or not doing a thing. This word presents two ideas differing essentially from each other. In one case an excuse may be made in order to show that the party accused is not guilty; in another, by showing that though guilty, he is less so, than he appears to be. Take, for example the case of a sheriff who has an execution against an individnal, and who in performance of his duty, arrests him; in an action by the defendant against the sheriff, the latter may prove the facts and this shall be a sufficient excuse for him: this is an excuse of the first kind, or a complete justification; the sheriff was guilty of no offence. But, suppose, secondly, that the sheriff has an execution against Paul, and by mistake, and without any malicious design, he arrests Peter instead of Paul, the fact of his having the execution against Paul and the mistake being made, will not justify the sheriff, but it will extenuate and excuse his conduct, and this will be an excuse of the second kind.

Many persons are excused in the commission of acts, which but for the valid and lawful excuse would be crimes. These persons are generally excused because they had no intention of doing wrong, or so the law presumes, because they had no power of judging, and therefore had no criminal will, (q. v.); or having power of judging they had no choice, and were compelled by necessity. Among the first class may be placed infants, under the age of discretion, lunatics, and married women, while acting in the presence of their husbands, when committing an offence, not *malum in se*, as treason or murder. 1 Hale's P. C. 44, 45; or in offences relating to the domestic concern or management of the house, as the keeping of a bawdy house, Hawk. b. 1, c. 1, s. 12. Among acts of the second kind may be classed, the beating or killing another in self-defence; the destruction of property in order to prevent a more serious calamity, as the tearing down of a house on fire, to prevent its spreading to the neighbouring property, and the like. See Dalloz, Dict. h. t.

EXEAT, *eccl. law*. This is a Latin term which is used to express the written permission which a bishop gives to an ecclesiastic, his diocesan, to allow him to exercise the functions of his ministry in another diocese.

EXECUTION, *contracts*, signifies the accomplishment of a thing; as, the execution of a bond and warrant of attorney, which is the signing, sealing, and delivery of the same.

EXECUTION, *crim. law*. The putting a convict to death, agreeably to law, in pursuance of his sentence.

EXECUTION, *practice*. The act of carrying into effect the final judgment of a court, or other jurisdiction. The writ which authorises the officer so to carry into effect such judgment is also called an execution. A distinction has been made between an execution which is used to make the money due on a judgment out of the property of the defendant, and which is called a *final* execution; and one which tends to an end but is not absolutely final, as a *capias ad satisfa-*

ciendum, by virtue of which the body of the defendant is taken, to the intent that the plaintiff shall be satisfied his debt, &c., the imprisonment not being absolute, but until he shall satisfy the same; this is called an execution *quousque*. 6 Co. 87.

Executions are either to recover specific things, or money.—1. Of the first class are the writs of *habere facias seisinam*, (q. v.) *habere facias possessionem*, (q. v.) *retorno habendo*, (q. v.) *distringas*, (q. v.).—2. Executions for the recovery of money are those which issue against the body of the defendant, as the *capias ad satisfaciendum*, (q. v.) an attachment; (q. v.) those which issue against his goods and chattels; namely, the *fieri facias*, (q. v.) the *venditioni exponas*, (q. v.) those which issue against his lands, the *levari facias*, (q. v.) the *liberari facias*, the *eligit*, (q. v.) Vide 10 Vin. Ab. 541; 1 Ves. jr. 430; 1 Sell. Pr. 512; Bac. Ab. h. t.; Com. Dig. h. t.; the various Digests, h. t.; Tidd's Pr. Index, h. t.

EXECUTIONER. The name given to him who puts criminals to death, according to their sentence; a hangman. In the United States executions are so rare that there are no executioners by profession. It is the duty of the sheriff or marshal to perform this office, or to procure a deputy to do it for him.

EXECUTIVE, *government*, is that power in the government which causes the laws to be executed and obeyed: it is usually confided in the hands of the chief magistrate; the president of the United States is invested with this authority under the national government; and the governor of each state has the executive power in his hands. The officer in whom is vested the executive power is also called the executive. The constitution of the United States directs that "the executive power shall be vested in a president of the United States of America." Art. 2, s. 1. Vide Story, Const. B. 3. c. 36.

EXECUTORS, *trusts*. The word executor taken in its largest sense, has several acceptations.—1. Executor dativus, who is one called an administrator to an intestate; 2. Executor testamentarius, or one appointed to the office by the last will of a testator, and this is what is usually meant by the term. In the civil law the person who is appointed to perform the duties of an executor as to goods, is called hæres testamentarius; the term executor, it is said, is a barbarism unknown to that law. 3 Atk. 304. An executor, as the term is at present accepted, is the person to whom the execution of a last will and testament of personal estate is, by the testator's appointment, confided. 2 Bl. Com. 503; 2 P. Wms. 548; Toller, 30; 1 Will. on Ex. 112; Swinb. pt. 4, s. 2, pl. 2. Generally speaking all persons who are capable of making wills may be executors, and some others beside, as infants and married women. 2 Bl. Com. 503. An executor is absolute or qualified; his appoinment is absolute when he is constituted certainly, immediately, and without restriction in regard to the testator's effects, or limitation in point of time. It may be qualified by limitation as to the time or place wherein, or the subject-matters whereon the office is to be exercised; or the creation of the office may be conditional. It may be qualified, 1st, by limitations in point of time, for the time may be limited when the person appointed shall begin, or when he shall cease to be executor; as, if a man be appointed executor upon the marriage of testator's daughter. Swinb. pt. 4, s. 17, pl. 4.—2. The appointment may be limited in point of place; as, if one be appointed executor of all the

testator's goods in the state of Pennsylvania.—3. The power of the executor may be limited as to the subject-matter, upon which it is to be exercised; as when a testator appoints A the executor of his goods and chattels in possession, B, of his choses in action. One may be appointed executor of one thing only, as of a particular claim or debt due by bond, and the like. Off. Ex. 29; 3 Phillim. 424. But although a testator may thus appoint separate executors of distinct parts of his property and may divide their authority, yet *quoad* creditors of the testator they are all executors, and as one executor, and may be sued as one executor. Cro. Car. 293.—4. The appointment may be conditional, and the condition may be either precedent or subsequent. Godolp. Orph. Leg. pt. 2, c. 2, s. 1; Off. Ex. 23.

An executor derives his interest in the estate of the deceased entirely from the will, and it vests in him from the moment of the testator's death. 1 Will. Ex. 159; Com. Dig. Administration, B 10, 5 B. & A. 745; 2 W. Bl. Rep. 692. His interest in the goods of the deceased is not that absolute, proper and ordinary interest, which every one has in his own proper goods. He is a mere trustee to apply the goods for such purposes as are sanctioned by law. 4 T. R. 645; 9 Co. 88; 2 Inst. 236; Off. Ex. 192. He represents the testator and therefore may sue and recover all the claims he had at the time of his death; and may be sued for all debts due by him. 1 Will. Ex. 508 et seq.

The following are the principal duties of an executor: 1. Within a convenient time after the testator's death, to collect the goods of the deceased, provided he can do so peaceably; when he is resisted he must apply to the law for redress.—2. To bury the deceased in a manner suitable to the estate he leaves behind him; and when there is just reason to believe he died insolvent, he is not warranted in expending more in funeral expenses (q. v.) than is absolutely necessary. 2 Will. Ex. 636; 1 Salk. 296; 11 Serg. & Rawle, 204; 14 Serg. & Rawle, 64.—3. The executor should prove the will in the proper office.—4. He should make an inventory (q. v.) of the goods of the intestate, which should be filed in the office.—5. He should ascertain the state of the debts and credits of the estate, and endeavour to collect all such claims with as little delay as possible consistently with the interest of the estate.—6. He should advertise for debts and credits, *see forms of advertisements*, 1 Chit. Pr. 521.—7. He should reduce the whole of the goods, not specifically bequeathed, into money with all due expedition.—8. Keep the money of the estate in bank, but not mixed with his own account, or he may be charged interest on it.—9. Be at all times ready to account and actually file an account within a year.—10. Pay the debts and legacies in the order required by law.

Co-executors, however numerous, are considered in law as an individual person, and, consequently, the acts of any one of them, in respect of the administration of the assets, are deemed, generally, the acts of all. Bac. Ab. Executor, D; Touch. 484; for they have all a joint and entire authority over the whole property. Off. Ex. 213; 1 Rolle's Ab. 924; Com. Dig. Administration, B 12. On the death of one of several joint executors, the rights and power which he possessed survive to those who are still living. When there are several executors and all die, the power is in common transferred to the executor of the executor, so that

he is executor of the first testator; and the law is the same when a sole executor dies leaving an executor, the rights are vested in the latter. This rule has been changed in Pennsylvania and perhaps some other states by legislative provision; there, in such case, administration cum testamento annexo must be obtained, the right does not survive to the executor of the executor. Act of Pennsylvania, of 15 March, 1832, s. 19. In general, executors are not responsible for each other, and they have a right to settle separate accounts. See *Joint Executors.*

Vide, generally, 11 Vin. Ab. h. t.; Bac. Ab. h. t.; Rolle, Ab. h. t.; Nelson's Ab. h. t.; Dane's Ab. Index, h. t.; Com. Dig. Administration; 1 Supp. to Ves. jr. 8, 90, 356, 438; 2 Ib. 69; 1 Vern. 302, 3; Yelv. 84 a; 1 Salk. 318; 18 Engl. C. L. Rep. 185; 10 East, 295; 2 Phil. Ev. 289; 1 Rop. Leg. 114; American Digests, h. t.; Swinburne, Williams, Lovelass and Roberts's several treatises on the law of Executors; Off. Ex. per totum; Chit. Pr. Index, h. t. For the origin and progress of the law in relation to executors, the reader is referred to 5 Toull. n. 576, note; Glossaire du Droit Français, par Delaulière, verbo Exécuteurs testamentaries, and the same author on art. 297, of the Custom of Paris; Poth. Des Donations Testamentaires.

EXECUTOR, INSTITUTED. An instituted executor is one who is appointed by the testator without any condition, and who has the first right of acting when there are substituted executors. An example will show the difference between an instituted and a substituted executor: suppose a man makes his son his executor, but if he will not act, he appoints his brother, and if neither will act, his cousin; here the son is the instituted executor, in the first degree, the brother is said to be substituted in the second degree, and the cousin in the third degree, and so on. See *Heir, instituted,* and Swinb. pt. 4, s. 19, pl. 1.

EXECUTOR, SUBSTITUTED, is the person who is appointed executor, if another person who has been so appointed refuses to act. See *Executor, instituted.*

EXECUTOR DE SON TORT, executor in his own wrong, is one who, without lawful authority, undertakes to act as executor of a person deceased. He is in general held responsible for all his acts, when he does any thing which might prejudice the estate, and receives no advantage whatever in consequence of his assuming the office. He cannot sue a debtor of the estate, but may be sued generally as executor. Vide Off. Ex. 181; Bac. Ab. Executor, &c. B 3; 11 Vin. Ab. 215; 1 Dane's Ab. 561; Bull. N. P. 48; Com. Dig. Administration, C 3; Ham. on Part. 146 to 156; 8 John. R. 426; 7 John. R. 161; 3 Penna. R. 129; 15 Serg. & Rawle, 39.

EXECUTOR TO THE TENOR. This phrase is used in the ecclesiastical law, to denote a person who is not directly appointed by the will an executor, but who is charged with the duties which appertain to one; as, "I appoint A B to discharge all lawful demands against my will." 3 Phill. 116; 1 Eccl. Rep. 374; Swinb. 247; Wentw. Ex. part 4, s. 4, p. 230.

EXECUTORY. Whatever may be executed, as an executory sentence or judgment, an executory contract.

EXECUTORY DEVISE, *estates.* An executory devise is a limitation by will of future contingent interest in lands, contrary to the rules of limitation of contingent estates in conveyances at law. When the limitation by will does not depart from those rules prescribed for the

government of contingent remainders, it is, in that case, a contingent remainder, and not an executory devise. 4 Kent, Com. 257; 1 Eden's R. 27; 3 T. R. 763. An executory devise differs from a contingent remainder in three material points; 1. It needs no particular estate to precede and support it; for example, a devise to A B, upon his marriage. 2. A fee may be limited after a fee, as in the case of a devise of land to C D in fee, and if he dies without issue, or before the age of twenty-one, then to E F in fee. 3. A term for years may be limited over after a life estate created in the same. 2 Bl. Com. 172, 173.

To prevent perpetuities a rule has been adopted that the contingency must happen during the time of a life in being and twenty-one years, and the months allowed for gestation in order to reach beyond the minority of a person not in esse at the time of making the executory devise. 3 P. Wms. 258; 7 T. R. 100; 2 Bl. Com. 174; 7 Cranch, 456; 1 Gilm. 194; 2 Hayw. 375.

There are several kinds of executory devises; two relative to real estate, and one in relation to personal estate.

1. When the devisor parts with his whole estate, but upon some contingency, qualifies the disposition of it, and limits an estate on that contingency. For example, when the testator devises to Peter for life, remainder to Paul, in fee, provided that if James should within three months after the death of Peter pay one hundred dollars to Paul, then to James in fee; this is an executory devise to James, and if he dies during the life of Peter, his heir may perform the condition. 10 Mod. 419; Prec. in Ch. 486; 2 Binn. 532; 5 Binn. 252; 7 Cranch, 456; 6 Munf. 187; 1 Desaus. 137, 183; 4 Ib. 340, 459; 5 Day, 517.

2. When the testator gives a future interest to arise upon a contingency, but does not part with the fee in the mean time; as in the case of devise of the estate to the heirs of John, after the death of John; or a devise to John in fee, to take effect six months after the testator's death; or a devise to the daughter of John, who shall marry Robert within fifteen years. T. Raym. 82; 1 Salk. 226; 1 Lutw. 798.

3. The executory bequest of a chattel interest is good, even though the ulterior devisee be not at the time *in esse*, and chattels so limited are protected from the demands of creditors beyond the life of the first taker, who cannot pledge them, nor dispose of them beyond his own life interest in them. 2 Kent, Com. 285; 2 Serg. & Rawle, 59; 1 Desaus. 271; 4 Desaus. 340; 1 Bay, 78.

Vide, Com. Dig. Estates by Devise, N 16; Fearne on Rem. 381; Cruise's Dig. Index, h. t.; 4 Kent, Com. 357 to 381; 1 Hill. Ab. c. 43, p. 533.

EXECUTORY PROCESS. *Via executiva.* A species of execution issued in Louisiana, on an authentic act.

EXEMPLIFICATION, *in evidence*, is a perfect copy of a record, or office-book lawfully kept, so far as relates to the matter in question. Vide, generally, 1 Stark. Ev. 151; 1 Phil. Ev. 307; 7 Cranch, 481; 3 Wheat. 234; 10 Wheat. 469; 9 Cranch, 122; 2 Yeates, 532; 1 Hayw. 359; 1 John. Cas. 238. As to the mode of authenticating records of other states, see articles *Authentication*, and *Evidence*.

EXEMPTION, is a privilege which dispenses with the general rule: for example, in Pennsylvania, and perhaps in all the other states, clergymen are exempt from serving on juries. Exemptions are generally

allowed, not for the benefit of the individual, but for some public advantage.

EXEMPTS, are persons who are not bound by law, but excused from the performance of duties imposed upon others. By the act of congress of May 8, 1792, 1 Story, L. U. S. 252, it is provided

§ 2. That the vice president of the United States; the officers, judicial and executive, of the government of the United States; the members of both houses of congress, and their respective officers; all custom-house officers, with their clerks; all post officers, and stage drivers, who are employed in the care and conveyance of the mail of the post office of the United States; all ferrymen employed at any ferry on the post road; all inspectors of exports; all pilots; all mariners, actually employed in the sea service of any citizen or merchant within the United States; and all persons who now are, or may hereafter be, exempted by the laws of the respective states, shall be, and are hereby, exempted from militia duty, notwithstanding their being above the age of eighteen, and under the age of forty-five years.

EXERCITOR, a term in the *civil law*, to denote the person who fits out and equips a vessel, whether he be the absolute or qualified owner, or even a mere agent. Emer. on Mar. Loans, c. 1, s. 1. In English we generally use the word "ship's husband," but it is generally to designate and distinguish from among several part owners of a ship, the one who has the immediate care and management of her. Hall on Mar. Loans, 142, n. See Dig. 19, 2, 19, 7; Id. 14, 1, 1, 15; *Ship's husband.*

EXEQUATUR, *French law.*—This Latin word was, in the ancient practice, placed at the bottom of a judgment emanating from another tribunal, and was a permission and authority to the officer to execute it within the jurisdiction of the judge who put it below the judgment. We have something of the same kind in our practice. When a warrant for the arrest of a criminal is issued by a justice of the peace of one county, and he flies into another, a justice of the latter county may endorse the warrant and then the ministerial officer may execute it in such county. This is called *backing* a warrant.

EXEQUATUR, *internat. law*, is a declaration made by the executive of a government near to which a consul has been nominated and appointed, after such nomination and appointment has been notified, addressed to the people, in which is recited the appointment of the foreign state, and that the executive having approved of the consul as such, commands all the citizens to receive, countenance, and, as there may be occasion, favourably assist the consul in the exercise of his place, giving and allowing him all the privileges, immunities, and advantages, thereto belonging. 3 Chit. Com. Law, 56; 3 Maule & Selw. 290; 5 Pardes. n. 1445.

EXHEREDATION, *civil law*, is the act by which a forced heir is deprived of his legitimate or legal portion which the law gives him; disinherison, (q. v.)

EXHIBIT, *in practice;* where a paper or other writing is on motion, or on other occasion, proved; or if an affidavit to which the paper-writing is annexed, refer to it, it is usual to mark the same with a capital letter, and to add, "This paper writing, marked with the letter A, was shown to the deponent at the time of his being sworn by me, and is the same by him referred to by the affidavit annexed thereto." Such paper or other writing, with this attestation, signed by the judge or other person before whom the affida-

vit shall have been sworn, is called an *exhibit*. Vide Stra. 674; 2 P. Wms. 410; Gresl. Eq. Ev. 98.

TO EXHIBIT, is to produce a thing publicly so that it may be taken possession of, or seized. Dig. 10, 4, 2. In medical language, to exhibit signifies to administer, to cause a thing to be taken by a patient. Chit. Med. Jur. 9.

EXHIBITION, *Scotch law*, is an action for compelling the production of writings; in Pennsylvania a party possessing writings is compelled to produce them on a proper notice being given, in default of which judgment is rendered against him.

EXIGENT, or EXIGI FACIAS, *in practice*, is a writ issued in the course of proceedings to outlawry, deriving its name and application from the mandatory words found therein, signifying, "that you cause to be exacted or required;" and it is that proceeding in an outlawry which, with the writ of proclamation, issued at the same time, immediately precedes the writ of *capias utlugatum*.

EXILE, *civil law*, is the interdiction of all places except one in which the party is forced to make his residence. This punishment did not deprive the sufferer of his right of citizenship, or of his property, unless the exile should have been perpetual, in which case confiscation might have been part of the sentence. Exile was temporary or perpetual. Dig. 48, 22, 4; Code, 10, 59, 2. Exile differs from deportation, (q. v.) and relegation, (q. v.) Vide 2 Lev. 191; Co. Litt. 133, a.

EXOINE, *French law*, is an act or instrument in writing, which contains the reasons why a party in a civil suit, or a person accused, who has been summoned, agreeably to the requisitions of a decree, does not appear. Poth. Procéd. Crim. s. 3, art. 3. Vide *Essoin*.

EXONERATION, is the taking off a burden or duty. It is a rule in the distribution of an intestate's estate that the debts which he himself contracted, and for which he mortgaged his land as security, shall be paid out of the personal estate in exoneration of the real. But when the real estate is charged with the payment of a mortgage at the time the intestate buys it, and the purchase is made subject to it, the personal is not in that case to be applied in exoneration of the real estate. 2 Pow. Mortg. 780; 5 Hayw. 57; 3 Johns. Ch. R. 229. But the rule for exonerating the real estate out of the personal, does not apply to the disappointment of specific or pecuniary legatees, nor the widow's right to paraphernalia, and with greater reason not with the interest of creditors. 2 Ves. jr. 64; 1 P. Wms. 693; Ib. 729; 2 Ib. 120, 335; 3 Ib. 367. Vide Pow. Mortg. Index, h. t.

EXPATRIATION, the voluntary act of abandoning one's country and becoming the citizen or subject of another. Citizens of the United States have the right to expatriate themselves until restrained by congress; but it seems that a citizen cannot renounce his allegiance to the United States without the permission of government, to be declared by law. To be legal, the expatriation must be for a purpose which is not unlawful, nor a fraud of the duties at home of the emigrant. A citizen may acquire in a foreign country the commercial privileges attached to his domicil, and be exempted from the operation of commercial acts embracing only persons resident in the United States or under its protection. 2 Cranch, 120; vide Serg. Const. Law, 318, 2d ed.; 2 Kent, Com. 36; Grotius, B. 2, c. 5, s. 24; Puffend. B. 8, c. 11, s. 2, 3; Vattel, B. 1, c. 19, s. 218, 223, 224, 225; Wyckf. tom. i. 117, 119; 3 Dall. 133; 7 Wheat. 342; 1 Pet. C. C.

R. 161; 4 Hall's Law Journ. 461; Bracken. Law Misc. 409; 9 Mass. R. 461.

EXPECTANCY, *estates*, signifies having a relation or dependence upon something future. Estates are of two sorts, either in *possession*, sometimes called estates executed; or in *expectancy*, which are executory. Expectancies are, first, created by the parties, called a *remainder*; or by act of law, called a *reversion*.

EXPECTANT, having relation to, or depending upon something; this word is commonly used with *fee*, as *fee expectant*.

EXPENSÆ LITIS, expenses of the suit, the costs which are generally allowed to the successful party.

EXPERTS, from the Latin *experiens*, which signifies instructed by experience, are persons who are selected by the courts or the parties in a cause on account of their knowledge or skill to examine, estimate and ascertain things, and make a report of their opinions. Merl. Répert. mot Expert; 2 Lois des Bâtimens, 253; 2 N. S. 1; 5 N. S. 557; 3 L. R. 350; 11 L. R. 314; 11 S. & R. 336; Ray, Med. Jur. Prel. Views, § 29.

EXPILATION, *civil law*. The crime of abstracting the goods of a succession. This is said not to be a theft because the property no longer belongs to the deceased, nor to the heir before he has taken possession. In the common law, the grant of letters testamentary or letters of administration relate back to the time of the death of the testator or intestate, so that the property of the estate is vested in him from that period.

EXPORTATION, *commer. law*. The act of sending goods and merchandise from one country to another. In order to preserve equality among the states, in their commercial relations, the constitution provides that "no tax or duty shall be laid on articles exported from any state," art. 1, s. 9. And to prevent a pernicious interference with the commerce of the nation, the 10th section of the 1st article of the constitution contains the following prohibition: "No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress." Vide 12 Wheat. 419; and the article *Importation*.

EXPRESS, that which is made known and not left to implication. The opposite of implied. It is a rule that when a matter or thing is expressed, it ceases to be implied by law; *expressum facit cessare tacitum*. Co. Litt. 183.

EXPRESSION. The term or use of language employed to explain a thing. It is a general rule, that expressions shall be construed, when they are capable of several significations, so as to give operation to the agreement, act or will, if it can be done, and an expression is always to be understood in the sense most agreeable to the nature of the contract. Vide *Clause; Construction; Equivocal; Interpretation; Words*.

EXPROMISSION, *civil law*, is the act by which a creditor accepts a new debtor, who becomes bound instead of the old, the latter being released. It is a species of novation, (q. v.) Vide *Delegation*.

EXPROMISSOR, *civ. law*. By this term is understood the person who alone becomes bound for the debt of another, whether the latter were obligated or not. He differs from a surety, who is bound together with his principal. Dig. 12, 4, 4;

Dig. 16, 1, 13; Id. 24, 3, 64, 4; Id. 38, 1, 37, 8.

EXPULSION of a member of a body politic, corporate, or of a society, is the act of depriving such member of his right of membership therein, by the vote of such body or society, for some violation of his duties as such, or for some offence which renders him unworthy of longer remaining a member of the same. By the constitution of the United States, art. 1, s. 5, § 2, each house may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member. In the case of John Smith, a senator from Ohio, who was expelled from the senate in 1807, the committee made a report which embraces the following points:

1. That the senate may expel a member for a high misdemeanor, such as a conspiracy to commit treason. Its authority is not confined to an act done in its presence.

2. That a previous conviction is not requisite, in order to authorise the senate to expel a member from their body, for a high offence against the United States.

3. That although a bill of indictment against a party for treason and misdemeanor has been abandoned, because a previous indictment against the principal party had terminated in an acquittal, owing to the inadmissibility of the evidence upon that indictment, yet the senate may examine the evidence for themselves, and if it be sufficient to satisfy their minds that the party is guilty of a high misdemeanor, it is a sufficient ground of expulsion.

4. That the 5th and 6th articles of the amendments of the constitution of the United States, containing the general rights and privileges of the citizen as to criminal prosecutions, refer only to prosecutions at law, and do not affect the jurisdiction of the senate as to expulsion.

5. That before a committee of the senate appointed to report an opinion, relative to the honour and privileges of the senate, and the facts respecting the conduct of the member implicated, such member is not entitled to be heard in his defence by counsel, to have compulsory process for witnesses, and to be confronted with his accusers. It is before the senate that the member charged is entitled to be heard.

6. In determining on expulsion, the senate is not bound by the forms of judicial proceedings, or the rules of judicial evidence; nor, it seems, is the same degree of proof essential which is required to convict of a crime. The power of expulsion must, in its nature, be discretionary, and its exercise of a more summary character. 1 Hall's Law Journ. 459, 465.

Corporations have the right of expulsion in certain cases, as such power is necessary to the good order and government of corporate bodies; and the cases in which this inherent power may be exercised are of three kinds: 1. When an offence is committed which has no immediate relation to a member's corporate duty, but is of so infamous a nature, as renders him unfit for the society of honest men; such are the offences of perjury, forgery and the like. But before an expulsion is made for a cause of this kind, it is necessary that there should be a previous conviction by a jury, according to the law of the land. 2. When the offence is against his duty as a corporator, in which case he may be expelled on trial and conviction before the corporation. 3. The third is of a mixed nature, against the member's duty as a corporator, and also indictable by the law of the land. 2 Binn. 448. See also 2 Burr. 536.

Members of what are called joint stock incorporated companies, or indeed members of any corporation

owning property, cannot, without express authority in the charter, be expelled, and thus deprived of their interest in the general fund. Ang. & Ames on Corp. 238.

See, generally, Ang. & Ames on Corp. ch. 11; Willcock on Mun. Corp. 270; 11 Co. 99; 2 Bing. 293; 5 Day, 329; Sty. 478; 6 Conn. R. 532; 6 Serg. & Rawle, 469; 5 Binn. 486.

EXTENSION, *comm. law.* This term is applied among merchants to signify an agreement made between a debtor and his creditors, by which the latter, in order to enable the former, who is somewhat embarrassed in his circumstances, to retrieve his former standing, agree to wait for a definite length of time after their several claims should become due and payable, before they will demand payment; as John Smith & Co. have received an extension. Among the French, a similar agreement is known by the name of atermoiement. Merl. Rép. mot Atermoiement.

EXTENT IN CHIEF, *in English practice*, is an execution issuing out of the exchequer at the suit of the crown. It is a mere fiscal writ. See West on Extents; 2 Tidd, Index.

EXTENT IN AID, *in English practice*, is an exchequer process, formerly much used, and now liable to be abused; it is regulated by 57 Geo. 3, c. 117.

EXTINCTION OF A THING. When a thing which is the subject of a contract has been destroyed, the contract is of course rescinded; as, for example, if Paul sell his horse Napoleon to Peter, and promises to deliver him to the buyer in ten days, and in the mean time the horse dies, the contract is rescinded, as it is impossible to deliver a thing which is not *in esse;* but, if Paul engage to deliver a horse to Peter in ten days, and, for the purpose of fulfilling his contract, he buys a horse, and the horse dies, this is no cause for rescinding the contract, because he can buy another and complete it afterwards; when the subject of the contract is an individual, and not generally one of a species, the contract may be rescinded; when it is one of a species which has been destroyed, then it may still be completed, and it will be enforced. Leç. El. Dr. Rom. § 1009.

EXTINGUISHMENT, *in contracts*, the destruction of a right or contract, the act by which a contract is made void. The extinction of a right; as, when a person becomes owner, either by descent or purchase of an estate subject to the payment of a rent, the latter is extinguished. Vide Co. Litt. 147 b; 1 Roll. Ab. 933; 7 Vin. Ab. 367; 11 Vin. Ab. 461; 18 Vin. Ab. 493 to 515; 2 Nels. Ab. 818; 14 Serg. & Rawle, 209; Bac. Ab. h. t.; 5 Whart. R. 541. Vide *Discharge of a debt.*

EXTORTION, *crimes*, in a large sense signifies any oppression, under colour of right: but in a more strict sense it means the unlawful taking by any officer, by colour of his office, of any money or thing of value that is not due to him, or more than is due, or before it is due. 4 Bl. Com. 141; 1 Hawk. P. C. c. 68, s. 1; 1 Russ. Cr. *144. To constitute extortion, there must be the receipt of money or something of value; the taking a promissory note, which is void, is not sufficient to make an extortion. 2 Mass. R. 523; see Bac. Ab. h. t.; Co. Litt. 168. It differs from exaction, (q. v.) See 6 Cowen, R. 661; 1 Caines, R. 130.

EXTRA-DOTAL PROPERTY. In Louisiana this term is used to designate that property which forms no part of the dowry of a woman, and which is also called paraphernal property. Civ. Co. Lo. art. 2315. Vide *Dotal property.*

EXTRACT is a part of a writing. This is not evidence, because the *whole* of the writing may explain the part extracted so as to give it a different sense.

EXTRADITION, *civil law*, is the act of sending by authority of law, a person accused of a crime to a foreign jurisdiction where it was committed, in order that he may be tried there. Merl. Rép. h. t. By the constitution and laws of the United States fugitives from justice, (q. v.) may be demanded by the executive of one state where the crime has been committed from that of another where the accused is. Const. United States, art. 4, s. 2, 2; 3 Story, Com. Const. U. S. § 1801 et seq. The government of the United States is bound by some treaty stipulations to surrender criminals who take refuge within the country, but independently of such conventions, it is questionable whether criminals can be surrendered. 1 Kent, Com. 36; 4 John. C. R. 106; 1 Amer. Jurist, 297; 10 Serg. & Rawle, 125; 22 Amer. Jur. 330; Story's Confl. of Laws, p. 520; Wheat. Intern. Law. 111.

EXTRAJUDICIAL, that which does not belong to the judge or his jurisdiction, notwithstanding which he takes cognizance of it. Extrajudicial judgments and acts are absolutely void. Vide *Coram non judice*, and Merl. Répert. mots Excés de Pouvoir.

EXTRAVAGANTES, *canon law*. This is the name given to the constitutions of the popes posterior to the Clementines; they are thus called *quasi vagantes extra corpus juris*, to express that they were out of the canonical law, which at first contained only the decrees of Gratian; afterwards the decretals of Gregory IX., the sexte of Boniface VIII., the Clementines, and at last the extravagantes were added to it. There are the extravagantes of John XXII., and the common extravagantes. The first contain twenty epistles, decretals or constitutions of that pope, divided under fifteen titles, without any subdivision into books. The others are epistles, decretals or constitutions of the popes who occupied the holy see either before or after John XXII.; they are divided into books like the decretals.

EXTREMIS. When a person is sick beyond the hope of recovery, and he afterwards dies, he is said to be in extremis. A will made in this state is liable to be impeached; but if made without undue influence by a person of sound mind, it is valid. The declarations of persons in extremis, when made with a full consciousness of approaching death, are admissible in evidence when the death of the person making them is the subject of the charge, and the circumstances of the death the subject of such declarations. 2 B. & C. 605; S. C. 9 Engl. C. L. Rep. 196; and see 15 John. 286; 1 John. Rep. 159; 2 John. R. 31; 7 John. 95; 2 Car. Law Repos. 102; 5 Whart. R. 396, 7.

EY. A watery place; water. Co. Litt. 6.

EYOTT, a small island arising in a river. See *Island*.

EYRE. Vide *Justiciarii Itenerantes*.

F.

F, *punishment, in the English law*, formerly felons were branded and marked with a hot iron, with this letter, on being admitted to the benefit of clergy.

FACT, is an action; a thing

done. It is either simple or compound. A fact is simple when it expresses a purely material act unconnected with any moral qualification; for example, to say Peter went in his house, kissed his children, took a book and went out, is to express four simple facts. A compound fact contains the materiality of the act, and the qualification which that act has in its connexion with morals and with the law. To say, then, that Peter has stolen a horse is to express a compound fact; for the fact of the stealing expresses at the same time, the material fact of taking the horse, and of taking him with the guilty intention of depriving the owner of his property and appropriating it to his own use; which is a violation of the law of property. Fact is also put in opposition to law; in every case which has to be tried there are facts to be established, and the law which bears on those facts. Facts are also to be considered as material or immaterial. Material facts are those which are essential to the right of action or defence, and therefore of the substance of the one or the other—these must always be proved; or immaterial, which are those not essential to the cause of action—these need not be proved. Facts are gènerally determined by a jury; but there are many facts, which not being the principal matters in issue, may be decided by the court; such, for example, whether a subpœna has or has not been served; whether a party has or has not been summoned, &c. As to pleading material facts, see Gould, Pl. c. 3, s. 28. Vide Eng. Ecc. R. 401, 2, and the article *Circumstances*.

FACTO, in fact, in contradistinction to the thing being in law: it is applied to any thing actually done. Vide *Ex post facto*.

FACTOR, *contracts*, is an agent employed to sell goods or merchandise consigned or delivered to him, by, or for his principal, for a compensation, commonly called factorage or commission. Paley on Ag. 13; 1 Liverm. on Ag. 68; Story on Ag. § 33; Com. Dig. Merchant, B; Mal. Lex Merc. 81; Beawes, Lex Merc. 44; 3 Chit. Com. Law, 193; 2 Kent, Com. 622, note (d), 3d ed.; 1 Bell's Com. 385, § 408, 409; 2 B. & Ald. 143. He is also called a commission merchant, or consignee. When he resides in the same state or country with his principal, he is called a home factor; and a foreign factor when he resides in a different state or country, 3 Chit. Com. Law, 193; 1 T. R. 112; 4 M. & S. 576; 1 Bell's Com. 289, § 313. When the agent accompanies the ship taking a cargo abroad, and it is consigned to him for sale, and he is to purchase a return cargo out of the proceeds, such agent is properly called a factor; he is, however, usually known by the name of a supercargo. Beawes, Lex Merc. 44, 47; Liverm. on Ag. 69, 70; 1 Domat, b. 1, t. 16, § 3, art. 2. A factor differs from a broker, in some important particulars, namely; he may buy and sell for his principal in his own name, as well as in the name of his principal; on the contrary, a broker must always buy and sell in the name of his principal. 3 Chit. Com. Law, 193, 210, 541; 2 B. & Ald. 143, 148; 3 Kent, Com. 622, note (d), 3d ed. Again a factor is entrusted with the possession, management, disposal and control of the goods to be bought and sold, and has a special property and a lien on them; the broker, on the contrary, has usually no such possession, management, control or disposal of the goods, nor any such special property nor lien. Paley on Ag. 13, (Loyd's ed.); 1 Bell's Com. 385. Before proceeding further, it will be proper to consider

the difference which exists in the liability of a home or domestic factor and a foreign factor. By the usages of trade, or intendment of law, when *domestic* factors are employed in the ordinary business of buying and selling goods, it is presumed that a reciprocal credit between the principal and the agent and third persons has been given. When a purchase has been made by such a factor, he, as well as his principal, is deemed liable for the debt; and in case of a sale, the buyer is responsible both to the factor and principal for the purchase money; but this presumption may be rebutted by proof of exclusive credit. Story, Ag. § § 267, 291, 293; Paley, Ag. 243, 371; 9 B. & C. 78; 15 East, R. 62. *Foreign* factors, or those acting for principals residing in a foreign country, are held personally liable upon all contracts made by them for their employers, whether they describe themselves in the contract as agents or not. In such cases the presumption is, that the credit is given exclusively to the factor. But this presumption may be rebutted by proof of a contrary agreement. Story, Ag. § 268; Paley, Ag. 248, 373; Bull. N. P. 130; Smith, Merc. Law, 66; 2 Liverm. Ag. 249; 1 B. & P. 368; 15 East, R. 62; 9 B. & C. 78. A factor is liable to duties, which will be first considered; and, afterwards a statement of his rights will be made.

1. *His duties.* He is required to use a reasonable exercise of skill and ordinary diligence in his vocation; in general, he has a right to sell the goods, but he cannot pawn them. He is bound to obey his instructions, but when he has none he may and ought to act according to the general usages of trade; sell for cash, when that is usual, or give credit on sales, when that is customary. He is bound to render a just account to his principal, and to pay him the moneys he may receive for him.

2. *His rights.* He has the right to sell the goods in his own name, and is, for many, if not for all purposes, between himself and third persons, to be considered as the owner of the goods. He may, therefore, recover the price of goods sold by him, in his own name, and consequently he may receive payment and give receipts, and discharge the debtor, unless, indeed, notice has been given by the principal to the debtor not to pay. He has a lien on the goods for advances made by him and for his commissions.

Mr. Bell, in his Commentaries, vol. 1, page 265, (5th ed.) lays down the following rules with regard to the rights of the principal, in those cases in which the goods in the factor's hands have been changed in the course of his transactions.

1. When the factor has sold the goods of his principal, and failed before the price of the goods has been paid, the principal is the creditor, and preferable to the creditors of the factor. Cook's B. L. 4th ed. p. 400.

2. When bills have been taken for the price, and are still in the factor's hands, undiscounted at his failure; or where goods have been taken in return for those sold; the principal is entitled to them, as forming no part of the divisible fund. Willes, R. 400.

3. When the price has been paid in money, coin, bank-notes, &c., it remains the property of the principal, if kept distinct as his. 5 T. R. 277; 2 Burr. 1369; 5 Ves. jr. 169; 2 Mont. B. L. 233, notes.

4. When a bill received for goods, or placed with the factor, has been discounted, or when money coming into his hands has been paid away, the endorsee of the bill, or the person receiving the money, will be free from all claim at the instance of the principal. Vide 1 B. & P. 539, 648.

5. When the factor sinks the name

of the principal entirely; as where he is employed to sell goods, and receives a del credere commission, for which he engages to guaranty the payment to the principal, it is not the practice to communicate the names of the purchasers to the principal, except where the factor fails. Under these circumstances, the following points have been settled. 1. When the factor fails, the principal is the creditor of the buyer, and has a direct action against him for the price. Cook's B. L. 400; and vide Bull. N. P. 42; 2 Stra. 1182. But persons contracting with the factor in his own name, and bona fide, are entitled to set off the factor's debt to them. 7 T. R. 360.—2. Where the factor is entrusted with the money or property of his principal to buy stock, bills, and the like, and misapplies it, the produce will be the principal's, if clearly distinguishable. 3 M. & S. 562.

6. When the factor purchases goods for behoof of his principal, but on his own general current account, without mention of the principal, the goods vest in the factor, and the principal has only an obligation against the factor's estate. But when the factor, after purchasing the goods, writes to his principal that he has bought such a quantity of goods in consequence of his order, and that they are lying in his warehouse, or elsewhere, the property would seem to be vested in the principal.

It may, therefore, be laid down as a general rule, that when the property remitted by the principal, or acquired for him by his order, is found distinguishable in the hands of the factor, capable of being traced by a clear and connected chain of identity, in no one link of it degenerating from a specific trust into a general debt, the creditors of the factor, who has become bankrupt, have no right to the specific property. Much discrimination is requisite in the application of this doctrine, as may be seen by the case of Ex parte Sayers, 5 Ves. jr. 169.

A factor has no right to barter the goods of his principal, nor to pledge them for the purpose of raising money for himself, or to secure a debt he may owe. But he may pledge them for advances made to his principal, or for the purpose of raising money for him, or in order to re-imburse himself to the amount of his own lien. 2 Kent, Com. (3d ed.) 625 to 628; 4 John. R. 103; Story on Bailm. § 325, 326, 327. Another exception to the general rule that a factor cannot pledge the goods of his principal, is, that he may raise money by pledging the goods, for the payment of duties, or any other charge or purpose allowed or justified by the usages of trade. 2 Gall. 13; 6 Serg. & Rawle, 386; Paley on Ag. 217; 3 Esp. R. 182.

The legislature of Pennsylvania, by an act entitled "An act for the amendment of the law relating to factors," passed April 14, 1834, have made the following provisions. This act is here inserted with a belief that it will be found useful to the commercial lawyer of the other states.

§ 1. Whenever, any person intrusted with merchandise, and having authority to sell or consign the same, shall ship or otherwise transmit the same to any other person, such other person shall have a lien thereon—

I. For any money advanced, or negotiable security given by him on the faith of such consignment, to or for the use of the person in whose name such merchandise was shipped or transmitted.

II. For any money or negotiable security received for the use of such consignee by the person in whose name such merchandise was shipped or transmitted.

§ 2. But such lien shall not exist for any of the purposes aforesaid, if such consignee shall have notice by the bill of lading or otherwise, before the time of such advance or receipt, that the person in whose name such merchandise was shipped or transmitted, is not the actual owner thereof.

§ 3. Whenever any consignee or factor, having possession of merchandise, with authority to sell the same, or having possession of any bill of lading, permit, certificate, receipt or order, for the delivery of merchandise, with the like authority, shall deposit or pledge such merchandise or any part thereof, with any other person, as a security for any money advanced or negotiable instrument given by him on the faith thereof; such other person shall acquire by virtue of such contract, the same interest in and authority over the said merchandise, as he would have acquired thereby if such consignee or factor had been the actual owner thereof; *Provided*, That such person shall not have notice by such document or otherwise before the time of such advance or receipt, that the holder of such merchandise or document is not the actual owner of such merchandise.

§ 4. If any person shall accept or take such merchandise or document from any such consignee or factor, in deposit or pledge for any debt or demand previously due by or existing against such consignee or factor, and without notice as aforesaid, and if any person shall accept or take such merchandise or document from any such consignee or factor in deposit or pledge, without notice or knowledge that the person making such deposit or pledge, is a consignee or factor only, in every such case the person accepting or taking such merchandise or document in deposit or pledge, shall acquire the same right and interest in such merchandise as was possessed or could have been enforced by such consignee or factor against his principal at the time of making such deposit or on pledge, and further or other right or interest.

§ 5. Nothing in this act contained shall be construed or taken—

I. To affect any lien which a consignee or factor may possess at law, for the expenses and charges attending the shipment or transmission and care of merchandise consigned, or otherwise intrusted to him.

II. Nor to prevent the actual owner of merchandise from recovering the same from such consignee or factor, before the same shall have been deposited or pledged as aforesaid, or from the assignees or trustees of such consignee or factor, in the event of his insolvency.

III. Nor to prevent such owner from recovering any merchandise so as aforesaid deposited or pledged, upon tender of the money, or of restoration of any negotiable instrument so advanced, or given to such consignee or factor, and upon tender of such further sum of money, or of restoration of such other negotiable instrument, if any, as may have been advanced or given by such consignee or factor to such owner, or on tender of a sum of money equal to the amount of such instrument.

IV. Nor to prevent such owner from recovering, from the person accepting or taking such merchandise in deposit or pledge, any balance or sum of money remaining in his hands as the produce of the sale of such merchandise, after deducting thereout the amount of money or the negotiable instrument so advanced or given upon the security thereof as aforesaid.

§ 6. If any consignee or factor shall deposite or pledge any merchandise or document as aforesaid,

consigned or intrusted to him as a security for any money borrowed, or negotiable instrument received by such consignee or factor, and shall apply and dispose of the same to his own use, in violation of good faith, and with intent to defraud the owner of such merchandise, and if any consignee or factor shall with the like fraudulent intent, apply or dispose of to his own use any money or negotiable instrument, raised or acquired by the sale or other disposition of such merchandise, such consignee or factor shall, in every such case, be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding two thousand dollars, and by imprisonment for a term not exceeding five years.

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

FACTORY, *Scotch law*, is a contract which partakes of a mandate and locatio operandum, and which is in the English and American law books discussed under the title of Principal and Agent. 1 Bell's Com. 259.

FACTUM, a deed; a man's own act and deed. When a man denies by his plea that he made a deed on which he is sued, he pleads *non est factum*, (q. v.) Vide *Deed; Fait.*

FACTUM, *French law*, is a memoir which contains summarily the fact on which a contest has happened, the means on which a party founds his pretensions, with the refutation of the means of the adverse party. Vide *Brief.*

FACULTY, *canon law*. A license; an authority. For example, the ordinary having the disposal of all seats in the nave of a church, may grant this power, which when it is delegated, is called a faculty, to another. Faculties are of two kinds; first, when the grant is to a man and his heirs in gross; secondly, when it is to a person and his heirs, as appurtenant to a house which he holds in the parish. 1 T. R. 429, 432; 12 Co. R. 106.

FACULTY, *Scotch law*, is equivalent to ability or power. The term faculty is more properly applied to a power founded on the consent of the party from whom it springs, and not founded on property. Kames on Eq. 504.

FAILURE. A suspension of payment; a neglect to fulfil commercial pecuniary engagements. According to the French code of commerce, art. 437, every merchant or trader, who suspends payment, is in a state of failure. Vide *Bankruptcy; Insolvency.*

FAILURE, *commercial law*, signifies the situation of a debtor who finds himself in the impossibility of paying his debts. Louis. Code, art. 3522, No. 15. See *Bankrupt; Insolvency; Insolvent.*

FAILURE OF RECORD, *pleading, practice.* When a record is pleaded, and the plaintiff replies *nul tiel* record, upon which the defendant has a day assigned to produce it, if he fail to do it, then he is said to fail of record, and the plaintiff shall have judgment to recover. T. de la Ley.

FAIR. A privileged market. In England fairs are granted by the king's patent. In the United States fairs are almost unknown. They are recognised in Alabama. Aik. Dig. 409, note; and in North Carolina, where they are regulated by statute. 1 N. C. Rev. St. 282. See Domat, Dr. Public, liv. 1, t. 7, s. 3, n. 1.

FAIR PLAY MEN. About the year 1769, there was a tract of country in Pennsylvania, situate between Lycoming creek and Pine creek, in which the proprietaries prohibited the making of surveys, as it was doubtful whether it had or had not been ceded

by the Indians; although settlements there were forbidden, yet adventurers settled themselves there; being without the pale of ordinary authorities, the inhabitants annually elected a tribunal, in rotation, of three of their number whom they denominated *fair play men*, who had authority to decide all disputes as to boundaries. Their decisions were final and enforced by the whole community en masse. Their decisions are said to have been just and equitable. 2 Smith's Laws of Penn. 195; Serg. Land Laws, 77.

FAIR PLEADER. Vide *Beau Pleader*.

FAIT, *conveyancing*, a deed lawfully executed. Com. Dig. h. t.; Cunn. Dict. h. t.

FAITH. Probity; good faith is the very soul of contracts. Faith also signifies confidence, belief; as, full faith and credit ought to be given to the acts of a magistrate while acting within his jurisdiction. Vide *Bona fide*.

FALCIDIAN LAW, *civil law*, is a plebecist made during the reign of Augustus, on the proposition of Falcidius, who was a tribune in the year of Rome, 714. Its principal provision gave power to fathers of families to bequeath three-fourths of their property, but deprived them of the power to give away the other fourth, which was to descend to the heir. The same rule, somewhat modified has been adopted in Louisiana; "donations *inter vivos* or *mortis causa*," says the Civil Code, art. 1480, "cannot exceed two-thirds of the property of the disposer, if he leaves at his decease, a legitimate child; one-half, if he leaves two children; and one-third, if he leaves three or a greater number."

FALSE IMPRISONMENT, *torts*. Any intentional detention of the person of another, not authorised by law, is false imprisonment. It is any illegal imprisonment, without any process whatever, or under colour of process wholly illegal, without regard to any question whether any crime has been committed or a debt due. 1 Chit. Pr. 48. The remedy is, in order to be restored to liberty, by writ of *habeas corpus*; and to recover damages for the injury, by action of trespass vi et armis. To punish the wrong done to the public, by the false imprisonment of an individual, the offender may be indicted. 4 Bl. Com. 218, 219; 2 Burr. 993. Vide Bac. Ab. Trespass, D 3; Dane's Ab. Index, h. t. Vide *Malicious Prosecution; Regular and Irregular Process*.

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

FALSE PRETENCES, *criminal law*, false representations and statements made with a fraudulent design to obtain "money, goods, wares and merchandise," with intent to cheat. This subject may be considered under the following heads: 1. The nature of the false pretence; 2, what must be obtained; 3, the intent.

1. When the false pretence is such as to impose upon a person of ordinary caution, it will doubtless be sufficient. 11 Wend. R. 557; but although it may be difficult to restrain false pretences to such as an ordinarily prudent man may avoid, yet it is not every absurd or irrational pretence which will be sufficient. 2 East, P. C. 828. It is not necessary that all the pretences should be false, if one of them, *per se*, is sufficient to constitute the offence. 14 Wend. R. 547. And although other circumstances may have induced the credit, or the delivery of the property, yet it will be sufficient if the false pretences had such an influence that without them, the credit would not have been

given or the property delivered. 11 Wend. R. 557; 14 Wend. R. 547; 13 Wend. Rep. 87. The false pretences must have been used before the contract was completed. 14 Wend. Rep. 546; 13 Wend. Rep. 311. In North Carolina, the cheat must be effected by means of some token or false contrivance adapted to impose on an ordinary mind. 3 Hawks, R. 620; 4 Pick. R. 178.

2. The wording of the statutes of the several states on this subject is not the same, as to the acts which are indictable. In Massachusetts, the intent must be to obtain "money, goods, wares, merchandise, or other things." Stat. of 1815, c. 136. In New York, the words are "money, goods, or chattels, or other effects." Under this statute it has been holden that obtaining a signature to a note, 13 Wend. R. 87, or an indorsement on a promissory note, 9 Wend. Rep. 190, fell within the spirit of the statute; and that where credit was obtained by false pretence, it was also within the statute. 12 John. R. 292.

3. There must be an intent to cheat or defraud some person. Russ. & Ry. 317; 1 Stark. Rep. 396. This may be inferred from a false representation. 13 Wend. R. 87. The intent is all that is requisite; it is not necessary that the party defrauded should sustain any loss. 11 Wend. R. 18.

FALSE TOKEN. Vide *Token*, and 2 Stark. Ev. 563.

FALSEHOOD is a wilful act or declaration contrary to truth. It is committed either by the wilful act of the party, or by dissimulation, or by words. It is wilful when the owner of a thing sells it twice, by different contracts to different individuals, unknown to them; for in this the seller must wilfully declare the thing is his own, when he knows that is not so. It is committed by dissimulation when a creditor has an understanding with his former debtor, sells the land of the latter, although he has been paid the debt which was due to him. Falsehood by word is committed when a witness swears to what he knows not to be true. Falsehood is usually attendant on Crime. Roscoe, Cr. Ev. 362. A slander must be false to entitle the plaintiff to recover damages. But whether a libel be true or false the writer or publisher may be indicted for it. Bul. N. P. 9; Selw. N. P. 1047, note 6; 5 Co. 125; Hawk. B. 1, c. 73, s. 6. Vide Dig. 48, 10, 31; Ib. 22, 6, 2; Code, 9, 22, 20. It is a general rule that if a witness testifies falsely as to any one material fact, the whole of his testimony must be rejected; but still the jury may consider whether the wrong statement be of such character, as to entitle the witness to be believed in other respects. 5 Shipl. R. 267.

TO FALSIFY, is to prove a thing to be false; as, "to falsify a record," Tech. Dict.; Co. Litt. 104 b. To alter or make false a record. This is punishable at common law. Vide *Forgery*. By the act of congress of April 30, 1790, s. 15, 1 Story's L. U. S. 86, it is enacted, that if any person shall feloniously steal, take away, alter, falsify, or otherwise avoid, any record, writ, process, or other proceedings in any of the courts of the United States, by means whereof any judgment shall be reversed, made void, or not take effect, or if any person shall acknowledge, or procure to be acknowledged, in any of the courts aforesaid, any recognizance, bail, or judgment, in the name or names of any other person or persons not privy or consenting to the same, every such person, or persons, on conviction thereof, shall be fined not exceeding five thousand dollars, or be imprisoned not exceeding seven years, and be whipped not exceeding thirty-nine stripes. *Pro-*

vided nevertheless, that this act shall not extend to the acknowledgment of any judgment or judgments by any attorney or attorneys, duly admitted, for any person or persons against whom any such judgment or judgments shall be had or given.

FALSO RETORNO BREVIUM, *old English law*. The name of a writ which might have been sued out against a sheriff, for falsely returning writs. Cunn. Dict.

FAMILY, *domestic relations*, in a limited sense signifies the father, mother, and children. In a more extensive sense it comprehends all the individuals who live under the authority of another, and includes the servants of the family. It is also employed to signify all the relations who descend from a common ancestor, or who spring from a common root. Louis. Code, art. 3522, No. 16; 9 Ves. 323. In the construction of wills, the word family, when applied to personal property is synonymous with *kindred*, or *relations*. It may, nevertheless, be confined to particular relations by the context of the will, or may be enlarged by it, so that the expression may in some cases mean children, or next of kin, and in others may even include relations by marriage. 1 Rop. on Leg. 115; 1 Hov. Supp. 365, notes 6 and 7, to Brown v. Higgs, 4 Ves. 708; 2 Ves. jr. 110; 3 East, Rep. 172; 5 Ves. 156; 17 Ves. 255; 5 M. & S. 126. Vide article *Legatee*; see Dig. lib. 50, t. 16, l. 195, s. 2.

FAMILY ARRANGEMENTS. This term has been used to signify an agreement made between a father and his son, or between brothers, to dispose of property in a different manner to that which would otherwise take place. In these cases frequently the mere relation of the parties will give effect to bargains otherwise without adequate consideration. 1 Chit. Pr. 67; 1 Turn. & Russ. 13.

FAMILY BIBLE, is a bible containing an account of the births, marriages, and deaths of the members of a family. An entry by a father made in a bible stating that Peter his eldest son was born in lawful wedlock of Maria his wife, at a time specified, is evidence to prove the legitimacy of Peter. 4 Campb. 401. But the entry, in order to be evidence, must be an original entry, and, when it is not so, the loss of the original must be proved before the copy can be received. 6 Serg. & Rawle, 135. See 10 Watts, R. 82.

FAMILY EXPENSES. The sum which it costs a man to maintain a family. Merchants and traders who desire to exhibit the true state of their affairs in their books, keep an exact account of family expenses which in case of failure is very important and at all times proper.

FAMILY MEETINGS, or family council, in Louisiana, are meetings of at least five relations, or in default of relations of minors or other persons on whose interest they are called upon to deliberate, then of the friends of such minors or other persons.

The appointment of the members of the family meeting is made by the judge. The relations or friends must be selected from among those domiciliated in the parish in which the meeting is held; the relations are selected according to their proximity, beginning with the nearest. The relation is preferred to the connection in the same degree, and among relations of the same degree, the eldest is preferred. The under-tutor must also be present. 6 N. S. 455.

The family meeting is held before a justice of the peace or notary public, appointed by the judge for the purpose. It is called for a fixed

day and hour, by citations delivered at least three days before the day appointed for the purpose.

The members of the family meeting, before commencing their deliberations, take an oath before the officer before whom the meeting is held, to give their advice according to the best of their knowledge, touching the interests of the person on whom they are called upon to deliberate. The officer before whom the family meeting is held, must make a particular process-verbal of the deliberations, cause the members of the family meeting to sign it, if they know how to sign, sign it himself, and deliver a copy to the parties that they may have it homologated. Civil Code of Louis. B. 1, tit. 8, c. 1, s. 6, art. 305 to 311; Code Civ. B. 1, tit. 10, c. 2, s. 4.

FARE, signifies a voyage or passage; in its modern application it is, the money paid for a passage.

FARM, *estates*, an indefinite quantity of land, some of which is cultivated. 2 Binn. 238. By the conveyance of a farm will pass a messuage, arable land, meadow, pasture, wood, &c. belonging to or used with it. 1 Inst. 5, a; Touch. 93; 4 Cruise, 321; Bro. Grants, 155; Plowd. 167.

FARMER. One who is lessee of a farm. It is said that every lessee for life or years, although it be but of a small house and land, is called *farmer*. This word implies no mystery except it be that of husbandmen. Cunn. Dict. h. t. In common parlance, a farmer is one who cultivates a farm, whether he be the owner of it or not.

FARO, *crim. law*. There is a species of game called faro table or faro bank which is forbidden by law, in many states; and the persons who keep it for the purpose of playing for money or other valuable thing, may generally be indicted at common law for a nuisance. 1 Rogers's Rec. 66. It is played with cards in this manner: a pack of cards is displayed on the table so that the face of each card may be seen by the spectators. The man who keeps the bank, as it is termed, and who is called the banker, sits by the table with another pack of cards, and a bag containing money, some of which is displayed, or sometimes instead of money *chips* or small pieces of ivory or other substance, are used. The parties who play with the banker, are called punters or pointeurs. Suppose the banker and A, a punter, wish to play for five dollars, the banker shuffles the pack which he holds in his hand while A lays his money intended to be bet, say five dollars, on any card he may choose as aforesaid. The banker then runs the cards alternately in two piles, one on the right the other on the left, until he reaches, in the pack, the card corresponding to that on which A has laid his money. If, in this alternative, the card chosen comes on the right hand, the banker takes up the money; if on the other, A is entitled to five dollars from the banker. Several persons are usually engaged at the same table with the banker. 1 Rog. Rec. 66, note; Encycl. Amer. h. t.

FATHER, *domestic relations*. A man who has a child. A father is the natural guardian of his children, and his duties by the natural law consist in maintaining and educating them during their infancy, and making a necessary provision for their happiness in life; these latter, however, are imperfect duties which the law does not enforce. By law, the father is bound to support his children if of sufficient ability, even though they have property of their own. 1 Bro. C. C. 387; 4 Mass. R. 97; 2 Mass. R. 415. But he is not bound, without some agreement,

to pay another for maintaining them. 9 C. & P. 497; nor is he bound to pay their debts, unless he has authorised them to be contracted. 38 E. C. L. R. 195, n. See 8 Watts, R. 366; 1 Craig. & Phil. 317; *Bind; Mother; Parent;* but this obligation ceases as soon as the child becomes of age, unless he becomes chargeable to the public. 1 Ld. Ray. 699.—The rights of the father are to have authority over his children to enforce all his lawful commands, and to correct with moderation his disobedient children. A father may delegate his power over the person of his child to a tutor or instructor, the better to accomplish the purposes of his education. This power ceases on the arrival of the child at the age of twenty-one years. Generally, the father is entitled to the services of his children during their minority. 4 S. & R. 207.

FATHER, PUTATIVE. Vide *Putative father.*

FATHOM. A measure of length, equal to six feet. Vide *Measure.*

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

1. Faults or negligence are usually divided into, gross, ordinary, and slight: 1. Gross fault or neglect, consists in not observing that care towards others, which a man the least attentive, usually takes of his own affairs. Such fault may, in some cases, afford a presumption of fraud, and in very gross cases it approaches so near, as to be almost undistinguishable from it, especially when the facts seem hardly consistent with an honest intention. But there may be a gross fault without fraud. 2 Str. 1099; Story, Bailm. § 18–22; Toullier, l. 3, t. 3, § 231.—2. Ordinary faults consist in the omission of that care which mankind generally pay to their own concerns; that is the want of ordinary diligence.—3. A slight fault consists in the want of that care which very attentive persons take of their own affairs. This fault assimilates itself, and, in some cases, is scarcely distinguishable, from mere accident, or want of foresight. This division has been adopted by common lawyers from the civil law. Although the civilians generally agree in this division, yet they are not without a difference of opinion. See Pothier, Observation générale, sur le précédent Traité, et sur les suivants; printed at the end of his Traité des Obligations, where he cites Accurse, Alciat, Cujas, Duaren, D'Avezan, Vinnius and Heineccius, in support of this division. On the other side the reader is referred to Thomasius, tom. 2, Dissertationem, page 1006; Le Brun, cited by Jones, Bailm. 27; and Toullier, Droit Civil Français, liv. 3, tit. 3, § 231.

2. These principles established, different rules have been made as to the responsibilities of parties for their faults in relation to their contracts. They are reduced by Pothier to three.

1. In those contracts where the party derives no benefit from his undertaking, he is answerable only for his gross faults.

2. In those contracts where the parties have a reciprocal interest, as in the contract of sale, they are responsible for ordinary neglect.

3. In those contracts where the party receives the only advantage, as in the case of loan for use, he is answerable for his slight fault. Poth. Observ. Générale; Traité des Oblig. § 142; Jones, Bailm. 119; Story, Bailm. 12. See also Ayliffe, Pand. 108; Civ. C. Lou. 3522; 1 Com. Dig. 413; 5 Ib. 184; Wesk. on Ins. 370.

FAVOUR. Bias; partiality; lenity; prejudice. The grand jury are sworn to inquire into all offences which have been committed and of all violations of law, without fear, *favour*, or affection. Vide *Grand Jury*. When a juror is influenced by bias or prejudice so that there is not sufficient ground for a principal challenge, he may nevertheless be challenged for favour. Vide *Challenge*, and Bac. Ab. Juries, (E); Dig. 50, 17, 156, 4; 7 Pet. R. 160.

FEALTY, fidelity, allegiance. Under the feudal system, every owner of lands held them of some superior lord, from whom or from whose ancestors, the tenant had received them. By this connexion the lord became bound to protect the tenant in the enjoyment of the land granted to him; and, on the other hand, the tenant was bound to be faithful to his lord, and defend him against all his enemies. This obligation was called *fidelitas*, or fealty. 1 Bl. Com. 366; 2 Bl. Com. 86; Co. Litt. 67, b.

FEAR, *crim. law*, dread, consciousness of approaching danger. Fear in the person robbed is one of the ingredients required to constitute a robbery from the person, and without this the felonious taking of the property is a larceny. It is not necessary that the owner of the property should be in fear for his own person, but fear of violence to the person of his child, 2 East, P. C. 718; or of his property, Ib. 731; 2 Russ. 72, 2, is sufficient; 2 Russ. 71 to 90. Vide *Putting in fear*, and Ayl. Pand. tit. 12, p. 106.

FEASTS, certain established periods in the Christian church. Formerly the days of the feasts of saints were used to indicate the dates of instruments, and memorable events. 8 Toull. n. 81. These are yet used in England, there they have Easter term, Hilary term, &c.

FEDERAL, *government*. This term is commonly used to express a league or compact between two or more states. In the United States the central government of the Union is federal. The constitution was adopted "to form a more perfect union" among the states, for the purpose of self-protection and for the promotion of their mutual happiness.

FEE FARM, *Eng. law*. Is a perpetual farm or rent. 1 Tho. Co. Litt. 446, n. 5.

FEE FARM RENT, *contracts, Eng. law*. When the lord upon the creation of a tenancy reserves to himself and his heirs, either the rent for which it was before let to farm, or at least one-fourth part of that farm rent. It is called a fee farm rent, because a *farm rent* is reserved upon a grant in fee. 2 Inst. 44.

FEE, FEODUM or FEUDUM, from the French, fief; *in estates*. A fee is an estate which may continue forever. The word fee is explained to signify that the land, or other subject of property, belongs to its owner, and is transmissible, in case of an individual, to those whom the the law appoints to succeed him, under the appellation of heirs; and in case of corporate bodies, to those who are to take on themselves the corporate function; and from the manner in which the body is to be continued, are denominated successors. 1 Co. Litt. 1, 271, b; Wright's Ten. 147, 150; 2 Bl. Com. 104, 106. Estates in fee are of several sorts, and have different denominations, according to their several natures and respective qualities. They may with propriety be divided into, 1, fees simple; 2, fees determinable; 3, fees qualified; 4, fees conditional; and 5, fees tail.

1. A fee simple is an interest which, in reference to the ownership of individuals, is not restrained to any heirs in particular, nor subject to any con-

dition or collateral determination, except the laws of escheat and the canons of descent, by which it may be qualified, abridged or defeated. 1 Co. Litt. 1, b; Plowd. 557; 2 Bl. Com. 104, 106; Hale's Analysis, 74. The word *fee-simple* is sometimes used by the best writers on the law, as contrasted with estates tail. 1 Co. Litt. 19. In this sense, the term comprehends all other fees as well as the estate, properly, and, in strict propriety of technical language, is peculiarly distinguished by this appellation.

2. A *determinable fee* is an interest which may continue forever. Plowd. 557; Shep. Touch. 97. It is a quality of this estate while it falls under this denomination, that it is liable to be determined by some act or event, expressed on its limitation, to circumscribe its continuance, or interfered by the law as bounding its extent; 2 Bl. Com. 109; limitations to a man and his heirs, till the marriage of such a person shall take place, Cro. Jac. 593; 10 Vin. Abr. 133; till debts shall be paid; Fearne, 187; until a minor shall attain the age of twenty-one years; 3 Atk. 74; Ambler, 204; 9 Mod. 28; 10 Vin. Abr. 203; Fearne, 342; are instances of such a determinable fee.

3. *Qualified fee*, is an interest given on its first limitation, to a man and to certain of his heirs, and not to extend to all of them generally, nor confined to the issue of his body. A limitation to a man and *his heirs on the part of his father*, affords an example of this species of estate. Litt. § 354; 1 Inst. 27, a. 220; 1 Prest. on Estates, 449.

4. A *conditional fee*, in the more general acception of the term, is when, to the limitation of an estate, a condition is annexed which renders the estate liable to be defeated. 10 Rep. 95, b. In this application of the term, either a determinable or qualified fee may at the same time be a conditional fee. An estate limited to a man and his heirs, to commence on the performance of a condition, is also frequently described by this appellation. Prest. on Est. 476; Fearne, 9.

5. As to *fee-tail*, see *Tail*.

FEES, *compensation*, are certain perquisites allowed by law to officers concerned in the administration of justice, or in the performance of duties required by law, as a recompense for their labour and trouble. Bac. Ab. h. t. The term fees differs from costs in this, that the former are, as above mentioned, a recompense to the officer for his services, and the latter, an indemnification to the party for money laid out and expended in his suit. 11 S. & R. 248. Vide *Costs; Colour of office; Exaction; Extortion.*

FEIGNED ACTION, *practice*, is an action brought on a pretended right, when the plaintiff has no true cause of action, for some illegal purpose. In a feigned action the words of the writ are true; it differs from *false action*, in which case the words of the writ are false. Co. Litt. 361, sect. 689. Vide *Fictitious action.*

FEIGNED ISSUE, *practice*, is an issue brought by consent of the parties, or the direction of a court of equity, or such courts as possess equitable powers, to determine before a jury some disputed right, which the court had not the power to try. 3 Bl. Com. 452.

FELO DE SE, *criminal law*, a felon of himself; a self-murderer. To be guilty of this offence the deceased must have had the will and intention of committing it, else he committed no crime. As he is beyond the reach of human laws, he cannot be punished; the English law, indeed attempts to inflict a punishment by a barbarous burial of his body, and by forfeiting to the king

the property which he owned, and which would belong to his relations. Hawk. P. C. c. 9; 4 Bl. Com. 189.

FELON, *crimes*, one convicted and sentenced for a felony. A felon is infamous and cannot fill any office or become a witness in any case, unless pardoned, except in cases of absolute necessity for his own preservation and defence, as, for example, an affidavit in relation to the irregularity of a judgment in a cause in which he is a party. 2 Salk. R. 461; 2 Str. 1148; Martin's R. 25; Stark. Ev. part 2, tit. Infamy. As to the effect of a conviction in one state, where the witness is offered in another, see 17 Mass. R. 515; 2 Harr. & M'Hen. R. 120, 378; 1 Harr. & Johns. R. 572.

FELONIOUSLY, *pleadings*;—this is a technical word which must be introduced into every indictment for a felony, charging the offence to have been committed feloniously, no other word, nor any circumlocution will supply its place. Com. Dig. Indictment, G 6; Bac. Ab. Indictment, G 1; 2 Hale, 172, 184; Hawk. B. 2, c. 25, s. 55; Cro. C. C. 37; Burn's Just. Indict. ix.; Williams's Just. Indict. iv.; Cro. Eliz. 193; 5 Co. 121; 1 Chit. Cr. Law, 242.

FELONY, *crimes*, is an offence which occasions a total forfeiture of either lands or goods or both at common law; and to which capital or other punishment may be superadded according to the degree of guilt. 4 Bl. Com. 94, 5; 1 Russ. Cr. *42; 1 Chit. Pract. 14; Co. Litt. 391; 1 Hawk. P. C. ch. 37; 5 Wheat. R. 153, 159.

FEMALE. An animal of the sex which bears young. It is a general rule, that the young of female animals which belong to us, are ours, *nam fœtus ventrem sequitur*. Inst. 2, 1, 19; Dig. 6, 1, 5, 2. The rule is, in general, the same with regard to slaves, but when a female slave comes into a free state, even without the consent of her master, and is delivered of a child, the latter is free. Vide *Feminine; Gender; Masculine*.

FEME, or more properly, FEMME. Woman. This word is frequently used in law. *Baron and feme*, husband and wife; *feme covert* a married woman; *feme sole*, a single woman.

FEME COVERT. A married woman. Coverture subjects a feme covert to some duties and disabilities, and gives her some rights and immunities to which she would not be entitled as a feme sole. These have been considered under the articles, *Marriage*, (q. v.) and *Wife*, (q. v.)

FEME SOLE. A single or unmarried woman. A married woman may sue and be sued at law, and will be treated as a feme sole, when the husband is *civiliter mortuus*, Bac. Ab. Baron and Feme, M; see article, *Parties to Actions*, part 1, section 1, § 7, n. 3; or where, as it has been decided in England, he is an alien and has left the country, or has never been in it. 2 Esp. R. 554; 1 B. & P. 357. And courts of equity will treat a married woman as a feme sole, so as to enable her to sue or be sued whenever her husband has abjured the realm, been transported for felony, or is civilly dead. And when she has a separate property she may sue her husband, in respect of such property, with the assistance of a next friend of her own selection. Story, Eq. Pl. § 61; Story, Eq. Jur. § 1368, and see article *Parties to a suit in equity*, § 1, n. 2.

FEME SOLE TRADER. A married woman who trades and deals on her own account, independently of her husband. By the custom of London a feme covert being a *sole trader*, may sue and be sued in the city courts, as a feme sole, with reference to her transactions in London. Bac.

Ab. Baron and Feme, M. In Pennsylvania where any mariners or others go abroad leaving their wives at shop-keeping, or to work for their livelihood at any other trade, all such wives are declared to be feme sole traders, with ability to sue and be sued, without naming the husbands. Act of February 22, 1718. See Poth. De la puissance du mari, n. 20.

FEMININE. What belongs to the female sex. When the feminine is used, it is generally confined to females; as, if a man bequeathed all his mares to his son, his horses would not pass. Vide *Gender; Man; Masculine.*

FEOD. Vide *Fief* or *Feud.*

FEOFFMENT, *conveyancing*, is a gift of any corporeal hereditaments to another. It also signifies the instrument or deed by which such hereditament is conveyed. This instrument was used as one of the earliest modes of conveyance of the common law. It signified, originally, the grant of a feud or fee; but it became, in time, to signify the grant of a free inheritance in fee, respect being had to the perpetuity of the estate granted, rather than to the feudal tenure. The feoffment was likewise accompanied by livery of seisin. The conveyance by feoffment, with livery of seisin, has long since become obsolete in England, and in this country it has not been used in practice. Cruise, Dig. t. 32, c. 4, s. 3; Touchs. ch. 9; 2 Bl. Com. 20; Co. Litt. 9; 4 Kent, Com. 467; Perk. ch. 3; Com. Dig. h. t.; 12 Vin. Ab. 167; Bac. Ab. h. t. *in pr;* Doct. Plac. 271; Dane's Ab. c. 104, a. 3, s. 4. He who gives or enfeoffs is called the *feoffor;* and the person enfeoffed is denominated the *feoffee.* 2 Bl. Com. 20.

FERÆ BESTIÆ. Wild beasts. See *Animals; Feræ naturæ.*

FERÆ NATURÆ. Of a wild nature. This term is used to designate animals which are not usually tamed. Such animals belong to the person who has captured them only while they are in his power; for if they regain their liberty his property in them instantly ceases, unless they have *animum revertendi*, which is to be known only by their habit of returning. 2 Bl. Com. 386; 3 Binn. 546; Bro. Ab. Propertie, 37; Com. Dig. Biens, F; 7 Co. 17, b; 1 Chit. Pr. 87; Inst. 2, 1, 15; 13 Vin. Ab. 207. Property in animals *feræ naturæ* is not acquired by hunting them and pursuing them; if, therefore, another person kill such animal in the sight of the pursuer, he has a right to appropriate it to his own use. 3 Caines, 175; but if the pursuer brings the animal within his own control, as by entrapping it, or wounding it mortally, so as to render escape impossible, it then belongs to him. Ib. Though if he abandons it, another person may afterwards acquire property in the animal. 20 John. 75. The owner of land has a qualified property in animals feræ naturæ, when in consequence of their inability and youth, they cannot go away. 2 Bl. Com. 394; Bac. Ab. Game. Vide *Whelp.*

FERM or FEARM. By this ancient word is meant land, fundus, (q. v.) and, it is said, houses and tenements may pass by it. Co. Litt. 5 a.

FERRY. A place where persons and things are taken across a river or other stream in boats or other vessels, for hire. In England a ferry is considered a franchise which cannot be set up without the king's license. In most, perhaps all the United States, ferries are regulated by statute. The termini of a ferry are at the water's edge. 15 Pick. R. 254; and see 8 Greenl. R. 367; 4 John. Ch. R. 161; 2 Porter, R. 296; 7 Pick. R. 448; 2 Car. Law Repos. 69; 2 Dev. R. 403; 1 Murph. R. 279; 1 Hayw. R. 457; Vin. Ab.

h. t.; Com. Dig. Piscary B; 6 B. & Cr. 703; 12 East, R. 333; 1 Bail. R. 469; 3 Watts, R. 219; 1 Yeates, R. 167; 9 S. & R. 26.

FERRYMAN. One employed in taking persons across a river or other stream, in boats or other contrivances at a ferry. The owner of a ferry is not considered a ferryman, when it is rented and in the possession of a tenant. Minor, R. 366. Ferrymen are considered as common carriers, and are therefore the legal judges to decide when it is proper to pass over or not. 1 M'Cord, R. 444; Id. 157; 1 N. & M. 19; 2 N. & M. 17. They are to regulate how the property to be taken across shall be put in their boats or flats, 1 M'Cord, 157; and as soon as the carriage is fairly on the drop or slip of a flat, although driven by the owner's servant, it is in possession of the ferryman, and he is answerable. 1 M'Cord's R. 439.

FESTINUM REMEDIUM. A speedy remedy. This is said of those cases where the remedy for the redress of an injury is given without any unnecessary delay. Bac. Ab. Assise, A.

FETTERS, a sort of iron put on the legs of malefactors, or persons accused. When a prisoner is brought into court to plead he shall not be put in fetters. 2 Inst. 315; 3 Inst. 34; 2 Hale, 119; Hawk. b. 2, c. 28, s. 1; Kel.; 10; 1 Chitty's Cr. Law, 417. An officer having arrested a defendant on a civil suit, or a person accused of a crime, has no right to handcuff him unless it is necessary, or he had attempted to make his escape. 4 B. & C. 596; 10 Engl. C. L. Rep. 412, S. C.

FEUD. This word, in Scotland, signifies a combination of kindred to revenge injuries or affronts done to any of their blood.

FEUDAL, a term applied to whatever concerned a feud; as *feudal law; feudal rights.*

FEUDAL LAW. By this phrase is understood a political system which placed men and estates under hierarchical and multiplied distinctions of lords and vassals. The principal features of this system were the following.

The right to all lands was vested in the sovereign. These were parcelled out among the great men of the nation by its chief, to be held of him, so that the king had the *Dominum directum*, and the grantee or vassal, had what was called *Dominum utile.* It was a maxim *nulle terre sans seigneur.* These tenants were bound to perform services to the king, generally of a military character. These great lords again granted parts of the lands they thus acquired, to other inferior vassals, who held under them, and were bound to perform services to the lord.

The principles of the feudal law will be found in Littleton's Tenures; Wright's Tenures; 2 Blackstone's Com. c. 5; Dalrymple's History of Feudal property; Sullivan's Lectures; Book of Fiefs; Spellman, Treatise of Feuds and Tenures; Le Grand Coutumier; the Salic Laws; The Capitularies; Les Etablissemens de St. Louis; Assises de Jerusalem; Poth. Des Fiefs; Merl. Rép. Feodalité; Dolloz, Dict. Feodalité.

In the United States the Feudal law never was in its full vigor, though some of its principles are still retained. "Those principles are so interwoven with every part of our jurisprudence," says Ch. J. Tilghman, 3 S. & R. 447, "that to attempt to eradicate them would be to destroy the whole. They are massy stones worked into the foundation of our legal edifice. Most of the inconveniences attending them have been removed, and the few that remain can be easily removed, by acts of the legislature." See 3 Kent, Com. 509, 4th ed.

FIAR, *in the Scotch law*, is he whose property is burdened with a life-rent. Ersk. Pr. of L. Scot. B. 2, t. 9, s. 23.

FIAT, *in practice*, is an order of a judge, or of an officer, whose authority, to be signified by his signiture, is necessary to authenticate the particular acts.

FICTION OF LAW, is the assumption that a certain thing is true, and which gives to a person or thing, a quality which is not natural to it, and establishes, consequently, a certain disposition, which without the fiction would be repugnant to reason and to truth. It is an order of things which does not exist, but which the law prescribes or authorises; it differs from presumption, because it establishes as true, something which is false; whereas presumption supplies the proof of something true. Dalloz, Dict. h. t. Fictions were invented by the Roman pretors, who, not possessing the power to abrogate the law, were nevertheless willing to derogate from it, under the pretence of doing equity. Fiction is the resourse of weakness, which, in order to obtain its object, assumes as a fact, what is known to be contrary to truth: when the legislator desires to accomplish his object he need not feign, he commands. Fictions of law owe their origin to the legislative usurpations of the bench. 4 Benth. Ev. 300. It is said that every fiction must be framed according to the rules of law, and that every legal fiction must have equity for its object. 10 Co. 42; 10 Price's R. 154; Cowp. 177; and, to prevent their evil effects, they are not allowed to be carried further than the reasons which introduced them necessarily require. 1 Lill. Ab. 610; 2 Hawk. 320. The law abounds in fictions. That an estate is in *abeyance;* the doctrine of *remitter*, by which a party who has been disseised of his freehold, and afterwards acquires a defective title, is remitted to his former good title; that one thing done to-day, is considered as done at a preceding time by the doctrine of *relation;* that because one thing is proved, another shall be presumed to be true, which is the case in all *presumptions;* that the heir, executor and administrator, stand by *representation*, in the place of the deceased; are all fictions of law. "Our various introduction of John Doe and Richard Roe," says Mr. Evans, (Poth. on Ob. by Evans, vol. ii., p. 43,) "our solemn process upon disseisin by Hugh Hunt; our casually losing and finding a ship (which never was in Europe,) in the parish of St. Mary Le Bow, in the ward of Cheap; our trying the validity of a will by an imaginary wager of five pounds; our imagining and compassing the king's death, by giving information which may defeat an attack upon an enemy's settlement in the antipodes; our charge of picking a pocket, or forging a bill with force and arms: of neglecting to repair a bridge, against the peace of our lord the king, his crown and dignity; are circumstances, which, looked at by themselves, would convey an impression of no very favourable nature, with respect to the wisdom of our jurisprudence." Vide 13 Vin. Ab. 209; Merl. Rép. h. t.; Dane's Ab. Index, h. t.; and Rey, des Inst. de l'Angl. tome 2, p. 219, where he severely censures these fictions as absurd and useless.

FICTITIOUS ACTIONS, *practice*, are suits brought on pretended rights. They are sometimes brought, usually on a pretended wager, for the purpose of obtaining the opinion of the court on a point of law. Courts of justice were constituted for the purpose of deciding really existing questions of right between parties, and they are not bound to answer

whatever impertinent questions persons think proper to ask them in the form of an action on a wager. 12 East, 248. Such an attempt has been held to be a contempt of court; and Lord Hardwicke in such a case committed the parties and their attorneys. Rep. Temp. Hardw. 237. See also Comb. 425; 1 Co. 83; 6 Cranch, 147, 8. Vide *Feigned actions*. The court of the king's bench fined an attorney forty pounds for stating a special case for the opinion of the court, the greater part of which statement was fictitious. 3 Barn. & Cr. 597; S. C. 10 E. C. L. R. 193.

FICTITIOUS PAYEE, *contracts*. A supposed person who has no existence. When the name of a fictitious payee has been used, in making a bill of exchange, and it has been indorsed in such name, it is considered as having the effect of a bill payable to bearer, and a bona fide holder ignorant of that fact may recover on it, against all prior parties who were privy to the transaction. 2 H. Bl. 178, 288; 3 T. R. 174, 182, 481; 3 Bro. C. C. 238. Vide *Bills of Exchange*, § 1.

FIDEICOMMISSUM, *civil law*, is a gift which a man makes to another, through the agency of a third person, who is requested to perform the desire of the giver. For example, when a testator writes, "I institute for my heir Lucius Titius," he may add, "I pray my heir Lucius Titius to deliver, as soon as he shall be able, my succession to Caius Scius: *cùm igitur aliquis scripserit Lucius Titius heres esto;* potest adjicere, *rogo te Luci Titi, ut cùm poteris hereditatem meam adire, eam Caio Sceio reddas, restituus.* Inst. 2, 23, 2; vide Code 6, 42. Fideicommissa were abolished in Louisiana by the code. 5 N. S. 302. The *uses* of the common law, it is said, were borrowed from the Roman *fideicommissum*. 1 Cru. Dig. 388; Bac. Read. 19; 1 Madd. Ch. 446, 7.

FIDEJUSSOR, *civil law*, is one who becomes security for the debt of another, promising to pay it in case the principal does not do so. He differs from a co-obligor in this that the latter is equally bound to a debtor with his principal, while the former is not liable till the principal has failed to fulfil his engagement. Dig. 12, 4, 4; Ib. 16, 1, 13; Ib. 24, 3, 64; Ib. 38, 1, 37; Ib. 50, 17, 110; and 14, 6, 20; Hall's Pr. 33; Dunl. Ad. Pr. 300; Clerke's Prax. tit. 63, 4, 5. The obligation of the fidejussor was an accessory contract, for, if the principal obligation was not previously contracted, his engagement then took the name of mandate. Leç. Elem. § 872; Code Nap. 2012.

FIDUCIA, *civil law*, is a contract by which we sell a thing to some one, that is, transmit to him the property of the thing with the solemn forms of emancipation, on condition that he will sell it back to us. This species of contract took place in the emancipation of children, in testaments, and in pledges. Poth. Pand. h. t.

FIDUCIARY. This term is borrowed from the civil law. The Roman laws called a fiduciary heir, the person who was instituted heir, and who was charged to deliver the succession to a person designated by the testament. Merl. Répert, h. t. But Pothier, Pand. vol. 22, h. t., says that *fiduciarius heres* properly signifies the person to whom a testator has sold his inheritance, under the condition that he should sell it to another. Fiduciary may be defined to be, in trust, in confidence. The bankrupt act of the United States, passed August 19, 1841, enables "all persons residing in the United States, owing debts which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or

while acting in any other *fiduciary* capacity," to take the benefit of that act. Sect. 1. See 2 Metc. R. 343.

FIEF or FEUD. In its origin, a fief was a district of country, allotted to one of the chiefs who invaded the Roman empire, as a stipend or reward; with a condition annexed that the possessor should do service faithfully both at home and in the wars, to him by whom it was given. 2 Bl. Com. 45; Encyclopédie, h. t.; Merl. Rép. h. t.

FIERI FACIAS, *practice*, is the name of a writ of execution. It is so called because when writs were in Latin, the words directed to the sheriff, were, *quod fieri facias de bonis et catallis*, &c. that you cause to be made of the goods and chattels, &c. Co. Litt. 290 b. The foundation of this writ is a judgment for debt or damages, and the party who has recovered such a judgment is generally entitled to it, unless he is delayed by the stay of execution which the law allows in certain cases after the rendition of the judgment, or by proceedings in error. This subject will be considered with regard to, 1, the form of the writ; 2, its effects; 3, the manner of executing it.

1. The writ is issued in the name of the government, as required by the constitution, and directed to the sheriff, commanding him that of the goods and chattels (and, where lands are liable for the payment of debts, as, in Pennsylvania, of the lands and tenements) of the defendant, therein named, in his bailiwick, he cause to be levied as well a certain debt of —— dollars, which the plaintiff, (naming him,) in the court of ——, (naming it,) recovered against him, as —— dollars, like money which to the said plaintiff were adjudged for his damages, which he had by the detention of that debt, and that he, (the sheriff,) have that money before the judges of the said court, on a day certain, (being the return day therein mentioned,) to render to the said plaintiff his debt and damages aforesaid, whereof the said defendant is convict. It must be tested in the name of the officer as directed by the constitution or laws; as, "Witness the honourable John B. Gibson, our chief justice, at Philadelphia, the tenth day of October, in the year of our Lord one thousand eight hundred and thirty-nine." It must be signed by the prothonotary, or clerk of the court, and sealed with its seal. The signature of the prothonotary, it has been decided in Pennsylvania, is not indispensable. The amount of the debt, interest, and costs, must also be endorsed on the writ. This form varies as it is issued on a judgment in debt, and one obtained for damages merely. The execution being founded on the judgment must, of course, follow, and be warranted by it. 2 Saund. 72 h, k; Bing. on Ex. 186; hence, where there is more than one plaintiff or defendant, it must be in the name of all the plaintiffs, against all the defendants. 6 T. R. 525. It is either for the plaintiff or the defendant. When it is against an executor or administrator, for a liability of the testator or intestate, it is conformable to the judgment, and must be only against the goods of the deceased, unless the defendant has made himself personally liable by his false pleading, in which case the judgment is *de bonis testatoris si, et si non, de bonis propriis*, and the fieri facias must conform to it. 4 Serg. & Rawle, 394; 18 John. 502; 1 Serg. & Rawle, 453; 1 Dall. 481; and see Tidd's Pr. 933; Com. Dig. Pleader, 2 D. 15; 1 Hayw. 298; 2 Hayw. 112.

2. At common law the writ bound the goods of the defendant or party against whom it was issued, from the teste day; by which must be understood that the writ bound the pro-

perty against the party himself, and all claiming by assignment from, or by representation under him; 4 East, R. 538; so that a sale by the defendant of his goods to a *bona fide* purchaser, did not protect them from a *fieri facias* tested before, although not issued or delivered to the sheriff till after the sale; Cro. Eliz. 174; Cro. Jac. 451; 1 Sid. 271. To remedy this manifest injustice, the statute of frauds, 29 Car. II. c. 3, s. 16, was passed. The principles of this statute have been adopted in most of the states, Griff. Law Reg. answers to No. 38, under No. III. The statute enacts "that no writ of *fieri facias*, or other writ of execution shall bind the property of the goods of the party, against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroners, to be executed; and for the better manifestation of the said time, the sheriffs, &c., their deputies, or agents, shall upon the receipt of any such writ, (without fee for doing the same,) endorse upon the back thereof, the day of the month and year, whereon he or they received the same." Vide 2 Binn. R. 174; 2 Serg. & Rawle, 157; 2 Yeates, 177; 8 Johns. R. 446; 12 Johns. R. 320; 1 Hopk. R. 368; 3 Penna. R. 247; 3 Rawle, 401; 1 Whart. R. 377.

3. The execution of the writ is made by levying upon the goods and chattels of the defendant, or party against whom it is issued; and, in general, seizing a part of the goods in the name of the whole on the premises, is a good seisure of the whole, Ld. Raym. 725; 2 Serg. & Rawle, 142; 4 Wash. C. C. R. 29; but see 1 Whart. Rep. 377. The sheriff cannot break the outer door of a house for the purpose of executing a *fieri facias*, 5 Co. 92; nor can a window be broken for this purpose, W. Jones, 429. See articles *Door; House.* He may, however, enter the house, if it be open, and, being once lawfully entered, he may break open an inner door or chest to seize the goods of the defendant, even without any request to open them. 4 Taunt. 619; 3 B. & P. 223; Cowp. 1. Although the sheriff is authorised to enter the house of the party to search for goods, he cannot enter that of a stranger, for that purpose, without being guilty of a trespass, unless the defendant's goods are actually in the house. Com. Dig. Execution, C 5; 1 Marsh. R. 565. The sheriff may break the outer door of a barn; 1 Sid. 186; S. C. 1 Keb. 689; or of a store disconnected with the dwelling-house, and forming no part of the curtilage. 16 Johns. R. 287. The *fi. fa.* may be executed at any time before, and on the return day, but not on Sunday, where it is forbidden by statute. Wats. on Sheriffs, 173; 5 Co. 92; Com. Dig. Execution, c. 5.

Vide Wats. on Sher. ch. 10; Bing. Ex. c. 1, s. 4; Gilb. on Exec. Index, h. t.; Grah. Pr. 321; Troub. & Hal. Pr. Index, h. t; Com. Dig. Execution, C 4; Process, F 5, 7; Caines's Pr. Index, h. t.; Tidd's Pr. Index, h. t.; Sell. Pr. Index, h. t.

FIERI FECI, *in practice*, is the return which the sheriff, or other proper officer, makes to certain writs, signifying, "I have caused to be made." When the officer has made this return, a rule may be obtained upon him, after the return day, to pay the money into court, and if he withholds payment, an action of debt may be had on the return, or assumpsit for money had and received may be sustained against him. 3 Johns. R. 183.

FIGURES, are numerals. They are either Roman, made with letters of the Alphabet, for example, MDCCLXXVI; or they are Arabic, as follows, 1776. Roman figures may be used in contracts and law

proceedings, and they will be held valid; but Arabic figures, probably owing to the ease with which they may be counterfeited, or altered, have been holden not to be sufficient to express the sum due on a contract; and indictments have been set aside because the day or year was expressed in figures. 13 Vin. Ab. 210; 1 Ch. Rep. 319; S. C. 18 Eng. Com. Law Rep. 95. Bills of exchange, promissory notes, checks and agreements of every description, are usually dated with Arabic figures; it is, however, better to date deeds and other formal instruments, by writing the words at length. Vide 1 Ch. Cr. L. 176; 1 Verm. R. 336; 5 Toull. n. 366; 4 Yeates, R. 278; 2 John. R. 233.

FILACER, FILAZER, or FILIZER, *English law*. An officer of the Court of Common Pleas, so called because he files those writs on which he makes out process.

FILE, *practice*, a thread, a string or wire, upon which writs and other exhibits in courts and offices are fastened or filed, for the more safe keeping and ready turning to the same. The papers put together in order, in bundles and tied, are also called a file. A paper is said to be filed, when it is delivered to the proper officer, and by him received to be kept on file. 13 Vin. Ab. 211.

FILIATION, *civil law*, is the descent of son or daughter with regard to her father, mother, and their ancestors.

FILLEY. A mare not more than one year old. Russ. & Ry. 416; Ib. 494.

FILUM AQUÆ, thread or middle of a water-course, (q. v.)

FILUM VIÆ. The thread or centre of the road. Where a law requires travellers meeting each other on a road to drive their carriages to the right of the centre of the road, the parties are bound to keep on their side of the centre of the worked part of the road, although the whole of the smooth or most travelled path may be upon one side of that centre. 7 Wend. 185.

FIN DE NON RECEVOIR, *French law*. It is an exception or plea founded on law, which without entering into the merits of the cause, shows that the plaintiff has no right to bring it, either because the time during which it ought to have been brought has elapsed, which is called *prescription*, or that there has been a compromise, accord and satisfaction or any other cause which has destroyed the right of action which once subsisted. Poth. Proc. Civ. partie 1, c. 2, s. 2, art. 2. Vide *Exception*.

FINAL, that which puts an end to a thing. It is used in opposition to interlocutory; as, a final judgment, is a judgment which ends the controversy between the parties litigant. 1 Wheat. 355; 2 Pet. 449. See 12 Wheat. 135; 4 Dall. 22; 9 Pet. 1; 6 Wheat. 448; 3 Cranch, 179; 6 Cranch, 51.

FINDER, is one who lawfully comes to the possession of another's personal property, which was then lost. The finder is entitled to certain rights and liable to duties which he is obliged to perform. This is a species of deposit, which as it does not arise *ex contractu*, may be called a *quasi* deposit, and it is governed by the same general rules as common deposits. The finder is required to take the same reasonable care of the property found, as any voluntary depositary *ex contractu*. Doct. & St. Dial. 2, c. 38; 2 Bulst. 306, 312; S. C. 1 Rolle's R. 125; the finder is not bound to take the goods he finds, yet, when he does undertake the custody, he is required to exercise reasonable diligence in preserving the property, and he will be responsible for gross negligence. Some of the old authorities

laid down that "if a man find butter, and by his negligent keeping it putrify; or if a man find garments, and by his negligent keeping they be moth eaten, no action lies." So it is if a man finds goods and lose them again, Bac. Ab. Bailment, D; and in support of this position, Leon. 123, 223; Owen, 141; and 2 Bulstr. 21, are cited. But these cases, if carefully examined, will not, perhaps, be found to decide the point as broadly as it is stated in Bacon. A finder would doubtless be held responsible for gross negligence. On the other hand, the finder of an article is entitled to recover all expenses which have necessarily occurred in preserving the thing found, as if a man were to find an animal, he would be entitled to be reimbursed for his keeping, for advertising in a reasonable manner, that he had found it, and to any reward which may have been offered by the owner for the recovery of such lost thing. Domat, l. 2, t. 9, s. 2, n. 2. Vide Story, Bailm. § 35. And when the owner does not reclaim the goods lost, they belong to the finder. 1 Black. Com. 296; 2 Kent's Com. 290. How far the finder is responsible criminally, see 1 Hill, (N. Y.) Rep. 94.

FINDING, *practice.* That which has been ascertained, as, the finding of the jury is conclusive as to matters of fact.

FINE. This word has various significations. It is employed, 1, to mean a sum of money, which by judgment of a competent jurisdiction, is required to be paid for the punishment of an offence; 2, to designate the amount paid by the tenant, on his entrance, to the lord; 3, to signify a special kind of conveyance.

FINE, *in conveyances, and in practice,* is an amicable composition or agreement of a suit, either actual or fictitious, by leave of the court, by which the lands in question become, or are acknowledged to be, the right of one of the parties. Co. Litt. 120; 2 Bl. Com. 349; Bac. Abr. Fines and Recoveries. A fine is so called, because it puts an *end*, not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter.

The stat. 18 E. 1, called *modus levandi fines,* declares and regulates the manner in which they should be levied and carried on; and that is as follows; 1, the party to whom the land is conveyed or assured, commences an action at law against the other, generally an action of covenant, by suing out a writ of *præcipe* called a writ of covenant, that the one shall convey the lands to the other, on the breach of which agreement the action is brought. The suit being thus commenced, then follows, 2. The *licentia concordi*, or leave to agree to the suit, 3. The *concord* or agreement itself, after leave obtained by the court; this is usually an acknowledgment from the deforciants, that the lands in question are the lands of the complainants; 4. The *note* of the fine, which is only an abstract of the writ of covenant, and the concord; naming the parties, the parcels of land, and the agreement. 5. The foot of the fine or the conclusion of it, which includes the whole matter, reciting the parties, day, year and place, and before whom it was acknowledged or levied.

Fines thus levied, are of four kinds, 1. What in law French is called a fine *sur cognizance de droit, come ceo que il ad de son done;* or a fine upon an acknowledgment of the right of the cognizee, as that which he has of the gift of the cognizor. This fine is called a feoffment of record. 2. A fine *sur cognizance de droit tantum,* or acknowledgment of the right merely. 3. A fine *sur concessit,* is where the cognizor in

order to make an end of disputes, though he acknowledges no precedent right, yet grants to the consignee an estate *de novo*, usually for life or years, by way of a supposed composition. 4. A fine *sur done grant et render*, which is a double fine, comprehending the fine *sur cognizance de droit come ceo*, &c. and the fine *sur concessit*; and may be used to convey particular limitations of estate, and to persons who are strangers, or not named in the writ of covenant, whereas the fine *sur cognizance de droit come ceo*, &c. conveys nothing but an absolute estate, either of inheritance, or at least of freehold. Salk. 340. In this last species of fines, the cognizee, after the right is acknowledged to be in him, grants back again, or renders to the cognizor, or perhaps to a stranger, some other estate in the premises. 2 Bl. Com. 348 to 358. See Cruise on Fines; Vin. Abr. Fine; Sheph. Touch. c. 2; Bac. Ab. Fines and Recoveries; Com. Dig. Fine.

FINE, *in criminal law*, is a pecuniary punishment imposed by a lawful tribunal, upon a person convicted of crime or misdemeanor. See Shep. Touchs. 2; Bac. Abr. Fines and Amercements. The amount of the fine is frequently left to the discretion of the court, who ought to proportion each fine to the offence. To prevent the abuse of excessive fines, the constitution of the United States directs that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Amendm. to the Constitution, art. 8.

FIRE, ACCIDENTAL. It is an uncontrollable fire which arises in consequence of some human agency, without any intention, or which happens by some natural cause without human agency. Whether a fire arise purely by accident, or from any other cause, when it becomes uncontrollable and dangerous to the public, a man may, in general, justify the destruction of a house on fire for the protection of the neighbourhood, for the maxim *salus populi est suprema lex*, applies in such case. 11 Co. 13; Jac. Intr. 122, max. 115. Vide *Accident; Act of God*, and 3 Saund. 422 a, note 2; 3 Co. Litt. 57 a, n. 1; Ham. N. P. 171; 1 Cruise's Dig. 151, 2; 1 Vin. Ab. 215; 1 Rolle's Ab. 1; Bac. Ab. Action on the case, F; 2 Lois des Bâtim. 124; Newl. on Contr. 323; 1 T. R. 310, 708; Amb. 619; 6 T. R. 489.

FIREBOTE, fuel for necessary use; a privilege allowed to tenants to take necessary wood for fuel.

FIRKIN. A measure of capacity, equal to nine gallons.

FIRM. The persons composing a partnership, taken collectively, are called the firm. Sometimes this word is used synonymously with partnership. The name of a firm should be distinct from the names of all other firms. When there is a confusion in this respect, the partners composing one firm may, in some cases, be made responsible for the debts of another. For example, where three persons carried on a trade under the firm of King and Company, and two of those persons with another, under the same firm, carried on another partnership; a bill under the firm, and which was drawn on account of the one partnership, was made the ground of an action of assumpsit against the other. Lord Kenyon was of opinion that this company was liable; that the partner not connected with the company that drew the bill, having traded along with the other partner under that firm, persons taking bills under it, though without his knowledge, had a right to look to him for payment. Peake's N. P. Cas. 80; and see 7 East, R. 210; 2 Bell's Com. 670, 5th ed. But it would seem, 1st, that any act

distinctly indicating credit to be given to one of the partnerships, will fix the election of the creditor to that company; and, 2dly, that making a claim on either of the firms, or, when they are insolvent, on either of the estates, will have the same effect.

When the style of the firm has been agreed upon, for example, John Doe and Company, the partners who sign the name of the firm are required to use such name in the style adopted, and a departure from it, may have the double effect of rendering the individual partner who signs it, personally liable not only to third persons, but to his co-partners. Story, Partn. § 102, 202; and it will be a breach of the agreement, if the partner sign his own name, and add "for himself and partners." Colly. Partn. B. 2, c. 2, § 2; 2 Jac. & Walk. 266.

As a general rule a firm will be bound by the acts of one of the partners in the course of their trade and business, and will be discharged by transactions with a single partner, for example, the payment or satisfaction of a debt by a partner, is a satisfaction and payment by them all, and a release to one partner is a release to them all. Co. Litt. 232 a; 6 T. R. 525. Vide *Partner; Partnership.*

FISC, *civil law.* The treasury of a prince. The public treasury. Hence *to confiscate* a thing, is to appropriate it to the *fisc.*

FISCAL, what belongs to the fisc, or public treasury.

FISH, an animal which inhabits the water exclusively. Fishes in rivers and in the sea are animals *feræ naturæ*, and consequently no one has any property in them until they have been captured; and, like other wild animals, if having been taken they escape, and regain their liberty, the captor loses his property in them. Vide *Feræ Naturæ.* The owner of a fishery in the lower part of the stream cannot construct any contrivance by which to obstruct the passage of fish up the stream. 5 Pick. R. 199.

FISHERY, *estates.* A place where fish may be caught. This term seems to be exclusively applied to a place of drawing a seine, or net. 1 Whart. R. 131, 2. The right of fishery is to be considered as to tide or navigable waters, and to rivers not navigable. A river where the tide ebbs and flows is considered an arm of the sea. The people have a common right to fish in all arms of the sea, creeks, coves, and navigable rivers. In rivers not navigable, that is where there is no flux or reflux of the tide, the right of fishing is incident to the owner of the soil over which the water passes, and to the riperian proprietors, when a stream is owned by two or more. 6 Cowen's R. 369; 5 Mason's R. 191; 4 Pick. R. 145; 5 Pick. R. 199. The rule, that the right of fishery, within his territorial limits, belongs exclusively to the riperian owner, extends alike to great and small streams. The owners of farms adjoining the Connecticut river, above the flowing of the tide, have the exclusive right of fishing opposite their farms, to the middle of the river; although the public have an easement in the river as a public highway, for passing and repassing with every kind of water craft. 2 Conn. R. 481. The right of fishery may exist, not only in the owner of the soil or the riperian proprietor, but also in another who has acquired it by grant or otherwise. Co. Litt. 122 a, n. 7; Schul. Aq. R. 40, 41; Ang. W. C. 184; sed vide 2 Salk. 637. Fisheries have been divided into—

1. *Several fisheries.* A several fishery is one to which the party claiming it has the right of fishing, independently of all others, as that

no person can have a co-extensive right with him in the object claimed, but a partial and independent right in another, or a limited liberty, does not derogate from the right of the owner. 5 Burr. 2814. A several fishery, as its name imports, is an exclusive property; this however is not to be understood as depriving the territorial owner of his right to a several fishery, when he grants to another person permission to fish; for he would continue to be the several proprietor, although he should suffer a stranger a co-extensive right with himself. Woolr. on Wat. 96.

2. *Free fisheries.* A free fishery is said to be a franchise in the hands of a subject, existing by grant or prescription, distinct from an ownership in the soil. It is an exclusive right and applies to a public navigable river, without any right in the soil. 3 Kent, Com. 329. Mr. Woolrych says, that sometimes a free fishery is confounded with a several, sometimes it is said to be synonymous with common, and again treated as distinct from either. Law of Waters, &c. 97.

3. *Common of fishery.* A common of fishery is not an exclusive right, but one enjoyed in common with certain other persons. 3 Kent, Com. 329. A distinction has been made between a common fishery, (*commune piscarium*,) which may mean for all mankind, as in the sea, and a common of fishery, (*communiam piscariæ*,) which is a right, in common with certain other persons, in a particular stream. 8 Taunt. R. 183. Mr. Angell seems to think that *common of fishery* and *free fishery*, are convertible terms. Law of Water Courses, c. 6, s. 3, 4.

These distinctions in relation to several, free, and common of fishery, are not strongly marked, and the lines are sometimes scarcely perceptible. "Instead of going into the black letter books, to learn what was a fishery, and a free fishery, and a several fishery," says Huston, J., "I am disposed to regard our own acts, even though differing from old feudal times." 1 Whart. R. 132. See 14 Mass. R. 488; 2 Bl. Com. 39, 40; 7 Pick. R. 79. Vide, generally, Ang. Wat. Co. Index, h. t.; Woolr. on Wat. Index, h. t.; Schul. Aq. R. Index, h. t.; 2 Hill. Ab. ch. 18, p. 163; Dane's Ab. h. t.; Bac. Ab. Prerogative, B 3; 12 John. R. 425; 14 John. R. 255; 14 Wend. R. 42; 10 Mass. R. 212; 13 Mass. R. 477; 20 John. R. 98; 2 John. R. 170; 6 Cowen, R. 369; 1 Wend. R. 237; 3 Greenl. R. 269; 3 N. H. Rep. 321; 1 Pick. R. 180; 2 Conn. R. 481; 1 Halst. 1; 5 Harr. & Johns. 195; 4 Mass. R. 527; and the articles *Arm of the sea*; *Creek*; *Navigable River*; *Tide*.

TO FIX. To render liable. This term is applied to the condition of special bail; when the plaintiff has issued a *ca. sa.* which has been returned by the sheriff, *non est*, the bail are said to be fixed, unless the defendant be surrendered within the time allowed *ex gratia*, by the practice of the court. 5 Binn. R. 332; Coxe, R. 110; 12 Wheat. R. 604; 4 John. R. 407; 1 Caines, R. 588. The defendant's death after the return is no excuse for not surrendering him during the time allowed *ex gratia*. See *Act of God*; *Death*. In New Hampshire, 1 N. H. Rep. 472, and Massachusetts, 2 Mass. R. 485, the bail are not fixed until judgment against them, on a *scire facias*, or unless the defendant die after the return of *non est* on the execution against him. In North Carolina, the bail are not fixed till judgment against them. 3 Dev. R. 155. When the bail are absolutely fixed, they are responsible.

FIXTURES, *property*, are personal chattels 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. Questions frequently arise as to whether fixtures are to be considered real estate, or a part of the freehold; or whether they are to be treated as personal property. To decide these, it is proper to consider the mode of annexation, the object and customary use of the thing, and the character of the contending parties.

1. The annexation may be actual or constructive; 1st, By actual connexation or annexation is understood every mode by which a chattel can be joined or united to the freehold. The article must not however be laid upon the ground; it must be fastened, fixed or set into the land, or some such erection as is unquestionably a part of the realty. Bull. N. P. 34; 3 East, R. 38; 9 East, R. 215; 1 Taunt. 21; Pothier, Traité des choses, § 1. Locks, iron stoves set in brick-work, posts, and window blinds, afford examples of actual annexation. 2dly, Some things have been held to be parcel of the realty, which are not in a real sense annexed, fixed, or fastened to the freehold; for example, deeds or chattels which relate to the title of the inheritance, go to the heir. Shep. Touch. 469; it is also laid down that deer in a park, fish in a pond, and doves in a dove-house, go to the heir and not to the executor, being, with keys and heir-looms, constructively annexed to the inheritance, Sheph. Touchs. 90; Pothier, Traité des choses, § 1.

2. The general rule is that fixtures once annexed to the freehold, become a part of the realty. But to this rule there are exceptions. These are, 1st, where there is a manifest intention to use the fixtures in some employment distinct from that of the occupier of the real estate; 2dly, where it has been annexed for the purpose of carrying on a trade, 3 East, 88; but the distinction between fixtures for trade and those for agriculture does not, in the United States, seem to have been generally admitted to prevail. 8 Mass. R. 411; 16 Mass. R. 449; 4 Pick. R. 311; and see 2 Peters's Rep. 137. The fact that it was put up for the purposes of trade indicates an intention that the thing should not become a part of the freehold. See 1 H. Bl. 260. But if there was a clear intention that the thing should be annexed to the realty, its being used for the purposes of trade would not perhaps bring the case within one of the exceptions. 1 H. Bl. 260.

3. There is a difference as to what fixtures may or may not be removed, as the parties claiming them stand in one situation or another. These classes of persons will be separately considered.

1st. When the question as to fixtures arises between the executor and the heir. The rule as between these persons has retained much of its original strictness, that the fixtures belong to the real estate, or the heir; but if the ancestor manifested an intention, which is to be inferred from circumstances, that the things affixed should be considered as personalty, they must be so considered, and will belong to the executor. See Bac. Abr. Executors and Administrators; 2 Str. 1141; 1 P. Wms. 94; Bull. N. P. 34.

2dly, As between vendor and vendee. The rule is as strict between these persons as between the executor and the heir; and fixtures erected by the vendor for the purpose of trade and manufactures, as pot-ash kettles for manufacturing ashes, pass to the vendee of the land. 6 Cowen, R. 663; 20 Johns. R. 29. Between mortgagor and mortgagee, the rule seems to be the same as that between vendor and vendee. Amos & F. on

Fixt. 188; 15 Mass. R. 159; 1 Atk. 477.

3dly. Between devisee and executor. On a devise of real estate, things permanently annexed to the realty, at the time of the testator's death, will pass to the devisee. His right to fixtures will be similar to that of the vendee. 2 Barn. & Cresw. 80.

4thly. Between landlord and tenant for years. The ancient rule is relaxed, and the right of removal of fixtures by the tenant is said to be most extensive. 3 East, 38. But his right of removal is held to depend rather upon the question whether the estate will be left in the same condition in which he took it. 4 Pick. R. 311.

5thly. In cases between tenants for life or their executors and the remainder-men or reversioners, the right to sever fixtures seems to be the same as that of the tenant for years. It has been held that the steam engines erected in a colliery, by a tenant for life, should belong to the executor and not to go to the remainder-man. 3 Atk. R. 13.

6thly, In a case between the landlord and a tenant at will, there seems to be no reason why the same privilege of removing fixtures should not be allowed. 4 Pick. R. 511; 5 Pick. R. 487.

The time for exercising the right of removal of fixtures is a matter of importance; a tenant for years may remove them at any time before he gives up the possession of the premises, although it should be after his term has expired, and he is holding over. 1 Barn. & Cres. 79; 2 East, 88. Tenants for life or at will having uncertain interests in the land, may, after the determination of their estates, not occasioned by their own faults, have a reasonable time within which to remove their fixtures. Hence their right to bring an action for them. 3 Atk. 13. In case of their death the right passes to their representatives.

See generally, Vin. Abr. Landlord and Tenant, A; Bac. Abr. Executors, &c. H 3; Com. Dig. Biens, B and C; 2 Chitty's Blacks. 281, n. 23; Pothier, Traité des choses; 4 Co. 63, 64; Co. Litt. 53, a, and note 5, by Hargr.; Moore, 177; Hob. 234; 3 Salk. 368; 1 P. Wms. 94; 1 Atk. 553; 2 Vern. 508; 3 Atk. 13; 1 H. Bl. 259, n; Ambl. 113; 2 Str. 1141; 3 Esp. 11; 2 East, 88; 3 East, 38; 9 East, 215; 3 Johns. R. 468; 7 Mass. 432; 6 Cowen, 665; 2 Kent, Com. 280; Ham. Part. 182; Jurist, No. 19, p. 53.

FLAG OF THE UNITED STATES. By the act entitled, "An act to establish the flag of the United States," passed April 4, 1818, 3 Story's L. U. S., 1667, it is enacted—

§ 1. That from and after the fourth day of July next, the flag of the United States be thirteen horizontal stripes, alternate red and white: that the union be twenty stars, white in a blue field.

§ 2. That, on the admission of every new state into the Union, one star be added to the union of the flag; and that such addition shall take effect on the fourth day of July then next succeeding such admission.

FLEET, *punishment*, *Engl. law*, a place of running water, where the tide or float comes up. A prison in London so called from a river or ditch which was formerly there, on the side of which it stood.

FLETA. The title of an ancient law-book, supposed to have been written by a judge who was confined in the Fleet prison. It is written in Latin, and is divided into six books.

FLIGHT, *crim. law*, is the evading the course of justice, by a man's voluntarily withdrawing himself. 4 Bl. Com. 387. Vide *Fugitive from justice*.

FLORIDA. The name of one of the territorities of the United States of America. It was purchased from Spain by treaty between the United States and Spain, executed at Washington on the twenty-second day of February, in the year one thousand eight hundred and nineteen. Congress established a temporary government for East and West Florida by the act of March 3, 1819, 3 Story's L. U. S. 1745; and by the act of March 30, 1822, lb. 1828, it is enacted, that all the territory ceded by Spain to the United States, known by the name of East and West Florida, shall constitute a territory of the United States.

FLORIN, *comm. law*, a denomination of money, of the United Netherlands. It is computed in the ad valorem duty upon goods, &c. at the rate of forty cents. Act of March 2, 1799, s. 61, 1 Story's L. U. S. 626. Vide *Foreign Coins*.

FLOTSAM or FLOTSAN, a name for the goods which float upon the sea when a ship is sunk, in distinction from *Jetsam*, (q. v.) and *Legan*, (q. v.) Bract. lib. 2, c. 5; 5 Co. 106; Com. Dig. Wreck (A.); Bac. Ab. Court of Admiralty, B.

FŒTICIDE, *med. jur.* Recently this term has been applied to designate the act by which criminal abortion is produced. 1 Beck's Med. Jur. 288. See *Infanticide; Prolicide*.

FŒTUS, *med. jur.*, is the unborn child. The name of embryo is sometimes given to it, but although the terms are occasionally used indiscriminately, the latter is more frequently employed to designate the state of an unborn child during the first three months after conception, and by some until quickening. A fœtus is sometimes described by the homely phrase of *infant in ventre sa mere*. It is sometimes of great importance, particularly in criminal law, to ascertain the age of a fœtus or how far it has progressed towards maturity. There are certain signs which furnish evidence on this subject, the size and weight and the formation of certain parts, as the cartilages, the bones, &c., are the principal. These are not always the same, much of course must depend upon the constitution and health of the mother, and other circumstances which have an influence on the fœtus. The average length and weight of the fœtus at different periods of gestation as deduced by Doctor Beck from various observers, and as found by Maygrier, is here given.

	Length.		Weight.	
	Beck.	Maygrier.	Beck.	Maygrier.
At 30 days	3 to 5 lines.	10 to 12 lines.		9 to 10 grains.
2 months	2 inches.	4 inches.	2 ounces.	5 drachms.
3 do.	3½ inches.	6 inches.	2 to 3 ounces.	2½ ounces.
4 do.	5 to 6 inches.	8 inches.	4 to 5 ounces.	7 to 8 ounces.
5 do.	7 to 9 inches.	10 inches.	9 to 10 ounces.	16 ounces.
6 do.	9 to 12 inches.	12 inches.	1 to 2 pounds.	2 pounds.
7 do.	12 to 14 inches.	14 inches.	2 to 3 pounds.	3 pounds.
8 do.	16 inches.	16 inches.	3 to 4 pounds.	4 pounds.

The discordance apparent between them proves that the observations which have been made, are only an approximation to truth.

It is proper to remark that the Paris pound *poids de marc*, which was the weight used by Maygrier, differs from *avoirdupois* weight used by Dr. Beck. The pound *poids de marc*, of sixteen ounces, contains 9216 Paris grains, whilst the *avoirdupois* contains only 8532.5 Paris grains. The Paris inch is 1.065977 English inch.

Vide, generally, 1 Beck's Med. Jur. 239; 2 Dunglison's Human Physiology, 391; Ryan's Med. Jur. 137; 1 Chit. Med. Jur. 403; 1 Briand, Méd. Lég. prém. partie, c. 4, art. 2; and the articles *Birth; Dead Born; Fœticide; In ventre sa mere; Infanticide; Life;* and *Quick with child.*

FOLCMOTE. The name of a court among the Saxons. It was literally an assembly of the people or inhabitants of the tithing or town; its jurisdiction extended over disputes between neighbours, as to matters of trespass in meadows, corn and the like.

FOLD-COURSE, *Eng. law.* By this phrase is understood land used as a sheep-walk; it also signifies land to which the sole right of folding the cattle of others is appurtenant; sometimes it means merely such right of folding. It is also used to denote the right of folding on another's land, which is called common foldage. Co. Litt. 6 a, note (1); W. Jo. 375; Cro. Car. 432; 2 Vent. 139.

FOOT, a measure of length, containing one-third of a yard, or twelve inches.

FOOT OF THE FINE, *estates, conveyancing*, is the fifth part or conclusion of a fine. It includes the whole matter, reciting the names of the parties, day, year, and place, and before whom it was acknowledged or levied. 2 Bl. Com. 351.

FOR THAT, *pleading.* It is a maxim in law, regulating alike every form of action, that the plaintiff shall state his complaint in positive and direct terms, and not by way of recital. "For that," is a positive allegation; "For that whereas," in Latin "quod cum," (q. v.) is a recital. Hamm. N. P. 9.

FORBEARANCE, *contracts*, is the act by which a creditor waits for the payment of the debt, due him by the debtor, after it has become due. When the creditor agrees to forbear with his debtor, this is a sufficient consideration to support an assumpsit made by the debtor. 4 John. R. 237; 2 Nott & McCord, 133; 2 Binn. R. 510; Com. Dig. Action upon the case upon assumpsit, B 1; Dane's Ab. Index, h. t.; 1 Leigh's N. P. 31; 1 Penna. R. 385; 4 Wash. C. C. R. 148; 5 Rawle's R. 69. Vide *Giving time.*

FORCE, is a power put in motion for some object. It is, 1, actual; or 2, implied.

§ 1. If a person with force break a door or gate for an illegal purpose, it is lawful to oppose force to force; and if one enter the close of another, *vi et armis*, he may be expelled immediately, without a previous request; for there is no time to make a request. 2 Salk. 641; 8 T. R. 78, 357. And see tit. *Battery*, § 2. When it is necessary to rely upon actual force in pleading, as in the case of a forcible entry, the words "*manu forti*," or "with a strong hand," should be adopted. 8 T. R. 357, 378; but in other cases, the words "*vi et armis*," or "with force and arms," is sufficient. Id.

§ 2. The entry into the ground of another, without his consent, is breaking his close, for force is implied in every trespass *quare clausum fregit.* 2 Salk. 641; Co. Litt.

257, b. 161, b. 162. a; 1 Saund. 81, 140, n. 4; 8 T. R. 78, 358; Bac. Abr. Trespass; this Dict. tit. *Close*. In the case of false imprisonment, force is implied, 1 N. R. 255; and the same rule prevails where a wife, a daughter, or servant have been enticed away or debauched, though in fact they consented, the law considering them incapable of consenting. See 3 Wils. 18; Fitz. N. B. 89, O; 5 T. R. 361; 6 East, 387; 2 N. R. 365, 454. In general, a mere nonfeasance cannot be considered as forcible; for where there has been no act, there cannot be force, as in the case of the mere detention of goods without an unlawful taking. 2 Saund. 47, k. l. In general, by force is understood unlawful violence. Co. Litt. 161, b. Vide *Arms*.

FORCED HEIRS, in Louisiana, are those persons whom the testator or donor, cannot deprive of the portion of his estate reserved for them by law except in cases where he has a just cause to disinherit them. Civ. Code of Lo. art. 1482; as to the portion of the estate they are entitled to, see the article *Legitime*. As to the causes for which forced heirs may be deprived of this right, see *Disinherison*.

FORCIBLE ENTRY OR DETAINER, *crim. law*, is committed by unlawfully and violently taking or keeping possession of lands and tenements with menaces, force and arms, and without the authority of law. Com. Dig. h. t. The proceedings in case of forcible entry and detainer, are regulated by statute in the several states, (q. v.) The offence is generally punished by indictment. 4 Bl. Com. 148; 1 Russ. on Cr. 283. A forcible entry and a forcible detainer, are distinct offences, 1 Serg. & Rawle, 124; 8 Cowen, 226. In the civil and French law a similar remedy is given for this offence. The party injured has two actions a criminal or a civil. The action is called *actio interdictum undè vi*. In French *l'action réintegrande*. Poth. Proc. Civ. partie 2, c. 3, art. 3. Vide generally, 3 Pick. 31; 3 Halst. R. 48; 2 Tyler's R. 64; 2 Root's R. 411; Ib. 472; 4 Johns. R. 150; 8 Johns. R. 44; 10 Johns. R. 304; 1 Caines's R. 125; 2 Caines's R. 98; 9 Johns. R. 147; 2 Johns. Cas. 400; 6 Johns. R. 334; 2 Johns. R. 27; 3 Caines's R. 104; 11 John. R. 504; 12 John. R. 31; 13 Johns. R. 158; Ib. 340; 16 Johns. R. 141; 8 Cowen, 226; 1 Coxe's R. 258; Ib. 260; 1 South. R. 125; 1 Halst. R. 396; 3 Ib. 48; 4 Ib. 37; 6 Ib. 84; 1 Yeates, 501; Addis. R. 14, 17, 43, 316, 355; 3 Serg. & Rawle, 418; 3 Yeates, 49; 4 Dall. 212; 4 Yeates, 326; 1 Harr. & McHen. 428; 2 Bay, R. 355; 2 Nott & McCord, 121; 1 Const. R. 325; Cam. & Norw. 337, 340; Com. Dig. h. t.; Vin. Ab. h. t.; Bac. Ab. h. t.; 2 Chit. Pr. 231 to 241. The civil law punished even the owner of an estate, in proportion to the violence used, when he forcibly took possession of it, *a fortiori*, a stranger. Domat, Supp. au Dr. Pub. l. 3, t. 4, s. 3.

FORECLOSURE, *practice*, is a proceeding in chancery, by which the mortgagor's right of redemption of the mortgaged premises is barred or foreclosed forever. This takes place when the mortgagor has forfeited his estate by non-payment of the money due on the mortgage at the time appointed, but still retains the equity of redemption; in such case the mortgagee may file a bill calling on the mortgagor, in a court of equity, to redeem his estate presently, or in default thereof, to be forever foreclosed and barred from any right of redemption.

In some cases, however, the mort-

gagee obtains a decree for a sale of the land, under the direction of an officer of the court, in which case the proceeds are applied to the discharge of encumbrances, according to their privity. This practice has been adopted in Indiana, Kentucky, Maryland, South Carolina, Tennessee and Virginia. 4 Kent, Com. 1180. When it is the practice to foreclose without a sale, its severity is mitigated by enlarging the time of redemption from six months to six months, or for shorter periods, according to the equity arising from the circumstances. Ib. Vide 2 John. Ch. R. 100; 5 Pick. R. 418; 1 Sumn. R. 100; 2 Sumn. R. 401; 7 Conn. R. 152; 5 N. H. Rep. 30; 1 Hayw. R. 482; 5 Han. R. 554; 5 Yerg. 240; 2 Pick. R. 540; 4 Pick. R. 6; 2 Gallis. 154; 9 Cowen's R. 346; 4 Greenl. R. 495.

FOREIGN. That which belongs to another country; that which is strange. Every nation is foreign to all the rest, and the several states of the American union are foreign to each other, with respect to their municipal laws. 2 Wash. R. 282. Vide *Attachment*, for foreign attachment; *Bill of exchange*, for foreign bills of exchange; *Foreign coins; Foreign Judgment; Foreign Laws; Foreigners.*

FOREIGN ATTACHMENT.—Vide *Attachment.*

FOREIGN COINS, *com. law.* The money of foreign nations. Congress have, from time to time, regulated the rates at which certain foreign coins should pass. The acts now in force are the following.

The act of June 25, 1834, 4 Sharsw. cont. of Story's L. U. S. 2373, enacts, sect. 1. That from and after the passage of this act, the following silver coins shall be of the legal value, and shall pass current as money within the United States, by tale, for the payment of all debts and demands, at the rate of one hundred cents the dollar, that is to say, the dollars of Mexico, Peru, Chili, and Central America, of not less weight than four hundred and fifteen grains each, and those re-stamped in Brazil of the like weight, of not less fineness than ten ounces, fifteen pennyweights of pure silver, in the troy pound of twelve ounces of standard silver; and the five franc pieces of France, when of not less fineness than ten ounces and sixteen pennyweights in twelve ounces troy weight of standard silver, and weighing not less than three hundred and eighty-four grains each, at the rate of ninety-three cents each.

The act of June 28, 1834, 4 Sharsw. Cont. of Story's L. U. S. 2377, enacts, sect. 1. That from and after the thirty-first day of July next, the following gold coins shall pass current as money within the United States, and be receivable in all payments, by weight, for the payment of all debts and demands, at the rates following, that is to say: the gold coins of Great Britain, Portugal and Brazil, of not less than twenty-two carats fine, at the rate of ninety-four cents and eight-tenths of a cent per penny-weight; the gold coins of France nine-tenths fine, at the rate of ninety-three cents and one-tenth of a cent per penny-weight; and the gold coins of Spain, Mexico, and Colombia, of the fineness of twenty carats three grains and seven-sixteenths of a grain, at the rates of eighty-nine cents and nine-tenths of a cent per penny-weight.

By the act of March 3, 1823, 3 Story's L. U. S. 1923, it is enacted, sect. 1. That from and after the passage of this act, the following gold coins shall be received in all payments on account of public lands, at the several and respective rates following, and not otherwise, viz.: the gold coins of Great Britain and Portugal, and of their present standard, at the rate of one hundred cents for every twenty-seven grains, or eighty-

eight cents and eight-ninths per pennyweight; the gold coins of France of their present standand, at the rate of one hundred cents for every twenty-seven and a half grains, or eighty-seven and a quarter cents per pennyweight; and the gold coins of Spain of their present standard, at the rate of one hundred cents for every twenty-eight and a half grains, or eighty-four cents per pennyweight.

The act of March, 2, 1799, 1 Story's L. U. S. 573, to regulate the collection of duties on imports and tonnage, sect. 61, (p. 626,) enacts, That the ad valorem rates of duty upon goods, wares, and merchandise, at the place of importation, shall be estimated by adding twenty per cent. to the actual cost thereof, if imported from the Cape of Good Hope, or from any place beyond the same; and ten per cent. on the actual cost thereof, if imported from any other place or country, including all charges; commissions, outside packages, and insurance, only excepted. That all foreign coins and currencies shall be estimated at the following rates; each pound sterling of Great Britain, at four dollars and forty-four cents; each livre tournois of France, at eighteen and a half cents; each florin, or guilder of the United Netherlands, at forty cents; each mark banco of Hamburg, at thirty-three and one-third cents; each rix dollar of Denmark, at one hundred cents; each rial of plate, and each rial of vellon, of Spain, the former at ten cents, the latter at five cents, each; each milree of Portugal, at one dollar and twenty-four cents; each pound sterling of Ireland, at four dollars and ten cents; each tale of China, at one dollar and forty-eight cents; each pagoda of India, at one dollar and ninety-four cents; each rupee of Bengal, at fifty-five cents and one half; and all other denominations of money, in value as nearly as may be to the said rates, or the intrinsic value thereof, compared with money of the United States: *Provided*, That it shall be lawful for the president of the United States to cause to be established fit and proper regulations for estimating the duties on goods, wares, and merchandise, imported into the United States, in respect to which the original cost shall be exhibited in a depreciated currency, issued and circulated under authority of any foreign government.

By the act of July, 14, 1832, s. 16, (4 Sharsw. Cont. of Story's L. U. S. 2326,) the law is changed as to the value of the pound sterling, in calculating the rate of duties. It is thereby enacted, that from and after the said third day of March, one thousand eight hundred and thirty-three, in calculating the rate of duties, the pound sterling shall be considered and taken as of the value of four dollars and eighty cents.

FOREIGN JUDGMENT, *evidence*, *remedies*. A judgment rendered in a foreign state. In Louisiana it has been decided that a judgment rendered by a Spanish tribunal, under the former government of the country, is not a foreign judgment. 4 M. R. 301; Id. 310. The subject will be considered with regard, 1st, to the manner of proving such judgment; and, 2dly, its efficacy.

1. Foreign judgments are authenticated in various ways; 1, by an exemplification certified under the great seal of the state or country where it was rendered; 2, by a copy proved to be a true copy; 3, by the certificate of an officer authorised by law, which certificate must itself, be properly authenticated. 2 Cranch, 238; 2 Caines's R. 155; 5 Cranch, 335; 7 Johns. R. 514; 8 Mass. R. 273; 2 Munf. R. 43; 4 Camp. R. 28; 2 Russ. on Cr. 723. There is a

difference between the judgments of courts of common law jurisdiction and courts of admiralty, as to the mode of proof of judgments rendered by them. Courts of admiralty are under the law of nations; certificates of such judgments with their seals affixed, will therefore be admitted in evidence without further proof. 5 Cranch, 335; 3 Conn. R. 171.

2. A judgment rendered in a foreign country by a court *de jure*, or even a court *de facto*, 4 Binn. 371, in a matter within its jurisdiction, when the parties litigant had been notified and had had an opportunity of being heard, either establishing a demand against the defendant or discharging him from it, is of binding force. 1 Dall. R. 191; 9 Serg. & Rawle, 260; 10 Serg. & Rawle 240; 1 Pet. C. C. R. 155. As to the plea of the act of limitation to a suit on a foreign judgment, see Bac. Ab. h. t.; 2 Vern. 540; 5 John. R. 132; 13 Serg. & Rawle, 395.

For the manner of proving a judgment obtained in a sister state; see the article *Authentication*. For the French law in relation to the force of foreign judgments, see Dalloz, Dict. mot Etranger, art. 6.

FOREIGN LAWS, *evidence*, the laws of a foreign country. They will be considered with regard to, 1, the manner in which they are to be proved; 2, their effect when proved.

1. The courts do not judicially take notice of foreign laws, and they must therefore be proved as facts. Cowp. 174; 3 Esp. C. 163; 3 Campb. R. 166; 2 Dow. & Clark's R. 171; 1 Cranch, 38; 2 Cranch, 187, 236, 237; 6 Cranch, 274; 2 Harr. & John. R. 193; 3 Gill & John. R. 234; 4 Conn. R. 517; 4 Cowen, R. 515, 516, note; Pet. C. C. R. 229; 8 Mass. R. 99; 1 Paige's R. 220; 10 Watts, R. 158. The manner of proof varies according to circumstances; as a general rule the best testimony or proof is required, for no proof will be received which pre-supposes better testimony attainable by the party who offers it. When the best testimony cannot be obtained, secondary evidence will be received. 2 Cranch, 237. Authenticated copies of written laws and other public documents must be produced when they can be procured; but should they be refused by the competent authorities, then inferior proof may be admissible. Ib. When our own government has promulgated a foreign law or ordinance of a public nature as authentic, that is held sufficient evidence of its existence. 1 Cranch, 38; 1 Dall. 462; 6 Binn. 321; 12 Serg. & Rawle, 203. When foreign laws cannot be proved by some mode which the law respects as being of equal authority to an oath, they must be verified by the sanction of an oath. The usual modes of authenticating them are by an exemplification under the great seal of a state; or by a copy proved by oath to be a true copy; or by a certificate of an officer authorised by law, which must, itself, be duly authenticated. 2 Cranch, 238; 2 Wend. 411; 6 Wend. 475; 5 Serg. & Rawle, 523; 15 Serg. & Rawle, 84; 2 Wash. C. C. R. 175. Foreign unwritten laws, customs and usages, may be proved, and are ordinarily proved by parol evidence; and when such evidence is objected to on the ground that the law in question is a written law, the party objecting must show that fact. 15 Serg. & R. 87; 2 L. R. 154. Proof of such unwritten laws is usually made by the testimony of witnesses learned in the law, and competent to state it correctly under oath. 2 Cranch, 237; 1 Pet. C. C. R. 225; 2 Wash. C. C. R. 175; 15 Serg. & R. 84; 4 John. Ch. R. 520; Cowp. 174; 2 Hagg. R. App. 15 to 144. In England certificates of persons in high autho-

rity have been allowed as evidence in such cases. 3 Hagg. Eccl. R. 767, 769. The public seal of a foreign sovereign or state affixed to a writing purporting to be a written edict, or law, or judgment, is, of itself, the highest evidence, and no further proof is required of such public seal. 2 Cranch, 238; 2 Conn. R. 85; 1 Wash. C. C. R. 363; 4 Dall. 413, 416; 6 Wend. 475; 9 Mod. 66. But the seal of a foreign court is not in general evidence without further proof, and it must therefore be established by competent testimony. 3 John. R. 310; 2 Harr. & John. 193; 4 Cowen, 526, n.; 3 East, 221. As courts of admiralty are courts under the laws of nations, their seals will be admitted as evidence without further proofs. 5 Cranch, 335; 3 Conn. 171. This is an exception to the general rule.

The mode of authenticating the laws and records of the several states of the American union, is peculiar, and will be found under the article *Authentication*.

2. The effect of such foreign laws, when proved, is properly referable to the court; the object of the proof of foreign laws, is to enable the court to instruct the jury what is, in point of law, the result from foreign laws, to be applied to the matters in controversy before them. The court are therefore to decide what is the proper evidence of the laws of a foreign country; and when evidence is given of those laws, the court are to judge of their applicability to the matter in issue. Story, Confl. of L. § 638; 2 Harr. & John. 193, 219; 4 Conn. R. 517; 3 Harr. & John. 234, 242; Cowp. 174. Vide *Opinion*.

FOREIGN NATION or STATE. Is a nation totally independent of the United States of America. The constitution authorises congress to regulate commerce with "foreign nations." This phrase does not include an Indian tribe, situated within the boundaries of a state, and exercising the powers of government and sovereignty. 5 Pet. R. 1. Vide *Nation*.

FOREIGN PLEA, is one which, if true, carries the cause out of court where it is brought, by showing that the matter alleged is not within its jurisdiction. 2 Lill. Pr. Reg. 374; Carth. 402; Lill. Ent. 475. It must be on oath and before imparlance. Bac. Ab. Abatement, R.

FOREIGNERS. Aliens; persons born in another country than the United States, who have not been naturalized. 1 Pet. R. 349. Vide 8 Com. Dig. 615, and the articles *Alien; Citizens*.

FOREJUDGED THE COURT. An officer of the court who is expelled the same, is, in the English law, said to be forejudged the court. Cunn. Dict. h. t.

FOREMAN. The title of the presiding officer of a grand jury.

FORESTALLING, *crim. law*. Every practice or device, by act, conspiracy, words, or news, to enhance the price of victuals or other provisions. 3 Inst. 196; Bac. Ab. h. t.; 1 Russ. Cr. 169; 4 Bl. Com. 158. All endeavours whatever to enhance the common price of any merchandize, and all kinds of practices which have that tendency, whether by spreading false rumours, or by buying things in a market before the accustomed hour, are offences at common law, and come under the notion of forestalling, which includes all kinds of offences of this nature. Hawk. P. C. b. 1, c. 80, s. 1; vide 13 Vin. Ab. 430; Dane's Ab, Index, h. t.; 4 Com. Dig. 391; 1 East, Rep. 143.

FORFEITURE, *punishments, torts*. 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 become vested in the party injured, as a recompense for the wrong which he alone, or the public together with himself, hath sustained. 2 Bl. Com. 267. Lands, tenements, and hereditaments may be forfeited by various means: 1. By the commission of crimes and misdemeanors; 2. By alienation contrary to law; 3. By the non-performance of conditions; 4. By waste.

1. *Forfeiture for crimes.* By the constitution of the United States, art. 3, s. 3, it is declared, that no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted. And by the act of April 30, 1790, s. 24, 1 Story's Laws U. S. 88, it is enacted, that no conviction or judgment for any of the offences aforesaid, shall work corruption of blood, or any forfeiture of estate. As the offences punished by this act are of the blackest dye, including cases of treason, the punishment of forfeiture may be considered as being abolished. The forfeiture of the estate for crimes is very much reduced in practice in this country, and when it occurs, the state takes the title the party had, and no more. 4 Mason's R. 174; Dalrymple on Feudal Property, c. 4, p. 145-154; Fost. C. L. 95.

2. *Forfeiture by alienation.* By the English law, estates less than a fee may be forfeited to the party entitled to the residuary interest by a breach of duty in the owner of the particular estate. When a tenant for life or years, therefore, by feoffment, fine, or recovery, conveys a greater estate than he is by law entitled to do, he forfeits his estate to the person next entitled in remainder or reversion. 2 Bl. Com. 274. In this country such forfeitures are almost unknown, and the more just principle prevails, that the conveyance by the tenant operates only on the interest which he possessed, and does not affect the remainder-man or reversioner. 4 Kent, Com. 81, 82, 424; 1 Hill. Ab. c. 4, s. 25 to 34; 3 Dall. Rep. 486; 5 Ohio, R. 30.

3. *Forfeiture by non-performance of conditions.* An estate may be forfeited by a breach or non-performance of a condition annexed to the estate, either expressed in the deed at its original creation, or impliedly by law, from a principle of natural reason. 2 Bl. Com. 281; and see Ad. Eject. 140 to 173. Vide article *Re-entry;* 12 Serg. & Rawle, 190.

4. *Forfeiture by waste.* Waste is also a cause of forfeiture. 2 Bl. Com. 283. Vide article *Waste.*

Vide, generally, 2 Bl. Com. ch. 18; 2 Kent's Com. 318; 4 Ib. 422; 10 Vin. Ab. 371, 394; 13 Vin. Ab. 436; Bac. Ab. Forfeiture; Com. Dig. h. t.; Dane's Ab. h. t.; 1 Bro. Civ. L. 252; 4 Bl. Com. 382; and Considerations on the law of forfeiture for High Treason, London ed. 1746.

FORGERY, *crim. law* Forgery at common law has been held to be "the fraudulent making and alteration of a writing to the prejudice of another man's right." 4 Bl. Com. 247. By a more modern writer, it is defined, as "a false making; a making malo animo, of any written instrument, for the purpose of fraud and deceit." 2 East, P. C. 852. This offence at common law is of the degree of a misdemeanor. There are many kind of forgery, especially subjected to punishment by statutes enacted by the national and state legislatures. The subject will be considered, with reference, 1, to the making or alteration requisite to constitute forgery; 2, the written instruments in respect of which forgery may be committed; 3, the fraud and deceit to the prejudice of another man's right; 4, the statutory provi-

sions under the laws of the United States, on the subject of forgery.

1. The making of a whole written instrument in the name of another with a fraudulent intent is undoubtedly a sufficient making; but a fraudulent insertion, alteration or erasure, even of a letter, in any material part of the instrument, whereby a new operation is given to it, will amount to a forgery; and this, although it be afterwards executed by a person ignorant of the deceit. 2 East, P. C. 855. The fraudulent application of a true signature to a false instrument for which it was not intended, or *vice versa*, will also be a forgery. For example, it is forgery in an individual who is requested to draw a will for a sick person in a particular way, instead of doing so, to insert legacies of his own head, and then procuring the signature of such sick person to be affixed to the paper without revealing to him the legacies thus fraudulently inserted. Noy, 101; Moor, 759, 760; 3 Inst. 170; 1 Hawk. c. 70, s. 2; 2 Russ. on Cr. 318; Bac. Ab. h. t. (A). It has even been intimated by Lord Ellenborough, that a party who makes a copy of a receipt, and adds to such copy material words not in the original, and then offers it in evidence on the ground that the original has been lost, may be prosecuted for forgery. 5 Esp. R. 100. It is a sufficient making where in the writing the party assumes the name and character of a person in existence. 2 Russ. 327. But the adoption of a false *description* and *addition*, where a false name is not assumed, and there is no person answering the description, it is not a forgery. Russ. & Ry. 405. Making an instrument in a fictitious name, or the name of a non-existing person, is equally a forgery, as making it in the name of an existing person, 2 East, P. C. 957; 2 Russ. on Cr. 328; and although a man may make the instrument in his own name, if he represent it as the instrument of another of the same name, when in fact there is no such person, it will be a forgery in the name of a non-existing person, 2 Leach, 775; 2 East, P. C. 963; but the correctness of this decision has been doubted. Rosc. Cr. Ev. 384. Though in general a party cannot be guilty of forgery by a mere *non-feasance*, yet if in drawing a will he should fraudulently omit a legacy which he had been directed to insert, and by the omission of such bequest, it would cause a material alteration in the limitation of a bequest to another, as where the omission of a devise of an estate for life to one, causes a devise of the same lands to another to pass a present estate, which would otherwise have passed a remainder only, it would be a forgery. Moor, 760; Noy, 101; 1 Hawk. c. 70, s. 6; 2 East, P. C. 856; 2 Russ. on Cr. 320. It may be observed that the offence of forgery may be complete without a publication of the forged instrument. 2 East, P. C. 855; 3 Chit. Cr. L. 1038.

2. With regard to the thing forged, it may be observed that it has been holden to be forgery at common law fraudulently to falsify, or falsely make records and other matters of a public nature, 1 Rolle's Ab. 65, 68; a parish register, 1 Hawk. c. 70; a letter in the name of a magistrate, the governor of a gaol, directing the discharge of a prisoner, 6 Car. & P. 129; S. C. 25 Eng. C. L. R. 315. With regard to private writings, it is forgery fraudulently to falsify or falsely make a deed or will, 1 Hawk. b. 1, c. 70, s. 10; or any private document, whereby another person may be prejudiced. 2 Greenl. Rep. 365; Addis. R. 33; 2 Binn. R. 322; 2 Russ. on Cr. b. 4, c. 32, s. 2; 2 East, P. C. 861; 3 Chit. Cr. Law, 1022 to 1038.

3. The intent must be to defraud another, but it is not requisite that any one should have been injured; it is sufficient that the instrument forged might have proved prejudicial. 3 Gill & John. 220; 4 W. C. C. R. 726. It has been holden that the jury ought to infer an intent to defraud the person who would have to pay the instrument, if it were genuine, although from the manner of executing the forgery, or from the person's ordinary caution, it would not be likely to impose upon him, and although the object was general to defraud whoever might take the instrument, and the intention of defrauding in particular, the person who would have to pay the instrument, if genuine, did not enter into the contemplation of the prisoner. Russ. & Ry. 291; vide Russ. on Cr. b. 4, c. 32, s. 3; 2 East, P. C. 853; 1 Leach, 367; 2 Leach, 775; Rosc. Cr. Ev. 400.

4. Perhaps each of the states in the union has passed laws making certain acts to be forgery, and the national legislature has also enacted several on this subject, which are here referred to. Act of March 2, 1803, 2 Story's L. U. S. 888; Act of March 3, 1813, 2 Story's L. U. S. 1304; Act of March 1, 1823, 3 Story's L. U. S. 1889; Act of March 3, 1825, 3 Story's L. U. S. 2003; Act of October 12, 1837, 9 Laws U. S. 696.

The term forgery, is also applied to the making of false or counterfeit coin. For the law respecting the forgery of coin, see article *Money*. And for the act of congress punishing forgery in the District of Columbia, see 4 Sharsw. cont. of Story's Laws U. S. 2234.

Vide, generally, Hawk, b. 1, c. 51 and 70; 3 Chit. Cr. Law, 1022 to 1048; 4 Bl. Com. 247 to 250; 2 East, P. C. 840 to 1003; 2 Russ. on Cr. b. 4, c. 32; 13 Vin. Ab. 459; Com. Dig. h. t.; Dane's Ab. h. t.; Williams's Just. h. t.; Burn's Just. h. t.; Rosc. Cr. Ev. h. t.; Stark. Ev. h. t. Vide article *Frank*.

FORM, *practice*, is the model of an instrument or legal proceeding, containing the substance and the principal terms, to be used in accordance with the laws; or, it is the act of pursuing, in legal proceedings, and in the construction of legal instruments, the order required by law. Form is usually put in contradistinction to substance. For example, by the operation of the statute of 27 Eliz. c. 5, s. 1, all merely formal defects in pleading, except in dilatory pleas, are aided on general demurrer. The difference between matter of form, and matter of substance, in general, under this statute, as laid down by Lord Hobart, is that "*that* without which *the right* doth sufficiently appear to the court, is *form*;" but that any defect, "by reason whereof the *right appears not*," is a defect in substance. Hob. 233. A distinction somewhat more definite, is, that if the *matter* pleaded be in itself insufficient, without reference to the manner of pleading it, the defect is substantial; but that if the fault is in the manner of alleging it, the defect is formal. Dougl. 683. For example, the omission of a consideration in a declaration in assumpsit; or of the performance of a condition precedent, when such condition exists; of a conversion of property of the plaintiff, in trover; of science in the defendant, in an action for mischief done by his dog; of malice, in action for malicious prosecution, and the like, are all defects in *substance*. On the other hand duplicity; a negative pregnant; argumentative pleading; a special plea, amounting to the general issue; omission of a day, when time is immaterial; of a place, in transitory actions, and the like, are only faults in form. Bac. Ab. Pleas,

&c. N. 5, 6; Com. Dig. Pleader, Q 7; 10 Co. 95 a; 2 Str. 694; Gould, Pl. c. 9, § 17, 18; 1 Bl. Com. 142. At the same time that fastidious objections against trifling errors of form, arising from mere clerical mistakes, are not encouraged or sanctioned by the courts, it has been justly observed, that "infinite mischief has been produced by the facility of the courts in overlooking matters of form; it encourages carelessness, and places ignorance too much upon a footing with knowledge amongst those who practice the drawing of pleadings." 1 B. & P. 59.

FORMA PAUPERIS, *English law;* when a person is so poor that he cannot bear the charges of suing at law or in equity, upon making oath that he is not worth five pounds, and bringing a certificate from a counsellor at law, that he believes him to have a just cause, he is permitted to sue *in forma pauperis*, in the manner of a pauper; that is, he is allowed to have original writs and subpœnas gratis, and counsel assigned him without fee. 3 Bl. Com. 400. See 3 John. Ch. R. 65; 1 Paige, R. 588; 3 Paige, R. 273; 5 Paige, R. 58; 2 Moll. R. 475; 1 Beat. R. 54.

FORMEDON, *old Eng. law.* The writ of formedon is nearly obsolete, it having been superseded by the writ of ejectment. Upon an alienation of the tenant in tail, by which the estate in tail is discontinued, and the remainder or reversion is by the failure of the particular estate displaced, and turned into a mere right, the remedy is by action of formedon, (*secundum formam doni*,) because the writ comprehends the *form* of the *gift*. This writ is in the nature of a writ of right, and the action of formedon is the highest a tenant in tail can have. This writ is distinguished into three species; a *formedon* in the *descender*, in the *remainder*, and in the *reverter*. 3 Bl. Com. 191; Bac. Ab. h. t.

FORMER RECOVERY. A recovery in a former action. It is a general rule, that in a real or personal action a judgment, unreversed, whether it be by confession, verdict, or demurrer is a perpetual bar, and may be pleaded to any new action of the same or a like nature. Bac. Ab. Pleas, I 12, n. 2; 6 Co. 7; Hob. 4, 5; Ventr. 170. There are two exceptions to this general rule, 1. The case of mutual dealings between the parties, when the defendant omits to set off his counter demand, in that case he may recover in a cross action; 2. When the defendant in ejectment neglects to bring forward his title, he may avail himself of a new suit. 1 John. Cas. 492, 502, 510. It is evident that in these cases the cause of the second action is not the same as that of the first, and, therefore, a former recovery cannot be pleaded. In real actions, one is not a bar to an action of a higher nature. 6 Co. 7. Vide 12 Mass. 338; *Res Judicata; Thing Adjudged.*

FORMULARY, a book of forms or precedents for matters of law; the form.

FORNICATION, *crim. law*, is the unlawful carnal knowledge of an unmarried person with another, whether the latter be married or unmarried; when the party is married, the offence as to him or her, is known by the name of adultery, (q. v.) Fornication is however included in every case of adultery, as a larceny is included in robbery. 2 Hale's P. C. 302.

FORPRISE, taken before hand. This word is sometimes, though but seldom, used in leases and conveyances, implying an exception or reservation. Forprise, in another sense, is taken for any exaction. Cunn. Dict. h. t.

TO FORSWEAR, *crim. law*,

torts. To swear to a falsehood. This word has not the same meaning as perjury. It does not *ex vi termini* signify a false swearing before an officer or court having authority to administer an oath, on an issue. A man may be forsworn by making a false oath before an incompetent tribunal as well as before a lawful court. Hence to say that a man is forsworn will or will not be slander, as the circumstances show that the oath was or was not taken before a lawful authority. Cro. Car. 378; Lut. 1292; 1 Rolle, Ab. 39, pl. 7; Bac. Ab. Slander, B 3; Cro. Eliz. 609; 13 Johns. R. 80; Ib. 48; 12 Mass. 496; 1 Johns. R. 505; 2 Johns. R. 10; 1 Hayw. R. 116.

FORTHWITH. When a thing is to be done forthwith, it seems that it must be performed as soon as by reasonable exertion, confined to that object, it may be done. This is the import of the term; it varies of course with every particular case. 4 Tyr. 837.

FORTIORI or *à fortiori*, an epithet for any conclusion or inference, which is much stronger than another. "If it be so, in a feoffment, passing a new right, *à fortiori*, *much more* is it for the restitution of an ancient right." Co. Litt. 253, 260.

FORTUITOUS EVENT, a term in the civil law to denote that which happens by a cause which cannot be resisted, Louis. Code, art. 2522, No. 7; or it is that which neither of the parties has occasioned or could prevent. Lois des Bât. Pt. 2, c. 2, § 1. It is also defined to be an unforeseen event which cannot be prevented. Dict. de Jurisp. Cas fortuit. There is a difference between a fortuitous event or inevitable accident and irresistible force; by the former commonly called the act of God, is meant any accident produced by physical causes, which are irresistible; such as a loss by lightning or storms, by the perils of the seas, by inundations and earthquakes, or by sudden death or illness. By the latter is meant such an interposition of human agency, as is, from its nature and power absolutely uncontrollable. Of this nature are losses occasioned by the inroads of a hostile army, or by public enemies. Story on Bailm. § 25; Lois des Bât. Pt. 2, c. 2, § 1.

Fortuitous events are fortunate or unfortunate. The accident of finding a treasure is a fortuitous event of the first class. Lois des Bât. Pt. 2, c. 2, § 2.

Involuntary obligations may arise in consequence of fortuitous events; for example, when to save a vessel from shipwreck, it is necessary to throw goods overboard, the loss must be borne in common; there arises in this case between the owners of the vessel and of the goods remaining on board, an obligation to bear proportionably the loss which has been sustained. Lois des Bât. Pt. 2, c. 2, § 2.

See, in general Dig. 50, 17, 23; Id. 16, 3, 1; Id. 19, 2, 11; Id. 44, 7, 1; Id. 18, 6, 10; Id. 13, 6, 18; Id. 26, 7, 50; *Act of God; Accident; Perils of the sea.*

FORUM, signifies jurisdiction, a court of justice, a tribunal. The French divide it into *forum exterior*, which is the authority which human justice exercises on persons and property, to a greater or lesser extent, according to the quality of those to whom it is entrusted; and *interior forum*, which is the moral sense of justice which a correct conscience indicates. Merlin, Répert. mot For.

FORWARDING MERCHANT, *in contracts*, is a person who receives and forwards goods, 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 wagons, by which they are trans-

ported, and no interest in the freight; such an one is not deemed a common carrier, but a mere warehouseman or agent. 12 Johns. 232; 7 Cowen's R. 497. He is required to use only ordinary diligence in sending the property by responsible persons. 2 Cowen's R. 593.

FOUNDLING, a new born child abandoned by its parents, who are unknown, and found by another. The settlement of such a child is in the place where found.

FOURCHER, *English law*, a French word which means to fork. Formerly when an action was brought against two, who, being jointly concerned, were not bound to answer till both appeared, and they agreed not to appear both in one day; the appearance of one excused the other's default, who had a day given him to appear with the other, the defaulter on the day appointed appeared, but the first then made default; in this manner they forked each other, and practiced this for delay. Vide 2 Inst. 250.

FRACTION, signifies, in arithmetic and algebra, a combination of numbers representing one or more parts of a unit or integer; thus four-fifths is a fraction, formed by dividing a unit into five equal parts, and taking one part four times. In law, the term fraction is usually applied to the division of a day. In general there are no fractions in days, Co. Litt. 225; 2 Salk. 625; but in some cases a fraction will be taken into the account in order to secure a party his rights. 3 Chit. Pr. 111; 8 Ves. 80; 4 Campb. 197; 2 B. & Ald. 586; Rob. Dig. of Engl. statutes in force in Pennsylvania, 431, 2, and when it is required by a special law. Vide article *Date*.

FRANC, *comm. law*. The name of a French coin. Five franc pieces when not of less fineness than ten ounces and sixteen pennyweight in twelve ounces troy weight of standard silver, and weighing not less than three hundred and eighty-four grains each, are made a legal tender at the rate of ninety-three cents each. Act of June 25, 1834, s. 1, 4 Sharsw. cont. of Story's L. U. S. 2373. See *Foreign coins*.

FRANCHISE. This word has several significations; 1 it is a right reserved to the people by the constitution, hence we say the elective franchise, to designate the right of the people to elect their officers. 2. It is a certain privilege conferred by grant from the government, and vested in individuals. Corporations, or bodies politic, are the most usual franchises known to our law. They have been classed among incorporeal hereditaments, perhaps improperly, as they have no inheritable quality. In England franchises are very numerous; they are said to be royal privileges in the hands of a subject. Vide 3 Kent, Com. 366; Cruise, Dig. tit. 27; 2 Bl. Com. 37; 15 Serg. & Rawle, 130; Finch, 164.

FRANK. The privilege of sending and receiving letters through the mails free of postage. This privilege is granted to various officers not for their own special benefit, but with a view to promote the public good. By the act of congress to reduce into one the several acts establishing and regulating the post office department, passed March 3, 1825, 3 Story's L. U. S. 1985, it is provided—

§ 27. That letters and packets to and from the following officers of the United States, shall be received and conveyed by post, free of postage. Each postmaster, provided each of his letters or packets shall not exceed half an ounce in weight; each member of the senate, and each member and delegate of the house of representatives of the congress of the United States, the secretary of

the senate, and clerk of the house of representatives, provided each letter or packet, (except documents printed by the order of either house of congress,) shall not exceed two ounces in weight, and during their actual attendance in any session of congress, and sixty days before and after such session; and in case of excess of weight, that excess alone shall be paid for; the president of the United States, vice president, the secretaries of state, of the treasury, of war, of the navy, attorney general, postmaster general, and the assistants postmaster general, the comptrollers of the treasury, auditors, register, treasurer, and commissioner of the general land office, and such individual who shall have been, or may hereafter be, president of the United States, and each may receive newspapers by post, free of postage: *Provided*, That postmasters shall not receive, free of postage, more than one daily newspaper, each, or what is equivalent thereto; nor shall members of the senate, or of the house of representatives, the clerk of the house, or secretary of the senate, receive newspapers, free of postage, after their privilege of franking shall cease.

§ 28. That, if any person shall frank any letter or letters, other than those written by himself, or by his order on the business of his office, he shall, on conviction thereof, pay a fine of ten dollars; and it shall be the especial duty of postmasters to prosecute for said offence: *Provided*, That the secretary of the treasury, secretary of state, secretary of war, secretary of the navy, and postmaster general, may frank letters or packets on official business, prepared in any other public office, in the absence of the principal thereof. And if any person, having the right to receive his letters free of postage, shall receive, enclosed to him, any letter or packet addressed to a person not having that right, it shall be his duty to return the same to the post office, marking thereon the place from whence it came, that it may be charged with postage. And if any person shall counterfeit the hand-writing or frank of any person, or cause the same to be done, in order to avoid the payment of postage, each person, so offending, shall pay for every such offence, five hundred dollars.

The franking privilege is also granted to the following named officers.

The adjutant general of the militia of any state or territory is vested with this privilege by the act of March 3, 1825, as follows:

§ 40. That the adjutant general of the militia of each state and territory shall have a right to receive, by mail, free of postage, from any major general or brigadier general thereof, and to transmit to said generals, any letter or packet, relating solely to the militia of such state or territory: *Provided always*, That every such officer, before he delivers any such letter or package for transmission, shall, in his own proper hand-writing, on the outside thereof, endorse the nature of the papers enclosed, and thereto subscribe his name and office, and shall previously furnish the postmaster of the office where he shall deposite the same, with a specimen of his signature. And, if any such officer shall frank any letter or package, in which shall be contained any thing relative to any subject, other than of the militia of such state or territory, every offender shall, on conviction of every such offence, forfeit and pay a fine of fifty dollars.

The speaker of the house of representatives is authorised to frank and to receive letters and packages by mail free of postage. Resolution

of congress, April 3, 1828, 4 Sharsw. cont. of Story's L. U. S. 2156.

The governors of the several states. By the act of June 30, 1834, 4 Sharsw. cont. of Story's L. U. S. 2406, it is enacted, that it shall be lawful for the governors of the several states, to transmit by mail, free of postage, all laws and reports, whether bound or unbound, and all records and documents of their respective states, which may be directed by the legislature of the several states to be transmitted to the executives of other states; and the governor of the state transmitting the same shall, in addition to his frank, endorse the kind of book or document enclosed, and direct the same to the governor of the state to which the same may be sent.

The solicitor of the treasury. All letters to and from the solicitor of the treasury relating to the duties and business of his office, shall be transmitted by mail free of postage. Act of May 29, 1830, 4 Sharsw. cont. of Story L. U. S. 2208.

The commissioner of patents, is declared by the act of July 4, 1836, 4 Sharsw. cont. of Story's L. U. S. 2504, to be entitled to send and receive letters and packages by mail relating to the business of the office free of postage. Vide article *Patent*.

FRANK, free. This word is used in composition, as frank-almoign, frank-marriage, frank-tenement, &c.

FRANKALMOIGN, *old English law*. This is a law French word signifying free-alms. Formerly religious corporations, aggregate or sole, held lands of the donor, to them and their successors forever in frank-almoign. The service which they were bound to render for these lands was not certainly defined; they were in general to pray for the souls of the donor, his ancestors, and successors. 2 Bl. Com. 101.

FRANK-MARRIAGE, *English law*, takes place, according to Blackstone, when lands are given by one man to another, together with a wife who is daughter or kinswoman of the donor, to hold in *frank-marriage*. By this gift, though nothing but the word frank-marriage is expressed, the donees shall have the tenements to them and the heirs of their two bodies begotten; that is they are tenants in special tail. It is called *frank* or *free* marriage, because the donees are liable to no service but fealty. This is now obsolete even in England. 2 Bl. Com. 115.

FRANK-TENEMENT, *estates*, the same as freehold, (q. v.) or *liberum tenementum*.

FRATER. Vide *Brother*.

FRATRICIDE, *criminal law*, he who kills his brother or sister. The crime of such a person is also called fratricide.

FRAUD, TO DEFRAUD, *torts*, unlawfully, designedly, and knowingly, to appropriate the property of another, with a criminal intent. *Illustrations*, 1. Every appropriation of the right of property of another, is not fraud. It must be unlawful; that is to say, such an appropriation as is not permitted by law. Property loaned, may during the time of the loan, be appropriated to the use of the borrower. This is not fraud, because it is permitted by law. 2. The appropriation must be, not only unlawful, but it must be made with a knowledge that the property belongs to another, and with a design to deprive him of the same. It is unlawful to take the property of another; but if it be done with a design of preserving it for the owners, or if it be taken by mistake, it is not done designedly or knowingly, and, therefore, does not come within the definition of fraud.—3. Every species of unlawful appropriation, not made with a criminal intent, enters into this definition when designedly made,

with a knowledge that the property is another's; therefore, such an appropriation, intended either for the use of another, or for the benefit of the offender himself, is comprehended by the term.—4. Fraud, however immoral or illegal, is not in itself a crime or offence, for want of a criminal intent. It only becomes such in the cases provided by law. Liv. System of Penal Law, 739.

FRAUD, *contracts*, *torts*, is any trick or artifice employed by one person to induce another to fall into an error, or to detain him in it, so that he may make an agreement contrary to his interest. The fraud, may consist either, first, in the misrepresentation, or secondly, in the concealment of a material fact. Fraud avoids a contract, *ab initio*, both at law and in equity, whether the object be to deceive the public or third persons, or one party endeavour thereby to cheat the other. 1 Fonb. Tr. Equity, 3d ed. 66, note, 6th ed. 122, and notes; Newl. Cont. 352; 1 Bl. R. 465; Dougl. Rep. 450; 3 Burr. Rep. 1909; 3 V. & B. Rep. 42; 3 Chit. Com. Law, 155, 306, 698; 1 Sch. & Lef. 209; Verpl. Contracts, *passim*; Domat, Lois Civ. p. 1, l. 4, t. 6, s. 3, n. 2.

The following enumeration of frauds, for which equity will grant relief, is given by Lord Hardwicke, 2 Ves. 155. 1. Fraud, *dolus malus*, may be actual arising from facts and circumstances of imposition, which is the plainest case. 2. It 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 and fair man would accept on the other, which are inequitable and unconscientious bargains. 1 Lev. R. 111. 3. Fraud, which may be presumed from the circumstances and condition of the parties contracting. 4. Fraud, which may be collected and 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, in what are called catching bargains, (q. v.) with heirs, reversioners, or expectants in the life of the parents. This last seems to fall naturally under one or more of the preceding divisions.

Frauds may be also divided into actual or positive and constructive frauds. An *actual* or *positive fraud* is the intentional and successful employment of any cunning, deception or artifice, used to circumvent, cheat or deceive another. 1 Story, Eq. Jur. § 186; Dig. 4, 3, 1, 2; Id. 2, 14, 7, 9. By *constructive fraud* is meant such a contract or act, which, though not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, yet, by its tendency to deceive or mislead them, or to violate private or public confidence, or to impair or injure the public interests, is deemed equally reprehensible with positive fraud, and, therefore, is prohibited by law, as within the same reason and mischief, as contracts and acts done *malo animo*. Constructive frauds are such as are either against public policy, in violation of some special confidence or trust, or operate substantially as a fraud upon private rights, interests, duties, or intentions of third persons; or unconscientiously compromit, or injuriously affect the private interests, rights or duties of the parties themselves. 1 Story, Eq. ch. 7, § 258 to 440.

The civilians divide frauds into *positive*, which consists in doing one's self or causing another to do such things as induce a belief of the truth of what does not exist; or *negative*, which consists in doing or dissimulating certain things in order to in-

duce the opposite party into error, or to retain him there. The intention to deceive, which is the characteristic of fraud, is here present. Fraud is also divided into that which has induced the contract, *dolus dans causum contractui*, and incidental or accidental fraud. The former is that which has been the cause or determining motive of the contract, that without which the party defrauded would not have contracted, when the artifices practised by one of the parties have been such, that it is evident without them the other would not have contracted. Incidental or accidental fraud is that by which a person otherwise determined to contract, is deceived on some accessories or incidents of the contract; for example, as to the quality of the object of the contract, or its price, so that he has made a bad bargain. Accidental fraud does not, according to the civilians, avoid the contract, but simply subjects the party to damages. It is otherwise where the fraud has been the determining cause of the contract, *qui causam dedit contractui;* in that case the contract is void. Toull. Dr. Civ. Fr. Liv. 3, t. 3, c. 2, n. § 5, n, 86, et seq. Vide *Catching bargain; Lesion; Voluntary Conveyance.*

FRAUDS, STATUTE OF. The name commonly given to the statute 29 Car. 2, c. 3, entitled "An act for prevention of frauds and perjuries." This statute has been re-enacted in most of the states of the Union, generally with amendments and alterations. When the *words* of the statute have been used, the construction put upon them has also been adopted. Most of the acts of the different states will be found in Anthon's Appendix to Shep. Touchst. See also the Appendix to the second edition of Roberts on Frauds.

FRAUDULENT CONVEYANCE. See *Voluntary Conveyance.*

FREE. Not bound to servitude; at liberty to act as one pleases. This word is put in opposition to slave. Representatives and direct taxes shall be apportioned among the several states, which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of *free* persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. Const. U. S. art. 1, s. 2. It is also put in contradistinction to being bound as an apprentice; as, an apprentice becomes *free* on attaining the age of twenty-one years. The Declaration of Independence asserts that all men are born *free*, and in that sense, the term includes all mankind.

FREE WARREN, *Eng. law*, is a franchise erected for the preservation and custody of beasts and fowls of warren. 2 Bl. Com. 39; Co. Litt. 233.

FREEDMEN, was the name given by the Romans to those persons who had been released from a state of servitude. Vide *Liberti libertini.*

FREEHOLD, *estates.* An estate of freehold is an estate in lands or other real property, held by a free tenure, for the life of the tenant or that of some other person; or for some uncertain period. It is called liberum tenementum, frank tenement or freehold; it was formerly described to be such an estate as could only be created by livery of seisin, a ceremony similar to the investiture of the feudal law. But since the introduction of certain modern conveyances, by which an estate of freehold may be created without livery of seisin, this description is not sufficient. There are two qualities essentially requisite to the existence of a freehold estate. 1 Immobility; that is the subject-matter must either be land, or some interest issuing out of or an-

nexed to land. 2. A sufficient legal indeterminate duration; for if the utmost period of time to which an estate can last, is fixed and determined, it is not an estate of freehold. For example, if lands are conveyed to a man and his heirs, or for his life, or for the life of another, or until he shall be married, or go to Europe, he has an estate of freehold; but if such lands are limited to a man for one hundred or five hundred years, if he shall so long live, he has not an estate of freehold. Cruise on Real Property, t. 1, s. 13, 14 and 15; Litt. § 59; 1 Inst. 42 a; 5 Mass. R. 419; 4 Kent, Com. 23. Freehold estates are of inheritance or not of inheritance. Cruise, t. 1, s. 42.

FREEHOLDER, a person who is the owner of a freehold estate.

FREEMAN. One who is in the enjoyment of the right to do whatever he pleases, not forbidden by law. One in the possession of the civil rights enjoyed by the people generally.

FREIGHT, *mar. law*, *contracts*, is the sum agreed on for the hire of a ship, entirely or in part, for the carriage of goods from one port to another; 13 East, 300, note; but in its more extensive sense it is applied to all rewards or compensation paid for the use of ships. 1 Pet. Adm. R. 206; 2 Boulay-Paty, t. 8, s. 1; 2 B. & P. 321; 4 Dall. R. 459; 3 Johns. R. 335; 2 Johns. R. 346; 3 Pardess. n. 705. It will be proper to consider, 1, how the amount of freight is to be fixed; 2, what acts must be done in order to be entitled to freight; 3, of the lien of the master or owner.

1. The amount of freight is usually fixed by the agreement of the parties, and if there be no agreement, the amount is to be ascertained by the usage of the trade, and the circumstances and reason of the case. 3 Kent, Com. 173. Pothier is of opinion that when the parties agree as to the conveyance of the goods, without fixing a price, the master is entitled to freight at the price usually paid for merchandise of a like quality at the time and place of shipment, and if the prices vary he is to pay the mean price, Charte-part. n. 8. But there is a case which authorises the master to require the highest price, namely, when goods are put on board without his knowledge. Ib. n. 9. When the merchant hires the whole ship for the entire voyage, he must pay the freight though he does not fully lade the ship; he is of course only bound to pay in proportion to the goods he puts on board, when he does not agree to provide a full cargo. If the merchant agrees to furnish a return cargo, and he furnishes none, and lets the ship return in ballast, he must make compensation to the amount of the freight; this is called *dead freight*, (q. v.) in contradistinction to freight due for the actual carriage of goods. Roccus, note 72—75; 1 Pet. Adm. R. 207; 10 East, 530; 2 Vern. R. 210.

2. The general rule is that the delivery of the goods at the place of destination, in fulfilment of the agreement of the charter party, is required, to entitle the master or owner of the vessel to freight. But to this rule there are several exceptions: 1, when a cargo consists of live stock, and some of the animals die in the course of the voyage, without any fault or negligence of the master or crew, and there is no express agreement respecting the payment of freight, it is in general to be paid, for all that were put on board; but when the contract is to pay for the transportation of them, then no freight is due for those which die on the voyage. Molloy, b. 2, c. 4, s. 8; Dig. 14, 2, 10; Abb. Ship. 272.—2. An

interruption of the regular course of the voyage, happening without the fault of the owner, does not deprive him of his freight if the ship afterwards proceed with the cargo to the place of destination, as in the case of capture and recapture. 3 Rob. Adm. R. 101.—3. When the ship is forced into a port short of her destination, and cannot finish the voyage. If in this case the owner of the goods will not allow the master a reasonable time to repair, or to proceed in another ship, the master will be entitled to the whole freight; and, if after giving his consent the master refuse to go on, he is not entitled to freight. —4. When the merchant accepts of the goods at an intermediate port, it is the general rule of marine law, that freight is to be paid according to the proportion of the voyage performed, and the law will imply such contract. The acceptance must be voluntary, and not one forced upon the owner by any illegal or violent proceedings, as, from it, the law implies a contract that freight *pro rata itineris* shall be accepted and paid. 2 Burr. 883; 7 T. R. 381; Abb. Shipp. part 3, c. 7, s. 13; 3 Binn. 445; 5 Binn. 525; 2 Serg. & Rawle, 229; 1 W. C. C. R. 530; 2 Johns. R. 323; 7 Cranch, R. 358; 6 Cowen, R. 504; Marsh. Ins. 281, 691; 3 Kent, Com. 182; Com. Dig. Merchant, E 3 a, note, pl. 43, and the cases there cited.—5. When the ship has performed the whole voyage, and has brought only a part of her cargo to the place of destination; in this case there is a difference between a general ship, and a ship chartered for a specific sum for the whole voyage. In the former case, freight is to be paid for the goods which may be delivered at their place of destination; in the latter it has been questioned whether the freight could be apportioned, and, it seems, that in such case a partial performance is not sufficient, and that a special payment cannot be claimed except in special cases. 1 Johns. R. 24; 1 Bulstr. 167; 7 T. R. 381; 2 Campb. N. P. R. 466. These are some of the exceptions to the general rule, called for by principles of equity, that a partial performance is not sufficient, and that a partial payment or rateable freight cannot be claimed.

3. In general the master has a lien on the goods, and need not part with them until the freight is paid; and when the regulations of the revenue require them to be landed in a public warehouse, the master may enter them in his own name and preserve the lien. His right to retain the goods may however be waived either by an express agreement at the time of making the original contract, or by his subsequent agreement or consent. Vide 18 Johns. R. 157; 4 Cowen, R. 470; 1 Paine's R. 358; 5 Binn. R. 392.

Vide, generally, 13 Vin. Ab. 501; Com. Dig. Merchant, E 3, a; Bac. Ab. Merchant, D; Marsh. Ins. 91; 10 East, 394; 13 East, 300, n.; 3 Kent, Com. 173; 2 Bro. Civ. & Adm. L. 190; Merl. Rép. h. t.; Poth. Charte-Partie, h. t.; Boulay-Paty, h. t.; Pardess. Index, Affrétement.

FREIGHTER, *contracts*, is he to whom a ship or vessel has been hired. 3 Kent, Com. 173; 3 Pardess. n. 704. The freighter is entitled to the enjoyment of the vessel according to contract, and the vessel hired is the only one that he is bound to take; there can, therefore, be no substitution without his consent. When the vessel has been chartered only in part, the freighter is only entitled to the space he has contracted for; and in case of his occupying more room, or putting on board a greater weight, he must pay freight on the principles mentioned under the article freight. The freighter is

required to use the vessel agreeably to the provisions of the charter-party, or, in the absence of any such provisions, according to the usages of trade: he cannot load the vessel with merchandise which would render it liable to condemnation for violating the laws of a foreign state. 3 John. R. 105. The freighter is also required to return the vessel as soon as the time for which he chartered her has expired, and to pay the freight.

FRESH SUIT, *Engl. law*, is an earnest pursuit of the offender, when a robbery has been committed, without ceasing, until he has been arrested or discovered. Toml. Law Dict. h. t.

FRIBUSCULUM, *in the civil law*, was a slight dissention between husband and wife, which produced a momentary separation, without any intention to dissolve the marriage, in which it differed from a divorce. Poth. Pand. lib. 50, s. 106. This amounted to a separation, (q. v.) in our law.

FRIENDLESS MAN. This name was sometimes anciently given to an outlaw.

FRIGIDITY, *med. juris.* The same as impotence, (q. v.)

FRUIT, *property*, the production of trees and other plants. Fruit is considered real estates before it is separated from the plant or tree on which it grows; after its separation it acquires the character of personalty, and may be the subject of larceny: it then has all the qualities of personal property.

The term fruit, among the civilians signifies not only the production of trees and other plants, but all sorts of revenue of whatever kind they may be. Fruits may be distinguished into two kinds; the first, called natural fruits, are those which the earth produces without culture, as hay, the production of trees, minerals, and the like; or with culture, as grain and the like. Secondly, the other kind of fruits, known by the name of civil fruits, are the revenue which is not produced by the earth, but by the industry of man, or from animals, from some estate, or by virtue of some rule of law. Thus, the rent of a house, a right of fishing, the freight of a ship, the toll of a mill, are called, by a metaphorical expression, fruits, Domat, Lois Civ. liv. 3, tit. 5, s. 3, n. 3. See Poth. De la Communauté, n. 45.

FUERO JURGO. A Spanish code of laws, said to be the most ancient in Europe. Barr. on the Stat. 8, note.

FUGAM FECIT, *Eng. law.* He fled. This phrase is used to express that it has been found by inquisition that a person fled for treason or felony. The effect of this is to make the party forfeit his goods absolutely, and the profits of his lands until he has been pardoned or acquitted.

FUGITIVE SLAVE, is one who has escaped from the service of his master. The constitution of the United States, art. 4, s. 2, 3, directs that "no person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any laws or regulation therein, be discharged from such service or labour, but shall be delivered up, on claim of the party to whom such service or labour may be due." In practice summary ministerial proceedings are adopted, and not the ordinary course of judicial investigations, to ascertain whether the claim of ownership be established beyond all legal controversy. In some states strenuous but unsuccessful efforts have been made to procure the supposed slave a trial by jury. Vide generally, 3 Story, Com. on Const. § 1804-1806; Serg. on Const. ch. 31, p. 387; 9 John. R. 62; 5 Serg. & Rawle, 62; 2 Pick. R. 11;

2 Serg. & Rawle, 306; 3 Ib. 4; 1 Wash. C. C. R. 500; 14 Wend. R. 507, 539; 18 Wend. R, 678; 22 Amer. Jur. 344.

FUGITIVE FROM JUSTICE, *crim. law*, is one who having committed a crime within a jurisdiction goes into another in order to evade the law, and avoid its punishment. By the constitution of the United States, art. 4, s. 2, 2, it is provided 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 same state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." The act of thus delivering up a prisoner is, by the law of nations called *extradition*, (q. v.) Different opinions are entertained in relation to the duty of a nation, by the law of nations, independently of any treaty stipulations, to surrender fugitives from justice when properly demanded. Vide 1 Kent, Com. 36; 4 John. C. R. 106; 1 Amer. Jurist, 297; 10 Serg. & Rawle, 125; 3 Story, Com. Const. United States, § 1801. 9 Wend. R. 218; 2 John. R. 479; 5 Binn. R. 617; 4 Johns. Ch. R. 113; 22 Am. Jur. 351; 24 Am. Jur. 226; 14 Pet. R. 540; 2 Caines, R. 213.

FUNCTION, *office*, is properly the occupation of an office, by the performance of its duties; the officer is said to fill his function. Dig. lib. 32, l. 65, § 1.

FUNCTIONARY. One who is in office or in some public employment.

FUNDED DEBT, is that part of the national debt for which certain funds are appropriated towards the payment of the interset.

FUNDUS, *civil law*. Any portion of land whatever, without considering the use or employ to which it is applied.

FUNERAL EXPENSES. Money expended in procuring the interment of a corpse. The person who orders the funeral is responsible personally for the expenses, and if the estate of the deceased should be insolvent, he must lose the amount. But if there are assets sufficient to pay these expenses, the executor or administrator is bound, upon an implied assumpsit, to pay them. 1 Campb. N. P. R. 298; Holt, 309; Com. on Contr. 529; 1 Hawke's R. 394; 13 Vin. Ab. 563. Frequent questions arise as to the amount which is to be allowed to the executor or administrator for such expenses. It is exceedingly difficult to gather from the numerous cases which have been decided upon this subject any certain rule. Courts of equity have taken into consideration the circumstances of each case, and when the executors have acted with common prudence and in obedience to the will, their expenses have been allowed. In a case where the testator directed to be buried at a church thirty miles distant from the place of his death, the sum of sixty pounds sterling was allowed; 3 Atk. 119; and in another case, under peculiar circumstances, six hundred pounds was allowed. Preced. in Ch. 29. In a case in Pennsylvania where the intestate left a considerable estate, and no children, the sum of two hundred and fifty-eight dollars and seventy-five cents was allowed, the greater part of which had been expended in erecting a tomb-stone over a vault in which the body was interred. 14 Serg. & Rawle, 64. It seems doubtful whether the husband can call upon the separate personal estate of his wife to pay her funeral expenses. 6. Madd. R. 90.

Vide 2 Bl. Com. 508; Godolph. p. 2; 3 Atk. 249; Off. Ex. 174; Bac. Ab. Executors, &c., L 4; Vin. Ab. h. t.

FUNGIBLE, a term used in the civil, French and Scotch law, signifies any thing, whatever, which consists in quantity, and is regulated by number, weight or measure, such as corn, wine or money. Hein. Elem. Pand. Lib. 12, t. 1, § 2; 1 Bell's Com. 225, n. 2; Ersk. Pr. Scot. Law, B. 3, t. 1, § 7; Poth. Prêt de Consomption, No. 25; Dict. de Jurisprudence, mot Fongible; Story, Bailm. § 284.

FURCA. The gallows. 3 Inst. 58.

FURLINGUS, a furlong, or a furrow one-eighth part of a mile long. Co. Litt. 5 b.

FURLONG. A measure of length being forty poles or one-eighth of a mile. Vide *Measures*.

FURLOUGH, is a permission given in the army and navy to an officer or private to absent himself for a limited time.

FURNITURE, personal chattels in the use of a family. By the term household furniture in a will, all personal chattels will pass which may contribute to the use or convenience of the householder, or the ornament of the house, as plate, linen, china, both useful and ornamental, and pictures. Amb. 610; 1 John. Ch. R. 329, 338; 1 Sim. & Stu. 189; S. C. 3 Russ. Ch. Cas. 301; 2 Williams on Ex. 752; 1 Rop. on Leg. 203, 4; 3 Ves. 312, 313.

FURTHER HEARING, *crim. law, practice*. Hearing at another time. Prisoners are frequently committed for further hearing, either when there is not sufficient evidence for a final commitment, or because the magistrate has not time at the moment to hear the whole of the evidence. The magistrate is required by law, and by every principle of humanity, to hear the prisoner as soon as possible after a commitment for further hearing; and if he neglect to do so within a reasonable time, he becomes a trespasser. 10 Barn. & Cresw. 28; S. C. 5 Man. & Ry. 53. Fifteen days were held an unreasonable time, unless under special circumstances. 4 Carr. & P. 134; 4 Day, 98; 6 S. & R. 427. In Massachusetts magistrates may, by statute, adjourn the case for ten days. Rev. Laws, 135, s. 9. It is the practice in England to commit for three days and then from three days to three days. 1 Chitty's Criminal Law, 74.

FUTURE STATE, *evidence*. A state of existence after this life. A witness who professed not to believe in any future state of existence was formerly rejected on the ground of his infidelity. See the authorities cited under the article *Infidel*. But it seems now to be settled that when the witness believes in a God who will reward or punish him even in this world, he is competent. Willes, 550. Vide *Atheist*.

G.

GABEL, a tax, imposition or duty. This word is said to have the same signification that *gabelle* formerly had in France. Cunn. Dict. h. t. But this seems to be an error, for gabelle signified in that country, previously to its revolution, a duty upon salt. Merl. Rép. h. t. Lord Coke says, that *gabel* or *gavel*, *gablum*, *gabellum*, *gabelletum*, *galbelletum*, and *gavillettum*, signify a rent, duty or service, yielded or done to the king or any other lord. Co. Litt. 142, a.

GAGE, *contracts.* Personal property placed by a debtor in possession of his creditor, as a security for his debt; a pawn, (q. v.) Hence *mortgage* is a dead pledge.

GAGER DEL LEY. *Wager of law*, (q. v.)

GAIN. The word is used as synonymous with profits, (q. v.) See *Fruit.*

GAINAGE, *old Eng. law*, signifies the draft oxen, horses, wain, plough, and furniture for carrying on the work of tillage by the baser sort of soke men and villians, and sometimes the land itself, or the profits raised by cultivating it. Bract. lib. 1, c. 9.

GALLON, *measures.* A gallon is a liquid measure containing two hundred and thirty one cubic inches, or four quarts.

GALLOWS. An instrument on which to hang criminals condemned to death.

GAME. Birds and beasts of a wild nature obtained by fowling and hunting. Bac. Ab. h. t.; *Animals; Feræ naturæ.*

GAMING, *contracts; crim. law*, is the playing at cards, dice, or other contrivance. When practised as a recreation, the better to fit a person for business, it is not unlawful at common law; but a person guilty of cheating at any game, as by playing with false cards, dice, and the like, may be indicted at common law, and fined and imprisoned according to the heinousness of the offence. 1 Russ. on Cr. 406. This offence is punished by statutory provisions in perhaps all the states. Vide Roscoe, Cr. Ev. 446; Hawk. B. 1, c. 92, s. 1. There is nothing contrary to natural equity in gaming, and unless the game be of an immoral, illegal or indecent tendency, the contract will be considered as a reciprocal gift, which the parties make of the thing played for under a certain condition. Vide Bac. Ab. h. t. (A); Toull. liv. 3, t. 3, n. 381; Barbeyrac, Traité du Jeu, tom. 1, page 104, n. 4; Poth. Traité du Jeu; Merl. Répert. mot Jeu; 1 P. A. Bro. Rep. 171. But the courts will not countenance gaming by giving too easy a remedy for the recovery of money won at play. Bac. Ab. *ut supra.* Vide *Wagers.*

GAMING HOUSES, *crim. law*, are houses kept for the purpose of permitting persons to game for money or other valuable thing. They are nuisances in the eye of the law, being detrimental to the public, as they promote cheating and other corrupt practices. 1 Russ. on Cr. 299; Roscoe's Cr. Ev. 663; Hawk. B. 1, ch. 75, s. 6. This offence is punished in Pennsylvania, and perhaps, in most of the states, by statutory provisions.

GANANCIAL, *Spanish law.* A term which in Spanish signifies nearly the same as acquets. *Bienes gananciales* are thus defined: "Aquellos que el marido y la muger ó cualquiera de los dos adquieren ó aumentan durante el matrimonio por compra ú otro contrato, ó mediante su trabajo é industria, como tambien los frutos de los bienes proprios que cada uno elevó al matrimonio, et de los que subsistiendo este adquieran para si por cualquier titulo." 1 Febr. Nov. lib. 1, tit. 2, c. 8, s. 1. This is a species of community; the property of which it is formed belongs in common to the two consorts, and, on the dissolution of the marriage is divisible between them in equal shares. It is confined to their future acquisition *durante el matrimonio*, and the *frutos* or rents and profits of the other property. 1 Burge on Confl. of Laws, 418, 419; Aso & Man. Inst. B. 1, t. 7, c. 5, § 1.

GAOL, is a prison or building designated by law or used by the

sheriff, for the confinement or detention of those whose persons are judicially ordered to be kept in custody. This word sometimes written *jail*, is said to be derived from the Spanish *jaula*, a cage, (derived from *caula*,) in French *gèole*, gaol. 1 Mann. & Gran. 222, note (*a*). Vide 6 John. R. 22; 14 Vin. Ab. 9; Bac. Ab. h. t; Dane's Ab. Index. h. t.; 4 Com. Dig. 619; and the articles *Gaoler; Prison; Prisoner*.

GAOL-DELIVERY, *Eng. law*. To insure the trial, within a certain time, of all prisoners, a patent in the nature of a letter is issued from the king to certain persons, appointing them his justices, and authorising them to deliver his goals. Cromp. Jurisd. 125; 4 Inst. 168; 4 Bl. Com. 269; 2 Hale, P. C. 22, 32; 2 Hawk. P. C. 14, 28. In the United States, the judges of the criminal courts are required to cause the accused to be tried within the times prescribed by the local statutes, and the constitutions require a speedy trial.

GAOLER, the keeper of a gaol or prison, one who has the legal custody of the place where prisoners are kept. It is his duty to keep the prisoners in safe custody; and for this purpose he may use all necessary force, 1 Hale, P. C. 601; but any oppression of a prisoner under a pretended necessity will be punished, for the prisoner, whether he be a debtor or a criminal, is entitled to the protection of the laws from oppression.

GARNISH, *Eng. law*. Money paid by a prisoner to his fellow prisoners on his entrance into prison.

TO GARNISH. To warn; to garnish the heir, is to warn the heir. Obsolete.

GARNISHEE, is a person who has money or property in his possession, belonging to a defendant, which money or property has been attached in his hands, and he has had notice of such attachment; he is so called because he has had warning or notice of the attachment. From the time of the notice of the attachment, the garnishee is bound to keep the property in his hands to answer the plaintiff's claim, until the attachment is dissolved, or he is otherwise discharged. Vide Serg. on Att. 88 to 110; Com. Dig. Attachment, E.

GARNISHMENT. A warning to any one for his appearance, in a cause in which he is not a party, for the information of the court, and explaining a cause. For example, in the practice of Pennsylvania, when an attachment issues against a debtor in order to secure to the plaintiff a claim due by a third person to such debtor, notice is given to such third person, which notice is a garnishment, and he is called the garnishee.

GAVEL, a tax, imposition or tribute; the same as *gabel*, (q. v.)

GAVELKIND, given to all the kindred. *Eng. law*. A tenure or custom annexed or belonging to land in Kent, by which the lands of the father are equally divided among all his sons, or the land of the brother among all his brothers, if he have no issue of his own. Litt. s. 210.

GELD, *old Eng. law*, signifies a fine or compensation for an offence; also, rent, money or tribute.

GEMOTE. An assembly. Wittena gemote, during the time of the Saxons in England, signified an assembly of wise men. The parliament.

GENDER. That which designates the sexes. As a general rule when the masculine is used it includes the feminine, as, man (q. v.) sometimes includes women. This is the general rule, unless a contrary intention appears. But in penal statutes, which must be construed strictly, when the masculine is used and

not the feminine, the latter is not in general included. 3 C. & P. 225. An instance to the contrary, however, may be found in the construction. 25 Ed. 3, st. 5, c. 2, § 1, which declares it to be high treason, "When a man doth compass or imagine the death of *our lord the king*," &c. These words "our lord the king" have been construed to include a *queen* regnant. 2 Inst. 7, 8, 9; H. P. C. 12; 1 Hawk. P. C. c. 17; Bac. Ab. Treason, D. Pothier says that the masculine often includes the feminine, but the feminine never includes the masculine; that according to this rule if a man were to bequeath to another all his horses, his mares would pass by the legacy; but if he were to give all his mares, the horses would not be included. Poth. Introd. au titre 16, des Testaments et Donations testamentaires, n. 170. Vide Ayl. Pand. 57; 4 Car. & Payne, 216; S. C. 19 Engl. Com. Law R. 351; Barr. on the Stat. 216, note. *Feme; Feme covert; Feminine; Male; Man; Sex; Women; Worthiest of blood.*

GENEALOGY, is the summary history or table of a house or family, showing how the persons there named are connected together. It is founded on the idea of a lineage or family. Persons descended from the common father constitute a family. Under the idea of degrees is noted the nearness or remoteness of relationship, in which one person stands with respect to another. A series of several persons, descended from a common progenitor, is called a *line*, (q. v.) Children stand to each other in the relation either of full blood or half blood, according as they are descended from the same parents, or have only one parent in common. For illustrating descent and relationship, genealogical tables are constructed, the order of which depends on the end in view. In tables the object of which is to show all the individuals embraced in a family, it is usual to begin with the oldest progenitor, and to put all the persons of the male or female sex in descending, and then in collateral lines. Other tables exhibit the ancestors of a particular person in ascending lines both on the father's and mother's side. In this way 4, 8, 16, 32, &c. ancestors are exhibited, doubling at every degree. Some tables are constructed in the form of a tree, after the model of canonical law, (*arbor consanguinitatis*,) in which the progenitor is placed beneath, as if for the root or stem. Vide *Branch; Line.*

GENERAL ISSUE, *pleading*, is a plea which traverses or denies at once the whole indictment or declaration, without offering any special matter, to evade it. It is called the general issue, because, by importing an absolute and general denial of what is alleged in the indictment or declaration, it amounts at once to an issue. 3 Bl. Com. 305. The general issue in criminal cases, is, *not guilty*. In civil cases, the general issues are almost as various as the forms of action; in assumpsit, the general issue is *non-assumpsit;* in debt, *nil debet;* in detinue, *non detinet;* in trespass, *non cul.* or *not guilty*, &c.

GENERAL LAND OFFICE.—One of the departments of government of the United States. It was established by the act of April 25, 1812, 2 Story's Laws U. S. 1238; another act was passed March 24, 1824, 3 Story, 1938, which authorised the employment of additional officers. And it was re-organized by the following act entitled "An act to re-organize the General Land Office," approved July 4, 1836.

§ 1. *Be it enacted, &c.* That from and after the passage of this act, the executive duties now prescribed, or which may hereafter be prescribed

by law, appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government of the United States, shall be subject to the supervision and control of the commissioner of the general land office, under the direction of the president of the United States.

§ 2. That there shall be appointed in said office, by the president, by and with the advice and consent of the senate, two subordinate officers, one of whom shall be called principal clerk of the public lands, and the other principal clerk on private land claims, who shall perform such duties as may be assigned to them by the commissioner of the general land office; and in case of vacancy in the office of the commissioner of the general land office, or of the absence or sickness of the commissioner, the duties of said office shall devolve upon and be performed, ad interim, by the principal clerk of the public lands.

§ 3. That there shall be appointed by the president, by and with the advice and consent of the senate, an officer to be styled the principal clerk of the surveys, whose duty it shall be to direct and superintend the making of surveys, the returns thereof, and all matters relating thereto, which are done through the officers of the surveyor general; and he shall perform such other duties as may be assigned to him by the commissioner of the general land office.

§ 4. That there shall be appointed by the president, by and with the consent of the senate, a recorder of the general land office, whose duty it shall be, in pursuance of instructions from the commissioner, to certify and affix the seal of the general land office to all patents for public lands, and he shall attend to the correct engrossing and recording and transmission of such patents. He shall prepare alphabetical indexes of the names of patentees, and of persons entitled to patents; and he shall prepare such copies and exemplifications of matters on file, or recorded in the general land office, as the commissioner may from time to time direct.

§ 5. That there shall be appointed by the president, by and with the advice and consent of the senate, an officer to be called the solicitor of the general land office, with an annual salary of two thousand dollars, whose duty it shall be to examine and present a report to the commissioner, of the state of facts in all cases referred by the commissioner to his attention which shall involve questions of law, or where the facts are in controversy between the agents of government and individuals, or there are conflicting claims of parties before the department, with his opinion thereon; and also, to advise the commissioner, when required thereto, on all questions growing out of the management of the public lands, or the title thereto, private land claims, Virginia military scrip, bounty lands, and preemption claims; and to render such further professional services in the business of the department as may be required, and shall be connected with the discharge of the duties thereof.

§ 6. That it shall be lawful for the president of the United States, by and with the advice and consent of the senate, to appoint a secretary, with a salary of fifteen hundred dollars per annum, whose duty it shall be, under the direction of the president, to sign in his name, and for him, all patents for land sold or granted under the authority of the United States.

§ 7. That it shall be the duty of the commissioner to cause to be prepared, and to certify, under the seal of the general land office, such copies of records, books, and papers on file in his office, as may be applied for, to be used in evidence in courts of justice.

§ 8. That whenever the office of recorder shall become vacant, or in case of the sickness or absence of the recorder, the duties of his office shall be performed, ad interim, by the principal clerk on private land claims.

§ 9. That the receivers of the land offices shall make to the secretary of the treasury monthly returns of the moneys received in their several offices, and pay over such money pursuant to his instructions. And they shall also make to the commissioner of the general land office, like monthly returns, and transmit to him quarterly accounts current of the debits and credits of their several offices with the United States.

§ 10. That the commissioner of the general land office shall be entitled to receive an annual salary of three thousand dollars; the recorder of the general land office, an annual salary of fifteen hundred dollars; the principal clerk of the surveys, an annual salary of eighteen hundred dollars; and each of the said principal clerks an annual salary of eighteen hundred dollars; from and after the date of their respective commissions; and that the said commissioner be authorised to employ, for the service of the general land office, one clerk, whose annual salary shall not exceed fifteen hundred dollars; four clerks, whose annual salary shall not exceed fourteen hundred dollars each; sixteen clerks, whose annual salary shall not exceed thirteen hundred dollars each; twenty clerks, whose annual salary shall not exceed twelve hundred dollars each; five clerks, whose annual salary shall not exceed eleven hundred dollars each; thirty-five clerks, whose annual salary shall not exceed one thousand dollars each; one principal draughtsman, whose annual salary shall not exceed fifteen hundred dollars; one assistant draughtsman, whose annual salary shall not exceed twelve hundred dollars; two messengers, whose annual salary shall not exceed seven hundred dollars each; three assistant messengers, whose annual salary shall not exceed three hundred and fifty dollars each; and two packers, to make up packages of patents, blank forms, and other things necessary to be transmitted to the district land offices, at a salary of four hundred and fifty dollars each.

§ 11. That such provisions of the act of the 25th of April, in the year one thousand eight hundred and twelve, entitled "An act for the establishment of a general land office in the department of the treasury," and of all acts amendatory thereof, as are inconsistent with the provisions of this act, be, and the same are hereby repealed.

§ 12. That from the first day of the month of October, until the first day of the month of April in each and every year, the general land office and all the bureaus and offices therein, as well as those in the departments of the treasury, war, navy, state, and general post office, shall be open for the transaction of the public business at least eight hours in each and every day, except Sundays, and the twenty-fifth day of December; and from the first day of April until the first day of October, in each year, all the aforesaid offices and bureaus shall be kept open for the transaction of the public business at least ten hours, in each and every day, except Sundays and the fourth day of July.

§ 13. That if any person shall apply to any register of any land office to enter any land whatever, and the said register shall knowingly and falsely inform the person so applying that the same has already been entered and refuse to permit the person so applying to enter the same, such register shall be liable therefor to the person so applying for five dollars for each acre of land which the person so applying offered to enter, to be recovered by action of debt in any court of record, having jurisdiction of the amount.

§ 14. That all and every of the officers whose salaries are hereinbefore provided for, are hereby prohibited from directly or indirectly purchasing or in any way becoming interested in the purchase of any of the public land; and in case of a violation of this section by such officer, and on proof thereof being made to the president of the United States, such officer, so offending, shall be, forthwith, removed from office.

GENERAL SHIP, is one which is employed by the master or owners, on a particular voyage, and is hired by a number of persons, unconnected with each other, to convey their respective goods to the place of destination. This contract although usually made with the master, and not with the owners, is considered in law to be made with them also, and that both he and they are separately bound to the performance of it. Abbott on Ship. 112, 215, 216.

GENERAL TRAVERSE, *in pleading*, is one preceded by a general inducement and denying in general terms, all that is last before alleged on the opposite side, instead of pursuing the words of the allegations, which it denies. Of this sort of traverse, the replication *de injuriâ suâ propria, absque tali causa*, in answer to a justification, is a familiar example. Bac. Ab. Pleas, H 1; Steph. Pl. 171; Gould, Pl. c. 7, § 5; Archb. Civ. Pl. 194. Vide *Traverse; Special Traverse.*

GENS. An ancient word signifying *nation*, and sometimes a *family*. 1 Tho. Co. Litt. 259, n. 13. In the French law, it is used to signify people or nations, as, Droit des Gens, the law of nations.

GENTLEMAN. In the English law, according to Sir Edward Coke, is one who bears a coat of armour. 2 Inst. 667. In the United States this word is unknown to the law, but in many places it is applied by courtesy to all men, rich or poor, black or white. See Poth. Proc. Crim. sect. 1, App. § 3.

GENTLEWOMAN. This word is unknown to the law in the United States, and is but little used. In England it was formerly a good addition of the state or degree of a woman. 2 Inst. 667.

GENUS, denotes the number of beings or objects, which agree in certain general properties, common to them all, so that genus is in fact only an abstract idea, expressed by some general name or term; or rather a name or term, to signify what is called an abstract idea. Thus, goods is the generic name, and includes, generally, all personal property; but this word may be restrained, particularly in bequests, to such goods as are of the same kind as those previously enumerated. Vide 3 Ves. 311; 11 Ves. 657; 1 Eq. Cas. Ab. 201, pl. 14; 2 Ves. sen. 278, 280; Dig. 50, 17. 80; Ib. 12, 1, 2, 3.

GEORGIA. The name of one of the original states of the United States of America. George the Second granted a charter to Lord Percival and twenty others, for the government of the province of Georgia. It was governed under this charter till the year 1751, when it was surrendered to the crown. From that

period to the time of the American revolution, the colony was governed as other royal provinces. The constitution of the state, as revised, amended, and compiled by the convention of the state, was adopted at Louisville, on the 30th day of May, 1798. It directs, art. 1, s. 1, that the legislative, executive, and judiciary departments of government shall be distinct, and each department shall be confided to a separate body of magistracy.

1. The legislative power is vested in two separate and distinct branches, to wit, a senate and house of representatives, styled, "the General Assembly." 1st. The senate is elected annually, and is composed of one member from each county, chosen by the electors thereof. The senate elect, by ballot, a president out of their own body. 2d. The house of representatives is composed of members from all the counties, according to their respective numbers of free white persons, and including three-fifths of all the people of colour. The enumeration is made once in seven years, and any county containing three thousand persons, according to the foregoing plan of enumeration, is entitled to two members; seven thousand to three members; and twelve thousand to four members; but each county shall have at least one, and not more than four members. The representatives are chosen annually. The house of representatives choose their speaker and other officers.

2. The executive power is vested in a governor, elected by the general assembly, who holds his office for the term of two years. In case of vacancy in his office, the president of the senate acts as governor, until the disability is removed, or until the next meeting of the general assembly.

3. The judicial powers of the state are, by the 3d article of the constitution, distributed as follows:

§ 1. The judicial powers of this state shall be vested in a superior court, and in such inferior jurisdictions as the legislature shall, from time to time, ordain and establish. The judges of the superior courts shall be elected for the term of three years, removable by the governor, on the address of two-thirds of both houses for that purpose, or by impeachment and conviction thereon. The superior court shall have exclusive and final jurisdiction in all criminal cases which shall be tried in the county wherein the crime was committed; and in all cases respecting titles to land, which shall be tried in the county where the land lies; and shall have power to correct errors in inferior judicatories by writs of *certiorari*, as well as errors in the superior courts, and to order new trials on proper and legal grounds: Provided, That such new trials shall be determined, and such errors corrected, in the superior court of the county in which such action originated. And the said court shall also have appellative jurisdiction in such other cases as the legislature may by law direct, which shall in no case tend to remove the cause from the county in which the action originated; and the judges thereof, in all cases of application for new trials, or correction of error, shall enter their opinions on the minutes of the court. The inferior courts shall have cognizance of all other civil cases, which shall be tried in the county wherein the defendent resides, except in cases of joint obligors, residing in different counties, which may be commenced in either county; and a copy of the petition and process served on the party or parties residing out of the county in which the suit may be commenced, shall be deemed sufficient service, under such rules and regula-

tions as the legislature may direct: but the legislature may, by law, to which two-thirds of each branch shall concur, give concurrent jurisdiction to the superior courts. The superior and inferior courts shall sit in each county twice in every year, at such stated times as the legislature shall appoint.

§ 2. The judges shall have salaries adequate to their services, established by law, which shall not be increased or diminished during their continuance in office; but shall not receive any other perquisites or emoluments whatever, from parties or others, on account of any duty required of them.

§ 3. There shall be a state's attorney and solicitors appointed by the legislature, and commissioned by the governor, who shall hold their offices for the term of three years, unless removed by sentence on impeachment, or by the governor, on the address of two-thirds of each branch of the general assembly. They shall have salaries adequate to their services, established by law, which shall not be increased or diminished during their continuance in office.

§ 4. Justices of the inferior courts shall be appointed by the general assembly, and be commissioned by the governor, and shall hold their commissions during good behaviour, or as long as they respectively reside in the county for which they shall be appointed, unless removed by sentence on impeachment, or by the governor, on the address of two-thirds of each branch of the general assembly. They may be compensated for their services in such manner as the legislature may by law direct.

§ 5. The justices of the peace shall be nominated by the inferior courts of the several counties, and commissioned by the governor; and there shall be two justices of the peace in each captain's district, either or both of whom shall have power to try all cases of a civil nature within their district, where the debt or litigated demand does not exceed thirty dollars, in such manner as the legislature may by law direct. They shall hold their appointments during good behaviour, or until they shall be removed by conviction, on indictment in the superior court, for mal-practice in office, or for any felonious or infamous crime, or by the governor, on the address of two-thirds of each branch of the legislature.

§ 6. The powers of a court of ordinary or register of probates, shall be invested in the inferior courts of each county; from whose decision there may be an appeal to the superior court, under such restrictions and regulations as the general assembly may by law direct; but the inferior court shall have power to vest the care of the records, and other proceedings therein, in the clerk, or such other person as they may appoint; and any one or more justices of the said court, with such clerk or other person, may issue citations and grant temporary letters in time of vacation, to hold until the next meeting of the said court; and such clerk or other person may grant marriage licenses.

§ 7. The judges of the superior courts, or any one of them, shall have power to issue writs of mandamus, prohibition, scire facias, and all other writs which may be necessary for carrying their powers fully into effect.

GERMAN, *relations*, *germanus*, whole or entire, as respects genealogy or descent; thus, "brother-german," denotes one who is brother both by the father and mother's side; "cousins-german," those in the first and nearest degree, i. e. children of brothers or sisters. Tech. Dict. 4 M. & C. 56.

GERONTOCOMI, *civil law.*

Are officers appointed to manage hospitals for poor old persons. Clef des Lois Rom. mot Administrateurs.

GESTATION, *med. jur.* The time during which, a female who has conceived, carries the embryo or fœtus in her uterus. By the common consent of mankind, the term of gestation is considered to be ten *lunar* months, or forty weeks, equal to nine *calendar* months and a week. This period has been adopted, because general observation when it could be correctly made, has proved its correctness. Cyclop. of Pract. Med. vol. 4, p. 87, art. Succession of Inheritance. But this may vary one, two, or three weeks. Co. Litt. 123 b, Harg. & Butler's notes, note 190*; Ryan's Med. Jurisp. 121; Coop. Med. Jur. 18; Civ. Code of Louis. art. 203-211; 1 Beck's Med. Jur. 478. See *Pregnancy*.

GIFT, *conveyancing*, is properly applied to the creation of an estate tail; as that of feoffment is to that of an estate in fee simple. It differs in nothing from a feoffment, but in the nature of the estate passing by it; and livery of seisin must be given to render it effectual. The operative words of this conveyance are *do* or *dedi*. The maker of this instrument is called the donor, and he to whom it is made, the donee. 2 Bl. Com. 316; Litt. 59; Touchs. ch. 11.

GIFT, *contracts*, is the act by which the owner of a thing, voluntarily transfers the title and possession of the same, from himself to another person, without any consideration. It differs from a grant, sale, or barter in this, that in each of these cases there must be a consideration, and a gift, as the definition states, must be without consideration. The manner of making the gift may be in writing, or verbally, and, as far as personal chattels are concerned, they are equally binding. Perk. § 57; 2 Bl. Com. 441. But real estate must be transferred by deed. There must be a transfer made with an intention of passing the title and delivering the possession of the thing given, and it must be accepted by the donee. 1 Madd. Ch. R. 176, Am. ed. p. 104; sed vide 2 Barn. & Ald. 551; Noy's Rep. 67. The transfer must be without consideration, for if there be the least consideration, it will change the contract into a sale or barter, if possession be delivered; or if not into an executory contract. 2 Bl. Com. 440. Gifts are divided into gifts *inter vivos*, and gifts *causa mortis*. Vide *Donatio causa mortis; Gifts inter vivos;* and Vin. Ab. h. t.; Com. Dig. Biens, D 2, and Grant; Bac. Ab. Grant; 14 Vin. Ab. 19; 3 M. & S. 7; 5 Taunt. 212.

GIFTS INTER VIVOS, is a gift made from one or more persons, without any prospect of immediate death, to one or more others. These gifts are so called to distinguish them from gifts causa mortis, (vide *Donatio causa mortis*,) from which they differ essentially.—1. A gift inter vivos, when completed by delivery, passes the title to the thing so that it cannot be recovered back, by the giver: the gift *causa mortis* is always given upon the implied condition that the giver may at any time during his life revoke it. 7 Taunt. 231; 3 Binn. 366.—2. A gift *inter vivos* may be made by the giver at any time; the donatio mortis causa must be made by the donor while in peril of death. In both cases there must be a delivery. 2 Kent's Com. 354; 1 Beav. R. 605.

GIFTOMAN, *Swedish law*. He who has a right to dispose of a woman in marriage. This right is vested in the father, if living; if dead, in the mother; they may nominate a person in their place, but for want of such nomination, the brothers german, and for want of them, consanguine brothers, and in default of the

latter, uterine brothers have the right, but they are bound to consult the paternal or maternal grandfather. Swed. Code, tit. of Marriage, c. 1.

GILL. A measure of capacity, equal to one fourth of a pint. Vide *Measure.*

GIRANTEM, *mer. law.* An Italian word which signifies the drawer. It is derived from *girare*, to draw, in the same manner that the English verb to murder, is transformed into *murdrare* in our old indictments. Hall, Mar. Loans, 183, n.

GIST, *pleading.* Gist of the action is the essential ground or object of it in point of law, and without which there is no cause of action. Gould. on Pl. ch. 4, § 12. But it is observable that the substance or gist of the action is not always the principal cause of the plaintiff's complaint in point of fact, nor that on which he recovers all or the greatest part of his damages. It frequently happens that upon that part of his declaration which contains the substance or gist of the action he only recovers nominal damages, and he gets his principal satisfaction on account of matters altogether collateral thereto. A familiar instance of this is the case where a father sues the defendant for a trespass for the seduction of his daughter. The gist of the action is the trespass and the loss of his daughter's services, but the collateral cause is the injury done to his feelings for which the principal damages are given. In stating the substance or gist of the action, every thing must be averred which is necessary to be proved at the trial. Vide 1 Vin. Ab. 598; 2 Phil. Ev. 1, note. See Bac. Abr. Pleas, B; Doct. Pl. 85. See *Damages, special, in pleading;* 1 Vin. Ab. 598; 2 Phil. Ev. 1, n.

GIVER, *contracts.* He who makes a gift, (q. v.); by his gift, the giver always impliedly agrees with the donee that he will not revoke the gift.

GIVING IN PAYMENT. Vide *Dation en paiement.*

GIVING TIME, *contracts.* Any agreement by which a creditor gives his debtor a delay or time in paying his debt, beyond that contained in the original agreement; when other persons are responsible to him either as drawer, endorser or surety, if such time be given without the consent of the latter, it discharges them from responsibility to him. 1 Gall. Rep. 32; 7 John. R. 332; 10 John. Rep. 180; Ib. 587; Kirby, R. 397; 3 Binn. R. 523; 2 John. Ch. R. 554; 3 Desaus. Ch. Rep. 604; 2 Desaus. Ch. R. 230, 389; 2 Ves. jr. 504; 6 Ves. jr. 805; 3 Atk. 91; 2 Bos. & Pull. 62; 4 M. & S. 232; Bac. Ab. Obligations, D; 6 Dow. P. C. 238; 3 Meriv. R. 272; 5 Barn. & A. 187. Vide 1 Leigh's N. P. 31; 1 B. & P. 652; 2 B. & P. 61; 3 B. & P. 363; 8 East, R. 570; 3 Price, R. 521; 2 Campb. R. 178; 12 East, R. 38; 5 Taunt. R. 319; S. C. 1 E. C. L. R. 119; Rosc. Civ. Ev. 171; 8 Watts, R. 448; and the article *Forbearance.*

GLADIUS. In our old Latin authors and in the Norman laws, this word was used to signify supreme jurisdiction, *jus gladii.*

GLEANING. The act of gathering such grain in a field where it grew, which may have been left by the reapers after the sheaves were gathered. There is a custom in England, it is said, by which the poor are allowed to enter and glean upon another's land after harvest without being guilty of a trespass. 3 Bl. Com. 212. But it has been decided that the community are not entitled to claim this privilege as a right. 1 Hen. Bl. 51. In the United States, it is believed, no such right exists. This right seems to have existed in some parts of France.

Merl. Répert. mot, Glanage. As to whether gleaning would or would not amount to larceny, Vide Woodf. Landl. & Ten. 242; 2 Russ. on Cr. 99.

GLEBE, *Eccles. law*, is the land which belongs to a church. It is the dowry of the church. Gleba est terra qua consistit dos ecclesiæ. Lind. 254; 9 Cranch, Rep. 329. In the civil law, it signified the soil of an inheritance; there were serfs of the glebe, called *glebæ addicti*. Code, 11, 47, 7 et 21; Nov. 54, c. 1.

GO. This word is used sometimes technically. When a party is dismissed the court, he is said to go without day; that is, there is no day appointed for him to appear again.

GOD AND MY COUNTRY.—When a prisoner is arraigned, he is asked, how will you be tried? he answers, *by God and my country*. This practice arose when the prisoner had the right to choose the mode of trial, namely, by ordeal or by jury, and then he elected by *God* or *his country*, that is, by jury. It is probable that originally it was *By God* or *my country;* for the question asked supposes an option in the prisoner, and the answer is meant to assert his innocence by declining neither sort of trial. 1 Chit. Cr. Law, 416; Barr. on the Stat. 73, note.

GOD BOTE, *eccles. law*. An ecclesiastical or church fine imposed upon an offender for crimes and offences committed against God.

GOING WITNESS, is one who is going out of the jurisdiction of the court, although only into a state or country under the general sovereignty; as, for example, if he is going from one to another of the United States, or, in Great Britain, from England to Scotland. 2 Dick. 454.

GOLD. A metal used mostly in making money, or coin. It is divided into pure gold, that is, when the metal is unmixed with any other; and standard gold, which is a gold less pure, and mixed with some other metal, called alloy. Vide *Money*.

GOOD BEHAVIOUR. Conduct authorised by law. Surety of good behaviour may be demanded from any person who is justly suspected, upon sufficient grounds, of intending to commit a crime or misdemeanor. Surety for good behaviour is somewhat similar to surety of the peace, but the recognizance is more easily forfeited, and it ought to be demanded with greater caution. 1 Binn. 98, n.; 2 Yeates, 437; 14 Vin. Ab. 21; Dane's Ab. Index, h. t.

GOOD AND LAWFUL MEN, *probi et legales homines*. The law requires that those who serve on juries shall be good and lawful men; by which is understood those qualified to serve on juries, that is, that they be of full age, citizens, not infamous nor *non compotes mentis*, and they must be resident in the county where the venue is laid. Bac. Ab. Juries, A; Cro. Eliz. 654; 3 Inst. 30; 2 Rolle's R. 82.

GOOD CONSIDERATION, *contracts*. A good consideration is one which flows from kindred or natural love and affection alone, and is not of a pecuniary nature. Vin. Ab. Consideration, B. Vide *Consideration*.

GOOD WILL; by this term is meant the benefit which arises from the establishment of particular trades or occupations. Mr. Justice Story describes a good will to be the advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stocks, 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, Partn. § 99; see 17 Ves. 336; 1 Hoffm. R. 68; 16 Am. Jur. 87. As between partners it has been held that the good-will of a partnership trade survives. 5 Ves. 539; but this appears to be doubtful, 15 Ves. 227; and a distinction, in this respect, has been suggested between the commercial and professional partnerships; the advantages of established connexions in the latter being held to survive, unless the benefit is excluded by positive stipulation. 3 Madd. 79. As to the sale of the good-will of a trade or business, see 3 Meriv. 452; 1 Jac. & Walk. 589; 2 Swanst. 332; 1 Ves. & Beames, 505; 17 Ves. 346; 2 Madd. 220; Gow on Partn. 428; Collyer on Partn. 172, note; 2 B. & Adolph. 341; 4 Id. 592, 596; 1 Rose, 123; 5 Russ. 29. Vide 5 Bos. & Pull. 67; 1 Bro. C. C. 160, as to the effect of a bankrupt's assignment on a good-will; and 16 Amer. Jur. 87.

GOODS, *property*. For some purposes this term includes money, valuable securities, and other mere personal effects. The term ***goods and chattels***, includes not only personal property in possession, but also choses in action, 12 Co. 1; 1 Atk. 182; the term ***chattels*** is more comprehensive than that of ***goods***, and will include all animate as well as inanimate property, and also a ***chattel real***, as a lease for years of house or land. Co. Litt. 118; 1 Russ. Rep. 376. The word ***goods*** simply and without qualification, will pass the whole personal estate when used in a will, including even stocks in the funds. But in general it will be limited by the context of the will. Vide 2 Supp. to Ves. jr. 289; 1 Chit. Pr. 89, 90; 1 Ves. jr. 63; Hamm. on Parties, 182; 3 Ves. 212; 1 Yeates, 101; 2 Dall. 142; Ayl. Pand. 296; Wesk. Ins. 260; 1 Rop. on Leg. 189; 1 Bro. C. C. 128; Sugd. Vend. 493, 497; and the articles ***Biens***; ***Chattels***; ***Furniture***.

Goods are said to be of different kinds, as ***adventitious***, such as are given or arise otherwise than by succession; ***dotal goods***, or those which accrue from a dowry, or marriage portion; ***vacant goods***, those which are abandoned or left at large.

GOUT, *med. jur., contracts*, is an inflammation of the fibrous and ligamentous parts of the joints. In cases of insurance on lives, when there is a warranty of health, it seems that a man subject to the gout, is a life capable of being insured, if he has no sickness at the time to make it an unequal contract. 2 Park, Ins. 583.

GOVERNMENT, ***natural and political law***, is the manner in which sovereignty is exercised in each state. There are three simple forms of government, the democratic, the aristocratic and monarchical. But these three simple forms may be varied to infinity by the mixture and divisions of their different powers. Sometimes by the word government is understood the body of men, or the individual in the state, to whom is intrusted the executive power. It is taken in this sense when the government is spoken of in opposition to other bodies in the state.

Governments are also divided into monarchical and republican: among the monarchical states may be classed empires, kingdoms, and others; in these the sovereignty resides in a single individual. There are some monarchical states under the name of duchies, counties, and the like. Republican steats are those where the sovereignty is in several persons. These are subdivided into aristocracies, where the power is exercised by a few persons of the first rank in the state, and democracies which are those governments where the common people may exercise the highest

powers. See *Aristocracy; Democracy; Despotism; Monarchy; Theocracy.*

GOVERNOR. The title of the executive magistrate in each state and territory of the United States. Under the names of the particular states, the reader will find some of the duties of the governor of such state.

GRACE. Is that which a person is not entitled to by law, but which is extended to him as a favour; a pardon, for example, is an act of grace. There are certain days allowed to the payer of a promissory note or bill of exchange, beyond the time which appears on its face, which are called *days of grace*, (q. v.)

GRAFFER. This word is a corruption of the French word *greffier*, a clerk, or prothonotary. It signifies a notary or scrivener; vide stat. 5 Hen. 8, c. 1.

GRAFT. A figurative term which had obtained in chancery practice, to designate the right of a mortgagee in premises, to which the mortgagor at the time of making the mortgage had an imperfect title, but who afterwards obtained a good title. In this case the new mortgage is considered a *graft* into the old stock, and, as arising in consideration of the former title. 1 Ball & Beat. 46; Ib. 40; Ib. 57; 1 Pow. on Mortg. 190. The same principle has obtained by legislative enactment in Louisiana: If a person contracting an obligation towards another, says the Civil Code, art. 2371, grants a mortgage on property of which he is not then the owner, this mortgage shall be valid, if the debtor should ever acquire the ownership of the property, by whatever right.

GRAIN, *weight*, is the twenty-fourth part of a penny-weight.

GRAIN, *corn*, signifies wheat, rye, barley, or other corn sown in the ground. In Pennsylvania a tenant for a certain term is entitled to the way-going crop. 5 Binn. 289, 258; 2 Binn. 487; 2 Serg. & Rawle, 14.

GRAINAGE, *Engl. law.* The name of an ancient duty collected in London, consisting of one-twentieth part of the salt imported into that city.

GRAMME. A French weight. The gramme is of the weight of a cubic centimètre of distilled water, at the temperature of zero. It is equal to 15.4441 grains troy, or 5.6481 drachms avordupois. Vide *Measure.*

GRAND. An epithet frequently used to designate that the thing to which it is joined is of more importance and dignity, than other things of the same name; as, *grand assize*, a writ in a real action to determine the right of property in land; *grand cape*, a writ used in England, on a plea of land, when the tenant makes default in appearance at the day given for the king to take the land into his hands; *grand days*, among the English lawyers, are those days in term which are solemnly kept in the inns of court and chancery, namely, Candlemas day, in Hilary term; Ascension day, in Easter term; and All-saint's day, in Michaelmas term; which days are *dies non juridici*. *Grand distress* is the name of a writ so called because of its extent, namely, to all the goods and chattels of the party distrained within the county; this writ is believed to be peculiar to England. *Grand Jury*, (q. v.) *Grand serjeantry*, the name of an ancient English military tenure.

GRAND COUTUMIER. Two collections of laws bore this title. The one, also called the Coutumier of France, is a collection of the customs, usages, and forms of practice, which had been used from time immemorial in France; the other called the Coutumier de Normandie, which indeed made a part of the former, with some alterations, was composed about the fourteenth of Henry II., in 1229, is a

collection of the Norman laws, not as they stood at the conquest of England by William the conqueror, but some time afterwards, and contains many provisions, probably borrowed from the old English or Saxon laws. Hale's Hist. C. L. c. 6.

GRAND JURY, *practice*. The grand jury is a body of men, consisting of not less than twelve nor more than twenty-three, taken at stated periods, from the mass of citizens residing in the proper county, in the manner prescribed by law. There is just reason to believe that this institution existed among the Saxons. Crabb's C. L. 35. A view of the important duties of grand juries will be taken, by considering, 1, the organization of the grand jury; 2, the extent of its jurisdiction; 3, the mode of doing business; 4, the evidence to be received; 5, their duty to make presentments; 6, the secrecy to be observed by the grand jury.

1. *Of the organization of the grand jury.*—The law requires that twenty-four citizens shall be summoned to attend on the grand jury, but in practice, not more than twenty-three are sworn, because of the inconvenience which else might arise, of having twelve, who are sufficient to find a true bill, opposed to other twelve who might be against it. 6 Adolp. & Ell. 236; S. C. 33 E. C. L. R. 66. Upon being called, all who present themselves are sworn, as it scarcely ever happens that all who are summoned are in attendance. The grand jury cannot consist of less than twelve, and from fifteen to twenty are usually sworn. 2 Hale, P. C. 161. Being called in the jury-box, they are usually permitted to select a foreman whom the court appoint, but the court may exercise the right to nominate one for them. The foreman then takes the following oath or affirmation, namely:—"You, A B, as foreman of this inquest for the body of the —— of ——, do swear (or affirm) that you will diligently inquire, and true presentments make, of all such articles, matters and things as shall be given you in charge, or otherwise come to your knowledge touching the present service; the commonwealth's counsel, your fellows and your own, you shall keep secret; you shall present no one for envy, hatred, or malice; nor shall you leave any one unpresented for fear, favour, affection, hope of reward or gain; but shall present all things truly, as they come to your knowledge, according to the best of your understanding, (so help you God.)" It will be perceived that this oath contains the substance of the duties of the grand jury. The foreman having been sworn or affirmed, the other grand jurors are sworn or affirmed, according to this formula:—"You and each of you do swear (or affirm) that the same oath (or affirmation) which your foreman has taken on his part, you and every one of you shall well and truly observe on on your part." Being so sworn or affirmed, and having received the charge of the court, the grand jury are organized, and may proceed to the room provided for them to transact the business which may be laid before them. 2 Burr. 1088; Bac. Ab. Juries, A. The grand jury constitute a regular body until discharged by the court, or by operation of law, as where they cannot continue by virtue of an act of assembly beyond a certain day. But although they have been formally discharged by the court, if they have not separated, they may be called back, and fresh bills submitted to them. 9 C. & P. 43; S. C. 38 E. C. L. R. 28.

2. *The extent of the grand jury's jurisdiction.* Their jurisdiction is co-extensive with that of the court for which they inquire, both as to the offences triable there, and the

territory over which such court has jurisdiction.

3. *The mode of doing business.*—The foreman acts as president, and the jury usually appoint one of their number to perform the duties of secretary. No records are to be kept of the acts of the grand jury, except for their own use, because, as will be seen hereafter, their proceedings are to be secret. Being thus prepared to enter upon their duties, the grand jury are supplied with bills of indictment by the attorney-general against offenders. On these bills are endorsed the names of the witnesses by whose testimony they are supported. The witnesses are in attendance in another room, and must be called when wanted. Before they are examined as to their knowledge of the matters mentioned in the indictment, care must be taken that they have been sworn or affirmed. For the sake of convenience they are generally sworn or affirmed in open court before they are sent to be examined, and when so qualified, a mark to that effect is made opposite their names.

In order to save time, the best practice is to find a true bill, as soon as the jury are satisfied that the defendant ought to be put upon his trial. It is a waste of time to examine any other witness after they have arrived at that conclusion. Twelve at least must agree, in order to find a true bill; but it is not required that they should be unanimous. Unless that number consent, the bill must be ignored. When a defendant is to be put upon his trial, the foreman must write on the back of the indictment "a true bill," sign his name as foreman, and date the time of finding. On the contrary, where there is not sufficient evidence to authorise the finding of the bill, the jury return that they are ignorant whether the person accused committed the offence charged in the bill, which is expressed by the foreman endorsing on the bill "ignoramus," signing his name as before, and dating the time.

4. *Of the evidence to be received.* In order to ascertain the facts which the jury have not themselves witnessed, they must depend upon the statement of those who know them, and who will testify to them. When the witness, from his position and ability, has been in a condition to know the facts about which he testifies, he is deserving of implicit confidence; if, with such knowledge, he has no motive for telling a false or exaggerated story, has intelligence enough to tell what he knows, and gives a probable account of the transaction. If, on the other hand, from his position he could not know the facts, or if knowing them, he distorts them, he is undeserving of credit. The jury are the sole judges of the credit and confidence to which a witness is entitled.

Should any member of the jury be acquainted with any fact on which the grand jury are to act, he must, before he testifies, be sworn or affirmed, as any other witness, for the law requires this sanction in all cases.

As the jury are not competent to try the accused, but merely to investigate the case so far as to ascertain whether he ought to be put on his trial; they cannot hear evidence in his favour; their's is a mere preliminary inquiry; it is when he comes to be tried in court that he may defend himself by examining witnesses in his favour and showing the facts of the case.

5. *Of presentments.* The jury are required to make true presentments of all such matters which may be given to them in charge, or which have otherwise come to their knowledge. A presentment, properly speaking, is the notice taken by the

grand jury of any offence from their own knowledge, as of a nuisance, a libel, or the like. In these cases, the authors of the offence should be named, so that they may be indicted.

6. *Of the secrecy to be observed by the grand jury.* The oath which they have taken obliges them to keep secret, "the commonwealth's counsel, your fellows and your own." Although contrary to the general spirit of our institutions, which do not shun day-light, this secrecy is required by law for wise purposes. It extends to the votes given in any case, to the evidence delivered by witnesses, and the communications of the jurors to each other; the disclosure of these facts, unless under the sanction of law, would render the imprudent juror who should make them public, liable to punishment. Giving intelligence to a defendant that a bill has been found against him, to enable him to escape, is so obviously wrong, that no one can for a moment doubt its being criminal. The grand juror who should be guilty of this offence might, upon conviction, be fined and imprisoned. The duration of the secrecy appears not to be definitely settled, but it seems this injunction is to remain as long as the particular circumstances of each case require. In a case, for example, where a witness swears to a fact in open court, on the trial, directly in opposition to what he swore before the grand jury, there can be no doubt the injunction of secrecy, as far as regards this evidence, would be at an end, and the grand juror might be sworn to testify what this witness swore to in the grand jury's room, in order that the witness might be prosecuted for perjury. 2 Russ. Cr. 616; 4 Greenl. Rep. 439; but see contra, 2 Halst. R. 347.

Vide, generally, 1 Chit. Cr. Law, 162; 1 Russ. Cr. 291; 2 Russ. Cr. 616; 2 Stark. Ev. 232, n. (1); 1 Hawk. 65, 506; 2 Hawk. ch. 25; 3 Story, Const. § 1778; 2 Swift's Dig. 370; 4 Bl. Com. 402; Archb. Cr. Pl. 63.

GRANDFATHER, *domestic relations*, is the father of one's father or mother. The father's father is called the paternal grandfather; the mother's father is the maternal grandfather.

GRANDMOTHER, *domestic relations*, is the mother of one's father or mother. The father's mother is called the paternal grandmother; the mother's mother is the maternal grandmother.

GRANT, *conveyancing*, *concessio*. Technically speaking, grants are applicable to the conveyance of incorporeal rights, though in the largest sense, the term comprehends every thing that is granted or passed from one to another, and is applied to every species of property. Grant is one of the usual words in a feoffment, and differs but little except in the subject-matter; for the operative words used in grants are *dedi et concessi*, "have given and granted." Incorporeal rights are said to lie in grant and not in livery, for existing only in idea, in contemplation of law, they cannot be transferred by livery of possession; of course at common law, a conveyance in writing was necessary, hence they are said to be in grant, and pass by the delivery of the deed. To render the grant effectual, the common law required the consent of the tenant of the land out of which the rent, or other incorporeal interest proceeded; and this was called *attornment*, (q. v.) It arose from the intimate alliance between the lord and vassal existing under the feudal tenures. The tenant could not alien the feud without the consent of the lord, nor the lord part with his seignory without the consent of the tenant. The necessity

of attornment has been abolished in the United States. 4 Kent, Com. 479. He who makes the grant is called the grantor, and he to whom it is made, the grantee. Vide Com. Dig. h. t.; 14 Vin. Ab. 27; Bac. Ab. h. t.; 4 Kent, Com. 477; 2 Bl. Com. 317, 440; Perk. ch. 1; Touchs. c. 12; 8 Cowen's R. 36.

By the word *grant* in a treaty is meant not only a formal grant, but any concession, warrant, order, or permission to survey, possess or settle, whether written or parole, express, or presumed from possession. Such a grant may be made by law, as well as by a patent pursuant to a law. 12 Pet. R. 410. See, generally, 9 A. & E. 532; 5 Mass. 472; 9 Pick. 80.

GRANT, BARGAIN, AND SELL. By the laws of the states of Pennsylvania, Delaware, Missouri, and Arkansas, it is declared that the words *grant, bargain, and sell*, shall amount to a covenant that the grantor was seised of an estate in fee, freed from encumbrances done or suffered by him, and for quiet enjoyment as against all his acts. These words do not amount to a general warranty, but merely to a covenant that the grantor has not done any acts, nor created any encumbrance, by which the estate may be defeated. 2 Binn. R. 95; 3 Penna. R. 313; vide 2 Caines's R. 188; 1 Murph. R. 343; Ib. 348; Ark. Rev. Stat. ch. 31, s. 1; 11 S. & R. 109.

GRASS HEARTH, *old Engl. law*. The name of an ancient customary service of tenant's doing one day's work for their landlord.

GRATIFICATION. A reward given voluntarily for some service or benefit rendered, without being requested so to do, either expressly or by implication.

GRATIS, without reward or consideration. When a bailee undertakes to perform some act or work *gratis*, he is answerable for his gross negligence, if any loss should be sustained in consequence of it; but a distinction exists between non-feasance and misfeasance; between a total omission to do an act which one gratuitously promises to do, and a culpable negligence in the execution of it; in the latter case he is responsible, while in the former he would not in general be bound to perform his contract. 4 Johns. R. 84; 5 T. R. 143; 2 Ld. Raym. 913.

GRATUITOUS CONTRACT,—*civ. law*, is one the object of which is for the benefit of the person with whom it is made, without any profit, received or promised, as a consideration for it; as, for example, a gift.

GRAVAMEN. The grievance complained of; the substantial cause of the action. See Greenl. Ev. § 66.

GRAVE, a place where a dead body is interred. The violation of the grave by taking up the dead body, or stealing the coffin or grave clothes is a misdemeanor at common law. 1 Russ. on Cr. 414. See *Dead Body*. In New York by statutory enactment it is provided that every person who shall open a grave or other place of interment, with intent, 1, to remove the dead body of any human being, for the purpose of selling the same, or for the purpose of dissection; or, 2, to steal the coffin, or any part thereof, or the vestments or other articles interred with any dead body, shall upon conviction be punished by imprisonment, in a state prison, not exceeding two years, or in a county gaol, not exceeding six months, or by fine not exceeding two hundred and fifty dollars, or by both such fine and imprisonment. Rev. Stat. part 4, tit. 5, art. 3, § 15.

GREAT LAW. The name of an act of the legislature of Pennsylvania passed at Chester immediately after the arrival of William Penn,

December 7th, 1682. Serg. Land Laws of Penn. 24, 230.

GREE, *obsolete*, signified satisfaction; as, to make gree to the parties, is to agree with, or satisfy them for an offence done.

GREEN WAX, *Engl. law*. The name of the estreats of fines, issues, and amercements in the exchequer, delivered to the sheriff under the seal of that court, which is made with green wax.

GROS BOIS, or GROSSE BOIS. Such wood as by the common law or custom is reputed timber. 2 Inst. 642.

GROSS, absolute, entire, not depending on another. Vide *Common*.

GROSS ADVENTURE. By this term the French law writers signify a maritime loan, or bottomry, (q. v.) It is so called because the lender exposes his money to the perils of the sea; and contributes to the gross or general average. Poth. h. t.; Pard. Dr. Com. h. t.

GROSS WEIGHT. The total weight of goods or merchandise, with the chests, bags, and the like, from which are to be deducted tare and tret.

GROUND RENT, *estates*. In Pennsylvania this term is used to signify a perpetual rent issuing out of some real estate. These rents are redeemable, where there is a covenant in the deed that before the expiration of a period therein named, it may be redeemed by the payment of a certain sum of money; or it is irredeemable, when there is no such agreement; and, in the latter case, it cannot be redeemed without the consent of both parties. See 1 Whart. R. 337; 4 Watts, R. 98; and *Emphyteosis*.

GROUNDAGE, *mar. law*, is the consideration paid for standing a ship in a port. Jacobs, Dict. h. t. Vide *Demurrage*.

GUAGER. An officer appointed to examine all tuns, pipes, hogsheads, barrels and tierces of wine, oil, and other liquids, and to give them a mark of allowance, as containing lawful measure.

GUARANTEE, *contracts*. He to whom a guaranty is made. The guarantee is entitled to receive payment in the first place from the debtor, and, secondly, from the guarantor. He must be careful not to give time beyond that stipulated in original agreement, to the debtor, without the consent of the guarantor; the guarantee should, at the instance of the guarantor, bring an action against the principal for the recovery of the debt. 2 Johns. Ch. R. 554; 17 Johns. R. 384; 8 Serg. & Rawle, 116; 10 Serg. & Rawle, 33; 2 Bro. C. C. 579, 582; 2 Ves. jr. 542. But the mere omission of the guarantee to sue the principal debtor will not in general discharge the guarantor. 8 Serg. & Rawle, 112; 3 Yeates, R. 157; 6 Binn. R. 292, 300.

GUARANTOR, *contracts*. He who makes a guaranty. The guarantor is bound to fulfil the engagement he has entered into, provided the principal debtor does not. He is bound only to the extent that the debtor is, and any payment made by the latter, or release of him by the creditor, will operate as a release of the guarantor, 3 Penna. R. 19; or even if the guarantee should give time to the debtor beyond that contained in the agreement, or substitute a new agreement, or do any other act by which the guarantor's situation would be worse, the obligation of the latter would be discharged. Smith on Mer. Law, 285.

GUARANTY, *contracts*, is a promise made upon a good consideration, 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 instance, liable to such payment or

performance. The English statute of frauds, 29 Car. II. c. 3, which, with modifications, has been adopted in most of the states, 3 Kent's Com. 86, requires that "upon any special promise to answer for the debt, default or miscarriage of another person, the agreement or some memorandum or note thereof, must be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." This clause of the statute is not in force in Pennsylvania. To render this contract valid, under the statute, its form must be in writing; it must be made upon a sufficient consideration; and it must be to fulfil the engagement of another.

1. The agreement must be in writing and signed by the party to be bound, or some one authorised by him. It should substantially contain the names of the party promising, and of the person on whose behalf the promise is made; the promise itself, and the consideration for it.

2. The word *agreement* in the statute includes the consideration for the promise, as well as the promise itself; if, therefore, the guaranty be for a subsisting debt, or engagement of another person, not only the engagement but the consideration for it, must appear in the writing. 5 East, R. 10. This has been the construction which has been given in England, and which has been followed in New York and South Carolina, though it has been rejected in several other states. 3 John. R. 210; 8 John. R. 29; 2 Nott & M'Cord, 372, note; 4 Greenl. R. 180, 387; 6 Conn. R. 81; 17 Mass. R. 122. The decisions have all turned upon the force of the word *agreement;* and where by statute the word *promise* has been introduced, by requiring the *promise or agreement*, to be in writing, as in Virginia, the construction has not been so strict. 5 Cranch's R. 151, 2.

3. The guaranty must be to answer for the debt or default of another. The term debt implies, that the liability of the principal debtor had been previously incurred; but a default may arise upon an executory contract and a promise to pay for goods to be furnished to another, is a collateral promise to pay on the other's default, provided the credit was given, in the first instance, solely to the other. It is a general rule that when a promise is made by a third person, previous to the sale of goods, or other credit given, or other liability incurred, it comes within the statute, when it is conditional upon the default of another, who is solely liable in the first instance, otherwise not; the only inquiry to ascertain this, is, to whom was it agreed that the vendor or creditor should look in the first instance? Many nice distinctions have been made on this subject. 1st. When a party actually purchases goods himself, which are to be delivered to a third person for his sole use, and the latter was not to be responsible, this is not a case of guaranty, because the person to whom the goods were furnished never was liable. 2 T. R. 80.—2d. Where a person buys goods, or incurs any other liability, jointly with another, but for the use of that other, and this fact is known to the creditor, the guaranty must be in writing. 8 John. R. 89.—3d. A person may make himself liable, in the third place, by adding his credit to that of another, but conditionally only, in case of the other's default. This species of promise comes immediately within the meaning of the statute, and in the cases is sometimes termed a *collateral promise.*

Vide generally, Fell on Mercantile Guaranties; 3 Kent's Com. 86;

Theob. P. & S. ch. 2 and 3; Smith on Mer. Law, ch. 10; 3 Saund. 414, n. 5; Wheat. Dig. 182; 14 Wend. 231.

GUARDIANS, *domestic relations.* Guardians are divided into, guardians of the person, in the civil law called tutors; and guardians of the estate, in the same law known by the name of curators; for the distinction between them, vide article *Curatorship*, and 2 Kent, Com. 186.

1. A guardian of the person is one who has been lawfully invested with the care of the person of an infant, whose father is dead. The guardian must be properly appointed; he must be capable of serving; he must be appointed guardian of an infant; and after his appointment he must perform the duties imposed on him by his office. 1st. In England and in some of the states, where the English law has been adopted in this respect, as in Pennsylvania, Rob. Dig. 312, by stat. 12 Car. II. c. 24, power is given to the father to appoint a testamentary guardian, for his children, whether *in esse*, or in *ventra sa* (leur) *mere*. According to Chancellor Kent, this statute has been adopted in the state of New York, and, probably, throughout this country. 2 Kent, Com. 184. The statute of Connecticut, however, is an exception, there the father cannot appoint a testamentary guardian. 1 Swift's Dig. 48. All other kinds of guardians (to be hereafter noticed) have been superseded in practice by guardians appointed by courts having jurisdiction of such matters. Courts of chancery, orphans' courts, and courts of a similar character having jurisdiction of testamentary matters in the several states, are invested generally with the power of appointing guardians.—2dly, The person appointed must be capable of performing the duties, an idiot therefore cannot be appointed guardian.—3dly, The person over whom a guardian is appointed must be an infant; for after the party has attained his full age he is entitled to all his rights, if of sound mind, and, if not, the person appointed to take case of him is called a committee, (q. v) No guardian of the person can be appointed over an infant whose father is alive, unless the latter be non compos mentis, in which case one may be appointed as if the latter were dead.—4thly. After his appointment the guardian of the person is considered as standing in the place of the father, and of course the relative powers and duties of guardian and ward correspond, in a great measure to those of parent and child; in one prominent matter they are different. The father is entitled to the services of his child, and is bound to support him; the guardian is not entitled to the ward's services, and is not bound to maintain him out of his own estate.

2. A guardian of the estate is one who has been lawfully invested with the power of taking care and managing the estate of an infant. 1 John. R. 561; 7 John. Ch. R. 150. His appointment is made in the same manner as that of a guardian of the person. It is the duty of the guardian to take reasonable and prudent care of the estate of the ward, and manage it in the most advantageous manner; and when the guardianship shall expire, to account with the ward for the administration of the estate.

Guardians have also been divided into guardians by nature; guardians by nurture; guardians in socage; testamentary guardians; statutory guardians; and guardians ad litem.

1. Guardians by *nature*, is the father, and, on his death, the mother; this guardianship extends only to the custody of the person, 3 Bro. C. C. 186; 1 John. Ch. R. 3; 3 Pick. R.

213; and continues till the child shall acquire the age of twenty-one years. Co. Litt. 84 a.

2. Guardian by *nurture*, occurs only when the infant is without any other guardian, and the right belongs exclusively to the parents, first the father, and then the mother. It extends only to the person, and determines, in males and females at the age of fourteen. This species of guardianship has become obsolete.

3. Guardian in *socage*, has the custody of the infant's lands as well as his person. The common law gave this guardianship to the next of blood to the child to whom the inheritance could not possibly descend: this species of guardianship has become obsolete, and does not perhaps exist in this country; for the guardian must be a relation by blood who cannot possibly inherit, and such a case can rarely exist.

4. *Testamentary* guardians; these are appointed under the stat. 12 Car. II., above mentioned: they supersede the claims of any other guardian, and extend to the person, and real and personal estate of the child, and continue till the ward arrives at full age.

5. Guardians *appointed by the courts*, by virtue of some statutory authority. The distinction of guardians by nature, and by socage, appear to have become obsolete, and have been essentially superseded in practice by the appointment of guardians by courts of chancery, orphans' courts, probate courts, and such other courts as have jurisdiction to make such appointments. Testamentary guardians might, as well as those of this class, be considered as statutory guardians, inasmuch as their appointment is authorised by a statute.

6. Guardian *ad litem*, is one appointed for the infant to defend him in an action brought against him. Every court when an infant is sued in a civil action, has power to appoint a guardian *ad litem* when he has no guardian, for as the infant cannot appoint an attorney, he would be without assistance if such a guardian were not appointed. The powers and duties of a guardian *ad litem* are confined to the defence of the suit. F. N. B. 27; Co. Litt. 88 b, note (16); Ib. 135 b, note (1).

GUARDIANS OF THE POOR. The name given to officers whose duties are very similar to those of overseers of the poor, (q. v.), that is, generally to relieve the distresses of such poor persons who are unable to take care of themselves.

GUARDIANSHIP, *persons*, is the power or protective authority given by law, and imposed on an individual who is free and in the enjoyment of his rights, over one whose weakness on account of his age, renders him unable to protect himself. Vide *Tutor*.

GUEST. A traveller who stays at an inn or tavern with the consent of the keeper. Bac. Ab. Inns, C 5; 8 Co. 32; and if after having taken lodgings at an inn, he leaves his horse there, and goes elsewhere to lodge, he is still to be considered a guest. But not if he merely leaves goods for which the landlord receives no compensation. 1 Salk. 388; 2 Lord Raym. 866; Cro. Jac. 188. The length of time a man is at an inn makes no difference, whether he stays a day, or a week, or a month, or longer, so always, that, though not strictly *transeuns*, he retains his character as a traveller. But if a person comes upon a special contract to board and sojourn at an inn, he is not in the sense of the law a guest, but a boarder. Bac. Ab. Inns, C 5; Story, Bailm. § 477. Innkeepers are generally liable for all goods, belonging to the guest, brought within the inn. It is not necessary that the goods should have been in the special

keeping of the innkeeper to make him liable. This rule is founded on principles of public utility, to which all private considerations ought to yield. 2 Kent, Com. 459; 1 Hayw. N. C. Rep. 40; 14 John. R. 175; Dig. 4, 9, 1. Vide 3 Barn. & Ald. 283; 4 Maule & Selw. 306; 1 Holt's N. P. 209; 1 Salk. 387; S. C. Carth. 417; 1 Bell's Com. 469; Dane's Ab. Index, h. t.; Yelv. 67, a; Smith's Leading Cases, 47; 8 Co. 32.

GUILD, a fraternity or company. Guildhall, the place of meeting of guilds.

GUILT, *crim. law*, is that quality in a person which renders him criminal, and to which the law annexes a punishment; or it is that disposition to violate the law, which has manifested itself by some act already done. The opposite of innocence. Vide Rutherf. Inst. B, 1, c. 18, s. 10.

GUILTY. The state or condition of a person who has committed a crime, misdemeanor or offence. In pleading, it is a plea by which a defendant who is charged with a crime or misdemeanor admits or confesses it. When the accused is arraigned, the clerk asks him, "How say you, A B, are you guilty or not guilty?" His answer, which is given *ore tenus*, is called his plea; and when he admits the charge in the indictment he answers or pleads *guilty*.

H.

HABEAS CORPORA, in English practice, is a writ issued out of the C. P. commanding the sheriff to compel the appearance of a jury in the cause between the parties. It answers the same purpose in that court as the *Distringas juratores* answers in the K. B.

HABEAS CORPUS, *remedies*.—A writ of habeas corpus is an order in writing, signed by the judge who grants the same, and sealed with the seal of a court of which he is a judge, issued in the name of the sovereignty where it is granted, by such a court or a judge thereof, having lawful authority to issue the same, directed to any one having a person in his custody or under his restraint, commanding him to produce such person at a certain time and place, and to state the reasons why he is held in custody, or under restraint.

This writ was at common law considered as a remedy to remove the illegal restraint on a freeman, but anterior to the 31 Charles II. its benefit was, in a great degree, eluded by time-serving judges, who awarded it only in term time, and who assumed a discretionary power of awarding or refusing it. 3 Bulstr. 23. To secure the full benefit of it to the subject, the statute 31 Car. 2, c. 2, commonly called the *habeas corpus* act was passed. This gave to the writ, the vigour, life, and efficacy requisite for the due protection of the liberty of the subject. In England this is considered as a high prerogative writ, issuing out of the court of king's bench, in term time or vacation, and running into every part of the king's dominions. It is also grantable as a matter of right, *ex merito justitiæ*, upon the application of any person.

The interdict *De homine libero exhibendo* of the Roman law, was a remedy very similar to the writ of *habeas corpus*. When a freeman was restrained by another contrary to good faith the pretor ordered his interdict that such person should be

brought before him that he might be liberated. Dig. 43, 29, 1.

The *habeas corpus* act has been substantially incorporated into the jurisprudence of every state in the union, and the right to the writ has been secured by most of the constitutions of the states, and of the United States. The statute of 31 Car. 2, c. 2, provides that the person imprisoned, if he be not a prisoner convict, or in execution of legal process, or committed for treason or felony, plainly expressed in the warrant, or has not neglected wilfully by the space of two whole terms after his imprisonment, to pray a *habeas corpus* for his enlargement, may apply by any one in his behalf, in vacation time, to a judicial officer for the writ of *habeas corpus*, and the officer upon view of the copy of the warrant of commitment, or upon proof of denial of it after due demand, must allow the writ to be directed to the person in whose custody the party is detained, and made returnable immediately before him. And, in term time, any of the said prisoners may obtain his writ of *habeas corpus*, by applying to the proper court.

By the habeas corpus law of Pennsylvania, (the act of 18 February, 1785,) the benefit of the writ of habeas corpus is given in "all cases where any person, not being committed or detained for any criminal or supposed criminal matter," who "shall be confined or restrained of his or her liberty, under any colour or pretence whatsoever." A similar provision is contained in the habeas corpus act of New York. Act of 21st April, 1818, sect. 41, ch. 277.

The constitution of the United States, art. 1, s. 9, n. 2, provides that "the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it;" and the same principle is contained in many of the state constitutions. In order still more to secure the citizen the benefit of this great writ, a heavy penalty is inflicted upon the judges who are bound to grant it, in case of refusal.

It is proper to consider, 1, when it is to be granted; 2, how it is to be served; 3, what return is to be made to it; 4, the hearing; 5, the effect of the judgment upon it.

1. The writ is to be granted whenever a person is in actual confinement, committed or detained as aforesaid, either for a criminal charge, or, as in Pennsylvania and New York, in all cases where he is confined or restrained of his liberty, under any colour or pretence whatsoever. But persons discharged on bail will not be considered as restrained of their liberty so as to be entitled to a writ of habeas corpus directed to their bail. 3 Yeates, R. 263; 1 Serg. & Rawle, 356.

2. The writ may be served by any free person, by leaving it with the person to whom it is directed, or left at the gaol or prison with any of the under officers, under keepers, or deputy of the said officers or keepers. In Louisiana it is provided that if the person to whom it is addressed shall refuse to receive the writ, he who is charged to serve it, shall inform him of its contents; if he to whom the writ is addressed conceal himself, or refuse admittance to the person charged to serve it on him, the latter shall affix the order on the exterior of the place where the person resides, or in which the petitioner is confined. Lo. Code of Pract. art. 803. The service is proved by the oath of the party making it.

3. The person to whom the writ is addressed or directed, is required to make a return to it, within the time prescribed; he either complies or he does not. If he *complies*, he

must positively answer; 1, whether he has or has not in his power or custody, the person to be set at liberty, or whether that person is confined by him; if he return that he has not, and has not had him in his power or custody, and the return is true, it is evident that a mistake was made in issuing the writ; if the return is false he is liable to a penalty and other punishment for making such a false return. If he return that he has such person in his custody, then he must show by his return further by what authority and for what cause he arrested or detained him. If he *does not comply*, he is to be considered in contempt of the court under whose seal the writ has been issued, and liable to a severe penalty, to be recovered by the party aggrieved.

4. When the prisoner is brought before the judge, his judicial discretion commences, and he acts under no other responsibility than that which belongs to the exercise of ordinary judicial power. The judge or court before whom the prisoner is brought on a habeas corpus, examines the return and papers, if any, referred to in it, and if no legal cause be shown for the imprisonment or restraint; or if it appear, although legally committed, he has not been prosecuted or tried within the periods required by law, or that for any other cause the imprisonment cannot be legally continued, the prisoner is discharged from custody. For those offences which are bailable when the prisoner offers sufficient bail, he is to be bailed. He is to be remanded in the following cases; 1, when it appears he is detained upon legal process, out of some court having jurisdiction of criminal matters; 2, when he is detained by warrant, under the hand and seal of a magistrate for some offence for which by law, the prisoner is not bailable; 3, when he is a convict in execution, or detained in execution by legal civil process; 4, when he is detained for a contempt, specially and plainly charged in the commitment, by some existing court having authority to commit for contempt; and 5, when he refuses or neglects to give the requisite bail in a case bailable of right. The judge is not confined to the return, but he is to examine into the causes of the imprisonment, and then he is to discharge bail, or remand, as justice shall require. 2 Kent, Com. 26; Lo. Code of Prac. art. 819.

5. It is provided by the habeas corpus act, that a person set at liberty by the writ, shall not again be imprisoned for the same offence, by any person whomsover, other than by the legal order and process of such court wherein he shall be bound by recognizance to appear, or other court having jurisdiction of the cause. 4 Johns. R. 318; 1 Binn. 374; 5 John. R. 282.

Vide, generally, Bac. Ab. h. t.; Vin. Ab. h. t.; Com. Dig. h. t.; Nels. Ab. h. t.; the various American Digests, h. t.; Lo. Code of Prac. art. 791 to 827; Dane's Ab. Index, h. t.

HABEAS CORPUS AD DELIBERANDUM ET RECIPIENDUM, *practice*, is a writ which lies to remove a prisoner to take his trial in the county where the offence was committed. Bac. Ab. Habeas Corpus, A.

HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM, *practice*, is a writ which issues out of a court of competent jurisdiction, when a person is sued in an inferior court, commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer, (whence this writ is frequently denominated ***habeas corpus cum causâ***,)

to *do and receive* whatever the court or the judge issuing the writ shall consider in that behalf. This writ may also be issued by the bail of a prisoner, who has been taken upon a criminal accusation, in order to surrender him in his own discharge; upon the return of this writ the court will cause an exoneratur to be entered on the bail-piece, and remand the prisoner to his former custody. Tidd's Pr. 405; 1 Chit. Cr. Law, 132.

HABEAS CORPUS AD PROSEQUENDUM, is a writ which issues for the purpose of removing a prisoner in order to prosecute. 3 Bl. Com. 130.

HABEAS CORPUS AD RESPONDENDUM, is a writ which issues at the instance of a creditor or one who has a cause of action against a person who is confined by the process of some inferior court; in order to remove the prisoner and charge him with this new action in the court above. 2 Mod. 198; 3 Bl. Com. 107.

HABEAS CORPUS AD SATISFACIENDUM, is a writ issued at the instance of a plaintiff for the purpose of bringing up a prisoner, against whom a judgment has been rendered, in a superior court to charge him with the process of execution. 2 Lill. Pr. Reg. 4; 3 Bl. Com. 129, 130.

HABEAS CORPUS AD SUBJICIENDUM, *remedies*, by way of eminence called the writ of *habeas corpus*, (q. v.), is a writ directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive, whatsoever the judge or court awarding such writ shall consider in that behalf. 3 Bl. Com. 131; 3 Story, Const. § 1333.

HABEAS CORPUS AD TESTIFICANDUM, a writ issued for the purpose of bringing a prisoner, in order that he may testify before the court. 3 Bl. Com. 130.

HABENDUM, *in conveyancing*. This is a Latin word which signifies to have. In conveyancing, it is that part of a deed which usually declares what estate or interest is granted by it, its certainty, duration, and to what use. It sometimes qualifies the estate, so that the general implication of the estate, which, by construction of law, passes in the premises, may by the habendum be controlled; in which case the habendum may enlarge the estate, but not totally contradict, or be repugnant to it. The habendum commences in our common deeds with the words, "to have and to hold." 2 Bl. Com. 298; 14 Vin. Ab. 143; Com. Dig. Fait, E 9; 2 Co. 55 a; 8 Mass. R. 175; 1 Litt. R. 220; Cruise, Dig. tit. 32, c. 20, s. 69 to 93; 5 Serg. & Rawle, 375; 2 Rolle, Ab. 65; Plowd. 153; Co. Litt. 183; Martin's N. C. Rep. 28; 4 Kent, Com. 456; 3 Prest. on Abstr. 206 to 210; 5 Barnw. & Cres. 709; 7 Greenl. R. 455; 6 Conn. R. 289; 6 Har. & J. 132; 3 Wend. 99.

HABERDASHER, a dealer in miscellaneous goods and merchandise.

HABERE FACIAS POSSESSIONEM, *practice, remedies*. The name of a writ of execution in the action of ejectment. The sheriff is commanded by this writ that without delay he cause the plaintiff to have possession of the land in dispute which is therein described; a *fi. fa.* or *ca. sa.* for costs may be included in the writ. The duty of the sheriff in the execution and return of that part of the writ, is the same as on a common *fi. fa.* or *ca. sa.* The sheriff is to execute this writ by delivering a full and actual possession of

the premises to the plaintiff. For this purpose he may break an outer or inner door of the house, and, should he be violently opposed, he may raise the *posse comitatus*. Wats. on Sher. 60, 215; 5 Co. 91 b.; 1 Leon. 145. The name of this writ is abreviated *hab. fa. poss.* Vide 10 Vin. Ab. 14; Tidd's Pr. 1081, 8th Engl. edit.; 2 Arch. Pr. 58; 3 Bl. Com. 412; Bing. on Execut. 115, 252; Bac. Ab. h. t.

HABERE FACIAS SEISINAM, *practice, remedies.* The name of a writ of execution, used in most real actions, by which the sheriff is directed that he cause the demandant to have seisin of the lands which he has recovered. This writ may be taken out at any time within a year and day after judgment. It is to be executed nearly in the same manner as the writ of *habere facias possessionem*, and, for this purpose, the officer may break open the outer door of a house to deliver seisin to the demandant. 5 Co. 91 b; Com. Dig. Execution, E; Wats. Off. of Sheriff, 238. The name of this writ is abbreviated *hab. fa. seis.* Vide Bingh. on Exec. 115, 252; Bac. Ab. h. t.

HABERE FACIAS VISUM, *practice*, the name of a writ which lies when a view is to be taken of lands and tenements. F. N. B. Index, verbo, View.

HABITATION, *civil law*, was the right of a person to live in the house of another without prejudice to the property. It differed from a usufruct, in this, that the usufructarian might have applied the house to any purpose, as, a store or manufactory; whereas the party having the right of habitation could only use it for the residence of himself and family. 1 Bro. Civ. Law, 184; Domat, l. 1, t. 11, s. 2, n. 7.

HABITATION, *estates.* A dwelling-house, a home-stall. 2 Bl. Com. 4; 4 Bl. Com. 220. Vide *House.*

HABITUAL DRUNKARD, one who is so frequently drunk as to manifest a design of repeating the same act. By the laws of Pennsylvania a habitual drunkard is put nearly upon the same footing with a lunatic; he is deprived of his property and a committee is appointed by the court to take care of his person and estate. Act of 13th June, 1836, Pamph. p. 589. Vide 6 Watts's Rep. 139; 1 Ashm. R. 71.

HABITUALLY, so frequently as to show a design of repeating the same act. 2 N. S. 622; 1 Mart. (Lo.) R. 149.

HAD BOTE, *Engl. law.* A recompense or amends made for violence offered to a person in holy orders.

HALF-BLOOD, *parentage, kindred.* When persons are descended from only one parent in common, they are of the half-blood, or related only by half in the same degree that children descended from the same parents are. For example, if John marry Sarah and has a son by that marriage, and after Sarah's death he marry Maria, and has by her another son, these children are of the half-blood, whereas two of the children of John and Sarah would be of the whole blood. By the English common law, one related to an intestate of the half-blood only, could never inherit, upon the presumption that he is not of the blood of the original purchaser; but this rule has been greatly modified by the 3 and 4 Wm. 4, c. 106. In this country the common law principle on this subject may be considered as not being in force, though in some states some distinction is still preserved between the whole and the half blood. 4 Kent, Com. 403, n.; 1 Badg. & Dev. (N. C.) Rep. 160; 2 Yerg. 115; 1 M'Cord, 456; Dane's Ab. Index, h. t.; Reeves on Descents, *passim.* Vide *Descents.*

HALF CENT, *money*, a copper coin of the United States, of the value of one two-hundredth part of a dollar, or five mills. It weighs eighty-four grains. Act of January 18, 1837, s. 12, 4 Sharswood's cont. of Story's L. U. S. 2523, 4. Vide *Money*.

HALF DEFENCE, *pleading*.—Vide *Defence; Et cetera*.

HALF DIME, *money*, a silver coin of the United States of the value of one-twentieth part of a dollar, or five cents. It weighs twenty grains and five-eighths of a grain. Of one thousand parts, nine hundred are of pure silver and one hundred of alloy. Act of January 18, 1837, s. 8 and 9, 4 Sharswood's cont. of Story's L. U. S. 2523, 4. Vide *Money*.

HALF DOLLAR, *money*, a silver coin of the United States of the value of fifty cents. It weighs two hundred and six and one-fourth grains. Of one thousand parts, nine hundred are of pure silver and one hundred of alloy. Act of January 18, 1837, s. 8 and 9, 4 Sharsw. cont. of Story's L. U. S. 2523, 4. Vide *Money*.

HALF EAGLE, *money*, a gold coin of the United States, of the value of five dollars. It weighs one hundred and twenty-nine grains. Of one thousand parts, nine hundred are of pure gold, and one hundred of alloy. Act of January 18th, 1837, 4 Sharsw. cont. of Story's L. U. S. 2523, 4. Vide *Money*.

HALF SEAL, is a seal used in the English chancery for the sealing of commissions to delegates appointed upon any appeal, either in ecclesiastical or marine causes.

HALF YEAR. In the computation of time, a half year consists of one hundred and eighty-two days. Co. Litt. 135 b; Rev. Stat. of N. Y. part 1, c. 19, t. 1, § 3.

HALL. A public building used either for the meetings of corporations, courts, or employed to some public use; as the city hall, the town hall. Formerly this word denoted the chief mansion or habitation.

HALLUCINATION, *med. jur.* It is a species of mania, by which "an idea reproduced by the memory is associated and embodied by the imagination." This state of mind is sometimes called delusion or waking dreams. An attempt has been made to distinguish *hallucinations* from illusions; the former are said to be dependent on the state of the intellectual organs; and, the latter, on that of those of sense. Ray, Med. Jur. § 99; 1 Beck, Med. Jur. 538, note. An instance is given of a temporary hallucination in the celebrated Ben Jonson, the poet. He told a friend of his that he had spent many a night in looking at his great toe, about which he had seen Turks and Tartars, Romans and Carthagenians, fight, in his imagination. 1 Coll. on Lun. 34. If instead of being temporary this affection of his mind had been parmanent, he would doubtless have been considered insane. See on the subject of spectral illusions, Hibbert, Alderson and Farrar's Essays; Scott on Demonology, &c.; Bostock's Physiology, vol. 3, p. 91, 161.

HALMOTE. The name of a court among the Saxons. It had civil and criminal jurisdiction.

HAMESUCKEN, *Scotch law*.—The crime of hamesucken consists in "the felonious seeking and invasion of a person in his dwelling-house." 1 Hume, 312; Burnett, 86; Alison's Princ. of the Cr. Law of Scotl. 199. The mere breaking into the house, without the personal violence does not constitute the offence, nor does the violence without an entry with intent to commit an assault. It is the combination of both which completes the crime. 1. It is necessary that the invasion of the house should have proceeded from forethought

malice; but it is sufficient if, from any illegal motive, the violence has been meditated, although it may not have proceeded from the desire of wreaking personal revenge properly so called. 2. The place where the assault was committed must have been the proper dwelling-house of the party injured, and not a place of business, visit, or occasional residence. 3. The offence may be committed equally in the day as in the night, and not only by effraction of the building by actual force, but by an entry obtained by fraud with the intention of inflicting personal violence, followed by its perpetration. 4. But unless the injury to the person be of a grievous and material character, it is not hamesucken, though the other requisites to the crime have occurred. When this is the case it is immaterial whether the violence be done *lucri causa*, or from personal spite. 5. The punishment of hamesucken, in aggravated cases of injury, is death; in cases of inferior atrocity, an arbitrary punishment. Alison's Pr. of Cr. Law of Scotl. ch. 6; Ersk. Pr. L. Scotl. 4, 9, 23.

HANAPER OFFICE. *Eng. law.* This is the name of one of the offices belonging to the English court of chancery. 3 Bl. Com. 49.

HAND, *measure.* The length of four inches. Horses are measured by the hand. Vide *Measures.*

HANDSALE, *contracts.* Anciently, among all the northern nations, shaking of hands was held necessary to bind a bargain; a custom still retained in verbal contracts; a sale thus made was called *handsale, venditio per mutuam manum complexionem.* In process of time the same word was used to signify the price or earnest, which was given immediately after the shaking of hands, or instead thereof. 2 Bl. Com. 448; Heineccius, *de Antique* Jure Germanico, lib. 2, § 335; Toull. Dr. Civ. Fr. liv. 3, t. 3, c. 2, n. 33.

HANDWRITING, *evidence;*—every man's hand is different from others, and the character of his writing differs from all others, this is called his handwriting. It is sometimes necessary to prove that a certain instrument or name is in the handwriting of a particular person, that is done either by the testimony of a witness, who saw the paper or signature actually written; or by one who has by sufficient means, acquired such a knowledge of the general character of the handwriting of the party as will enable him to swear to his belief, that the handwriting of the person is the handwriting in question. 1 Phil. Ev. 422; Stark. Ev. h. t.; 2 John. Cas. 211; 5 John. R. 144; 1 Dall. 14; 2 Grenl. R. 33; 6 Serg. & Rawle, 568; 1 Nott & M'Cord, 554; 19 Johns. R. 134; Anthon's N. P. 77; 1 Ruffin's R. 6; 2 Nott & M'Cord, 400; 7 Com. Dig. 447; Bac. Ab. Evidence, M; Dane's Ab. Index, h. t.

HANGING, *punishment.* Suspension by the neck of a criminal, who has been sentenced to suffer death in due form of law, until he is dead.

HAP. An old word which signifies to catch; as, "to hap the rent," "to hap the deed poll." Techn. Dict. h. t.

TO HARBOUR, *torts,* is to receive clandestinely and without lawful authority a person for the purpose of so concealing him that another having a right to the lawful custody of such person, shall be deprived of the same; for example the harbouring of a wife or an apprentice in order to deprive the husband or the master of them. The harbouring of such persons will subject the harbourer to an action for the injury; but in order to put him completely in the wrong, a demand should be made for their

restoration, for in cases where the harbourer has not committed any other wrong than merely receiving plaintiff's wife, child or apprentice, he may be under no obligation to return them without a demand. 1 Chit. Pr. 564; Dane's Ab. Index, h. t.

HARD LABOUR, *punishment.* In those states where the penitentiary system has been adopted, convicts who are to be imprisoned as part of their punishment, are sentenced to perform *hard labour.* This labour is not greater than many freemen perform voluntarily, and the quantity required to be performed is not at all unreasonable. In the penitentiaries of Pennsylvania it consists in being employed in weaving, shoemaking and such like employments.

HART. A stag or male deer of the forest five years old complete.

HAT MONEY, *mar. law.* The name of a small duty paid to the captain and mariners of a ship, usually called primage, (q. v.)

TO HAVE. Vide *Habendum; Tenendum.*

HAVEN. A place calculated for the reception of ships, and so situated, in regard to the surrounding land that the vessel may ride at anchor in it in safety. Hale, de Port. Mar. c. 2; 2 Chit. Com. Law, 2; 15 East, R. 304, 5. Vide *Creek; Port; Road.*

HAWKERS. Persons going from place to place with goods and merchandise for sale. To prevent impositions they are generally required to take out licenses, under regulations established by the local laws of the states.

HAZARDOUS CONTRACT,—*civ. law.* When the performance of that which is one of its objects, depends on an uncertain event, the contract is said to be hazardous. Civ. Co. of Lo. art. 1769.

HEAD BOROUGH, *Engl. law.* Formerly he was the chief officer of a borough, but now he is an officer subordinate to constable.

HEALTH. The most perfect state of life. It may then be defined to be the natural agreement and concordant dispositions of the parts of the living body. Public health is an object of the utmost importance, and has attracted the attention of the national and state legislatures. By the act of congress of the 25th of February, 1799, 1 Story's Laws U. S. 564, it is enacted, 1, that the quarantines and other restraints, which shall be established by the laws of any state, respecting any vessels arriving in or bound to any port or district thereof, whether coming from a foreign port or some other part of the United States, shall be observed and enforced by all officers of the United States, in such place. Sect. 1.—2. In times of contagion the collectors of the revenue may remove, under the provisions of the act, into another district. Sect. 4.—3. The judge of any district court, may, when a contagious disorder prevails in his district, cause the removal of persons confined in prison under the laws of the United States, into another district. Sect. 5.—4. In case of the prevalence of a contagious disease at the seat of government, the president of the United States may direct the removal of any or all public offices to a place of safety. Sect. 6.—5. In case of such contagious disease, at the seat of government, the chief justice, or in case of his death or inability, the senior associate justice of the supreme court of the United States, may issue his warrant to the marshal of the district court within which the supreme court is by law to be holden, directing him to adjourn the said session of the said court to such other place within the same or adjoining district as he may deem convenient. And the district judges

may under the same circumstances, have the same power to adjourn to some other part of their several districts. Sect. 7.—Offences against the provisions of the health laws are generally punished by fine and imprisonment. There are offences against public health punishable by the common law by fine and imprisonment, such for example as selling unwholesome provisions. 4 Bl. Com. 162; 2 East's P. C. 822; 6 East, R. 133 to 141; 3 M. & S. 10; 4 Campb. R. 10.

Private injuries affecting a man's health arise upon a breach of contract, express or implied; or in consequence of some tortious act unconnected with a contract. 1. Those injuries to health which arise upon a contract are, 1st. The misconduct of medical men, when through neglect, ignorance, or wanton experiments, they injure their patients. 1 Saund. 312, n. 2.—2d. By the sale of unwholesome food; though the law does not consider a sale to be a warranty as to the goodness or quality of a personal chattel, it is otherwise with regard to food and liquors. 1 Rolle's Ab. 90, pl. 1, 2.—2. Those injuries which affect a man's health, and which arise from tortious acts unconnected with contracts are, 1st, private nuisances; 2d, public nuisances; 3d, breaking quarantine; 4th, by sudden alarms, and frightening: as by raising a pretended ghost. 4 Bl. Com. 197, 201, note 25; 1 Hale, 429; Smith's Forens. Med. 37 to 39; 1 Paris & Fonbl. 351, 352. For private injuries affecting his health a man may generally have an action on the case.

HEALTH OFFICER. The name of an officer invested with power to enforce the health law. The powers and duties of health officers are regulated by local laws.

HEARING, *chancery practice*. The name of hearing is given to the trial of a chancery suit. The hearing is conducted as follows. When the cause is called on in court, the pleadings on each side are opened in a brief manner to the court by the junior counsel for the plaintiff; after which the plaintiff's leading counsel states the plaintiff's case, and the points in issue, and submits to the court his arguments upon them. Then the depositions (if any) of the plaintiff's witnesses, and such parts of the defendant's answer as support the plaintiff's case are read by the plaintiff's solicitor; after which the rest of the plaintiff's counsel address the court; then the same course of proceedings is observed on the other side excepting that no part of the defendant's answer can be read in his favour, if it be replied to: the leading counsel for the plaintiff is then heard in reply; after which the court pronounces the decree. Newl. Pr. 153, 4; 14 Vin. Ab. 233; Com. Dig. Chancery, T 1, 2, 3.

HEARING, *crim. law*. Is the investigation by a magistrate of a charge made against a person accused of the facts of the case. This is always done upon oath of witnesses who must be examined face to face with the accused. It is the duty of the magistrate to take and complete the examination of all concerned. When either for want of time, or from any other reason, the magistrate cannot complete the examination at the time, he may postpone it for a further hearing. 1 Chit. Cr. Law, 72. Vide *Further Hearing*.

HEARSAY EVIDENCE, is the evidence of those who relate, not what they know themselves, but what they have heard from others. As a general rule, hearsay evidence of a fact is not admissible. If any fact is to be substantiated against a person, it ought to be proved in his presence by the testimony of a witness sworn or affirmed to speak the

truth. There are, however, exceptions to the rule.—1. Hearsay is admissible when it is introduced, not as a medium of proof in order to establish a distinct fact, but as being in itself a part of the transaction in question, when it is a part of the *res gestæ*. 1 Phil. Ev. 218; 4 Wash. C. C. R. 729; 14 Serg. & Rawle, 275; 21 How. St. Tr. 535; 6 East, 193.—2. What a witness swore on a former trial, between the same parties, and where the same point was in issue as in the second action, and he is since dead, what he swore to is, in general, evidence. 2 Show. 47; 11 John. R. 446; 2 Hen. & Mumf. 193; 17 John. R. 176. But see, 14 Mass. 234; 2 Russ. on Cr. 683, and the notes.—3. The dying declarations of a person who has received a mortal injury, as to the fact itself, and the party by whom it was committed, are good evidence under certain circumstances. Vide *Declarations*, and 15 John. R. 286; 1 Phil. Ev. 215; 2 Russ. on Cr. 683.—4. In questions concerning public rights, common reputation is admitted to be evidence.—5. The declarations of deceased persons in cases where they appear to have been made against their interest, have been admitted.—6. Declarations in cases of birth and pedigree are also to be received in evidence. 7. Boundaries may be proved by hearsay evidence, but, it seems, it must amount to common tradition or repute. 6 Litt. 7; 6 Pet. 341; Cooke, R. 142; 4 Dev. 342; 1 Hawks, 45; 4 Hawks, 116; 4 Day, 265. See 3 Ham. 283. There are perhaps a few more exceptions which will be found in the books referred to below. 2 Russ. on Cr. B. 6, c. 3; Phil. Ev. ch. 7, s. 7; 1 Stark. Ev. 40; Rosc. Cr. Ev. 20; Rosc. Civ. Ev. 19 to 24; Bac. Ab. Evidence, K; Dane's Ab. Index, h. t. Vide also, Dig. 39, 3, 2, 8; Ib. 22, 3, 28. See Gresl. Eq. Ev. pt. 2, c. 3, s. 3, p. 218, for the rules in courts of equity as to receiving hearsay evidence. 20 Am. Jur. 68.

HEIFER. The female issue of a cow, which issue has not had a calf. A beast of this kind two years and a half old was held to be improperly described in an indictment as a cow. 2 East, P. C. 616; 1 Leach, 105.

HEIR, is one born in lawful matrimony, who succeeds by descent, right of blood, and by act of God, to lands, tenements or hereditaments, being an estate of inheritance. Under the word heirs are comprehended the heirs of heirs in infinitum. 1 Co. Litt. 7 b, 9 a, 237 b; Wood's Inst. 69. According to many authorities, heir may be *nomen collectivum*, as well in a deed as in a will, and operate in both in the same manner, as heirs in the plural number. 1 Roll. Abr. 253; Ambl. 453; Godb. 155; T. Jones, 111; Cro. Eliz. 313; 1 Burr. 38; 10 Vin. Abr. 233, pl. 1; 8 Vin. Abr. 233; sed vide 2 Prest. on Est. 9, 10. In wills in order to effectuate the intention of the testator the word *heirs* is sometimes construed to mean next of kin. 1 Jac. & Walk. 388; and children, Ambl. 273; see further as to the force and import of this word, 2 Vent. 311; 1 P. Wms. 229; 3 Bro. P. C. 60, 454; 2 P. Wms. 1, 369; 2 Black. R. 1010; 4 Ves. 326, 766, 794; 2 Atk. 89, 580; 5 East, Rep. 533; 5 Burr. 2615; 11 Mod. 189; 8 Vin. Abr. 317; 1 T. R. 630; Bac. Abr. Estates in fee simple, B.

There are several kinds of heirs specified below.

By the civil law heirs are divided into testamentary or instituted heirs; legal heirs or heirs of the blood; to which the Civil Code of Louisiana has added irregular heirs. They are also divided into unconditional and beneficiary heirs.

It is proper here to notice a difference in the meaning of the word heir, as it is understood by the common and by the civil law. By the civil law the term *heirs* was applied to all persons who were called to the succession, whether by the act of the party or by operation of law. The person who was created universal successor by a will, was called the testamentary heir; and the next of kin by blood was, in cases of intestacy, called the heir at law, or heir by intestacy. The executor of the common law is in many respects not unsimilar to the testamentary heir of the civil law. Again, the administrator in many respects corresponds with the heir by intestacy. By the common law, executors, unless expressly authorised by the will, and administrators have no right, except to the personal estate of the deceased; whereas the heir by the civil law was authorised to administer both the personal and real estate. 1 Brown's Civ. Law, 344; Story, Confl. of Laws, § 508.

All free persons, even minors, lunatics, persons of insane mind or the like, may transmit their estates as intestate ab intestato, and inherit from others. Civ. Code of Lo. 945; accord, Co. Litt. 8 a. The child in its mother's womb is considered as born for all purposes of its own interest; it takes all successions opened in its favour, since its conception, provided it be capable of succeeding at the moment of its birth. Civ. Code of Lo. 948. Nevertheless, if the child conceived is reputed born, it is only in the hope of its birth; it is necessary then that the child be born alive, for it cannot be said those who are born dead ever inherited. Ib. 949. See *In ventre sa mere.*

HEIR APPARENT is one who has an indefeasible right to the inheritance, provided he outlive the ancestor. 2 Bl. Com. 208.

HEIR, (BENEFICIARY,) a term used in the civil law. Beneficiary heirs are those who have accepted the succession under the benefit of an inventory regularly made. Civ. Code of Lo. art. 879. If the heir apprehend that the succession will be burdened with debts beyond its value, he accepts with benefit of inventory, and in that case he is responsible only for the value of the succession. See *Inventory, benefit of.*

HEIR, (COLLATERAL). A collateral heir is one who is not of the direct line of the deceased, but comes from a collateral line; as a brother, sister, an uncle and aunt, a nephew, niece, or cousin of the deceased.

HEIR, (CONVENTIONAL,) *civ. law.* A conventional heir is one who takes a succession by virtue of a contract; for example, a marriage contract which entitles the heir to the succession.

HEIR, FORCED. Vide *Forced heirs.*

HEIR GENERAL, or heir at common law, in the English law. The heir at common law is he who after his father or ancestor's death has a right to, and is introduced into all his lands, tenements and hereditaments. He must be of the whole blood, not a bastard, alien, &c. Bac. Abr. Heir, B 2; *Coparceners; Descent.*

HEIR, (IRREGULAR) *in Louisiana.* Irregular heirs are those who are neither testamentary nor legal, and who have been established by law to take the succession. See Civ. Code of Lo. art. 874. When the deceased has left neither lawful descendants nor ascendants, nor collateral relations, the law calls to his inheritance either the surviving husband or wife, or his or her natural children or the state. Ib. art. 911. This is called an irregular succession.

HEIR, (LEGAL) *civil law.* A legal heir is one who is of the same blood of the deceased, and who takes the succession by force of law; this is different from a testamentary or conventional heir who takes the succession in virtue of the disposition of man. See Civ. Code of Louis. art. 873, 875; Dict. de Jurisp. Heritier legitime. There are three classes of legal heirs, to wit; the children and other lawful descendants; the fathers and mothers and other lawful ascendants; and the collateral kindred. Civ. Code of Lo. art. 883.

HEIR LOOM, *estates*, is literally a *limb* or member of the inheritance. The term *heir looms* is applied to those chattels which are considered as annexed and necessary to the enjoyment of an inheritance. They are chattels, which contrary to the nature of chattels, descend to the heir, along with the inheritance, and do not pass to the executor of the last proprietor. Charters, deeds, and other evidences of the title of the land, together with the box or chest in which they are contained; the keys of a house, and fish in a fish pond, are all heir looms. 1 Inst. 3 a; Ib. 185 b; 7 Rep. 17 b; Cro. Eliz. 372; Bro. Ab. Charters, pl. 13; 2 Bl. Com. 28; 14 Vin. Ab. 291.

HEIR PRESUMPTIVE. A presumptive heir is one who in the present circumstances would be entitled to the inheritance, but whose rights may be defeated by the contingency of some nearer heir being born. 2 Bl. Com. 208. In Louisiana, the presumptive heir is he who is the nearest relation to the deceased, capable of inheriting. This quality is given to him before the decease of the person from whom he is to inherit, as well as after the opening of the succession, until he has accepted or renounced it. Civ. Code of Lo. art. 876.

HEIR, (TESTAMENTARY,) *civil law.* A testamentary heir is one who is so constituted by testament executed in the form prescribed by law. He is so called to distinguish him from the legal heirs who are called to the succession by the law; and from conventional heirs, who are so constituted by a contract *inter vivos.* See *Hæres factus; Devisee.*

HEIR, (UNCONDITIONAL,) a term used in the civil law, adopted by the Civil Code of Louisiana. Unconditional heirs are those who inherit without any reservation, or without making an inventory, whether their acceptance be express or tacit. Civ. Code of Louisiana, art. 878.

HEIRESS, a female heir to a person having an estate of inheritance. When there is more than one, they are called *co-heiresses*, or *co-heirs.*

HERBAGE, *English law.* A species of easement, which consists in the right to feed one's cattle on another man's ground.

HEREDITAMENTS, *estates*, is any thing capable of being inherited, be it corporeal or incorporeal, real, personal or mixed, and including not only lands and every thing thereon, but also heir-looms, and certain furniture which by custom may descend to the heir together within the land. Co. Litt. 5 b; 1 Tho. Co. Litt. 219; 2 Bl. Com. 17; by this term such things are denoted, as may be the subject-matter of inheritance, but not the inheritance itself; it cannot, therefore, by its own intrinsic force, enlarge an estate, *prima facie* a life estate, into a fee. 2 B. & P. 251; 8 T. R. 503; 1 Tho. Co. Litt. 219; note T. Hereditaments are divided into corporeal and incorporeal. Corporeal hereditaments are confined to lands, (q. v.) Vide *Incorporeal hereditaments*, and Shep. To. 91; Cruise's Dig. tit. 1, s. 1; Wood's Inst. 121;

3 Kent, Com. 321; Dane's Ab. Index, h. t.

HEREDITARY. That which is inherited.

HERESY, *Eng. law*, is the adoption of any erroneous tenet not warranted by the established church. This is punished by the deprivation of certain civil rights, and by fine and imprisonment. 1 East, P. C. 4. Vide *Apostacy; Christianity.*

HERISCHILD. A species of English military service or knight's fee.

HERIOTS, *Engl. law*, are a render of the best beast or other goods, as the custom may be, to the lord on the death of the tenant. 2 Bl. Com. 97. They are usually divided into two sorts, heriot-service, and heriot-custom; the former are such as are due upon a special reservation in the grant or lease of lands, and therefore amount to little more than a mere rent; the latter arise upon no special reservation whatsoever, but depend merely upon immemorial usage and custom; these are defined to be a customary tribute of goods and chattles, payable to the lord of the fee, on the decease of the owner of the land. 2 Bl. Com. 422; vide Com. Dig. Copyhold, K 18; Bac. Ab. h. t; 2 Saund. Index, h. t.; 1 Vern. 441.

HERITAGE. Something that can be inherited. Co. Litt. s. 731.

HERMAPHRODITES are persons who have in the sexual organs the appearance of both sexes; they are adjudged to belong to that which prevails in them. Co. Litt. 2, 7; Domat, Lois Civ. lib. 1, t. 2, s. 1, n. 9. The sexual characteristics in the human species, are widely separated, and the two sexes never, perhaps, united in the same individual. 2 Dunglison's Hum. Physiol. 304; 1 Beck's Med. Jur. 94 to 110. Dr. Wm. Harris in a lecture delivered to the Philadelphia Medical Institute gives an interesting account of a supposed hermaphrodite who came under his own observation in Chester county, Pennsylvania. The individual was called Elizabeth, and till the age of eighteen wore the female dress, when she threw it off, and assumed the name of Rees with the dress and habits of a man: at twenty-five she married a woman, but had no children. Her clitoris was five or six inches long, and in coition, which she greatly enjoyed, she used this instead of the male organ. She lived till she was sixty years of age, and died in possession of a large estate which she had acquired by her industry and enterprise. Medical Examiner, vol. ii. p. 314. Vide 1 Briand, Méd. Lég. c. 2, art. 2, § 2, n. 2; Dict. des Sciences Méd. art. Hypospaedias, et art. Impuissance.

HIDE, *measures.* In England a hide of land, according to some ancient manuscripts, contained one hundred and twenty acres. Co. Litt. 5; Plowd. 167; Touchst. 93.

HIGH CONSTABLE. An officer appointed in some cities who bears this name. His powers are generally limited to matters of police, and are not more extensive in these respects than those of *constables*, (q. v.)

HIGH SEAS. This term, which is frequently used in the laws of the United States, signifies the unenclosed waters of the ocean, and also those waters on the sea coast which are without the boundaries of low water mark. 1 Gall. R. 624; 5 Mason's R. 290; 1 Bl. Com. 110; 2 Hagg. Adm. R. 398; Dunl. Adm. Pr. 32, 33. The act of congress of 30th of April, 1790, s. 8, 1 Story's L. U. S. 84, enacts, that if any person shall commit upon the *high seas*, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder, &c., which, if

committed within the body of a county would, by the laws of the United States be punishable with death, every such offender, being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought. See 4 Dall. R. 426; 3 Wheat. R. 336; 5 Wheat. 184, 412; 3 W. C. C. R. 515; Serg. Const. Law, 334; 13 Am. Jur. 279.

HIGH WATER MARK, is that part of the shore of the sea to which the waves reach on ordinary occasions, when the tide is at its highest. 6 Mass. R. 435; 1 Pick. R. 180; 1 Halst. R. 1; 1 Russ. on Cr. 107; 2 East, P. C. 803. Vide *Sea shore; Tide.*.

HIGHEST BIDDER, *contracts*, he who, at an auction, offers the greatest price for the property sold. The highest bidder is entitled to have the article sold at his bid, provided there has been no unfairness on his part. A distinction has been made between the *highest* and the *best* bidder. In judicial sales, where the highest bidder is unable to pay, it is said the sheriff may offer the property to the next highest, who will pay, and he is considered the best bidder. 1 Dall. R. 419.

HIGHWAY. This is said to be a generic name for all kinds of public ways, 6 Mod. R. 255. Highways are universally laid out by public authority, and repaired at the public expense, by direction of law. The public have an easement over a highway, of which the owner of the land cannot deprive them; but the soil and freehold still remain in the owner, and he may use the land above and below consistently with the easement. He may, therefore, work a mine, sink a drain or water-course, under the highway, if the easement remains unimpaired. Vide *Road; Street; Way;* and 4 Vin. Ab. 502; Bac. Ab. h. t.; Com. Dig. Chemin; Dane's Ab. Index. h. t.; Egremont on Highways; Wellbeloved on Highways; Woolrych on Ways; 1 N. H. Rep. 16; 1 Conn. R. 103; 1 Pick. R. 122; 1 M'Cord's R. 67; 2 Mass. R. 127; 1 Pick. R. 122; 3 Rawle, R. 495; 15 John. R. 483; 16 Mass. R. 33; 1 Shepl. R. 250; 4 Day, R. 330; 2 Bail. R. 271.

HIGHWAYMAN, a robber on the highway.

HIGLER, *Eng. law*, a person who carries from door to door, and sells by retail, small articles of provisions, and the like.

HIRE, *contracts*, is a bailment, where a compensation is to be given for the use of a thing or for labour or services about it. 2 Kent's Com. 456; 1 Bell's Com. 451; Story on Bailm. § 369; See Pothier, Contrat de Louage, ch. 1, n. 1; Domat, B. 1, tit. 4, § 1, n. 1; Code Civ. art. 1709, 1710; Civ. Code of Lo. art. 2644; 2645. See this Dict. *Hirer; Letter.*

The contract of letting and hiring is usually divided into two kinds; first, *Locatio* or *Locatio conductio rei*, the bailment of a thing to be used by the hirer for a compensation to be paid by him. Secondly, *Locatio operis*, or the hire of the labour and services of the hirer for a compensation to be paid by the letter. And this last kind is again subdivided into two classes; 1. *Locatio operis facienda*, or the hire of labour and work to be done, or care and attention to be bestowed on the goods let by the hirer for a compensation; or, 2, *Locatio operis mercium vehendarum*, or the hire and carriage of goods from one place to another, for a compensation. Jones's Bailm. 85, 86, 90, 103, 118; 2 Kent's Com. 456; Code Civ. art. 1709, 1710, 1711.

This contract arises from the principles of natural law; it is voluntary, and founded in consent; it involves mutual and reciprocal obligations; and it is for mutual benefit. In some respects it bears a strong resemblance to the contract of sale; the principal difference between them being, that in cases of sale, the owner parts with the whole proprietary interest in the thing, and in cases of hire, the owner parts with it only for a temporary use and purpose. In a sale, the thing itself is the object of the contract; in hiring, the use of the thing is its object. Vinnius, lib. 3, tit. 25, in pr.; Pothier, Louage, n. 2, 3, 4; Jones's Bailm. 86; Story on Bailm. § 371.

Three things are of the essence of the contract; 1. That there should be a thing to be let; 2, a price for the hire; and, 3, a contract possessing a legal obligation. Pothier, Louage, n. 6. Civ. Code of Lo. art. 2640.

There is a species of contract in which, though no price in money be paid, and which strictly speaking is not the contract of hiring, yet partakes of its nature. According to Pothier it is an agreement which must be classed with contracts *do ut des*. It frequently takes place among poor people in the country. He gives the following example: two poor neighbours, each owning a horse, and desirous to plough their respective fields, to do which two horses are required, one agrees that he will let the other have his horse for a particular time, on condition that the latter will let the former have his horse for the same length of time. Du Louage, n. 458. This contract is not a hiring strictly speaking, for want of a price; nor is it a loan for use, because there is to be a recompense. It has been supposed to be a partnership; but it is different from that contract, because there is no community of profits. This contract is in general ruled by the same principles which govern the contract of hiring. 19 Toull. n. 247.

Hire also means the price given for the use of the thing hired; as, the hirer is bound to pay the hire or recompense.

Vide Domat, liv. 1, tit. 4; Poth. Contrat de Louage; Toull. tomes 18, 19, 20; Merl. Répert. mot Louage; Dalloz, Dict. mot Louage; Argou, Inst. liv. 3, c. 27.

HIRER, *contracts*, called in the civil law, *conductor*, and in the French law, *conducteur*, *procureur*, *locataire*, is he who takes a thing from another, to use it, and pays a compensation therefor. Wood's Inst. B. 3, c. 5, p. 236; Pothier, Louage, n. 1; Domat, B. 1, tit. 4, § 1, n. 2; Jones's Bailm. 70; see this Dict. *Letter*.

There is, on the part of the hirer, an implied obligation, not only to use the thing with due care and moderation, but not to apply it to any other use than that for which it is hired; for example, if a horse is hired as a saddle horse, the hirer has no right to use the horse in a cart, or to carry loads, or as a beast of burden. Pothier, Louage, n. 189; Domat, B. 1, tit. 4, § 2, art. 2, 3; Jones's Bailm. 68, 88; 2 Saund. 47 g, and note; 1 Bell's Com. 454; 1 Cowen's R. 322; 1 Meigs, R. 459. If a carriage and horses are hired to go from Philadelphia to New York, the hirer has no right to go with them on a journey to Boston. Jones's Bailm. 68; 2 Ld. Raym. 915. So if they are hired for a week, he has no right to use them for a month. Jones's Bailm. 68; 2 Ld. Raym. 915; 5 Mass. 104. And if the thing is used for a different purpose from that which was intended by the parties, or in a different manner, or for a longer period, the hirer is not only responsible

for all damages, but if a loss occurs, although by inevitable casualty, he will be responsible therefor. 1 Rep. Const. C. So. Car. 121; Jones's Bailm. 68, 121; 2 Ld. Raym. 909, 917. In short, such a mis-user is deemed a conversion of the property, for which the hirer is deemed responsible. Bac. Abr. Bailment, C; Id. Trover, C, D, E; 2 Saund. 47 g; 2 Bulst. 306, 309. The above rules apply to cases where the hirer has the possession as well as the use of the thing hired; when the owner or his agents retain the possession, the hirer is not in general responsible for any injury done to it. For example, when the letter of a carriage and a pair of horses sent his driver with them, and an injury occurred, the hirer was held not to be responsible. 9 Watts, R. 556, 562; 5 Esp. R. 263; Poth. Louage, n. 196; Jones, Bailm. 88; Story, Bailm. § 403.

Another implied obligation of the hirer is to restore the thing hired, when the bailment is determined. 4 T. R. 260. And 3 Campb. 5, n; 13 Johns. R. 211.

The time, the place, and the mode of restitution of the thing hired, are governed by the circumstances of each case, and depend upon rules of presumption of the intention of the parties, like those in other cases of bailment. Story on Bailm. § 415.

There is also an implied obligation on the part of the hirer, to pay the hire or recompense. Pothier, Louage, n. 134; Domat, B. 2, tit. 2, § 2, n, 11; Code Civ. art. 1728.

See generally, *Employer; Hire; Letter.*

HIS EXCELLENCY, a title given by the constitution of Massachusetts to the governor of that commonwealth. Const. part 2, c. 2, s. 1, art. 1.

HIS HONOUR. A title given by the constitution of Massachusetts to the lieutenant governor of that commonwealth. Const. part, 2, c. 2, s. 2, art. 1.

HISTORY, *evidence.* The recital of facts written and given out for true. Facts stated in ancient histories may be read in evidence, on the ground of their notoriety. Skin. R. 14; 1 Ventr. R. 149. But these facts must be of a public nature, and the general usages and customs of the country. Bull. N. P. 248; 7 Pet. R. 554; 1 Phil. & Am. Ev. 606; 30 Howell's St. Tr. 492. Histories are not admissible in relation to matters not of a public nature, such as the custom of a particular town, a descent, the boundaries of a county, and the like. 1 Salk. 281; S. C. Skin. 623; T. Jones, 164; 6 C. & P. 586, note. See 9 Ves. 347; 10 Ves. 354; 3 John. 385; 1 Binn. 399; and *Notoriety.*

HOGSHEAD. A measure of wine, oil, and the like, containing half a pipe, the fourth part of a tun, or sixty-three gallons.

TO HOLD. Vide *Habendum; Tenendum.*

HOLDER. The holder of a bill of exchange is the person who is legally in the possession of it, either by endorsement or delivery, or both, and entitled to receive payment either from the drawee or acceptor, and is considered as an assignee. 4 Dall. 53. Vide *Bill of Exchange.*

HOLDING OVER, the act of keeping possession by the tenant, without the consent of the landlord, of premises which the latter, or those under whom he claims, had leased to the former, after the term has expired. When a proper notice has been given, this injury is remedied by ejectment, or, under local regulations, by summary proceedings. Vide 2 Yeates's R. 523; 2 Serg. & Rawle, 486; 5 Binn. 228; 8 Serg. & Rawle, 459; 1 Binn. 334, n.; 5 Serg. & Rawle, 174; 2 Serg. & Rawle, *50; 4 Rawle, 123.

HOLOGRAPH. Vide *Ologaph.*

HOMAGE, *Engl. law*, is an acknowledgment made by the vassal in the presence of his lord, that he is his man, that is, his subject or vassal. The form in law French was, *Jeo deveigne vostre home.*

HOMESTALL. The mansion-house.

HOMESTEAD. The place of the house or home place. Homestead farm does not necessarily include all the parcels of land owned by the grantor though lying and occupied together. This depends upon the intention of the parties when the term is mentioned in a deed, and is to be gathered from the context. 7 N. H. Rep. 241; 15 John. R. 471. See *Manor; Mansion.*

HOMICIDE, *crim. law*, is, according to Blackstone, the killing of any human creature, 4 Com. 177. This is the most extensive sense of this word, in which the intention is not considered. But in a more limited sense, it is always understood that the killing is by human agency, and Hawkins defines it to be the killing of a man by a man. 1 Hawk. c. 8, s. 2. See Dalloz, Dict. h. t. Homicide may perhaps be described to be the destruction of the life of one human being, either by himself, or by the act, procurement or culpable omission of another. When the death has been intentionally caused by the deceased himself, the offence is called *felo de se;* when it is caused by another, it is justifiable, excusable, or felonious.

The person killed must have been born, the killing before birth is called fœticide, (q. v.) The destruction of human life at any period after birth, is homicide, however near it may be extinction, from any other cause.

1. Justifiable homicide is such as arises, 1st, from unavoidable necessity, without any will, intention or desire, and without any inadvertence in the party killing, and therefore without blame; as, for instance, the execution, according to law, of a criminal who has been lawfully sentenced to be hanged: or, 2dly, it is committed for the advancement of public justice; as, if an officer, in the lawful execution of his office, either in a civil or criminal case, should kill a person who assaults and resists him. 4 Bl. Com. 178—180.

2. Excusable homicide is of two kinds, 1st, homicide *per infortunium*, (q. v.); or, 2d, *se defendendo*, or self defence, (q. v.) 4 Bl. Com. 182, 3.

3. Felonious homicide, which includes, 1, self murder, or suicide; 2, manslaughter, (q. v.); and, 3, murder, (q. v.)

Vide, generally, 3 Inst. 47 to 57; 1 Hale, P. C. 411 to 502; 1 Hawk. c. 8; Fost. 255 to 337; 1 East, P. C. 214 to 391; Com. Dig. Justices, L, M; Bac. Ab. Murder and Homicide; Burn's Just. h. t.; Williams's Just. h. t.; 2 Chit. Cr. Law, ch. 9; Cro. C. C. 285 to 300; 4 Bl. Com. 176 to 204; 1 Russ. Cr. 421 to 553; 2 Swift's Dig. 267 to 292.

HOMINE CAPTO IN WITHERNAM, *Engl. law.* The name of a writ directed to the sheriff and commanding him to take one who has taken any bondsman, and conveyed him out of the country, so that he cannot be replevied. Vide *Withernam.*

HOMINE ELIGENDO, *Engl. law.* The name of a writ directed to a corporation, requiring the members to make choice of a new man, to keep the one part of a seal appointed for statutes merchant. Techn. Dict. h. t.

HOMINE REPLEGIANDO,—vide *Writ de homine replegiando.*

HOMO. This Latin word, in its most enlarged sense, includes both man and woman. 2 Inst. 45. Vide *Man.*

HOMOLOGATION, *civil law.* Approbation, confirmation by a court of justice, a judgment which orders the execution of some act; as the approbation of an award, and ordering execution on the same. Merl. Repert. h. t.; Civil Code of Louis. Index, h. t.; Dig. 4, 8; 7 Toull. n. 254.

HONORARIUM, a recompense for services rendered. It is usually applied only to the recompense given to persons whose business is connected with science; as the fee paid to counsel. It is said this *honorarium* is purely voluntary, and differs from a fee, which may be recovered by action. 5 Serg. & Rawle, 412; 3 Bl. Com. 28; 1 Chit. Rep. 38; 2 Atk. 332; but see 2 Penna. R. 75; 4 Watts's R. 331. Vide Dalloz, Dict. h. t., and *Salary.*

HONOUR. It is the esteem we have of ourselves, and the consciousness that we deserve the esteem of others, because we have not departed from the principles of virtue, in which we are resolved to continue. This is true honour. False honour is the standard of respect to which we claim to be entitled, without considering whether or not we are deserving it. It is the latter which causes duels. A duel is not justified by any insult to our honour. Honour is also employed to signify integrity in a judge, courage in a soldier, and chastity in a woman. To deprive a woman of her honour is in some cases punished as a public wrong, and by an action for the recovery of damages done to the relative rights of a husband or a father. Vide *Criminal Conversation.* In England, when a peer of parliament is sitting judicially in that body, his pledge of honour is considered equal to another's oath; and in courts of equity peers, peeresses and lords of parliament, answer on their honour only. But the courts of common law know no such distinction. It is needless to add that as we are not encumbered by a nobility, there is no such distinction in the United States, all persons being equal in the eyes of the law.

TO HONOUR, *contr.*, is to accept a bill of exchange; to pay a bill accepted, or a promissory note, on the day it becomes due. 7 Taunt. 164; 1 T. R. 172. Vide *To Dishonour.*

HORS DE SON FEE, *pleading in the ancient English law.* These words signify *out of his fee.* A plea which was pleaded, when a person who pretended to be the lord, brought an action for rent services, as issuing out of his land: because if the defendant could prove the land was out of his fee, the action failed. Vide 9 Rep. 30; 2 Mod. 104; 1 Danvers's Ab. 655; Vin. Ab. h. t.

HORSE, a stallion, the male of the mare; until a horse has attained the age of four years, he is called a colt, (q. v.) Russ. & Ry. 416. This word is sometimes used as a generic name for all animals of the horse kind. Vide *Colt; Gender,* and Yelv. 67, a.

HOSTAGE. A person delivered in the possession of a public enemy in time of war as a security for the performance of a contract entered into between the belligerents. Hostages are frequently given as a security for the payment of a ransom bill, and if they should die, their death would not discharge the contract. 3 Burr. 1734; 1 Kent, Com. 106; Dane's Ab, Index, h. t.

HOSTELLAGIUM, *Engl. law.* A right reserved to the lords to be lodged and entertained in the houses of their tenants.

HOSTILITY. A state of open enmity, open war. Hostility, as it regards individuals, may be permanent or temporary; it is permanent when the individual is a citizen or subject of the government at war, and temporary when he happens to

be domiciliated or resident in the country of one of the belligerents; in this latter case the individual may throw off the national character he has thus acquired by residence, when he puts himself in motion, *bona fide*, to quit the country *sine animo revertendi*. 3 Rob. Adm. Rep. 12; 3 Wheat. R. 14. There may be a hostile character merely as to commercial purposes, and hostility may attach only to the person as a temporary enemy, or it may attach only to property of a particular description. This hostile character in a commercial view, or one limited to certain intents and purposes only, will attach in consequence of having possessions in the territory of the enemy, or by maintaining a commercial establishment there, or by a personal residence, or by particular modes of traffic, as by sailing under the enemy's flag or passport. 9 Cranch, 191; 5 Rob. Adm. Rep. 21, 161; 1 Kent, Com. 73; Wesk. on Ins. h. t.; Chit. Law of Nat. Index, h. t.

HOTCHPOT, *estates*. This homely term is used figuratively to signify the blending and mixing property belonging to different persons, in order to divide it equally among those entitled to it. For example, if a man seised of thirty acres of land, and having two children, should on the marriage of one of them give him ten acres of it, and then die intestate seised of the remaining twenty; now in order to obtain his portion of the latter the married child must bring back the ten acres he received, and add it to his father's estate, when an equal division of the whole will take place, and each be entitled to fifteen acres. 2 Bl. Com. 190. The term hotchpot is also applied to bringing together all the personal estate of the deceased, with the advancements he has made to his children, in order that the same may be divided agreeably to the provisions of the statute for the distribution of intestate's estates. In bringing an advancement into hotchpot, the donee is not required to account for the profits of the thing given, for example, he is not required to bring into hotchpot the produce of negroes, nor the interest of money. The property must be accounted for at its value when given. 1 Wash. R. 224; 17 Mass. 358; 2 Desaus. 127; 3 Rand. R. 117; 3 Pick. R. 450; 3 Rand. 559.

In Louisiana the term collation is used instead of hotchpot. The collation of goods is the supposed or real return to the mass of the succession, which an heir makes of property which he received in advance of his share or otherwise, in order that such property may be divided together with the other effects of the succession. Civ. Code of Lo. art. 1305; and vide from that article to article 1367.

Vide, generally, Bac. Ab. Coparceners, E; Bac. Ab. Executors, &c. K; Com. Dig. Guardian, G 2, Parcener, C 4; 8 Com. Dig. App. tit. Distribution, Statute of, III. For the French law, see Merl. Répért. mots Rapport à succession.

HOUR, *measure of time*, is the space of sixty minutes, or the twenty-fourth part of a natural day. Vide *Date; Fraction*, and Co. Litt. 135; 3 Chit. Pr. 110.

HOUSE, *estates*, a place for the habitation and dwelling of man. This word has several significations, as it is applied to different things. In a grant or demise of a house, the curtilage and garden will pass even without the words "with the appurtenances," being added. Cro. Eliz. 89; S. C. 3 Leon. 214; 1 Plowd. 171; 2 Saund. 401, note (2). In a grant or demise of a house with the appurtenances, no more will pass, although other lands have been oc-

cupied with the house. 1 P. Wms. 603; Cro. Jac. 526; 2 Co. 32; Co. Litt. 5 b.; Id. 36 a. b.; 2 Saund. 401, note (2). If a house, originally entire, be divided into several apartments, with an outer door to each apartment, and no communication with each other subsists, in such case the several apartments are considered as distinct houses. 6 Mod. 214; Woodf. Land. & Ten. 178. In cases of burglary, the mansion or dwelling-house in which the burglary might be committed, at common law includes the outhouses, though not under the same roof or adjoining to the dwelling-house, provided they were within the curtilage, or common fence, as the dwelling or mansion house. 3 Inst. 64; 1 Hale, 558; 4 Bl. Com. 225; 2 East, P. C. 493; 1 Hayw. (N. C.) Rep. 102, 142; 2 Russ. on Cr. 14. The term house in case of arson, includes not only the dwelling but all the outhouses as in the case of burglary. It is a maxim in law that every man's house is his castle, and there he is entitled to perfect security; this asylum cannot therefore be legally invaded, unless by an officer duly authorised by legal process; and this process must be of a criminal nature to authorise the breaking of an outer door; and even with it, this cannot be done until after demand of admittance and refusal. 5 Co. 93; 4 Leon. 41; T. Jones, 234; the house may be also broken for the purpose of executing a writ of *habere facias*. 5 Co. 93; Bac. Ab. Sheriff, (N 3). The house protects the owner from the service of all civil process in the first instance, but not if he is once lawfully arrested and he takes refuge in his own house, in that case, the officer may pursue him and break open any door for the purpose. Foster, 320; 1 Rolle, R. 138; Cro. Jac. 555; Bac. Ab. *ubi sup.* In the civil law the rule was nemo de domo sua extrahi debet. Dig. 50, 17, 103. Vide, generally, 14 Vin. Ab. 315; Yelv. 29 a, n. (1); 4 Rawle, R. 342; Arch. Cr. Pl. 251; and *Burglary*.

House is used figuratively to signify a collection of persons as the house of representatives; or an institution, as the house of refuge; or a commercial firm, as the house of A B & Co. of New Orleans.

HOUSE OF REFUGE, *punishment*. The name given to a prison for juvenile delinquents. These houses are regulated in the United States on the most humane principles, by special local laws.

HOUSE OF REPRESENTATIVES, *government*, is the popular branch of the legislature. The constitution of the United States, art. 1, s. 2, 1, provides that "the house of representatives shall be composed of members chosen every second year by the people of the several states; and the electors of each state, shall have the qualifications requisite for electors of the most numerous branch of the state legislature." The general qualifications of electors of the assembly, or most numerous branch of the legislature, in the several state governments, are, that they be of the age of twenty-one years and upwards, and free resident citizens of the state in which they vote, and have paid taxes: several of the state constitutions have prescribed the same or higher qualifications, as to property in the elected, than in the electors. The constitution of the United States, however, requires no evidence of property in the representatives, nor any declarations as to his religious belief. He must be free from undue bias or dependence by not holding any office under the United States. Art. 1, s. 6, 2. By the constitutions of the several states, the most numerous branch of the legislature generally bears the name of the house of

representatives. Vide Story, on Constitution of the United States, chapter 9; 1 Kent's Com. 228.

By the act of June 22, 1842, ch. 47, it is provided

§ 1. That from and after the third day of March, one thousand eight hundred and forty-three, the house of representatives shall be composed of members elected agreeably to a ratio of one representative for every seventy thousand six hundred and eighty persons in each state, and of one additional representative for each state having a fraction greater than one moiety of the said ratio, computed according to the rule prescribed by the constitution of the United States; that is to say: Within the state of Maine, seven; within the state of New Hampshire, four; within the state of Massachusetts, ten; within the state of Rhode Island, two; within the state of Connecticut, four; within the state of Vermont, four; within the state of New York, thirty-four; within the state of New Jersey, five; within the state of Pennsylvania, twenty-four; within the state of Delaware, one; within the state of Maryland, six; within the state of Virginia, fifteen; within the state of North Carolina, nine; within the state of South Carolina, seven; within the state of Georgia, eight; within the state of Alabama, seven; within the state of Louisiana, four; within the state of Mississippi, four; within the state of Tennessee, eleven; within the state of Kentucky, ten; within the state of Ohio, twenty-one; within the state of Indiana, ten; within the state of Illinois, seven; within the state of Missouri, five; within the state of Arkansas, one; within the state of Michigan, three.

§ 2. That in every case where a state is entitled to more than one representative, the number to which each state shall be entitled under this apportionment shall be elected by districts composed of contiguous territory equal in number to the number of representatives to which said state may be entitled, no one district electing more than one representative.

For the constitutions of the houses of representatives in the several states, the reader is referred to the names of the states in this work. Vide *Congress.*

HOUSEBOTE. An allowance of necessary timber out of the landlord's woods, for the repairing and support of a house or tenement. This belongs of common right to any lessee for years or for life; housebote is said to be of two kinds, *estoveriam ædificandi et ardendi.* Co. Litt. 41.

HOUSEKEEPER, one who occupies a house. 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. 1 Chit. Rep. 502; 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; in this case, the under-tenant paid the taxes, and let to the tenant the first floor of the house, and the rent was paid for the whole house to the tenant, who paid it to the landlord. Ib. note. In order to make the party a housekeeper, he must be in actual possession of the house. 1 Chit. Rep. 288; and must occupy a whole house, 1 Chit. Rep. 316. See 1 Barn. & Cresw. 178; 2 T. R. 406; 1 Bott, 5; 3 Petersd. Ab. 103, note.

HOVEL. A place used by husbandmen to set their ploughs, carts and other farming utensils, out of the rain and sun. Law Latin Dict. A shed.

HUE AND CRY, *Eng. law.* A mode of pursuing felons, or such as have dangerously wounded any person, or assaulted any one with intent to rob him, by the constable, for the

purpose of arresting the offender. 2 Hale, P. C. 100.

HUISSIER, an usher of a court. In France, an officer of this name performs many of the duties which in this country devolve on the sheriff or constable. Dalloz, Dict. h. t.

HUNDRED, *Eng. law.* A district of country originally comprehending one hundred families. In many cases when an offence is committed within the hundred, the inhabitants are civilly responsible to the party injured.

HUNDRED GEMOTE. The name of a court among the Saxons. It was holden every month for the benefit of the inhabitants of the hundred.

HUNDREDORS, in England, are inhabitants of a local division of a county, who, by several statutes, are held to be liable in the cases therein specified to make good the loss sustained by persons within the hundred, by robbery or other violence, therein also specified. The principal of these statutes are, 13 Edw. 1, st. 2, c. 1, s. 4; 28 Edw. 3, c. 11; 27 Eliz. c. 13; 29 Car. 2, c. 7; 8 Geo. 2, c. 16; 22 Geo. 2, c. 24.

HUNGER. The desire for taking food. Hunger is no excuse for larceny. 1 Hale, P. C. 54; 4 Bl. Com. 31. It is a matter which applies itself strongly to the consciences of the judges in mitigation of the punishment.

When a person has died and it is suspected he has been starved to death, an examination of his body ought to be made to ascertain whether or not he died of hunger. The signs which usually attend death from hunger are the following: the body is much emaciated, and a fœtid, acrid odour exhales from it, although death may have been very recent. The eyes are red and open, which is not usual in other causes of death. The tongue and throat are dry, even to aridity, and the stomach and intestines are contracted and empty. The gall bladder is pressed with bile, and this fluid is found scattered over the stomach and intestines, so as to tinge them very extensively. The lungs are withered, but all the other organs are generally in a healthy state. The blood-vessels are usually empty. Foderé, tom. ii. p. 276, tom. iii. p. 231; 2 Beck's Med. Jur. 52; see Eunom. Dial. 2, § 47, p. 142, and the note at p. 384.

HUNTING. The act of pursuing and taking wild animals; the chase. The chase gives a kind of title by occupancy, by which the hunter acquires a right or property in the game which he captures. In the United States the right of hunting is universal, and limited only so far as to exclude hunters from committing injuries to private property or to the public, as by shooting on public roads. Vide *Feræ naturæ; Occupancy.*

HURDLE, *Eng. law.* A species of sledge used to draw traitors to execution.

HUSBAND, *domestic relations*, a man who has a wife. The husband, as such, is liable to certain obligations, and entitled to certain rights, which will be here briefly considered. First, of his obligations. He is bound to receive his wife at his home, and treat her there as a husband, that is, furnish her with all the necessaries and conveniences which his fortune enables him to do, and which her situation requires; but this does not include such luxuries, as, according to her fancy, she deems necessaries; vide article *Cruelty*, where this matter is considered. He is bound to love his wife, and to bear with her faults, and, if possible, by mild means to correct them; and he is required to fulfil towards her his marital promise of fidelity, and can, therefore, have no carnal connexion with any

other woman, without a violation of his obligations. As he is bound to govern his house properly, he is liable for its misgovernment, and he may be punished for keeping a disorderly house, where his wife had the principal agency, and he is liable for her torts, as, for her slander or trespass. He is also liable for the wife's debts, incurred before coverture, provided they are recovered from him during his life; and generally for such as are contracted by her, after coverture, for necessaries. Secondly, of his rights. Being the head of the family, the husband has a right to establish himself wherever he may please, and in this he cannot be controlled by his wife; he may manage his affairs his own way, buy and sell all kinds of personal property, without any control, and he may buy any real estate he may deem proper, but as the wife acquires a right in the latter, he cannot sell it, discharged of her dower, except by her consent, expressed in the manner prescribed by the laws of the state where such lands lie. All her *personal* property in possession, is vested in him, and he may dispose of it as if he had acquired it by his own contract; this arises from the principle that they are considered one person in law; 2 Bl. Com. 433; and he is entitled to all her property in action, provided he reduces it to possession during her life. Ib. 434. He is also entitled to her *chattels real*, but these vest in him not absolutely, but *sub modo*; as, in the case of a lease for years, the husband is entitled to receive the rents and profits of it, and may, if he pleases, sell, surrender, or dispose of it during the coverture, and it is liable to be taken in execution for his debts; and, if he survives her, it is to all intents and purposes his own. In case his wife survives him, it is considered as if it had never been transferred from her, and it belongs to her alone. In his wife's freehold estate, he has a life estate, during the joint lives of himself and wife, and, at common law when he has a child by her who could inherit, he has an estate by the curtesy.

The laws of Louisiana differ essentially from those of the other states as to the rights and duties of husband and wife, particularly as it regards their property. Those readers, desirous of knowing the legislative regulations on this subject, in that state, are referred to Civil Code of Louis. B. 1, tit. 4; B. 3, tit. 6.

Vide generally, articles, *Divorce; Marriage; Wife;* and Bac. Ab. Baron and Feme; Rop. H. & W.; Prater on H. & W.; Clancy on the rights, duties and liabilities of Husband and Wife; Canning on the interest of Husband and Wife, &c.; 1 Phil. Ev. 63; Woodf. L. & T. 75; 2 Kent, Com. 109; 1 Salk. 113 to 119‡; Yelv. 106 a, 156 a, 166 a; Vern. by Raithby, 7, 17, 48, 261; Chit. Pr. Index, h. t.; Poth. Du contr. de Mar. n. 379.

HUSBAND, *mar. law.* Vide *Ship's Husband.*

HUSBRECE, *old Engl. law.* The ancient name of the offence now called burglary.

HUSTINGS, *Engl. law.* The name of a court held before the lord mayor and aldermen of London; it is the principal and supreme court of the city.

HYDROMETER, measure of density (for fluids), is an instrument, which being immersed in fluids, as, in water, brine, beer, brandy, &c. determines the proportion of their densities, or their specific gravities, and thence their qualities. By the act of congress of January 12, 1825, 3 Story's Laws, U. S. 1976, the secretary of the treasury is authorised, under the direction of the president of the United States, to adopt

and substitute such hydrometer as he may deem best calculated to promote the public interest, in lieu of that now prescribed by law, for the purpose of ascertaining the proof of liquors; and that after such adoption and substitution, the duties imposed by law upon distilled spirits, shall be levied, collected and paid, according to the proof ascertained by any hydrometer so substituted and adopted.

HYPOBOLUM, *civ. law.* The name of the bequest or legacy given by the husband to his wife, at his death, above her dowry. Techn. Dict. h. t.

HYPOTHECATION, *civil law.* This term is used principally in the civil law; it is defined to be a right which a creditor has over a thing belonging to another, and which consists in the power to cause it to be sold, in order, out of the proceeds, to be paid his claim. There are two species of hypothecation, one called pledge, *pignus*, and the other properly denominated hypothecation. Pledge is that species of hypothecation which is contracted by the delivery by the debtor to the creditor, of the thing hypothecated. Hypothecation, properly so called, is that which is contracted without delivery of the thing hypothecated. 2 Bell's Com. 25, 5th ed.

Hypothecation is further divided into general and special. When the debtor hypothecates to his creditor all his estate and property, which he has, or may have, the hypothecation is general: when the hypothecation is confined to a particular estate, it is special.

Hypothecations are also distinguished into conventional, legal and tacit. 1. Conventional hypothecations are those which arise by the agreement of the parties. Dig. 20, 1, 5.—2. Legal hypothecation is that which has not been agreed upon by any contract, express or implied; such as arises from the effect of judgments and executions.—3. A tacit, which is also a legal hypothecation, is that which the law gives in certain cases, without the consent of the parties, to secure the creditor, such as, 1st, the lien which the public treasury has over the property of public debtors. Code, 8, 15, 1.—2d. The landlord has a lien on the goods in the house leased, for the payment of his rent. Dig. 20, 2, 2; Code, 8, 15, 7.—3d. The builder has a lien, for his bill, on the house he has built, Dig. 20, 1.—4th. The pupil has a lien on the property of the guardian for the balance of his account. Dig. 46, 6, 22; Code, 5, 37, 20.—5th. There is hypothecation of the goods of a testator for the security of a legacy he has given. Code, 6, 43, 1.

In the common law, cases of hypothecation, in the strict sense of the civil law, that is of a pledge without possession by the pledgee, are scarcely to be found; cases of bottomry bonds and claims for seamen's wages against ships are the nearest approach to it; but these are liens and privileges rather than hypothecations. Story, Bailm. § 288. It seems that chattels not in existence, though they cannot be pledged, can be hypothecated, so that the lien will attach, as soon as the chattel has been produced. 14 Pick. R. 497.

Vide, generally, Poth. De l'Hypothèque; Poth. Mar. Contr. translated by Cushing, note, 26, p. 145; Commercial Code of France, translated by Rodman, note, 52, p. 351; Merl. Répertoire, mot Hypothèque, where the subject is fully considered; 2 Bro. Civ. Law, 195; Ayl. Pand. 524; 1 Law Tracts, 224; Dane's Ab. h. t.; Abbott on Shipp. Index, h. t.; 13 Ves. 599; Bac. Ab. Merchant, &c. G. Civil Code of Louis. tit. 22, where this sort of security bears the name of mortgage, (q. v.)

I.

I O U, *contracts.* The memorandum I O U, (I owe you), given by merchants to each other is a mere evidence of the debt, and does not amount to a promissory note. Esp. Cas. N. P. 426; 4 Carr. & Payne, 324; 19 Eng. Com. L. Rep. 405; 1 Man. & Gran. 46; 39 E. C. L. R. 346.

ICTUS ORBUS, *med. jurisp.* A maim, a bruise or swelling; any hurt without cutting the skin. When the skin is cut, the injury is called a wound, (q. v.) Bract. lib. 2, tr. 2, c. 5 and 24.

IDEM SONANS, of the same sound. In pleadings, when a name which it is material to state, is wrongly spelled, yet if it be idem sonans with that proved, it is sufficient, as *Segrave* for *Seagrave*, 2 Str. R. 889; vide also Russ. & Ry. 412; 2 Taunt. R. 401. In the following cases the variances there mentioned were declared to be fatal. Russ. & Ry, 351; 10 East, R. 83; 5 Taunt. R. 14; 1 Baldw. R. 83; 2 Crom. & M. 189; 6 Price, R. 2; 1 Chit. R. 659; 18 E. C. L. R. 194. See, generally, 3 Chit. Pr. 231, 2; 4 T. R. 611; 3 B. & P. 559; 1 Stark. R. 47; 2 Stark. R. 29; 3 Camp. R. 29; 6 M. & S. 45; 2 N. H. Rep. 557; 7 S. & R. 479; 3 Caines, 219; 1 Wash. C. C. R. 285; 4 Cowen, 148; and the article *Name.*

IDENTITY, *evidence*, sameness. It is frequently necessary to identify persons and things. In criminal prosecutions, and in actions for torts and on contracts, it is required to be proved that the defendants have in criminal actions, and for injuries, been guilty of the crime or injury charged, and in an action on a contract, that the defendant was a party to it. Sometimes, too, a party who has been absent, and who appears to claim an inheritance, must prove his identity; and, not unfrequently, the body of a person which has been found dead must be identified; cases occur when the body is much disfigured, and, at other times, there is nothing left but the skeleton. Cases of considerable difficulty arise, in consequence of the omission to take particular notice; 2 Stark. Cas. 239; Ryan's Med. Jur. 301; and in consequence of the great resemblance of two persons. 1 Hall's Am. Law Journ. 70; 1 Beck's Med. Jur. 509; 1 Paris, Med. Jur. 222; 3 Id. 143; Trail, Med. Jur. 33. In cases of larceny, trover, replevin, and the like, the things in dispute must always be identified. Vide 4 Bl. Com. 396.

M. Briand, in his Manuel Complet de Mèdicine Légale, 4eme partie, ch. 1, gives rules for the discovery of particular marks, which an individual may have had, and also the true colour of the hair, although it may have been artificially coloured. He also gives some rules for the purpose of discovering, from the appearance of a skeleton, the sex, the age, and the height of the person when living, which he illustrates by various examples. See, generally, 6 C. & P. 677; 1 C. & M. 730; 3 Tyr. 806, Shelf. on Mar. & Div. 226; 1 Hagg. Cons. R. 189; 2 Hagg. Cons. R. 187.

IDENTITATE NOMINIS, in *Eng. law.* The name of a writ which lies for a person taken upon a capias or exigent and committed to prison, for another man of the same name; this writ directs the sheriff to inquire whether he be the same person against whom the action was brought, and if not, then to discharge him.

F. N. B. 267. In practice a party would be relieved by *habeas corpus*.

IDES, NONES and CALENDS, *civil law*. This mode of computing time, formerly in use among the Romans, is yet used in several chanceries in Europe, particularly in that of the pope. Many ancient instruments bear these dates; it is therefore proper to notice them here. These three words designate all the days of the month. The calends were the first day of every month, and were known by adding the names of the months; as *calendis januarii*, *calendis februarii*, for the first days of the months of January and February. They designated the following days by those before the *nones*. The fifth day of each month, except those of March, May, July, and October; in those four months the *nones* indicated the seventh day; *nonis* martii, was therefore the seventh day of March, and so of the rest. In those months in which the nones indicated the fifth day, the second was called *quarto nonas* or 4 *nonas*, that is to say, *quarto die ante nonas*, the fourth day before the *non*. The words *die* and *ante*, being understood were usually suppressed. The third day of each of those eight months was called *tertio*, or 3 *nonas*. The fourth, was, *pridie* or 2 *nonas;* and the fifth was *nonas*. In the months of March, May, July and October, the second day of the months was called *sexto* or 6 *nonas;* the third, *quinto*, or 5 *nonas;* the fourth, *quarto*, or 4 *nonas;* the fifth, *tertio* or 3 *nonas;* the sixth, *pridie*, usually abridged *prid.* or *pr.* or 2 *nonas;* and the seventh, *nonis*. The word *nonæ* is so applied, it is said, because it indicates the ninth day before the ides of each month.

In the months of March, May, July, and October, the fifteenth day of the months was the *Ides*. These are the four months, as above mentioned, in which the nones were on the seventh day. In the other eight months of the year the *nones* were the fifth of the months, and the *ides* the thirteenth; in each of them the *ides* indicated the ninth day after the *nones*. The seven days between the *nones* and the *ides*, which we count 8, 9, 10, 11, 12, 13, and 14, in March, May, July and October, the Romans counted *octavo*, or 8 *idus; septimo*, or 7 *idus; sexto*, or 6 *idus; quinto*, or 5 *idus; quarto*, or 4 *idus; tertio*, or 3 *idus; pridie*, or 2 *idus;* the word *ante* being understood as mentioned above. As to the other eight months of the year, in which the nones indicated the fifth day of the month, instead of our 6, 7, 8, 9, 10, 11, and 12, the Romans counted *octavo idus*, *septimo*, &c. The word is said to be derived from the Tuscan, iduare, in Latin *dividere*, to divide, because the day of ides divided the month in nearly equal parts. The days from the ides to the end of the month were computed as follows; for example, the fourteenth day of January, which was the next day after the ides, was called *decimo nono*, or 19 *kalendas*, or ante *kalendas febrarii;* the fifteenth, *decimo octavo*, or 18 *kulendas februarii*, and so of the rest counting in a retrograde manner to *pridie* or 2 *kalendas februarii*, which was the thirty-first day of January.

As in some months the Ides indicate the thirteenth, and in some the fifteenth of the month, and as the months have not an equal number of days, it follows that the *decimo nono* or 19 *kalendas* did not always happen to be the next day after the *Ides;* this was the case only in the months of January, August and December. *Decimo sexto* or the 16th in February; *decimo septimo* or 17, March, May, July and October; *decimo octavo* or 18, in April, June,

September, and November. Merlin, Répértoire de Jurisprudence, mots Ides, Nones et Calendes.

IDIOCY, *med. jur.*, is that condition of mind, in which the reflective, or all or a part of the affective powers, are either entirely wanting, or are manifested to the least possible extent. Idiocy generally depends upon organic defects. The most striking physical trait, and one seldom wanting, is the diminutive size of the head, particularly of the anterior superior portions, indicating a deficiency of the anterior lobes of the brain. According to Gall, whose observations on this subject are entitled to great confidence, its circumference, measured immediately over the orbitar arch, and the most prominent part of the occipital bone, is between 11¼ and 14¼ inches. Gall, sur les Fonctions, p. 329. In the intelligent adult, it usually measures from 21 to 22 inches. Chit. Med. Jur. 248. See on this subject the learned work of Dr. Morton of Philadelphia, entitled Crania Americana. The brain of an idiot equals that of a new born infant; that is, about one-fourth, one-fifth, or one-sixth of the cerebral mass of an adult's in the enjoyment of his faculties. The above is the only constant character observed in the heads of idiots. In other respects their forms are as various as those of other persons. When idiocy supervenes in early infancy, the head is sometimes remarkable for immense size. This unnatural enlargement arises from some kind of morbid action preventing the developement of the cerebral mass, and producing serous cysts, dropsical effusions, and the like.

In idiocy the features are irregular; the forehead low, retreating and narrowed to a point; the eyes are unsteady and often squint; the lips are thick and the mouth is generally open; the gums are spongy and the teeth are defective; the limbs are crooked and feeble. The senses are usually entirely wanting; many are deaf and dumb or blind; and others are incapable of perceiving odours, and show little or no discrimination in their food for want of taste. Their movements are constrained and awkward, they walk badly, and easily fall, and are not less awkward with their hands, dropping generally what is given to them. They are seldom able to articulate beyond a few sounds. They are generally affected with rickets, epilepsy, scrofula, or paralysis. Its subjects seldom live beyond the twenty-fifth year, and are incurable, as there is a natural deformity which cannot be remedied. Vide Chit. Med. Jur. 345; Ray's Med. Jur. ch. 2; 1 Beck's Med. Jur. 571; Shelf. on Lun. Index, h. t., and *Idiot*.

IDIOT, *persons*, is a person who has been without understanding from his nativity, and whom the law therefore presumes never likely to attain any. Shelf. on Lun. 2. It is an imbecility or sterility of mind, and not a perversion of the understanding. Chit. Med. Jur. 345, 327, note (*s*); 1 Russ. on Cr. 6; Bac. Ab. h. t. (A); Bro. Ab. h. t.; Co. Litt. 246, 247; 3 Mod. 44; 1 Vern. 16; 4 Rep. 126; 1 Bl. Com. 302. When a man cannot count or number twenty, nor tell his father's or mother's name, nor how old he is, having been frequently told of it, it is a fair presumption that he is devoid of understanding. F. N. B. 233. Vide 1 Dow. P. C. new series, 392; S. C. 3 Bligh, R. new ser. 1. Persons born deaf, dumb and blind, are presumed to be idiots, for the senses being the only inlets of knowledge, and these, the most important of them, being closed, all ideas and associations belonging to them are totally excluded from their minds. Co. Litt. 42; Shelf. on Lun. 3.

Vide Locke on Human understanding, B. 2, c. 11, §§ 12, 13; Ayliffe's Pand. 234; 4 Com. Dig. 610; 8 Com. Dig. 644. Idiots are incapable of committing crimes, or entering into contracts: they cannot of course make a will: but they may acquire property by descent. Vide, generally, 1 Dow's Parl. Cas. new series, 392; 3 Bligh's R. 1; 19 Ves. 286, 352, 353; Stock on the law of Non Compotes Mentis.

IDIOTA INQUIRENDO, WRIT DE. This is the name of an old writ which directs the sheriff to inquire whether a man be an idiot or not. The inquisition is to be made by a jury of twelve men. Fitz. N. B. 232.

IDLENESS, is the refusal or neglect to perform some honest labour, in order to gain a livelihood. The vagrant act of 17 G. 2, c. 5, which, with some modification has been adopted in perhaps most of the states, describes idle persons to be those who, not having wherewith to maintain themselves, live idle without employment, and refuse to work for the usual and common wages. These are declared to be vagrants. They are punishable according to the different police regulations with fine and imprisonment. In Pennsylvania vagrancy is punished, on a conviction before a magistrate, with imprisonment for one month.

IGNIS JUDICIUM, *Engl. law.* The name of the old judicial trial by fire.

IGNORAMUS, *practice.* We are ignorant. This word which in law means we are uninformed, is written on a bill presented to them, by a grand jury, when they find there is not sufficient evidence to authorise the finding a true bill. Sometimes instead of using this word the grand jury endorse on the bill *Not found.* 4 Bl. Com. 305. Vide *Grand Jury.*

IGNORANCE is the want of knowledge. Considered in itself ignorance is distinguished from error. Ignorance is but a privation of ideas or knowledge; but error is the non conformity or opposition of our ideas to the nature or state of things. Considered as a motive of our actions, ignorance differs but little from error, they are generally found amalgamated, and what is said of one is said of both. Ignorance and error are of several kinds; 1, when considered as to their object, they are of law, and of fact; 2, when examined as to their origin, they are voluntary or involuntary; 3, when viewed with regard to their influence on the affairs of men, they are essential, or non-essential.

§ 1. Ignorance of law and fact. 1. *Ignorance of law* consists in the want of knowledge of those laws which it is our duty to understand, and which every man is presumed to know. The law forbids any one to marry a woman whose husband is living. If any man, then, imagined he could marry such a woman, he would be ignorant of the law, and, if he married her, he would commit an error as to a matter of law. How far a party is bound to fulfil a promise to pay, upon a supposed liability, and in ignorance of the law, see 12 East, R. 38; 2 Jac. & Walk. 263; 5 Taunt. R. 143; 3 B. & Cresw. R. 280; 1 John. Ch. R. 512, 516; 6 John. Ch. R. 166; 9 Cowen's R. 674; 4 Mass. R. 342; 7 Mass. R. 452; 7 Mass. R. 488; 9 Pick. R. 112; 1 Binn. R. 27. And whether he can be relieved from a contract entered into in ignorance or mistake of the law; 1 Atk. 591; 1 Ves. & Bea. 23, 30; 1 Chan. Cas. 84; 2 Vern. 243; 1 John. Ch. R. 512; 2 John. Ch. R. 51; 1 Pet. S. C. R. 1; 6 John. Ch. R. 169, 170; 8 Wheat. R. 174; 2 Mason, R. 244, 342. 2. *Ignorance of fact* is the absence of knowledge as to the fact in question.

It is a defect of the will, when a man intending to do what is lawful does that which is unlawful. It would be ignorance of fact, if a man believed he could marry a certain woman, whom he believed to be unmarried and free, when in fact she was a married woman. Ignorance of the laws of a foreign government, or of another state, is ignorance of a fact. 9 Pick. 112. Vide for the difference between ignorance of law and ignorance of fact, 9 Pick. R. 112. Clef des Lois Rom. mot Fait; Dig. 22, 6, 7.

§ 2. Ignorance is either voluntary or involuntary. 1. It is voluntary when a party might, by taking sufficient pains, have acquired the necessary knowledge. For example, every man might acquire a knowledge of the laws which have been promulgated, a neglect to become acquainted with them is therefore voluntary ignorance. Doct. & St. 1, 46; Plowd. 343. 2. Involuntary ignorance is that which is invincible, and which cannot by any exertion be overcome; as, the ignorance of a law which has not yet been promulgated.

§ 3. Ignorance is either essential or non-essential. 1. By essential ignorance is understood that which has for its object some essential circumstance so intimately connected with the matter in question, and which so influences the parties that it induces them to act in the business. For example, if A should sell his horse to B, and at the time of the sale the horse was dead unknown to the parties, the fact of the death would render the sale void. Poth. Vente, n. 3 and 4; 2 Kent, Com. 367.—2. *Non-essential* or accidental ignorance is that which has not, of itself, any necessary connexion with the business in question, and which is not the true consideration for entering into the contract; as, if a man should marry a woman whom he believed to be rich, and she proved to be poor, this fact would not be essential, and the marriage would therefore be good. Vide, generally, Ed. Inj. 7; 1 Johns. Ch. R. 512; 2 Johns. Ch. R. 41; S. C. 14 Johns. R. 501; Dougl. 467; 2 East, R. 469; 1 Campb. 134; 5 Taunt. 379; 3 M. & S. 378; 12 East, R. 38; 1 Vern. 243; 3 P. Wms. 127, n.; 1 Bro. C. C. 92; 10 Ves. 406; 2 Madd. R. 163; 1 V. & B. 30; 2 Atk. 112, 591; 3 P. Wms. 315; Mos. 364; Doct. & Stud. Dial. 1, c. 26, p. 92; Id. Dial. 2, ch. 46, p. 303; 2 East, R. 469; 12 East, R. 38; 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (*v*); 8 Wheat. R. 174; S. C. 1 Pet. S. C. R. 1; 1 Chan. Cas. 84; 1 Story, Eq. Jur. § 137, note 1; Dig. 22, 6; Code, 1, 16; Clef des Lois Rom. h. t.; Merl. Répert. h. t.

ILL FAME. This is a technical epxression which means not only bad character as generally understood, but every person, whatever may be his conduct and character in life, who visits bawdy houses, gaming houses, and other places which are of ill fame, is a person of ill fame. 1 Rogers's Recorder, 67.

ILLEGAL. Vide *Illicit; Unlawful.*

ILLEGITIMATE, that which is contrary to law; it is usually applied to children born out of lawful wedlock. A bastard is sometimes called an illegitimate child.

ILLEVIABLE. A debt or duty that cannot or ought not to be levied; as *nihil* set upon a debt is a mark for *illeviable.*

ILLICIT. What is unlawful; what is forbidden by the law. Vide *Unlawful.* This word is frequently used in policies of insurance, where the assured warrants against illicit trade. By illicit trade is understood that "which is made unlawful by the laws of the country to which the

object is bound." The insured having entered into this warranty, is required to do no act which will expose the vessel to be legally condemned. 2 L. R. 337, 338. Vide *Insurance; Trade; Warranty.*

ILLINOIS. The name of one of the new states of the United States of America. This state was admitted into the Union by virtue of a "Resolution declaring the admission of the state of Illinois into the Union," passed December 3, 1818, in the following words: *Resolved, &c.* That, whereas, in pursuance of an act of congress, passed on the eighteenth day of April, one thousand eight hundred and eighteen, entitled "An act to enable the people of the Illinois territory to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original states," the people of said territory did, on the twenty-sixth day of August, in the present year, by a convention called for that purpose, form for themselves a constitution and state government, which constitution and state government, so formed, is republican, and in conformity to the principles of the articles of compact between the original states and the people and states in the territory northwest of the river Ohio, passed on the thirteenth day of July, one thousand seven hundred and eighty-seven: *Resolved, &c.* That the state of Illinois shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever.

The constitution of this state was adopted in convention, held at Kaskaskia, on the twenty-sixth day of August, one thousand eight hundred and eighteen. The powers of the government are divided into three distinct departments; each of them is confided to a separate body of magistracy, to wit: those which are legislative, to one; those which are executive, to another; and those which are judiciary, to another. Art. 1, s. 1.

1st. The *legislative* power is vested in a general assembly, which consists of a senate and house of representatives, both elected by the people. The elections for senators and representatives are directed to be held on the first Monday in August, one thousand eight hundred and twenty, and forever after, elections are required to be held once in two years on the first Monday of August, in each and every county, at such places therein as may be provided by law. 1. The *senate*, is to be composed of a number of persons who shall never be less than one-third, nor more than one-half of the number of representatives. Art. 2, s. 5. To be a senator a person must be twenty-five years of age, a citizen of the United States, have resided one year in the district or county in which he shall be chosen immediately preceding his election, if such county or district shall have been so long erected; but if not, then within the limits of the county or counties, district or districts, out of which the same shall have been taken, unless he shall have been absent on the public business of the United States, or of this state; and moreover have paid a state or county tax. Art. 2, s. 6. The one-half of the senate is renewed biennially. Art. 2, s. 4.—2. The *house of representatives*, is to consist of the number of members to be fixed by the general assembly, which number is to be not less than twenty-seven, nor more than thirty-six, until the number of white inhabitants within the state, shall amount to one hundred thousand. The qualifications of the representatives are that the person, 1, be of the age of twenty-one years; 2, be a citizen of

the United States; 3, be an inhabitant of the state; 4, have resided within the limit of the county or district in which he shall be chosen, twelve months next preceding his election, if such county or district shall have been so long erected, but if not, then within the limits of the county or counties, district or districts, out of which the same shall have been taken, unless he shall have been absent on the public business of the United States or of this state; 5, have, moreover, paid a state or county tax. Art. 2, s. 3. The members are elected for two years.

2d. The executive power of the state is vested in a governor, and lieutenant-governor.—1. The *governor* holds his office for the term of four years; he is elected by the electors of members of the general assembly. Art. 3, ss. 2 and 3. He must, 1, be at least thirty years of age; 2, have been a citizen of the United States thirty years, two years of which next preceding his election, he shall have resided within the limits of this state. He is invested with the power to grant reprieves and pardons after conviction, except in cases of impeachment—to make appointments of officers in case of vacancy during the recess of the legislature, to continue till the end of its next session—to convene the general assembly upon extraordinary occasions—to give information to the legislature. He is commander-in-chief of the army and navy of the state. Art. 3.—2. The *lieutenant-governor* is chosen at every election for governor, in the same manner, continues in office for the same time, and possesses the same qualifications. By virtue of his office, he is speaker of the senate, has a right when in committee of the whole, to debate and vote on all subjects, and, whenever the senate are equally divided, to give the casting vote. Art. 3, s. 13 and 14.

In case of an impeachment of the governor, his removal from office, death, refusal to qualify, resignation, or absence from the state, the lieutenant-governor shall exercise all the power and authority appertaining to the office of governor, until the time pointed out by this constitution for the election of governor shall arrive, unless the general assembly shall provide by law for the election of a governor to fill such vacancy. Art. 3, s. 18.

Whenever the government shall be administered by the lieutenant-governor, or he shall be unable to attend as speaker of the senate, the senators shall elect one of their own members as speaker for that occasion. And if, during the vacancy of the office of governor, the lieutenant-governor shall be impeached, removed from office, refuse to qualify, or resign, or die, or be absent from the state, the speaker of the senate shall, in like manner, administer the government. Art. 3, s. 15.

The governor for the time being, and the judges of the supreme court, or a major part of them, together with the governor, shall be and are hereby constituted a council to revise all bills about to be passed into laws by the general assembly; and for that purpose shall assemble themselves from time to time, when the general assembly shall be convened; for which, nevertheless, they shall not receive any salary or consideration, under any pretence whatever; and all bills which have passed the senate and house of representatives, shall, before they become laws, be presented to the said council for their revisal and consideration; and if, upon such revisal and consideration, it should appear improper to the said council, or a majority of them, that the bill should become a

law of this state, they shall return the same, together with their objections thereto, in writing to the senate or house of representatives, (in whichsoever the same shall have originated) who shall enter the objections set down by the council, at large, in their minutes, and proceed to reconsider the said bill. But if, after such reconsideration, the said senate or house of representatives shall, notwithstanding the said objections, agree to pass the same, by a majority of the whole number of members elected, it shall, together with the said objections, be sent to the other branch of the general assembly, where it shall also be reconsidered; and if approved by a majority of all the members elected, it shall become a law. If any bill shall not be returned within ten days after it shall have been presented, the same shall be a law; unless the general assembly shall, by their adjournment, render a return of the said bill, in ten days, impracticable, in which case the said bill shall be returned on the first day of the meeting of the general assembly after the expiration of the said ten days, or be a law. Art. 3, s. 19.

3d. The judicial power of the state is vested by the 4th article of the constitution as follows:

§ 1. The judicial power of this state shall be vested in one supreme court, and such inferior courts as the general assembly shall from time to time ordain and establish.

§ 2. The supreme court shall be holden at the seat of government, and shall have an appellate jurisdiction only except in cases relating to the revenue, in cases of mandamus, and in such cases of impeachment as may be required to be tried before it.

§ 3. The supreme court shall consist of a chief justice, and three associates, any two of whom shall form a quorum. The number of justices, may, however be increased, by the general assembly, after the year one thousand eight hundred and twenty-four.

§ 4. The justices of the supreme court, and the judges of the inferior courts shall be appointed by joint ballot of both branches of the general assembly, and commissioned by the governor, and shall hold their offices during good behaviour, until the end of the first session of the general assembly, which shall be begun and held after the first day of January, in the year of our lord one thousand eight hundred and twenty-four, at which time their commissions shall expire; and until the expiration of which time the said justices respectively shall hold circuit courts in the several counties, in such manner, and at such times, and shall have and exercise such jurisdiction, as the general assembly shall by law prescribe. But ever after the aforesaid period, the justices of the supreme court shall be commissioned during good behaviour, and the justices thereof shall not hold circuit courts, unless required by law.

§ 5. The judges of the inferior courts shall hold their offices during good behaviour, but for any reasonable cause, which shall not be sufficient ground for impeachment, both the judges of the supreme and inferior courts shall be removed from office, on the address of two-thirds of each branch of the general assembly: Provided, always, that no member of either house of the general assembly, nor any person connected with a member by consanguinity or affinity, shall be appointed to fill the vacancy occasioned by such removal. The said justices of the supreme court, during their temporary appointments, shall receive an annual salary of one thousand dollars, payable quarter-yearly out of the public

treasury. The judges of the inferior courts, and the justices of the supreme court, who may be appointed after the end of the first session of the general assembly, which shall be begun and held after the first day of January, in the year of our Lord one thousand eight hundred and twenty-four, shall have adequate and competent salaries, which shall not be diminished during their continuance in office.

§ 6. The supreme court, or a majority of the justices thereof, the circuit courts, or the justices thereof, shall respectively appoint their own clerks.

§ 7. All process, writs, and other proceedings, shall run in the name of "the people of the state of Illinois." All prosecutions shall be carried on in the name and by the authority of "the people of the state of Illinois," and conclude "against the peace and dignity of the same."

§ 8. A competent number of justices of the peace shall be appointed in each county, in such manner as the general assembly may direct, whose time of service, power, and duties, shall be regulated and defined by law. And justices of the peace when so appointed, shall be commissioned by the governor.

ILLITERATE, this term is applied to one unacquainted with letters. When an ignorant man unable to read, signs a deed or agreement, or makes his mark instead of a signature, and he alleges, and can prove, that it was falsely read to him, he is not bound by it in consequence of the fraud. And the same effect would result, if the deed or agreement were falsely read to a blind man, who could have read before he lost his sight, or to a foreigner who did not understand the language. To induce an illiterate man, by false representations and false reading, to sign a note for a greater amount than that agreed on, is indictable as a cheat. 1 Yerg. 76. Vide, generally, 2 Nels. Ab. 946; 2 Co. 3; 11 Co. 28; Moor, 148.

ILLUSION, *med. jur.* Vide *Hallucination.*

ILLUSORY APPOINTMENT, *chancery practice.* Such an appointment or disposition of property under a power as is merely nominal and not substantial. Illusory appointments are void in equity. Sugd. Pow. 489; 1 Vern. 67; 1 T. R. 438, note; 4 Ves. 785; 16 Ves. 26; 1 Taunt. 289; and the article *Appointment.*

TO IMAGINE, *Engl. law.* In cases of treason the law makes it a crime to imagine the death of the king. In order to complete the offence there must, however, be an overt act; the terms *compassing* and *imagining* being synonymous. It has been justly remarked that the words to compass and imagine are too vague for a statute whose penalty affects the life of a subject. Barr. on the Stat. 243, 4. Vide *Fiction.*

IMBECILITY, *med. jur.*, is described to be an abnormal deficiency, either in those faculties which acquaint us with the qualities and ordinary relation of things, or in those which furnish us with the moral motives that regulate our relations and conduct towards our fellow men. It is frequently attended with excessive activity of one or more of the animal propensities. Imbecility differs from idiocy in this, that the subjects of the former possess some intellectual capacity, though inferior in degree to that possessed by the great mass of mankind; while those of the latter are utterly destitute of reason. Imbecility differs also from stupidity, (q. v.) The former consists in a defect of the mind, which renders it unable to examine the data presented to it by the senses, and therefrom to deduce correct judgment, that is, a

defect of intensity, or the reflective power. The latter is occasioned by a want of extensity, or the perceptive power. There are various degrees of this disease. It has been attempted to classify the degrees of imbecility, but the careful observer of nature will perhaps be soon satisfied that the shades of difference between one species and another, are almost imperceptible. Ray, Med. Jur. ch. 3; 2 Beck, Med. Jur. 550, 642; 1 Hagg. Ecc. R. 384; 2 Phillim. R. 449; 1 Litt. R. 252; 5 John. Ch. R. 161; 1 Litt. R. 101; Des Maladies mentales, considérées dans leurs rapports avec la legislation civille et criminelle, 8; Georget, Discussion medico-légale sur la folie, 140.

IMMEDIATE. That which is produced directly by the act to which it is ascribed, without the intervention or agency of any distinct intermediate cause. For *immediate* injuries the remedy is trespass, for those which are *consequential*, an action on the case. 11 Mass. R. 59, 137, 525; 1 & 2 Ohio R. 342; 6 S. & R. 348; 18 John. 257; 19 John. 381; 2 H. & M. 423; 1 Yeates, R. 586; 12 S. & R. 210; Coxe, R. 339; Harper's R. 113; 6 Call's R. 44; 1 Marsh. R. 194. When an immediate injury is caused by negligence, the injured party may elect to regard the negligence as the immediate cause of action, and declare in case; or to consider the act itself as the immediate injury, and sue in trespass. 14 John. 432; 6 Cowen, 342; 3 N. H. Rep. 465; sed vide 3 Conn. 64. See *Cause*.

IMMEMORIAL. That which commences beyond the time of memory. Vide *Memory, time of*.

IMMEMORIAL POSSESSION. In Louisiana, by this term is understood that of which no man living has seen the beginning, and the existence of which he has learned from his elders. Civ. Code of Lo. art. 762; 2 M. R. 214; 7 L. R. 46; 3 Toull. p. 410; Poth. Contr. de Societé, n. 244.

IMMORALITY. That which is *contra bonos mores*. Immoral contracts are generally void; an agreement in consideration of future illicit cohabitation between the parties, 3 Burr. 1568; S. C. 1 Bl. Rep. 517; 1 Esp. R. 13; 1 B. & P. 340, 341; an agreement for the value of libellous and immoral pictures, 4 Esp. R. 97; or for printing a libel, 2 Stark. R. 107; or for an immoral wager, Chit. Contr. 156, cannot, therefore, be enforced. It is a general rule, that whenever an agreement appears to be illegal, immoral, or against public policy, a court of justice leaves the parties where it finds them; when the agreement has been executed, the court will not rescind it; when executory, the court will not help the execution. 4 Ohio R. 419; 4 John. R. 419; 11 John. R. 388; 12 John. R. 306; 19 John. R. 341; 3 Cowen's R. 213; 2 Wils. R. 341.

IMMOVABLES, *civil law*.—Things are movable or immovable. Immovables, *res immobiles*, are things in general, such as cannot move themselves or be removed from one place to another. But this definition, strictly speaking, is applicable only to such things as are immovable by their own nature, and not to such as are so only by the destination of the law. There are things immovable by their nature, others by their destination, and others by the objects to which they are applied. 1. Lands and buildings or other constructions, whether they have their foundations in the soil or not, are immovable by their nature. By the common law, buildings erected on the land are not considered real estate unless they have been let into, or united to the land or to substances previously connected therewith. Fer-

ard on Fixt. 2.—2. Things which the owner of the land has placed upon it for its service and improvement, are immovables by destination, as seeds, plants, fodder, manure, pigeons in a pigeon-house, bee-hives, and the like. By the common law, erections with or without a foundation, when made for the purpose of trade, are considered personal estate. 2 Pet. S. C. Rep. 137; 3 Atk. 13. Ambl. 113.—3. A servitude established on real estate, is an instance of an immovable which is so considered in consequence of the object to which it is applied. Vide Civil Code of Louis. B. 2, t. 1, c. 2, art. 453–463; Poth. Des Choses, § 1; Poth. De la Communauté, n. 25 et seq.; Clef des Lois Romaines, mot Immeubles.

IMMUNITY is an exemption to serve in an office, or to perform duties which the law generally requires other citizens to perform. Vide Dig. lib. 50, t. 6; 1 Chit. Cr. L. 821; 4 Har. & M'Hen. 341.

IMPAIRING THE OBLIGATION OF CONTRACTS. The constitution of the United States, art. 1, s. 9, cl. 1, declares that no state shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." Contracts when considered in relation to their effects are executed, that is, transfer for the *possession* of the thing contracted for, or they are executory, which gives only a right of *action* for the subject of the contract. Contracts are also express or implied. The constitution makes no distinction between one class of contracts and the other. 6 Cranch, 135; 7 Cranch, 164. The *obligation* of a contract here spoken of is a legal not a mere moral obligation; it is the law which binds the party to perform his undertaking. The obligation does not inhere or subsist in the contract itself, *proprio vigore*, but in the law applicable to the contract. 4 Wheat. R. 197; 12 Wheat. R. 318; and this law is not the universal law of nations, but it is the law of the state where the contract is made. 12 Wheat. R. 213. Any law which enlarges, abridges, or in any manner changes the intention of the parties, resulting from the stipulations in the contract, necessarily impairs it. 12 Wheat. 256; Id. 327; 3 Wash. C. C. Rep. 319; 8 Wheat. 84; 4 Wheat. 197. The constitution forbids the *states* to pass any law impairing the obligation of contracts, but there is nothing in that instrument which prohibits *congress* from passing such a law. Pet. C. C. R. 322. Vide, generally, Story on the Const. § 1368 to 1391; Serg. Const. Law, 356; Rawle on the Const. h. t.; Dane's Ab. Index, h. t.

TO IMPANEL, *practice*, is to write the names of a jury on a schedule, by the sheriff or other officer lawfully authorised.

IMPARLANCE, *pleading and practice*. Imparlance from the French, *parler*, to speak, or licentia loquandi, in its most general signification, means time given by the court to either party to answer the pleading of his opponent, as either to plead, reply, rejoin, &c. and is said to be nothing else but the continuance of the cause till a further day. Bac. Abr. Pleas, G. But the more common signification of the term is time to plead. 2 Saund. 1, n. 2; 2 Show. 310; Barnes, 346; Lawes, Civ. Pl. 93, 94. Imparlances are of three descriptions; first, a common or general imparlance; secondly, a special imparlance; and, thirdly, a general special imparlance. 1. A general imparlance is the entry of a general prayer and allowance of time to plead till the next term, without reserving to the defendant the benefit of any exception; so that after such an imparlance the defendant cannot object to the jurisdiction

of the court, or plead any matter in abatement. This kind of imparlance is always from one term to another. 2. A special imparlance reserves to the defendant all exception to the writ, bill, or count; and therefore after it the defendant may plead in abatement, though not to the jurisdiction of the court. 3. A general special imparlance contains a saving of all exceptions whatsoever, so that the defendant after this may plead, not only in abatement, but he may also plead a plea which affects the jurisdiction of the court, as privilege. He cannot, however, plead a tender and that he was always ready to pay, because by craving time he admits he is not ready, and so falsifies his plea. Tidd's Pr. 418, 419. The last two kinds of imparlances, are, it seems, sometimes from one day to another in the same term. See, in general, Com. Dig. Abatement, I 19, 20, 21; 1 Chitt. Pl. 420; Bac. Abr. Pleas, G; 14 Vin. Abr. 335; Com. Dig. Pleader, D; 1 Sell. Pr. 265; Doct. Pl. 291; Encycl. de M. D'Alembert, art. Delai (Jurisp.)

IMPEACHMENT, *const. law, punishments.* Under the constitution and laws of the United States, an impeachment may be described to be a written accusation by the house of representatives of the United States, to the senate of the United States, against an officer. The presentment or written accusation is called articles of impeachment. The constitution declares that the house of representatives shall have the sole power of impeachment, art. 1, s. 2, cl. 5; and that the senate shall have the sole power to try all impeachments, art. 1, s. 3, cl. 6. The persons liable to impeachment are the president, vice-president, and all civil officers of the United States, art. 2, s. 4. A question arose upon an impeachment before the senate in 1799, whether a senator was a civil officer of the United States within the purview of this section of the constitution, and it was decided by the senate, by a vote of fourteen against eleven, that he was not: Senate Journ. 10th January, 1799; Story on Const. § 791; Rawle on Const. 213, 214; Serg. Const. Law, 376. The offences for which a guilty officer may be impeached are treason, bribery, and other high crimes and misdemeanors, art. 2. s. 4. The constitution defines the crime of treason, art. 3, s. 3. Recourse must be had to the common law for a definition of bribery. Not having particularly mentioned what is to be understood by "other high crimes and misdemeanors," resort, it is presumed, must be had to parliamentary practice and the common law in order to ascertain what they are. Story, § 795. The mode of proceeding in the institution and trial of impeachments is as follows: When a person who may be legally impeached has been guilty, or is supposed to have been guilty, of some malversation in office, a resolution is generally brought forward by a member of the house of representatives, either to accuse the party, or for a committee of inquiry. If the committee report adversely to the party accused, they give a statement of the charges, and recommend that he be impeached; when the resolution is adopted by the house, a committee is appointed to impeach the party at the bar of the senate, and to state that the articles of impeachment 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. The house then agree upon the articles of impeachment, and they are presented to the senate, by a committee appointed by the house to prosecute the impeachment; the senate then issues process sum-

moning 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 a return is made of it to the senate under oath. On the return day of the process the senate resolve themselves into a court of impeachment, and the senators are sworn to do justice according to the constitution and laws. The person impeached is called to answer, and either appears or does not appear. If he does not appear, his default is recorded and the senate may proceed *ex parte*. If he does appear, either by himself or attorney, the parties are required to form an issue, and a time is then assigned for the trial. The proceedings on the trial are conducted substantially as they are upon common judicial trials. If any debates arise among the senators they are conducted in secret and the final decision is given by yeas and nays; but no person can be convicted without the concurrence of two-thirds of the members present. Const. art. 1, s. 2, cl. 6. When the president is tried, the chief justice shall preside. The judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honour, trust or profit under the United States. Proceedings on impeachments under the state constitutions are somewhat similar. Vide *Courts of the United States*.

IMPEACHMENT, *evidence*, is an allegation, supported by proof, that a witness who has been examined, is unworthy of credit. Every witness is liable to be impeached as to his character for truth; and, if his general character is good, he is presumed at all times to be ready to support it.

IMPEACHMENT OF WASTE, signifies a restraint from committing waste upon lands or tenements; or a demand of compensation for waste done by a tenant who has but particular estate in the land granted, and therefore no right to commit waste. All tenants for life or any less estate, are liable to be impeached for waste, unless they hold *without impeachment of waste;* in the latter case they may commit waste, without being questioned, or any demand for compensation for the waste done. 11 Co. 82.

IMPEDIMENTS, *contracts*, legal objections to the making of a contract: impediments which relate to the person are those of minority, want of reason, coverture and the like: they are sometimes called disabilities. Vide *Incapacity*.

IMPERFECT. That which is incomplete. This term is applied to rights and obligations. A man has a right to be relieved by his fellow-creatures when in distress; but this right he cannot enforce by law; hence it is called an imperfect right. On the other hand, we are bound to be grateful for favours received, but we cannot be compelled to perform such imperfect obligations. Vide Poth. Ob. art. Préliminaire; Vattel, Dr. des Gens, Prél. notes, § 17; and *Obligations*.

IMPERTINENT, *in practice, pleading*. What does not appertain or belong, *id est, qui ad rem non pertinet*. Evidence of facts which do not belong to the matter in question, is impertinent and inadmissible. Impertinent matter in a declaration or other pleading, is that which does not belong to the subject; in such case it is considered as mere surplusage, (q. v.) and is rejected. Ham. N. P. 25; vide 2 Ves. 24; 5 Madd. R. 450; Newl. Pr. 38; 2 Ves. 631; 5 Ves. 656; 18 Eng. Com. Law. R. 201; Eden on Inj. 71. There is a difference between matter merely impertinent and that which is scandalous; matter may be impertinent without being scandalous; but if it is

scandalous, it must be impertinent. In equity a bill cannot, according to the general practice, be referred for impertinence after the defendant has answered or submitted to answer, but it may be referred for scandal at any time, and even upon the application of a stranger to the suit. Coop. Eq. Pl. 19; 2 Ves. 631; 6 Ves. 514; Story, Eq. Pl. § 270. Vide Gresl. Eq. Ev. p. 2, c. 3, s. 1; 1 John. Ch. R. 103; 1 Paige's R. 555; 1 Edw. R. 350; 11 Price, R. 111; 5 Paige's R. 522; 1 Russ. & My. 28; *Scandal.*

IMPETRATION. The obtaining any thing by prayer or petition. In the ancient English statutes, it signifies a pre-obtaining of church benefices in England from the church of Rome, which belonged to the gift of the king, or other lay patrons.

TO IMPLEAD, *practice*, to sue or prosecute by due course of law.

IMPLEMENTS, are such things as are used or *employed* for a trade, or furniture of a house.

IMPLICATA, *mar. law.* In order to avoid the risk of making fruitless voyages, merchants have been in the habit of receiving small adventures on freight at so much per cent., to which they are entitled at all events, even if the adventure be lost. This is what the Italians call *implicata.* Targa, chap. 34; Emer. Mar. Loans. s. 5.

IMPLICATION, is an inference of something not directly declared, but arising from what is admitted or expressed. It is a rule that when the law gives any thing to a man, it gives him by implication all that is necessary for its enjoyment. It is also a rule that when a man accepts an office, he undertakes by implication to use it according to law, and by non user he may forfeit it. 2 Bl. Com. 152. An estate in fee simple will pass by implication, 6 John. R. 185; 18 John. R. 31; 2 Binn. R. 464, 532: such implication must not only be a possible or probable one, but it must be plain and necessary; that is, so strong a probability of intention, that an intention contrary to that imputed to the testator cannot be supposed. 1 Ves. & B. 466; Willes, 141; 1 Ves. jr. 564; 14 John. R. 198. Vide, generally, Com. Dig. Estates by Devise, N 12, 13; 2 Rop. Leg. 342; 14 Vin. Ab. 341; 5 Ves. 805; 5 Ves. 582; 3 Ves. 676.

IMPORTATION, *comm. law*, is the act of bringing goods and merchandize into the United States from a foreign country. To prevent the mischievous interference of the several states with the national commerce, the constitution of the United States, art. 1, s. 10, provides as follows: "no state shall without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress." This apparently plain provision has received a judicial construction. In the year 1821, the legislature of Maryland passed an act requiring that all importers of foreign articles, commodities, &c. by the bale or package, of wine, rum, &c., and other persons selling the same by wholesale, bale or package, hogshead, barrel or tierce, should before they were authorised to sell, take out a license for which they were to pay fifty dollars, under certain penalties. A question arose whether this act was or was not a violation of the constitution of the United States and particularly of the above clause, and the supreme court decided against the constitutionality of the law. 12 Wheat. 419.

The act of congress of March 1, 1817, 3 Story, L. U. S. 1622, provides:

§ 1. That, after the thirtieth day of September next, no goods, wares, or merchandise, shall be imported into the United States from any foreign port or place, except in vessels of the United States, or in such foreign vessels as truly or wholly belong to the citizens or subjects of that country of which the goods are the growth, production or manufacture; or from which such goods, wares or merchandise, can only be or most usually are, first shipped for transportation; Provided, nevertheless, That this regulation shall not extend to the vessels of any foreign nation which has not adopted, and which shall not adopt a similar regulation.

§ 2. That all goods, wares or merchandise, imported into the United States contrary to the true intent and meaning of this act, and the ship or vessel wherein the same shall be imported, together with her cargo, tackle, apparel, and furniture, shall be forfeited to the United States; and such goods, wares, or merchandise, ship, or vessel, and cargo, shall be liable to be seized, prosecuted, and condemned, in like manner, and under the same regulations, restrictions, and provisions, as have been heretofore established for the recovery, collection, distribution, and remission, of forfeitures to the United States by the several revenue laws.

§ 4. That no goods, wares, or merchandise, shall be imported, under penalty of forfeiture thereof, from one port of the United States to another port of the United States, in a vessel belonging wholly or in part to a subject of any foreign power; but this clause shall not be construed to prohibit the sailing of any foreign vessel from one to another port of the United States, provided no goods, wares, or merchandise, other than those imported in such vessel from some foreign port, and which shall not have been unladen, shall be carried from one port or place to another in the United States.

§ 6. That after the thirtieth day of September next, there shall be paid upon every ship or vessel of the United States, which shall be entered in the United States from any foreign port or place, unless the officers, and at least two-thirds of the crew thereof, shall be proved citizens of the United States, or persons not the subjects of any foreign prince or state, to the satisfaction of the collector, fifty cents per ton: And provided also, That this section shall not extend to ships or vessels of the United States, which are now on foreign voyages, or which may depart from the United States prior to the first day of May next, until after their return to some port of the United States.

§ 7. That the several bounties and remissions, or abatements of duty, allowed by this act, in the case of vessels having a certain proportion of seamen who are American citizens, or persons not the subjects of any foreign power, shall be allowed only in the case of vessels having such proportion of American seamen during their whole voyage, unless in case of sickness, death or desertion, or where the whole or part of the crew shall have been taken prisoners in the voyage.

Vide article, *Entry of goods at the Custom-house.*

IMPORTUNITY. Tiresome solicitation. In cases of wills and devises, they are sometimes set aside in consequence of the importunity of those who have procured them. Whenever the importunity is such as to deprive the devisor of the freedom of his will, the devise becomes fraudulent and void. Dane's Ab. ch.

127, a, 14, s. 5, 6, 7; 2 Phillim. R. 551, 2.

IMPOSSIBILITY. The character of that which cannot be done agreeably to the accustomed order of nature. As to impossible conditions in contracts, see Bac. Ab. Conditions, M; Co. Litt. 206; Roll. Ab. 420; 6 Toull. n. 486, 686; Dig. 2, 14, 39; Ib. 44, 7, 31; Ib. 50, 17, 185; Ib. 45, 1, 69; on the subject of impossible conditions in wills, vide 1 Rop. Leg. 505; Swinb. pt. 4, s. 6; 6 Toull. 614. Vide, generally, Dane's Ab. Index, h. t.; Clef des Lois Rom. par Fieffé Lacroix, h. t.; Com. Dig. Conditions, D 1 & 2; Vin. Ab. Conditions, C a, D a, E a.

IMPOSTS. This word is sometimes used to signify taxes, or duties, or impositions; and, sometimes, in the more restrained sense of a duty on imported goods and merchandise. The Federalist, No. 30; 3 Elliott's Debates, 289; Story, Const. § 949. The constitution of the United States, art. 1, s. 8, n. 1, gives power to congress "to lay and collect taxes, duties, imposts and excises." And art. 1, s. 10, n. 2, directs that "no state shall, without the consent of congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." See Bac. Ab. Smuggling, B; 2 Inst. 62; Dy. 165 n.; Sir John Davis on Imposition.

IMPOTENCE, *med. jur.* The incapacity for copulation or propagating the species. It has also been used synonymously with *sterility*. Impotence may be considered as incurable, curable, accidental or temporary. Absolute or incurable impotence, is that for which there is no known relief, principally originating in some malformation or defect of the genital organs. Where this defect existed at the time of the marriage, and was incurable, by the ecclesiastical law and the law of several of the American states, the marriage may be declared void *ab initio*. Com. Dig. Baron and Feme, (C 3); Bac. Ab. Marriage, &c. E 3; 1 Bl. Com. 440; Beck's Med. Jur. 67; Code, lib. 5, t. 17, l. 10; Poynt. on Marr. and Div. ch. 8; Merl. Rép. mot Impuissance. But it seems the party naturally impotent cannot allege that fact for the purpose of obtaining a divorce. 3 Phillim. R. 147; S. C. 1 Eng. Eccl. R. 384. See 3 Phillim. R. 325; S. C. 1 Eng. Eccl. R. 408; 1 Chit. Med. Jur. 377; 1 Par. & Fonbl. 172, 173, note (*d*); Ryan's Med. Jur. 95 to 111; 1 Bl. Com. 440; 2 Phillim. R. 10; 1 Hagg. R. 725. See, as to the signs of impotence, 1 Briand, Méd. Lég. c. 2, art. 2, § 2, n. 1; Dictionnaire des Sciences Médicales, art. Impuissance; and, generally, Trebuchet, Jur. de la Méd. 100, 101, 102; 1 State Tr. 315; 8 State Tr. App. No. 1, p. 23; 3 Phillim. R. 147; 1 Hagg. Eccl. R. 523.

IMPRIMERY. In some of the ancient English statutes this word is used to signify a printing-office, the art of printing, a print or impression.

IMPRISONMENT, is the restraint of a person contrary to his will, 2 Inst. 589; Baldw. Rep. 239, 600; imprisonment is either lawful or unlawful; lawful imprisonment is used either for crimes or for the appearance of the party in a civil suit, or arrest in execution. Imprisonment for crimes is either for the appearance of a person accused, as when he cannot give bail; or it is the effect of a sentence, and then it is a part of the punishment. Imprisonment in civil cases takes place when a defendant on being sued on bailable process refuses or cannot give the bail legally demanded, or is under a *capias ad satisfaciendum*, when he is taken in execution under a judgment. An unlawful imprisonment, commonly called *false impri-*

sonment, (q. v.) means any illegal imprisonment either with or without process whatever, or under colour of process wholly illegal, without regard to any question whether any crime has been committed or a debt due. As to what will amount to an imprisonment, the most obvious modes are confinement in a prison or a private house, but a forcible detention in the street, or the touching of a person by a peace officer by way of arrest, are also imprisonments. Bac. Ab. Trespass, D 3; 1 Esp. R. 431, 526. It has been decided that lifting up a person in his chair, and carrying him out of the room in which he was sitting with others, and excluding him from the room, was not an imprisonment, 1 Chit. Pr. 48; and the merely giving charge of a person to a peace officer, not followed by any actual apprehension of the person does not amount to an imprisonment, though the party to avoid it, next day attend at a police office, 1 Esp. R. 431; New Rep. 211; 1 Carr. & Payn. 153; S. C. 11 Eng. Com. Law R. 351; and if in consequence of a message from a sheriff's officer holding a writ, the defendant execute and send him a bail bond, such submission to the process will not constitute an arrest. 6 Bar. & Cres. 528; S. C. 13 Eng. Com. Law Rep. 245; Dowl. & R. 233. Vide, generally, 14 Vin. Ab. 342; 4 Com. Dig. 618; 1 Chit. Pr. 47; Merl. Répert. mot Emprisonnement; 17 Eng. Com. L. R. 246, n.

IMPROBATION. The act by which perjury or falsehood is proved. Techn. Dict. h. t.

IMPROPRIATION, *eccl. law.* The act of employing the revenues of a church living to one's own use; it is also a parsonage or ecclesiastical living in the hands of a layman, or which descends by inheritance. Techn. Dict. h. t.

IMPROVEMENT, *estates.* This term is of doubtful meaning. It would seem to apply principally to buildings, though generally it extends to every amelioration of every description of property, whether real or personal; it is generally explained by other words. Where, by the terms of a lease the covenant was to leave at the end of the term a water-mill with all the fixtures, fastenings, and *improvements*, during the demise fixed, fastened, or set up on or upon the premises, in good plight and condition, it was held to include a pair of new mill-stones set up by the lessee during the term, although the custom of the country in general authorised the tenant to remove them. 9 Bing. 24; 3 Sim. 450; 2 Ves. & Bea. 349. Vide 3 Yeates, 71; Addis. R. 335; 4 Binn. R. 418; 5 Binn. R. 77; 5 S. & R. 266; 1 Binn. R. 495; 1 John. Ch. R. 450; 15 Pick. R. 471. Vide *Profits.*

IMPROVEMENT, *rights.* Is an addition of some useful thing to a machine, manufacture or composition of matter. The patent law of July 4, 1836, authorises the granting of a patent for any new and useful improvement on any art, machine, manufacture or composition of matter. Sect. 6. It is often very difficult to say what is a new and useful improvement, the cases often approach very near to each other. In the present improved state of machinery, it is almost impracticable not to employ the same elements of motion, and in some particulars, the same manner of operation, to produce any new effect. 1 Gallis. 478; 2 Gallis. 51. See 4 B. & Ald. 540; 2 Kent, Com. 370.

IMPUBER, *in the civil law*, one who is more than seven years old, or out of infancy, and who has not attained the age of an adult, (q. v.) and who is yet in his puberty; that

is, if a boy, till he has attained his full age of fourteen years, and, if a girl, her full age of twelve years. Domat, Liv. Prel. t. 2, s. 2, n. 8.

IMPUTATION OF PAYMENT. This term is used in Louisiana to signify the appropriation which is made of a payment, when the debtor owes two debts to the creditor. Civ. Code of Lo. art. 2159 to 2262. See 3 N. S. 483; 6 N. S. 28; Id. 113; Poth. Ob. n. 539, 565, 570; Durant. Des Contr. Liv. 3, t. 3, § 3, n. 191; 10 L. R. 232, 352; 7 Toull. n. 173, p. 246.

IN ALIO LOCO. In another place. Vide *Cepit in alio loco.*

IN AUTRE DROIT. In another's right. An executor, administrator or trusteee, is said to have the property confided to him in such character *in autre droit.*

IN CHIEF. Evidence is said to be *in chief* when it is given in support of the case opened by the leading counsel. Vide *To Open—Opening.* The term is used to distinguish evidence of this nature from evidence obtained on a *cross-examination*, (q. v.) 3 Chit. Pr. 890. Evidence in chief should be confined to such matters as the pleadings and the opening warrant, and a departure from this rule, will be sometimes highly inconvenient, if not fatal. Suppose, for example, that two assaults have been committed, one in January and the other in February, and the plaintiff prove his cause of action to have been the assault in January, he cannot abandon that, and afterwards prove another committed in February, unless the pleadings and openings extend to both. 1 Campb. R. 473. See also, 6 Carr. & P. 73; S. C. 25 E. C. L. R. 288; 1 Mood. & R. 282.

IN COMMENDAM. Vide *Commendam.*

IN ESSE. In being. A thing in existence. It is used in opposition to *in posse.* A child in *ventre sa mere* is a thing in *posse;* after he is born, he is *in esse.* Vide 1 Supp. to Ves. jr. 466; 2 Suppl. to Ves. jr. 155, 191. Vide *Posse.*

IN LIMINE, in or at the beginning. This phrase is frequently used, as, the courts are anxious to check crimes *in limine.*

IN MITIORI SENSU, *construction.* Formerly in actions of slander it was a rule to take the expression used *in mitiori sensu*, in the mildest acceptation, and ingenuity was, upon these occasions, continually exercised to devise or discover a meaning which by some remote possibility the speaker might have intended; and some ludicrous examples of this ingenuity may be found. To say of a man who was making his livelihood by buying and selling merchandise, he is a base, broken rascal, he has broken twice, and I'll make him break a third time, was gravely asserted not to be actionable—"ne poet dar porter action, car poet estre intend de *burstness de belly*," Latch, 114. And to call a man a thief was declared to be no slander, for this reason "perhaps the speaker might mean he had stolen a lady's heart." The rule now is to construe words agreeably to the meaning usually attached to them. 1 Nott & McCord, 217; 2 Nott & McCord, 511; 8 Mass. R. 248; 1 Wash. R. 152; Kirby, R. 12; 7 Serg. & Rawle, 451; 2 Binn. 34; 3 Binn. 515.

IN MORA. Vide *Mora, in.*

IN NULLO EST ERRATUM, *pleading.* A plea to errors assigned on proceedings in error, by which the defendant in error affirms there is no error in the record. As to the effect of such plea, see 1 Vent. 252; 1 Str. 684; 9 Mass. R. 532; 1 Burr. 410; T. Ray. 231. It is a general rule that the plea *in nullo est erratum* confesses the fact as-

signed for error. Yelv. 57; Dane's Ab. Index, h. t.

IN PERSONAM, *remedies.* A remedy *in personam*, is one where the proceedings are against the person, in contradistinction of those which are against specific things, or *in rem.* (q. v.)

IN REM, *remedies.* This technical term is used to designate proceedings or actions instituted *against the thing*, in contradistinction to personal actions which are said to be *in personam.* Courts of admiralty enforce the performance of a contract by seizing into their custody the very subject of hypothecation; for in these cases the parties are not personally bound, and the proceedings are confined to the thing in specie. Bro. Civ. and Adm. Law, 98; and see 2 Gall. R. 200; 3 T. R. 269, 270. There are cases however where the remedy is either *in personam* or *in rem.* Seamen, for example, may proceed against the ship or cargo for their wages, and this is the most expeditious mode; or they may proceed against the master or owners. 4 Burr. 1944; 2 Bro. C. & A. Law, 396. Vide, generally, 1 Phil. Ev. 254; 1 Stark. Ev. 228; Dane's Ab. h. t.; Serg. Const. Law, 202, 203, 212.

IN SOLIDO, a term used in the civil law, to signify that a contract is joint. Obligations are *in solido*, first, between several creditors; secondly, between several debtors.—1. When a person contracts the obligation of one and the same thing, in favour of several others, each of these is only creditor for his own share, but he may contract with each of them for the whole when such is the intention of the parties, so that each of the persons in whose favour the obligation is contracted, is creditor for the whole, but that a payment made to any one liberates the debtor against them all. This is called solidity of obligation. Poth. Obl. pt. 2, c. 3, art. 7. The common law is exactly the reverse of this, for a general obligation in favour of several persons, is a joint-obligation to them all, unless the nature of the subject, or the particularity of the expression lead to a different conclusion. Evans's Poth. vol. 2, p. 56. See tit. *Joint and Several; Parties to action.*—2. An obligation is contracted *in solido* on the part of the debtors, when each of them is obliged for the whole, but so that a payment made by one liberates them all. Poth. Obli. pt. 2, c. 3, art. 7, s. 1. See 9 M. R. 322; 5 L. R. 287; 2 N. S. 140; 3 L. R. 352; 4 N. S. 317; 5 L. R. 122; 12 M. R. 216.

IN TERROREM. By way of threat, terror, or warning. For example, when a legacy is given to a person upon condition not to dispute the validity or the dispositions in wills and testaments, the conditions are not in general obligatory, but only *in terrorem;* if, therefore, there exist *probabilis causa litigandi*, the non-observance of the conditions will not be a forfeiture. 2 Vern. 90; 1 Hill. Ab. 253; 3 P. Wms. 344; 1 Atk. 404. But when the acquiescence of the legatee appears to be a material ingredient in the gift, the bequest is only *quousque* the legatee shall refrain from disturbing the will. 2 P. Wms. 52; 2 Ventr. 352. For cases of legacies given to a wife while she shall continue unmarried, see 1 Madd. R. 590; 1 Rop. Leg. 558.

IN TERROREM POPULI, to the terror of the people. An indictment for a riot is bad unless it conclude in terrorem populi. 4 Carr. & Payne, 373.

IN TRANSITU. See *Stoppage in transitu.*

IN VENTRE SA MERE, in his mother's womb.—1. In law a child is for all beneficial purposes consider-

ed to be born while in ventre sa mere. 5 T. R. 49; Co. Litt. 36; 1 P. Wms. 329; Civ. Code of Lo. art. 948.—2. He is enabled to have an estate limited to his use. 1 Bl. Com. 130.—3. May have a distributive share of intestate property. 1 Ves. 81.—4. Is capable of taking a devise of lands. 2 Atk. 117; 1 Freem. 244, 293.—5. Takes under a marriage settlement a provision made for children living at the death of the father. 1 Ves. 85.—6. Is capable of taking a legacy, and is entitled to a share in a fund bequeathed to children under a general description of "children," or of "children living at the testator's death." 2 H. Bl. 399; 2 Bro. C. C. 320; S. C. 2 Ves. jun. 673; 1 Sim. & Stu. 181; 1 B. & P. 243; 5 T. R. 49. See also, 1 Ves. sen. 85; Id. 111; 1 P. Wms. 244, 341; 2 Bro. C. C. 63; Amb. 708, 711; 1 Salk. 229; 2 P. Wms. 446; 2 Atk. 114; Pre. Ch. 50; 2 Vern. 710; 3 Ves. 486; 7 T. R. 100; 4 Ves. 322; Bac. Ab. Legacies, &c. A; 1 Rop. Leg. 52, 3; 5 Serg. & Rawle, 40.—7. May be appointed executor. Bac. Ab. Infancy, B.—8. A bill may be brought in its behalf, and the court will grant an injunction to stay waste, 2 Vern. 710; Pre. Ch. 50.—9. The mother of a child *in ventre sa mere* may detain writings on its behalf. 2 Vern. 710.—10. May have a guardian assigned to it. 1 Bl. Com. 130.—11. The destruction of such a child is a heinous misdemeanor. 1 Bl. Com. 129, 130.—12. And the birth of a posthumous child amounts in Pennsylvania to a revocation of a will previously executed, so far as regards such child. 3 Binn. 498. See Coop. Just. 496. See as to the law of Virginia on this subject, 3 Munf. 20. Vide *Fœtus*.

INADEQUATE PRICE. This term is applied to indicate the want of a sufficient consideration for a thing sold, or such price as under ordinary circumstances would be considered insufficient. Inadequacy of price is frequently connected with fraud, gross misrepresentation, or an intentional concealment of the defects in the thing sold. In these cases, it is clear, the vendor cannot compel the buyer to fulfil the contract. 1 Lev. 111; 1 Bro. P. C. 187; 6 John. R. 110; 3 Cranch, 270; 4 Dall. R. 250; 3 Atk. 283; 1 Bro. C. C. 440. In general, however, inadequacy of price is not sufficient ground to avoid a contract, particularly when the property has been sold by auction. 7 Ves. Jr. 30; 3 Bro. C. C. 228; 7 Ves. Jr. 35, note. But if an uncertain consideration (as a life annuity) be given for an estate, and the contract be executory, equity, it seems, will enter into the adequacy of the consideration. 7 Bro. P. C. 184; 1 Bro. C. C. 156. Vide 1 Yeates, R. 312; Sugd. Vend. 189 to 199; 1 B. & B. 165; 1 M'Cord's Ch. R. 383, 389, 390; 4 Desaus. R. 651. Vide *Price*.

INADMISSIBLE. What cannot be received. Parol evidence, for example, is inadmissible to contradict a written agreement.

INALIENABLE. This word is applied to those things, the property of which cannot be lawfully transferred from one person to another. Public highways and rivers are of this kind; there are also many rights which are inalienable, as the rights of liberty, or of speech.

INAUGURATION, this word was applied by the Romans to the ceremony of dedicating some temple, or raising some man to the priesthood, after the *augurs* had been consulted. It was afterwards applied to the *installation* (q. v.) of the emperors, kings and prelates, in imitation of the ceremonies of the Romans when they entered into the temple of the augurs. It is applied in the United States to

the installation of the chief magistrate of the republic, and of the governors of the several states.

INCAPACITY, is the want of a quality legally to do, give, transmit or receive something. It arises from nature, from the law, or from both. From nature, when the party has not his senses, as, in the case of an idiot; from the law, as in the case of a bastard who cannot inherit; from nature and the law, as in the case of a married woman, who cannot make contracts or a will. In general the incapacity ceases with the cause which produces it. If the idiot should obtain his senses, or the married woman's husband die, their incapacity would be at an end. When a cause of action arises during the incapacity of a person having the right to sue, the act of limitation does not, in general, commence to run till the incapacity has been removed. But two incapacities cannot be joined in order to come within the statute.

INCENDIARY, *crim. law.* One who maliciously and wilfully sets another person's house on fire; one guilty of the crime of arson. This offence is punished by the statute laws of the different states according to their several provisions. The civil law punished him with death, Dig. 47, 9, 12, 1, by being cast into the fire. Ib. 48, 19, 28, 12; Code, 9, 1, 11; vide Dane's Ab. Index, h. t.

INCEPTION. The commencement; the beginning. In making a will, for example, the writing is its inception. 3 Co. 31 b; Plowd. 343. Vide *Consummation; Progression.*

INCEST, is the carnal copulation of two persons related to each other in any of the degrees within which marriage is prohibited by law. Vide *Marriage.* It is punished by fine and imprisonment, under the laws of the respective states. Vide 1 Smith's Laws of Pennsylv. 26; Dane's Ab. Index, h. t.; Dig. 23, 2, 68; 6 Conn. R. 446; Penal Laws of China, B. 1, s. 2, § 10.

INCH, a measure of length, containing one-twelfth part of a foot.

INCHOATE. That which is not yet completed; what is not finished. Contracts are considered inchoate until they are executed by all the parties who ought to have executed them. For example, a covenant which purports to be triparte, and it is executed by only two of the parties, is incomplete, and no one is bound by it. 2 Halst. 142. Vide *Locus pœnitentiæ.*

INCIDENT, is a thing necessarily depending upon, appertaining to, or following another, called the principal. The power of punishing for contempt is incident to a court of record; rent is incident to a reversion; distress to rent; estovers of wood to a tenancy for life or years. 1 Inst. 151; Noy's Max. n. 13; Vin. Ab. h. t.; Dane's Ab. h. t.; Com. Dig. h. t. and the references there; Bro. Ab, h. t.; Rolle's Ab. 75.

INCIPITUR, *practice.* This word, which means "it is begun," signifies the commencement of the entry on the roll on signing judgment, &c.

INCLUSIVE, is that which is taken in the computation of any thing. In computing time, as ten days from a particular time, one day is generally to be included and one excluded. Vide article *Exclusive*, and the authorities there cited.

INCOMPATIBILITY, *offices, rights;* this term is used to show that two or more things ought not to be at the same time in the same person; for example, a man cannot at the same time be landlord and tenant of the same land; heir and devisee of the same thing; trustee and cestui que trust of the same property. There are offices which are incompatible with each other by constitutional provision; the vice-president

of the United States cannot act as such when filling the office of president; Const. art. 1, s. 3, n. 5; and by the same instrument, art. 1, s. 6, n. 2, it is directed that "no senator or representative, shall during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States, shall be a member of either house, during his continuance in office." Provisions rendering offices incompatible are to be found in most of the constitutions of the states and in some of their laws. In Pennsylvania the acts of the 12th of February, 1802, 3 Smith's Laws of Pa. 485; and 6th of March, 1812, 5 Sm. L. Pa. 309, contain various provisions making certain offices incompatible with each other. At common law, offices subordinate and interfering with each other have been considered incompatible; for example, a man cannot be at once a judge and prothonotary or clerk of the same court. 4 Inst. 100. Vide 4 S. & R. 277; 17 S. & R. 219; and the article *Office*.

INCOMPETENCY, *in the French law*, is the state of a judge who cannot take cognizance of a dispute brought before him; a want of jurisdiction. Incompetency is material, *ratione materiæ*, or personal, *ratione personæ*. The first takes place when a judge takes cognizance of a matter over which another judge has the sole jurisdiction, and this cannot be cured by the appearance or agreement of the parties. The second is when the matter in dispute is within the jurisdiction of the judge, but the parties in the case are not, in which case they make the judge competent unless they make their objection before they take defence. See Peck, 374; 17 John. 13; 12 Conn. 88; 3 Cowen, Rep. 724; 1 Penn. 195; 4 Yeates, 446. When a party has a privilege which exempts him from the jurisdiction, he may waive the privilege. 4 McCord, 79; Wright, 484; 4 Mass. 593; Pet. C. C. R. 489; 5 Cranch, 288; 1 Pet. R. 449; 4 W. C. C. R. 84; 8 Wheat. 699; Merl. Rép. mot Incompétence. It is a maxim in the common law, *aliquis non debet esse judex in propriâ causâ*. Co. Litt. 141 a; see 14 Vin. Abr. 573; 4 Com. Dig. 6. The greatest delicacy is constantly observed on the part of judges, so that they never act when there could be the possibility of doubt whether they could be free from bias, and even a distant degree of relationship has induced a judge to decline interfering. 1 Knapp's Rep. 376. The slightest degree of pecuniary interest is considered as an insuperable objection. 4 Mod. 226; Comb. 218; Hard. 44; Hob. 87; 2 Binn. R. 454; 13 Mass. R. 340; 5 Mass. R. 92; 6 Pick. 109; Peck, R. 374; Coxe, Rep. 190; 3 Ham. R. 289; 17 John. Rep. 133; 12 Conn. R. 88; 1 Penning. R. 195; 4 Yeates, R. 446; 3 Cowen, R. 725; Salk. 396; Bac. Ab. Courts, B; and the articles *Competency; Credibility; Interest; Judge; Witness*.

INCOMPETENCY, *evidence*, is the want of legal ability in a witness to be heard as such on the trial of a cause. The objections to the competency (q. v.) of a witness are fourfold. The first ground is the want of understanding; a second is defect of religious principles; a third arises from the conviction of certain crimes or infamy of character; the fourth is on account of interest, (q. v.) 1 Phil. Ev. 15.

INCORPORATION. This term is frequently confounded, particularly in the old books, with corporation. The distinction between them is this, that by incorporation is understood

the act by which a corporation is created; by corporation is meant the body thus created. Vide *Corporation.*

INCORPORATION, *civil law.* The reunion of one domain to another.

INCORPOREAL, is that which has no body. Things incorporeal are those which are not the object of sense, which cannot be seen nor felt, but which we can easily conceive in the understanding, as rights, actions, successions, easements, and the like. Dig. lib. 6, t. 1; lb. lib. 41, t. 1, l. 43, § 1; Poth. Traité des choses, § 2.

INCORPOREAL HEREDITAMENT, *title, estates,* is a right issuing out of, or annexed unto, a thing corporeal. Their existence is merely in idea and abstracted contemplation, though their effects and profits may be frequently the objects of our bodily senses. Co. Litt. 9 a; Poth. Traité des choses, § 2. According to Sir William Blackstone, there are ten kinds of incorporeal hereditaments; namely, 1, advowsons; 2, titles; 3, commons; 4, ways; 5, offices; 6, dignities; 7, franchises; 8, corodies; 9, annuities; 10, rents. 2 Blacks. Com. 20.

INCORPOREAL PROPERTY, *civil law,* is that which consists in legal right merely; or, as the term is in the common law, of choses in actions. Vide *Corporeal property.*

TO INCULPATE. To accuse one of a crime or misdemeanor.

INCUMBENT, *eccles. law.* A clerk resident on his benefice with cure; he is so called because he does or ought to bend the whole of his studies to his duties. In common parlance, it signifies one who is in the possession of an office, as, the present incumbent.

INCUMBRANCE, whatever is a lien upon an estate. In cases of sales of real estate, the vendor is required to disclose the incumbrances, and to deliver to the purchaser the instruments by which they were created, or on which the defects arise; and the neglect of this will be considered as a fraud. Sugd. Vend. 6; 1 Ves. 96; and see 6 Ves. jr. 193; 10 Ves. jr. 470; 1 Sch. & Lef. 227; 7 Serg. & Rawle, 73. Whether the tenant for life or the remainder-man is to keep down the interest on incumbrances, see Turn. R. 174; 3 Mer. R. 566; 5 Ves. 99; 4 Ves. 24. See, generally, 14 Vin. Ab. 352; Com. Dig. Chancery, 4 A 10, 4 I 3; 9 Watts, R. 152.

INDEBITATUS ASSUMPSIT, *remedies, pleadings,* is that species of action of assumpsit, in which the plaintiff alleges in his declaration, first a debt, and then a promise in consideration of the debt, that the defendant *being indebted he promised* the plaintiff to pay him. The promise so laid is generally an implied one only. Vide 1 Chit. Pl. 334; Steph. Pl. 318; Yelv. 21; 4 Co. 92 b. For the history of this form of action, see 3 Reeve's Hist. Com. Law; 2 Comyn on Contr. 549 to 556; 1 H. Bl. 550, 551; 3 Black. Com. 154; Yelv. 70. Vide *Pactum Constitutæ Pecuniæ.*

INDEBTEDNESS. The state of being in debt, without regard to the ability or inability of the party to pay the same. See 1 Story, Eq. 343; 2 Hill. Ab. 421.

INDECENCY. Obscenity calculated to promote the violation of the law, or that which tends to the general corruption of morals. 2 Serg. & Rawle, 91. The following are examples of such indecency, namely, the exposure by a man of his naked person on a balcony, to public view, or bathing in public, 2 Campb. 89; or the exhibition of bawdy pictures, 2 Chit. Cr. Law, 42; 2 Serg. & Rawle, 91. This indecency is punishable by indictment.

Vide 1 Sid. 168; S. C. 1 Keb. 620; 2 Yerg. R. 482, 589; 1 Mass. Rep. 8; 2 Chan. Cas. 110; 1 Russ. Cr. 302; 1 Hawk. P. C. c. 5, s. 4; 4 Bl. Com. 65, n.; 1 East, P. C. c. 1, s. 1; Burn's Just. Lewdness.

INDEFEASIBLE, what cannot be defeated; what cannot be undone. This epithet is usually applied to an estate or right which cannot be defeated.

INDEFENSIS. One sued or impleaded, who refuses to answer.

INDEFINITE NUMBER. See *Definite number*.

INDEFINITE PAYMENT, *contracts*, is that which a debtor who owes several debts to a creditor, makes without making an *appropriation*; (q. v.) in that case the creditor has a right to make such appropriation.

INDEMNITY. What is given to a person to prevent his suffering damage. 2 McCord, 279. Sometimes it signifies diminution; a tenant who has been interrupted in the enjoyment of his lease may require an indemnity from the lessor, that is, a reduction of his rent.

INDENTURE, *conveyancing*, is an instrument of writing containing a conveyance or contract between two or more persons usually indented or cut unevenly, or in and out, on the top or side. Formerly it was common to make two instruments exactly alike, and it was then usual to write both on the same parchment, with some words or letters written between them, through which the parchment was cut, either in a straight or indented line, in such a manner as to leave one-half of the word on one part, and half on the other. The instrument usually commences with these words, "This indenture," which were not formerly sufficient, unless the parchment or paper was actually indented to make an indenture, 5 Co. 20; but now if the form of indenting the parchment be wanting, it may be supplied by being done in court, this being mere form. Besides it would be exceedingly difficult with even the most perfect instruments, to cut parchment or paper without indenting it. Vide Bac. Ab. Leases, &c. E 2; Com. Dig. Fait, C, and note (d); Litt. sec. 370; Co. Litt. 143 b, 229 a; Cruise, Dig. t. 32, c. 1, s. 24; 2 Bl. Com. 294; 1 Sess. Cas. 222.

INDEPENDENCE. A state of perfect irresponsibility to any superior; the United States are free and independent of all earthly power. Independence may be divided into *political* and *natural* independence. By the former is to be understood that we have contracted no tie except those which flow from the three great natural rights of safety, liberty and property. The latter consists in the power of being able to enjoy a permanent well-being, whatever may be the dispositions of those from whom we call ourselves independent. In that sense a nation may be independent with regard to most people, but not independent of the whole world. Vide *Declaration of Independence*.

INDEPENDENT CONTRACT, is one in which the mutual acts or promises have no relation to each other, either as equivalents or considerations. Civil Code of Lo. art. 1762.

INDIAN TRIBE, a body of the aboriginal Indian race of men found in the United States. Such a tribe, situated within the boundaries of a state, and exercising the powers of government and sovereignty, under the national government, is deemed politically a state; that is, a distinct political society, capable of self-government; but is not deemed a foreign state, in the sense of the constitution. It is rather a domestic dependent nation. Such a tribe may properly be deemed in a state of pupillage; and its relation to the United States

resembles that of a ward to a guar dian. 5 Pet. R. 1, 16, 17; 20 John. R. 193; 3 Kent, Com. 308 to 318; Story on Const. § 1096.

INDIANA. The name of one of the new states of the United States. This state was admitted into the union by virtue of the "Resolution for admitting the state of Indiana into the Union," approved December 11, 1816, in the following words: Whereas, in pursuance of an act of congress, passed on the nineteenth day of April, one thousand eight hundred and sixteen, entitled "An act to enable the people of the Indiana terrritory to form a constitution and state government, and for the admission of that state into the Union," the people of the said territory did, on the twenty-ninth day of June, in the present year, by a convention called for that purpose, form for themselves a constitution and state government, which constitution and state government, so formed, is republican, and in conformity with the principles of the articles of compact between the original states and the people and states in the territory north-west of the river Ohio, passed on the thirteenth day of July, one thousand seven hundred and eighty-seven.

Resolved, That the state of Indiana shall be one, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever.

The constitution of the state was adopted by a convention, held at Corydon, in the year eighteen hundred and sixteen, from the 10th to the 29th day of June of that year. The powers of the government are divided into three distinct departments, and each of them is confided to a separate body of magistracy, to wit: those which are legislative, to one; those which are executive, to another; and those which are judiciary to another. Art. 2.

1st. The legislative authority of the state is vested in a general assembly, which consists in a senate and house of representatives, both elected by the people.

1. The senate is composed of a number of persons, who shall never be less than one-third, nor more than one-half of the number of representatives. The number to be fixed by law. Art. 3, s. 6. A senator shall, 1, have attained the age of twenty-five years; 2, be a citizen of the United States; 3, have resided, next preceding his election, two years in this state, the last twelve months of which in the county or district in which he may be elected, if the county or district shall have been so long erected, but if not, then within the limits of the county or counties, district or districts, out of which the same shall have been taken, unless he shall have been absent on the public business of the United States, or of this state; 4, have paid a state or county tax. Art. 3, s. 7. One-third of the senate is elected every year, on the first Monday in August.

2. The number of representatives is to be fixed by law. It shall never be less than twenty-five, nor more than thirty-six, until the number of white male inhabitants, above twenty-one years of age, shall be twenty-two thousand; and, after that event, in such ratio that the whole number of representatives shall never be less than thirty-six, nor exceed one hundred. To be qualified for a representative, a person must, 1, have attained the age of twenty-one years; 2, be a citizen of the United States; 3, be an inhabitant of this state; 4, have resided within the limits of the county in which he shall be chosen one year next preceding his election,

if the county shall have been so long erected, but if not, then within the limits of the county or counties out of which the same shall have been taken, unless he shall have been absent on the public business of the United States, or of this state; 5, have paid a state or county tax. Art. 3, s. 4. The members are elected yearly, by the qualified electors of each county respectively, on the first Monday of August. Art. 3, s. 3.

2d. The supreme *executive* power of this state is vested in a governor, who is styled the governor of the state of Indiana. And, under certain circumstances, this power is exercised by the lieutenant-governer.

1. The *governor* is chosen by the qualified electors on the first Monday in August, at the place where they shall respectively vote for representatives. He shall hold his office during three years, from and after the third day of the first session of the general assembly next ensuing his election, and until a successor shall be chosen and qualified; and shall not be capable of holding it longer than six years in any term of nine years. His requisite qualifications are, that he shall, 1, have been a citizen of the United States for ten years; 2, be at least thirty years of age; 3, have resided in the state five years next preceding his election, unless he shall have been absent on the business of this state, or of the United States; 4, not hold any office under the United States, or this state. He is commander-in-chief of the army and navy of the state, when not in the service of the United States; but he shall not command personally in the field, unless advised so to do by a resolution of the general assembly. He nominates, and by and with the consent of the senate, appoints all officers whose appointment is not otherwise provided for; fills vacancies, during the recess of the legislature; remits fines and forfeitures; grants reprieves and pardons, except in cases of impeachments; may require information from executive officers; gives to the general assembly information, and recommends necessary measures; may convene the legislature at the seat of government, or at a different place, on extraordinary occasions, such as war or pestilence; may adjourn the two houses, when they cannot agree as to an adjournment; and cause the laws to be faithfully executed. He is also invested with the veto power. Art. 4.

2. The *lieutenant-governor* shall be chosen at every election for a governor, in the same manner, continue in office for the same time, and possess the same qualifications. In voting for governor and lieutenant-governor, the electors shall distinguish whom they vote for as governor, and whom as lieutenant-governor. He shall, by virtue of his office, be president of the senate; have a right, when in committee of the whole, to debate and vote on all subjects, and when the senate are equally divided, to give the casting vote. In case of impeachment of the governor, his removal from office, death, refusal to qualify, resignation, or absence from the state, the lieutenant-governor shall exercise all the powers and authority appertaining to the office of governor, until another be duly qualified, or the governor absent or impeached shall return or be acquitted. Whenever the government shall be administered by the lieutenant-governor, or he shall be unable to attend as president of the senate, the senate shall elect one of their own members as president for that occasion. And if, during the vacancy of the office of governor, the lieutenant-governor shall be

impeached, removed from office, refuse to qualify, resign, die, or be absent from the state, the president of the senate pro tem. shall, in like manner, administer the government, until he shall be superseded by a governor or lieutenant-governor. The lieutenant-governor, while he acts as president of the senate, shall receive for his services the same compensation which shall, for the same period, be allowed to the speaker of the house of representatives, and no more: and during the time he administers the government, as governor, shall receive the same compensation which the governor would have received and been entitled to, had he been employed in the duties of his office, and no more. The president pro tempore of the senate, during the time he administers the government, shall receive, in like manner, the same compensation which the governor would have received, had he been employed in the duties of his office, and no more. If the lieutenant-governor shall be called upon to administer the government, and shall while in such administration, resign, die, or be absent from the state, during the recess of the general assembly, it shall be the duty of the secretary of state, for the time being, to convene the senate for the purpose of choosing a president pro tempore. Art. 4, s. 15 to 20.

3d. The *judicial* power of the state is vested by the 5th article of the constitution as follows:

§ 1. The judiciary power of this state, both as to matters of law and equity, shall be vested in one supreme court, in circuit courts, and in such other inferior courts as the general assembly may, from time to time, direct and establish.

§ 2. The supreme court shall consist of three judges, any two of whom shall form a quorum, and shall have appellative jurisdiction only, which shall be co-extensive with the limits of the state, under such restrictions and regulations, not repugnant to this constitution, as may, from time to time, be prescribed by law: Provided, nothing in this article shall be so construed as to prevent the general assembly from giving the supreme court original jurisdiction in capital cases and cases in chancery, where the president of the circuit court may be interested or prejudiced.

§ 3. The circuit courts shall consist of a president and two associate judges. The state shall be divided by law into three circuits, for each of which a president shall be appointed, who, during his continuance in office shall reside therein. The president and associate judges, in their respective counties, shall have common law and chancery jurisdiction, as also complete criminal jurisdiction, in all such cases, and in such manner, as may be prescribed by law. The president alone, in the absence of the associate judges, or the president and one of the associate judges, in the absence of the other, shall be competent to hold a court, as also the two associate judges, in the absence of the president, shall be competent to hold a court, except in capital cases, and cases in chancery; Provided, that nothing herein contained shall prevent the general assembly from increasing the number of the circuits and presidents, as the exigencies of the state may, from time to time require.

§ 4. The judges of the supreme court, the circuit and other inferior courts, shall hold their offices during the term of seven years, if they shall so long behave well, and shall at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

§ 5. The judges of the supreme court shall, by virtue of their offices,

be conservators of the peace throughout the state, as also the presidents of the circuit courts, in their respective circuits, and the associate judges in their respective counties.

§ 6. The supreme court shall hold its sessions at the seat of government, at such times as shall be prescribed by law: and the circuit courts shall be held in the respective counties as may be directed by law.

§ 7. The judges of the supreme court shall be appointed by the governor, by and with the advice and consent of the senate. The presidents of the circuit courts shall be appointed by joint ballot of both branches of the general assembly, and the associate judges of the circuit courts shall be elected by the qualified electors in their respective counties.

§ 8. The supreme court shall appoint its own clerk; and the clerks of the circuit court, in the several counties, shall be elected by the qualified electors in the several counties, but no person shall be eligible to the office of clerk of the circuit court in any county, unless he shall first have obtained from one or more of the judges of the supreme court, or from one or more of the presidents of the circuit courts, a certificate that he is qualified to execute the duties of the office of clerk of the circuit court: Provided, that nothing herein contained shall prevent the circuit courts in each county from appointing a clerk pro tem. until a qualified clerk may be duly elected: And provided also, that the said clerks respectively, when qualified and elected, shall hold their offices seven years, and no longer, unless re-appointed.

§ 12. A competent number of justices of the peace shall be elected by the qualified electors in each township in the several counties, and shall continue in office five years, if they shall so long behave well; whose powers and duties shall, from time to time, be regulated and defined by law.

INDICTED, *practice.* When a man is accused by a bill of indictment preferred by a grand jury, he is said to be indicted.

INDICTION, *comput. of time.* An indiction contained a space of fifteen years. It was used in dating at Rome and in England. It began at the dismission of the Nicene council, anno Domini 312; the first year was reckoned the first of the first indiction, the second, the third, &c., till fifteen years afterwards. The sixteenth year was the first year of the second indiction, the thirty-first year, was the first year of the third indiction, &c.

INDICTMENT, *crim. law, practice,* is a written accusation of one or more persons of a crime or misdemeanor, presented to, and preferred upon oath or affirmation, by a grand jury legally convoked. 4 Bl. Com. 299; Co. Litt. 126; 2 Hale, 152; Bac. Ab. h. t.; Com. Dig. h. t. (A); 1 Chit. Cr. L. 168. This word, indictment, is said to be derived from the old French word *inditer*, which signifies *to indicate; to show, or point out.* Its object is to indicate the offence charged against the accused. Rey, des Inst. de l'Angl. tome 2, p. 347. To render an indictment valid, there are certain essential and formal requisites. First, the essential requisites are, 1st, that the indictment be presented to some court having jurisdiction of the offence stated therein; 2dly, that it appear to have been found by the grand jury of the proper county or district; 3dly, that the indictment be found a true bill, and signed by the foreman of the grand jury; 4thly, that it be framed with sufficient certainty; for this

purpose, the charge must contain a certain description of the crime or misdemeanor, of which the defendant is accused, and a statement of the facts by which it is constituted, so as to identify the accusation. Cowp. 682, 3; 2 Hale, 167; 1 Binn. R. 201; 3 Binn. R. 533; 1 P. A. Bro. R. 360; 6 Serg. & Rawle, 398; 4 Serg. & Rawle, 194; 4 Bl. Com. 301; 3 Yeates, R. 407; 4 Cranch, R. 167. 5thly, the indictment must be in the English language. But if any document in a foreign language, as a libel, be necessarily introduced, it should be set out in the original tongue, and then translated, showing its application. 6 T. R. 162. Secondly, the formal requisites, are, 1st, the *venue*, which at common law should always be laid in the county where the offence has been committed, although the charge is in its nature transitory, as a battery. Hawk. B. 2, c. 25, s. 35. The venue is stated in the margin thus, "City and county of Philadelphia, to wit." 2dly, The *presentment* which must be in the present tense, and is usually expressed by the following formula, "the grand inquest of the commonwealth of Pennsylvania, inquiring for the city and county aforesaid, upon their oaths and affirmations present." 3dly, The *name and addition of the defendant;* but in case an error has been made in this respect, it is cured by the plea of the defendant. Bac. Ab. Misnomer, (B); Indictment, (G 2); 2 Hale, 175; 1 Chit. Pr. 202, 4thly, The *names of third persons*, when they must be necessarily mentioned in the indictment, should be stated with certainty to a common intent, so as sufficiently to inform the defendant who are his accusers. When, however, the names of third persons cannot be ascertained, it is sufficient in some cases, to state "a certain person or persons to the jurors aforesaid unknown." Hawk. B. 2, c. 25, s. 71; 2 East, P. C. 651, 781; 2 Hale, 181; Plowd. 85; Dyer, 97, 286; 8 C. & P. 773. See *Unknown*. 5thly, The *time* when the offence was committed, should in general be stated to be on a specific year and day. In some offences, as in perjury, the day must be precisely stated, 2 Wash. C. C. Rep. 328; but although it is necessary that a day certain should be laid in the indictment, yet, in general, the prosecutor may give evidence of an offence committed on any other day previous to the finding of the indictment. 5 Serg. & Rawle, 316. Vide 11 Serg. & Rawle, 177; 1 Chit. Cr. Law, 217, 224; 1 Chit. Pl. Index, tit. Time. 6thly, The *offence should be properly described.* This is done by stating the substantial circumstances necessary to show the nature of the crime; and, next, the formal allegations and terms of art required by law. 1. As to the substantial circumstances. The whole of the facts of the case necessary to make it appear judicially to the court that the indictors have gone upon sufficient premises, should be set forth; but there should be no unnecessary matter or any thing which on its face makes the indictment repugnant, inconsistent, or absurd. 2 Hale, 183; Haw. B. 2, c. 25, s. 57; Bac. Ab. h. t. (G 1); Com. Dig. h. t. (G 3); 2 Leach, 660; 2 Str. 1226. All indictments ought to charge a man with a particular offence, and not with being an offender in general: to this rule there are some exceptions, namely, a common barrator, a common scold, and the keeper of a common bawdy-house, may be indicted by these general words. 1 Chit. Cr. Law, 230, and the authorities there cited. The offence must not be stated in the disjunctive, so as to leave it uncertain on what it is intended to rely

as an accusation; as, that the defendant erected *or* caused to be erected a nuisance. 2 Str. 900; 1 Chit. Cr. Law, 236.—2. There are certain terms of art used, so appropriated by the law to express the precise idea which it entertains of the offence, that no other terms, however synonymous they may seem, are capable of filling the same office: such, for example, as traitorously, (q. v.) in treason; feloniously, (q. v.) in felony; burglariously, (q. v.) in burglary; maim, (q. v.) in mayhem, &c. 7thly, The conclusion of the indictment should conform to the provision of the constitution of the state on the subject, where there is such provision; as in Pennsylvania, Const. art. 5, s. 12, which provides, that "all prosecutions shall be carried on in the name and by the authority of the commonwealth of Pennsylvania, *and conclude against the peace and dignity of the same.*" As to the necessity and propriety of having several counts in an indictment, vide 1 Chit. Cr. Law, 248; as to joinder of several offences in the same indictment, vide 1 Chit. Cr. Law, 253; Arch. Cr. Pl. 60; several defendants may in some cases be joined in the same indictment, Ib. 255; Arch. Cr. Pl. 59. When an indictment may be amended, see Ib. 297; Stark. Cr. Pl. 286; or quashed, Ib. 298; Stark. Cr. Pl. 331; Arch. Cr. 66. Vide, generally, Arch. Cr. Pl. B. 1, part 1, c. 1, p. 1 to 68; Stark. Cr. Pl. 1 to 336; 1 Chit. Cr. Law, 168 to 304; Com. Dig. h. t.; Vin. Ab. h. t.; Bac. Ab. h. t.; Dane's Ab. h. t.; Nels. Ab. h. t.; Burn's Just. h. t.; Russ. on Cr. Index, h. t. By the constitution of the United States, Amendm. art. 5, no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war, or public danger.

INDICTOR. He who causes another to be indicted. The latter is sometimes called the indictee.

INDIVISUM. What two or more persons hold in common without partition; undivided, (q. v.)

TO INDORSE, to write on the back. Bills of exchange and promissory notes are indorsed by the party writing his name on the back; writing one's name on the back of a writ, is to indorse such writ. 7 Pick. 117. See 13 Mass. 396.

INDORSEE, *contracts*, is the person in whose favour an indorsement is made. He is entitled to all the rights of the indorser, and, if the bill or note have been indorsed over to him before it became due, he is entitled to greater rights than the indorser would have had, had he retained it till it became due, as none of the parties can make a set-off or inquire into the consideration of the bill which he then holds. If he remains to be the holder (q. v.) when the bill becomes due, he ought to make a legal demand, and give notice in case of non-acceptance or non-payment. Chitty on Bills, *passim.*

INDORSEMENT, *crim. law and practice.* When a warrant for the arrest of a person charged with a crime has been issued by a justice of the peace of one county, which is to be executed in another county, it is necessary in some states, as in Pennsylvania, that it should be indorsed by a justice of the county where it is to be executed, this indorsement is called backing, (q. v.)

INDORSEMENT, *contracts*, in its most general acceptation is what is written on the back of an instrument of writing, and which has relation to it; as, for example, a receipt or acquittance on a bond; an assignment on a promissory note.

Writing one's name on the back of a bill of exchange or a promissory note payable to order is what is usually called an indorsement. It will be convenient to consider, 1, the form of an indorsement; and, 2, its effect.

1. An indorsement is in full or in blank. In full, when mention is made of the name of the indorsee; and in blank when the name of the indorsee is not mentioned. Chitty on Bills, 170; 13 Serg. & Rawle, 315. A blank indorsement is made by writing the name of the indorser on the back; a writing or assignment on the face of the note or bill would however be considered to have the force and effect of an indorsement. 16 East, R. 12.

Indorsements may also be restrictive, conditional or qualified. A restrictive indorsement may restrain the negotiability of a bill by using express words to that effect, as by indorsing it "payable to J. S. only," or by using other words clearly demonstrating his intention to do so. Dougl. 637. The indorser may also make his indorsement conditional, and if the condition be not performed it will be invalid. 4 Taunt. Rep. 30. A qualified indorsement is one which passes the property in the bill to the indorsee, but is made without responsibility to the indorser, 7 Taunt. R. 160; the words commonly used are *sans recours*, without recourse. Chit. on Bills, 179.

2. The effects of a regular indorsement, may be considered, 1, as between the indorser and the indorsee; 2, between the indorser and the acceptor; and, between the indorser and future parties to the bill.

1. An indorsement is sometimes an original engagement, as, when a man draws a bill payable to his own order, and indorses it; mostly, however, it operates as an assignment, as when the bill is perfect, and the payee indorses it over to a third person. As an assignment it carries with it all the rights which the indorsee had with a guaranty of the solvency of the debtor. This guaranty is nevertheless upon condition that the holder will use due diligence in making a demand of payment from the acceptor, and give notice of non-acceptance or non-payment. 13 Serg. & Rawle, 311.

2. As between the indorsee and the acceptor, the indorsement has the effect of giving to the former all the rights which the indorser had against the acceptor and all other parties liable on the bill, and it is unnecessary that the acceptor or other party should signify his consent or knowledge of the indorsement; and if made before the bill is paid, it conveys all these rights without any set-off, as between the antecedent parties. Being thus fully invested with all the rights in the bill, the indorsee may himself indorse it to another, when he becomes responsible to all future parties as an indorser, as the others were to him.

3. The indorser becomes responsible by that act to all persons who may afterwards become party to the bill.

Vide Chitty on Bills, ch. 4; 3 Kent, Com. 58; Vin. Abr. Indorsement; Com. Dig. Fait, E 2; 13 Serg. & Rawle, 311; Merl. Répert. mot Endossement; Pard. Droit, Com. 344–357.

INDORSER, *contracts*, is the person who makes an indorsement. The indorser of a bill of exchange or other negotiable paper by his indorsement undertakes to be responsible to the holder for the amount of the bill or note if the latter shall make a legal demand from the payer, and, in default of payment give proper notice thereof to the indorser. But the indorser may make his indorsement conditional, which will

operate as a transfer of the bill, if the condition be performed; or he may make it qualified, so that he shall not be responsible on non-payment by the payer. Chitty on Bills, 179, 180. To make an indorser liable on his indorsement, the instrument must be commercial paper, for the indorsement of a bond or single bill will not, per se, create a responsibility. 13 Serg. & Rawle, 311. When there are several indorsers, the first in point of time is generally, but not always, first responsible; there may be circumstances which may cast the responsibility, in the first place, as between them, on a subsequent indorser. 5 Munf. R. 252.

INDUCEMENT, *pleading*, is the statement of matter which is introductory to the principal subject of the declaration or plea, &c. but which is necessary to explain and elucidate it; such matter as is not introductory to or necessary to elucidate the substance or gist of the declaration or plea, &c. nor is collaterally applicable to it, not being inducement but surplusage. Inducement or conveyance (which are synonymous terms) is in the nature of a preamble to an act of assembly, and leads to the principal subject of the declaration or plea, &c. the same as that does to the purview or providing clause of the act. For instance, in an action for a nuisance to property in the possession of the plaintiff, the circumstance of his being possessed of the property should be stated as inducement, or by way of introduction to the mention of the nuisance. Lawes, Pl. 66, 67; 1 Chit. Pl. 292; Steph. Pl. 257; 14 Vin. Ab. 405; 20 Ib. 345; Bac. Ab. Pleas, &c. I 2.

INDUCLÆ LEGALES, *Scotch law*. The days between the citation of the defendant, and the day of appearance. Bell's Scotch Law Dict. h. t.; the days between the test and the return day of the writ.

INDUCTION, *eccles. law*. The giving a clerk instituted to a benefice, the actual possession of its temporalties, in the nature of livery of seisin. Ayl. Parerg. 299.

INELIGIBILITY. The incapacity to be lawfully elected. This incapacity arises from various causes, and a person may be incapable of being elected to one office who may be elected to another; the incapacity may also be perpetual or temporary. 1. Among the perpetual inabilities may be reckoned, 1, the inability of women to be elected to a public office; 2, of citizens born in a foreign country to be elected president of the United States. 2. Among the temporary inabilities may be mentioned, 1, the holding of an office declared by law to be incompatible with the one sought; 2, the non-payment of the taxes required by law; 3, the want of certain property qualifications required by the constitution; 4, the want of age, or being over the age required. Vide *Elegibility; Incompatibility*.

INEVITABLE ACCIDENT.—A term used in the civil law, nearly synonymous with *fortuitous event*, (q. v.) In the common law commonly called the *act of God*, (q. v.)

INFAMY, *crim. law, evidence*, is that state which is produced by the conviction of crime and the loss of honour, which renders the infamous person incompetent as a witness. It is to be considered, 1st, what crimes or punishment incapacitate a witness; 2dly, how the guilt is to be proved; 3dly, how the objection is answered; and, 4thly, the effect of infamy.

1. When a man is convicted of an offence which is inconsistent with the common principles of honesty and humanity, the law considers his oath to be of no weight, and excludes his testimony as of too doubtful and suspicious a nature to be admitted in

a court of justice to deprive another of life, liberty or property. Gilb. L. E. 256; 2 Bulst. 154; 1 Phil. 23; Bull. N. P. 291. The crimes which render a person incompetent, are treason, 5 Mod. 16, 74; felony, 2 Bulst. 154; Co. Litt. 6; T. Raym. 369; all offences founded in fraud, and which come within the general notion of the crimen falsi of the Roman law. Leach, 496; as perjury and forgery, Co. Litt. 6; Fort. 209; piracy, 2 Roll. Ab. 886; swindling, cheating, Fort. 209; barretry, 2 Salk. 690; and the bribing a witness to absent himself from a trial, in order to get rid of his evidence, Fort. 208. It is the crime and not the punishment which renders the offender unworthy of belief. 1 Phill. Ev. 25.

2. In order to incapacitate the party, the judgment must be proved as pronounced by a court possessing competent jurisdiction. 1 Sid. 51; 2 Stark. C. 183; Stark. Ev. part 2, p. 144, note (1); Ib. part 4, p. 716.

3. The objection to competency may be answered, 1st, by proof of pardon. See *Pardon*. And, 2dly, by proof of a reversal by writ of error, which must be proved by the production of the record.

4. The judgment for an infamous crime, even for perjury, does not preclude the party from making an affidavit with a view to his own defence, 2 Salk. 461; 2 Str. 1148; Martin's Rep. 45. He may, for instance, make an affidavit in relation to the irregularity of a judgment in a cause in which he is party, for otherwise he would be without a remedy. But the rule is confined to defence, and he cannot be heard upon oath as complainant, 2 Salk. 461; 2 Str. 1148. When the witness becomes incompetent from infamy of character, the effect is the same as if he were dead; and if he has attested any instrument as a witness, previous to his conviction, evidence may be given of his handwriting. 2 Str. 833; Stark. Ev. part 2, sect. 193; Ib. part 4, p. 723.

INFANCY. The state or condition of a person under the age of twenty-one years. Vide *Infant*.

INFANT, *persons*, is one under the age of twenty-one years. Co. Litt. 171. But he is reputed to be twenty-one years old, or of full age, the first instant of the last day of the twenty-first year next before the anniversary of his birth; if, for example, a person were born at any hour of the first day of January, 1810, (even a few minutes before twelve o'clock of the night of that day,) he would be of full age at the first instant of the thirty-first of December, 1831, although nearly forty-eight hours before he had actually attained the full age of twenty-one years, according to years, days, hours and minutes, because there is, in this case, no fraction of a day. 1 Sid. 162; S. C. 1 Keb. 589; 1 Salk. 44; Raym. 84; 1 Bl. Com. 463, 464, note (13) by Chitty; 1 Lilly's Reg. 57; Com. Dig. Enfant, A. A curious case occurred in England of a young lady who was born after the house clock had struck, while the parish-clock was striking, and before St. Paul's had begun to strike twelve on the night of the fourth and fifth of January, 1805, and the question was whether she was born on the 4th or 5th of January. Mr. Coventry gives it as his opinion that she was born on the fourth, because the house clock does not regulate any thing but domestic affairs, that the parochial clock is much better evidence, and that a metropolitan clock ought to be received with "implicit acquiescence." Cov. on Conv. Ev. 182, 3. It is conceived that this can only be prima facie, because if the fact were otherwise, and the parochial and

metropolitan clocks should both be wrong, they would undoubtedly have no effect in ascertaining the age of the child. The sex makes no difference, a woman is therefore an infant until she has attained her age of twenty-one years. Co. Litt. 171. Before arriving at full age an infant may do many acts. A *male* at fourteen is of discretion, and may consent to marry; and at that age he may disagree to and annul a marriage he may before that time have contracted; he may then choose a guardian; and, if his discretion be proved, may at common law make a will of his personal estate; at seventeen he may be an executor. A *female* at seven may be betrothed or given in marriage; at nine she is entitled to dower; at twelve may consent or disagree to marriage; and at seventeen may be an executrix. Considerable changes of the common law have probably taken place in many of the states. In Pennsylvania to be an executor the party must be of full age. In general an infant is not bound by his contracts, unless to supply him for necessaries. Selw. N. P. 137; Chit. Contr. 31; Bac. Ab. Infancy, &c. I 3; 9 Vin. Ab. 391; 1 Com. Contr. 150, 151; 3 Rawle's R. 351; 8 T. R. 335; 1 Keb. 905, 913; S. C. 1 Sid. 258; 1 Lev. 168; 1 Sid. 129; 1 Southard's R. 87. Sed vide 6 Cranch, 226; 3 Pick. 492; 1 Nott & M'Cord, 197. Or, unless he is empowered to enter into a contract, by some legislative provision; as with the consent of his parent or guardian to put himself apprentice, or to enlist in the service of the United States. 4 Binn. 487; 5 Binn. 423. Contracts made with him, may be enforced or avoided by him on his coming of age, see *Parties, in contracts; Voidable.* But to this general rule there is an exception: he cannot avoid contracts for necessaries, because these are for his benefit. See *Necessaries.* When the contract has been performed, and it is such as he would be compellable by law to perform, it will be good and bind him. Co. Litt. 172 a; and all the acts of an infant, which do not touch his interest, but take effect from an authority which he has been trusted to execute, are binding. 3 Burr. 1794; Fonbl. Eq. b. 1, c. 2, § 5, note (c). The protection which the law gives an infant is to operate as a shield to him, to protect him from improvident contracts, but not as a sword to do injury to others. An infant is therefore responsible for his torts, as for slander, trespass, and the like: but he cannot be made responsible in an action ex delicto, where the cause arose on a contract. 3 Rawle's R. 351; 6 Watts's R. 9. But see contra, 6 Cranch. 226; 15 Mass. 359; 4 M'Cord, 387. He is also punishable for his crime, if of sufficient discretion, or *doli capax.* 1 Russ. on Cr. 2, 3. Vide, generally, Bingh. on Infancy; the various Abridgments and Digests, tit. Enfant, Infancy; and articles *Age; Birth; Capax Doli; Dead born; Fœtus; In ventre sa mere.*

INFANTICIDE, *med. jurisp.*— The murder of a new born infant. Dalloz, Dict. Homicide, § 4; Code Pénal, 300. There is a difference between this offence and those known by the names of *prolicide,* (q. v.) and *fœticide,* (q. v.) To commit infanticide the child must be wholly born, it is not sufficient that it was born so far as the head and breathed, if it died before it was wholly born. 5 Carr. & Payn. 329; 24 Eng. C. L. Rep. 344; S. C. 6 Carr. & Payn. 349; S. C. 25 Eng. C. L. Rep. 433. When this crime is to be proved from circumstances, it is proper to consider whether the child had attained that size and maturity by which it would be enabled to maintain an independent existence; whether it was born

alive; and, if born alive, by what means it came to its death. 1 Beck's Med. Jur. 331 to 428, where these several questions are learnedly considered. See also 1 Briand, Méd. Lég. prém. part. c. 8; Cooper's Med. Jur. h. t. Vide Ryan's Med. Jur. 137.

INFEOFFMENT, *estates.* The act or instrument of feoffment, (q. v.) In Scotland it is synonymous with *sasine*, meaning the instrument of possession; formerly it was synonymous with investiture. Bell's Sc. L. Dict. h. t.

INFERENCE. It is a conclusion drawn by reason and common sense from premises established by proof. It is the province of the judge who is to decide upon the facts to draw the inference. When the facts are submitted to the court, the judges draw the inference; when they are to be ascertained by a jury, it is their duty to do so. The witness is not permitted in any case to draw the inference, and testify that to the court or jury. It is his duty to state the facts simply as they occurred. Inferences differ from presumptions, (q. v.)

INFERIOR COURTS. By this term are understood all courts except the supreme courts.

INFIDEL, *persons, evidence*, is one who does not believe in the existence of a God, who will reward or punish in this world or that which is to come. Willes's R. 550. This term has been very indefinitely applied, and has been by different persons made to express almost opposite ideas. Under the name of infidel, Lord Coke comprises Jews and heathens. 2 Inst. 506; 3 Inst. 165; and Hawkins includes among infidels such as do not believe either in the Old or New Testament. Hawk. P. C. b 2, c. 46, s. 148. It is now settled that when the witness believes in a God who will reward or punish him even in this world, he is competent. Willes, R. 550. His belief may be proved from his previous declarations and avowed opinions, and when he has avowed himself to be an infidel, he may show a reform of his conduct, and change of his opinion since the declarations proved; when the declarations have been made for a very considerable space of time, slight proof will suffice to show he has changed his opinion. There is some conflict in the cases on this subject, some of them are here referred to, 18 John. R. 98; 1 Harper, R. 62; 4 N. Hamp. R. 444; 4 Day's Cas. 51; 2 Cowen, R. 431, 433 n., 572; 7 Conn. R. 66; 2 Tenn. R. 96; 4 Law Report. 268; Alis. Pr. Cr. Law, 438; 5 Mason, 16; 15 Mass. 184; 1 Wright, 345; So. Car. Law Journ. 202. Vide *Atheist; Future state.*

INFIRM. To be in want of health. When a witness is infirm to an extent likely to destroy his life, or to prevent his attendance at the trial, his testimony *de bene esse* may be taken at any age. 1 P. Will. 117; see *Aged witness; Going witness.*

INFLUENCE. Authority, credit, ascendance. Influence is proper or or improper. Proper influence is that which one person gains over another by acts of kindness and attention, and by correct conduct, 3 Serg. & Rawle, 269. Improper influence is that dominion acquired by any person over a mind of sanity for general purposes, and of sufficient soundness and discretion to regulate his affairs in general, which prevents the exercise of his discretion, and destroys his free will. 1 Cox's Cas. 355. When the former is used to induce a testator to make a will, it will not vitiate it, but when the latter is the moving cause, the will cannot stand. 1 Hagg. R. 581; 2 Hagg. 142; 5 Serg. & Rawle, 207; 13 Serg. & Rawle, 323; 4 Greenl. R. 220; 1 Paige, R. 171.

INFORMATION, is an accusation or complaint made in writing to a court of competent jurisdiction, charging some person with a specific violation of some public law. It differs in nothing from an indictment in its form and substance, except that it is filed at the discretion of the proper law officer of the government, *ex officio*, without the intervention or approval of a grand jury. 4 Bl. Com. 308, 9. In the French law the term information is used to signify the act or instrument which contains the depositions of witnesses against the accused. Poth. Proc. Cr. sect. 2, art. 5. Informations have for their object either to punish a crime or misdemeanor, and these have, perhaps, never been resorted to in the United States; or to recover penalties or forfeitures, which are quite common. For the form and requisites of an information for a penalty, see 2 Chit. Pr. 155 to 171. Vide Blake's Ch. 49; 14 Vin. Ab. 407; 3 Story Const. § 1780; 3 Bl. Com. 261.

In summary proceedings before justices of the peace the complaint or accusation, at least when the proceedings relate to a penalty, is called an information, and it is then taken down in writing and sworn to. As the object is to limit the informer to a certain charge, in order that the defendant may know what he has to defend, and the justice may limit the evidence and his subsequent adjudication to the allegations in the information, it follows that the substance of the particular complaint must be stated, and it must be sufficiently formal to contain all material averments, 8 T. R. 286; 5 Barn. & Cres. 251; 11 E. C. L. R. 217; 2 Chit. Pr. 156. See 1 Wheat. R. 9.

INFORMATION IN THE NATURE OF A WRIT OF QUO WARRANTO, *remedies*. The name of a proceeding against any one who usurps a franchise or office. Informations of this kind are filed in the highest courts of ordinary jurisdiction in the several states, either by the attorney-general, of his own authority, or by the prosecutor, who is entitled, pro forma, to use his name, as the case may be. 6 Cowen, R. 102, n.; 10 Mass. 290; 2 Dall. 112; 2 Halst. R. 101; 1 Rep. Const. Ct. (So. Car.) 36; 3 Serg. & Rawle, 52; 15 Serg. & Rawle, 127; though, in form, these informations are criminal, they are, in their nature, but civil proceedings. 3 T. R. 484; Kyd on Corp. 439; they are used to try a civil right, or to oust a wrongful possessor of an office. 3 Dall. 490; 1 Serg. & Rawle, 385. For a full and satisfactory statement of the law on this subject, the reader is referred to Angell on Corp. ch. 20, p. 469. And see *Quo Warranto*.

IMFORMATUS NON SUM, *pleading, practice*, i. e., I am not informed; a formal answer made in court, or put upon record by an attorney when he has no more to say in defence of his client.

INFORMER. A person who informs or prefers an accusation against another, whom he suspects of the violation of some penal statute. When the informer is entitled to the penalty or part of the penalty, upon the conviction of an offender, he is, or is not a competent witness, accordingly as the statute creating the penalty has or has not made him so. 1 Phil. Ev. 97; Rosc. Cr. Ev. 107; 5 Mass. R. 57; 1 Dall. 68; 1 Saund. 262, c. Vide articles, *Prosecutor; Rewards*.

INFORTIATUM, *civil law*. The second part of the Digest or Pandects of Justinian, is called *infortiatum*, see *Digestum infortiatum*. This part, which commences with the third title of the twenty-fourth book, and ends with the thirty-eighth book, was thus called because

it was the middle part, which, it was said, was supported and fortified by the two others. Some have supposed that this name was given to it, because it treats of successions, substitutions and other important matters, and being more used than the others, produced greater fees to the lawyers.

INFRA PRÆSIDIA. This term is used in relation to prizes, to signify that they have been brought completely in the power of the captors that is within the towns, camps, ports or fleet of the captors. Formerly, the rule was, and perhaps still in some countries is, that the act of bringing a prize *infra præsidia*, changed the property, but the rule now established is, that there must be a sentence of condemnation to effect this purpose. 1 Rob. Adm. R. 134; 1 Kent's Com. 104; Chit. Law of Nat. 98; Abb. Sh. 14.

INFUSION, *med. jur.* A pharmaceutical operation, which consists in pouring a hot or cold fluid upon a substance, whose medical properties it is desired to extract. *Infusion* is also used for the product of this operation. Although *infusion* differs from *decoction*, (q. v.) they are said to be *ejusdem generis*, and in the case of an indictment which charged the prisoner with giving a decoction, and the evidence was that he had given an infusion, the difference was held to be immaterial. 3 Camp. R. 74.

INGENUI, *civ. law*, were those freemen who were born free. They were a class of freemen, distinguished from those who, born slaves, had afterwards legally obtained their freedom; the latter were called at various periods, sometimes *liberti*, sometimes *libertini*. An unjust or illegal servitude did not prevent a man from being *ingenuus*.

INGRATITUDE is the forgetfulness of a kindness or benefit. In the civil law, ingratitude on the part of a legatee, was sufficient to defeat a legacy in his favour. In Louisiana, donations *inter vivos* are liable to be revoked or dissolved on account of the ingratitude of the donee; but the revocation on this account can take place only in the three following cases: 1, if the donee has attempted to take the life of the donor; 2, if he has been guilty towards him of cruel treatment, crimes or grievous injuries; 3, if he has refused him food when in distress. Civ. Code of Lo. art 1546, 1547; Poth. Donations entrevifs, s. 3, art. 1, § 1. There are no such rules in the common law. Ingratitude is not punishable by law.

INGRESS, EGRESS and REGRESS. These words are frequently used in leases to express the right of the lessee to enter, go upon, and return from the lands in question.

INGRESSU. An ancient writ of entry, by which the plaintiff or complainant sought an entry into his lands. Techn. Dict. h. t.

INGROSSING, *practice*, the act of copying from a rough draft a writing in order that it may be executed; as ingrossing a deed.

INHABITANT, one who has his domicil in a place is an inhabitant of that place; one who has an actual fixed residence in a place. A mere intention to remove to a place will not make a man an inhabitant of such place, although as a sign of such intention he may have sent his wife and children to reside there, 1 Ashm. R. 126; nor will his intention to quit his residence, unless consummated, deprive him of his right as an inhabitant. 1 Dall. 480. Vide 10 Ves. 339; 14 Vin. Ab. 420; 1 Phil. Ev. Index, h. t.; Const. of Mass. part 2, c. 1, s. 2, a. 1; Kyd on Corp. 321; Anal. des Pand. de Poth mot Habitans; Poth. Pand. lib. 50, t. 1, s. 2; 6 Adolp. & Ell. 153; 33 Eng. Com. Law Rep. 31.

INHERITANCE, *estates*, is a perpetuity in lands to a man and his heirs. The term inheritance includes not only lands and tenements which have been acquired by descent, but also every fee simple or fee tail, which a person has acquired by purchase, may be said to be an inheritance, because the purchaser's heirs may inherit it. Litt. sec. 9. Estates of inheritance are divided into inheritance absolute, or fee simple; and inheritances limited, one species of which is called fee tail. They are also divided into corporeal, as houses and lands; and incorporeal, commonly called incorporeal hereditaments, (q. v.) 1 Cruise Dig. 68; Sw. 163; Poth. des Retraits, n. 28.

INHIBITION, *Scotch law*, is a personal prohibition which passes by letters under the signet, prohibiting the party inhibited to contract any debt, or do any deed, by which any part of the lands may be aliened or carried off, in prejudice of the creditor inhibiting. Ersk. Pr. L. Scot. B. 2, t. s. 2. See *Diligences*.

INHIBITION, *Eng. law*, is the name of a writ which forbids a judge from further proceeding in a cause depending before him; it is in the nature of a prohibition. T. de la Ley; F. N. B. 39.

INITIAL, placed at the beginning. The initials of a man's name are the first letters of his name, as, G. W. for George Washington. When in a will the legatee is described by the initials of his name only, parol evidence may be given to prove his identity. 3 Ves. 148.

INITIALIA TESTIMONII, *Scotch law*. Before a witness can be examined in chief, he may be examined with regard to his disposition, whether he bear good or ill will towards either of the parties; whether he has been prompted what to say; whether he has received a bribe, and the like. This previous examination, which somewhat resembles our *voir dire* is called *initialia testimonii*.

INITIATIVE, *French law*. The name given to the important prerogative given by the *charte constitutionelle*, art. 16, to the king to propose through his ministers projects of laws. 1 Toull. n. 39.

INJUNCTION, *remedies, chancery practice*. An injunction is a prohibitory writ, specially prayed for by a bill, in which the plaintiff's title is set forth, restraining a person from committing or doing an act (other than criminal acts,) which appear to be against equity and conscience. Mitf. Pl. 124; 1 Madd. Ch. Pr. 126. Injunctions are of two kinds, the one called the writ remedial, and the other the judicial writ.

1. The former kind of injunction, or remedial writ, is in the nature of a prohibition, directed to, and controlling, not the inferior court, but the party. It is granted when a party is doing or is about to do an act against equity or good conscience, or litigious or vexatious; in these cases the court will not leave the party to feel the mischief or inconvenience of the wrong, and in vain look for redress, but will interpose its authority to restrain such unjustifiable proceedings. Remedial injunctions are of two kinds; common or special. 1. It is common when it prays to stay proceedings at law, and will be granted of course; as, upon an attachment for want of an appearance, or of an answer; or upon a *dedimus* obtained by the defendant to take his answer in the country; or upon his praying for time to answer, &c. Newl. Pl. 92; 13 Ves. 323.—2. A special injunction is obtained only on motion or petition, with notice to the other party, and is applied for, sometimes on affidavit before answer, but more frequently upon the merits disclosed

in the defendant's answer. Injunctions before answer are granted in cases of waste and other injuries of so urgent a nature, that mischief would ensue if the plaintiff were to wait until the answer were put in; but the court will not grant an injunction during the pendency of a plea or demurrer to the bill, for until that be argued, it does not appear whether or not the court has jurisdiction of the cause. The injunction granted in this stage of the suit, is to continue till answer or further order; the injunction obtained upon the merits confessed in the answer, continues generally till the hearing of the cause.

An injunction is generally granted for the purpose of preventing a wrong, or preserving property in dispute pending a suit. Its effect in general is only *in personam*, that is, to attach and punish the party if disobedient in violating the injunction. Ed. Inj. 363; Harr. Ch. Pr. 552.

The principal injuries which may be prevented by injunction relate to the *person*, to *personal property*, or to *real property*. These will be separately considered.

1. With respect to the *person*, the chancellor may prevent a breach of the peace by requiring sureties of the peace. A court of chancery has also summary and extensive jurisdiction for the protection of the *relative rights of persons*, as between husband and wife, parent and child, and guardian and ward; and in these cases on a proper state of facts, an injunction will be granted. For example, an injunction may be obtained by a parent to prevent the marriage of his infant son. 1 Madd. Ch. Pr. 348; Ed. Inj. 297; 14 Ves. 206; 19 Ves. 282; 1 Chitt. Pr. 702.

2. Injunctions respecting *personal property* are usually granted, 1st, to restrain a partner or agent from making or negociating bills, notes, or contracts, or doing other acts injurious to the partner or principal. 3 Ves. Jr. 74; 3 Bro. C. C. 15; 2 Campb. 619; 1 Price, R. 503; 1 Mont. on Part. 93; 1 Madd. Ch. Pr. 160; Chit. Bills, 58, 61; 1 Hov. Supp. to Ves. jr. *335; Woodd. Lect. 416.—3d. To restrain the negociation of bills or notes obtained by fraud, or without consideration. 8 Price, R. 631; Chit. Bills, 31 to 41; Ed. Inj. 210; Blake's Ch. Pr. 338; 2 Anst. 519; 3 Anst. 851; 2 Ves. jr. 493; 1 Fonb. Eq. 43; 1 Madd. Ch. Pr. 154.—3d. To deliver up void or satisfied deeds. 1 V. & B. 244; 11 Ves. 535; 17 Ves. 111.—4th. To enter into and deliver a proper security. 1 Anst. 49. —5th. To prevent breaches of covenant or contract, and enjoin the performance of others. Ed. Inj. 308.—6th. To prevent a breach of confidence or good faith, or to prevent other loss; as, for example, to restrain the *disclosure of secrets*, which came to the defendant's knowledge in the course of any confidential employment. 1 Sim. R. 483; and see 1 Jac. & W. 394.—7th. To prevent improper sales, payments, or conveyances. Chit. Eq. Dig. tit. Practice, xlvii.—8th. To prevent loss or inconvenience; this can be obtained on filing a bill *quia timet*, (q. v.) 1 Madd. Ch. Pr. 218 to 225.—9th. To prevent waste of property by an executor or administrator. Ed. Inj. 300; 1 Madd. Ch. Pr. 160, 224.—10th. To restrain the infringement of patents; Ed. Inj. ch. 12; 14 Ves. 130; 1 Madd. Ch. Pr. 137; or of copyrights; Ed. Inj. ch. 13; 8 Ves. 225; 17 Ves. 424.—11th. To stay proceedings in a court of law. These proceedings will be stayed when justice cannot be done in consequence of accident, 1 John. Cas. 417; 4 John. Ch. R. 287, 194; Latch, 24, 146, 148; 1 Vern. 180,

247; 1 Ch. C. 77, 120; 1 Eq. Cas. Ab. 92; Mistake, 1 John. Ch. R. 119, 607; 2 John. Ch. R. 585; 4 John. Ch. R. 85; Ib. 144; 2 Munf. 187; 1 Day's Cas. Err. 139; 3 Ch. R. 55; Finch, 413; 2 Freem. 16; Fitzg. 118; or fraud, 1 John. Ch. R. 402; 2 John. Ch. R. 512; 4 John. Ch. R. 65. But no injunction will be granted to stay proceedings in a criminal case. 2 John. Ch. R. 387; 6 Mod. 12; 2 Ves. 396.

3. Injunctions respecting real property may be obtained, 1st, to prevent wasteful trespasses or irreparable damages, although the owner may be entitled to retake possession, if he can do so, without a breach of the peace. 1 Chit. Pr. 722.—2d. To compel the performance of lawful works in the least injurious manner. 1 Turn. & Myl. 181.—3d. To prevent waste. 3 Tho. Co. Litt. 241, M; 1 Madd. Ch. Pr. 138; Ed. Inj. ch. 8, 9, and 10; 1 John. Ch. R. 11; 2 Atk. 183.—4th. To prevent the creation of a nuisance either private or public. 1. Private nuisance, for example, to restrain the owner of a house from making any erections or improvements, so as materially to darken or obstruct the ancient lights and windows of an adjoining house. 2 Russ. R. 121. 2. Public nuisances. Though usual to prosecute the parties who create nuisances by indictment, yet in some cases an injunction may be had to prevent the creating of such nuisance. 5 Ves. 129; 1 Mad. Ch. 156; Ed. Inj. ch. 11.

2d. An injunction of the second kind called the *judicial writ* issues subsequently to a decree. It is a direction to yield up, to quit, or to continue possession of lands, and is properly described as being in the nature of an execution. Ed. Inj. 2.

Injunctions are also divided into temporary and perpetual. 1. A temporary injunction is one which is granted until some stage of the suit shall be reached, as, until the defendant shall file his answer; until the hearing; and the like. 2. A perpetual injunction is one which is issued when in the opinion of the court, at the hearing, the plaintiff has established a case, which entitles him to an injunction; or when a bill praying for an injunction is taken pro confesso; in such cases a perpetual injunction will be decreed. Ed. Inj. 253.

The Interdict (q. v.) of the Roman law resembles in many respects our injunction. It was used in three distinct but cognate senses. 1. It was applied to signify the edicts made by the prætor, declaratory of his intention to give a remedy in certain cases, chiefly to preserve or to restore possession; this interdict was called edictal, edictale, quod prætoriis edictis proponitur, ut sciant omnes eâ formâ posse implorari. 2. It was used to signify his order or decree, applying the remedy in the given case before him, and then was called decretal; decretale, quod prætor pro re natâ implorantibus decrevit. It is this which bears a strong resemblance to the injunction of a court of equity. 3. It was used, in the last place, to signify the very remedy sought in the suit commenced under the prætor's edict; and thus it became the denomination of the action itself. Livingston on the Batture case, 5 Am. Law Journ. 271; 2 Story, Eq. Jur. § 865; Analyse des Pandectes de Pothier, h. t.; Dict. du Dig. h. t.; Clef des Lois Rom. h. t.; Heineccii, Elem. Pand. Ps. 6, § 285, 286.

Vide, generally, Eden on Injunctions; 1 Madd. Ch. Pr. 125 to 165; Blake's Ch. Pr. 330 to 344; 1 Chit. Pr. 701 to 731; Coop. Eq. Pl. Index, h. t.; Redesd. Pl. Index, h. t.; Smith's Ch. Pr. h. t.; 14 Vin. Ab. 442; 2 Hov. Supp. to Ves. jr. 173, 434, 442; Com. Dig. Chancery, D 8; Newl. Pr. ch. 4, s. 7.

INJURIOUS WORDS. This phrase is used in Louisiana to signify slander or libellous words. Code, art. 3501.

INJURY, a wrong or tort. Injuries are divided into public and private; and they affect the person, personal property or real property. 1. They affect the *person* absolutely or relatively; the *absolute* injuries are threats and menaces, assaults, batteries, wounding, mayhems; injuries to health, by nuisances or medical malpractices; those affecting reputation are verbal slander, libels, and malicious prosecutions; and those affecting personal liberty are false imprisonment and malicious prosecutions. The *relative* injuries are those which affect the right of a husband; these are abduction and harbouring, adultery and battery:—those which affect the rights of a parent, as abduction, seduction and battery;—and of a master, seduction, harbouring and battery of his apprentice or servant. Those which conflict with the right of the inferior relation, namely, the wife, child, apprentice or servant; they are withholding conjugal rights, maintenance, wages, &c. 2. Injuries to *personal property*, are the unlawful taking and detention thereof from the owner; and other injuries, are some damage affecting the same while in the claimant's possession or that of a third person, or injuries to his reversionary interests.—3. Injuries to *real property* are ousters, trespasses, nuisances, waste, subtraction of rent, disturbance of right of way, and the like.

The remedies are different as the injury affects private individuals, or the public. 1. When the injuries affect a private right and a private individual, (although often also affecting the public) there are three description of remedies; first, the preventive, such as defence, resistance, recaption, abatement of nuisance, surety of the peace, injunction, &c.: secondly, remedies for compensation, which may be by arbitration, suit, action, or summary proceedings before a justice of the peace: thirdly, proceedings for punishment, as by indictment, or summary proceedings before a justice. 2. When the injury is such as to affect the public, it becomes a crime, misdemeanor, or offence, and the party may be punished by indictment, or summary conviction, for the public injury; and by civil action, at the suit of the party, for the private wrong. But in cases of felony, the remedy by action for the private injury is generally *suspended* until the party particularly injured has fulfilled his duty to the public by prosecuting the offender for the public crime; and in cases of homicide the remedy is *merged* in the felony. 1 Chit. Pr. 10; Ayl. Pand. 592; and article *Civil Remedy*.

There are many injuries for which the law affords no remedy. In general, it interferes only when there has been a visible bodily injury inflicted by force or poison, while it leaves almost totally unprotected, the whole class of the most malignant mental injuries and sufferings, unless in a few cases, where by descending to a fiction, it sordidly supposes some pecuniary loss, and sometimes under a mask, and contrary to its own legal principles, affords compensation to wounded feelings. A parent, for example, cannot sue in that character, for an injury inflicted on his child; and when his own domestic happiness has been destroyed, unless the fact will sustain the allegation that the daughter was the servant of her father, and that by reason of such seduction, he lost the benefit of her services. Another instance may be mentioned. A party cannot recover damages for *verbal* slander in many cases; as when the facts published

are true, for the defendant would justify and the party injured must fail. A case of this kind, remarkably hard, occurred in England. A young nobleman had seduced a young woman, who after living with him some time, became sensible of the impropriety of her conduct, she left him secretly, and removed to an obscure place in the kingdom, where she obtained a situation, and became highly respected in consequence of her good conduct, she was even promoted to a better and more public employment, when she was unfortunately discovered by her seducer. He made proposals to her to renew their illicit intercourse which were rejected; in order to force her to accept them, he published the history of her early life, and she was discharged from her employment, and lost the good opinion of those on whom she depended for her livelihood. For this outrage the culprit could not be made answerable civilly or criminally. Nor will the law punish *criminally* the author of *verbal* slander, imputing even the most infamous crimes, unless done with intent to extort a chattel, money, or valuable thing. The law presumes, perhaps unnaturally enough, that a man is incapable of being alarmed or affected by such injuries to his feelings. Vide 1 Chit. Med. Jur. 320.

INJURY, *in the civil law*, is the reproaching or affronting our neighbour. Injuries are verbal or real. A *verbal* injury when directed against a private person consists in the uttering contumelious words, which tend to expose our neighbour's character by making him little or ridiculous. Where the offensive words are uttered in the heat of a dispute, and spoken to the person's face, the law does not presume any malicious intention in the utterer, whose resentment generally subsides with his passion; and yet, even in that case, the truth of the injurious words seldom absolves entirely from punishment. Where the injurious expressions have a tendency to blacken one's moral character, or fix some particular guilt upon him, and are deliberately repeated in different companies, or handed about in whispers to confidants, it then grows up to the crime of slander, agreeably to the distinction of the Roman law, l. 15, § 12, *de injur.* A *real* injury is inflicted by any fact by which a person's honour or dignity is affected; as striking one with a cane, or even aiming a blow without striking; spitting in one's face; assuming a coat of arms, or any other mark of distinction proper to another, &c. The composing and publishing defamatory libels may be reckoned of this kind. Ersk. Pr. L. Scot. 4, 4, 45.

INLAGARE. To admit or restore to the benefit of law.

INLAGATION. The restitution of one outlawed to the protection of the law. Bract. lib. 2, c. 14.

INLAND, within the same country. It seems not to be agreed whether the term inland applies to all the United States or only to one state. It has been holden in New York that a bill of exchange by one person in one state, on another person in another, is an inland bill of exchange, 5 John. Rep. 375; but a contrary opinion seems to have been held in the circuit court of the United States for Pennsylvania. Whart. Dig. tit. Bills of Exchange, E, pl. 78. Vide 2 Phil. Ev. 36, and *Bills of Exchange.*

INMATE, is one who dwells in a part of another's house, the latter dwelling, at the same time, in the said house. Kitch. 45, b; Com. Dig. Justices of the Peace, B 85; 1 B. & Cr. 578; 8 E. C. L. R. 153; 2 Dowl. & Ryl. 743; 8 B. & Cr. 71; 15 E. C. L. R. 154; 2 Mann. & Ryl. 227; 9 B. & Cr. 176; 17 E. C. L. R. 355; 4 Mann. & Ryl. 151;

2 Russ. on Cr. 937; 1 Deac. Cr. L. 185; 2 East, P. Cr. 499, 505; 1 Leach's Cr. L. 90, 237, 427; Alcock's Registration Cases, 21; 1 Mann. & Gran. 83; 39 E. C. L. R. 365. Vide *Lodger*.

INN. A house where a traveller is furnished with every thing he has occasion for while on his way. 3 B. & A. 283; 4 Campb. 77; 2 Chit. Rep. 484; 3 Chit. Com. Law, 365, n. 6. All travellers have a lawful right to enter an inn for the purpose of being accommodated. It has been held that an innkeeper in a town through which lines of stages pass, has no right to exclude the driver of one of these lines from his yard and the common public rooms, where travellers are usually placed, who comes there at proper hours, and in a proper manner, to solicit passengers for his coach, and without doing any injury to the innkeeper. 8 N. H. R. 523; Hamm. N. P. 170. Vide *Entry; Guest*.

INNINGS, *estates*. Lands gained from the sea by draining. Cunn. L. Dict. h. t.; Law of Sewers, 31.

INNKEEPER, is defined to be the keeper of a common inn for the lodging and entertainment of travellers and passengers, their horses and attendants, for a reasonable compensation. Bac. Ab. Inns, &c.; Story, Bailm. § 475. His duties will be first considered; and, secondly, his rights.

1. He is bound to take in and receive all travellers and wayfaring persons, and to entertain them, if he can accommodate them, for a reasonable compensation; and he must guard their goods with proper diligence. He is liable only for the goods which are brought within the inn. 8 Co. 32; Jones's Bailm. 91. A delivery of the goods into the custody of the innkeper is not, however, necessary, in order to make him responsible; for although he may not know any thing of such goods, he is bound to pay for them if they are stolen or carried away, even by an unknown person, 8 Co. 32; Hayw. N. C. R. 41; 14 John. R. 175; 1 Bell's Com. 469; and if he receive the guest, the custody of the goods may be considered as an accessory to the principal contract; and the money paid for the apartments as extending to the care of the box and portmanteau. Jones's Bailm. 94; Story, Bailm. § 470; 1 Bl. Com. 430; 2 Kent, Com. 458 to 463. The degree of care which the innkeeper is bound to take is uncommon care, and he will be liable even for a slight negligence. He is responsible for the acts of his domestics and servants, as well as for the acts of his other guests, if the goods are stolen or lost; but he is not responsible for any tort or injury done by his servants or others to the person of his guest without his own co-operation or consent. 8 Co. 32. The innkeeper will be excused whenever the loss has occurred through the fault of the guest. Story, Bailm. § 483; 4 M. & S. 306; S. C. 1 Stark. R. 251, note; 2 Kent, Com. 461; 1 Yeates's R. 34.

2. The innkeeper is entitled to a just compensation for his care and trouble in taking care of his guest and his property; and to enable him to obtain this, the law invests him with some peculiar privileges, giving him a lien upon the goods, and, it is said, upon the person of his guest, for his compensation. 3 B. & Ald. 287; 8 Mod. 172; 1 Shower, Rep. 270; Bac. Ab. Inns, &c. D. But the horse of the guest can be detained only for his own keeping, and not for the boarding and personal expenses of the guest. Bac. Ab. h. t. The landlord may also bring an action for the recovery of his compensation.

Vide, generally, 1 Vin. Ab. 224; 14 Vin. Ab. 436; Bac. Ab. h. t.; Yelv. 67, a, 162, a; 2 Kent, Com. 458; Ayl. Pand. 266.

INNOCENCE, the absence of guilt. The law presumes in favour of innocence, even against another presumption of law: for example, when a woman marries a second husband within the space of twelve months after her husband had left the country, the presumption of innocence preponderates over the presumption of the continuance of life. 2 B. & A. 386; 3 Stark. Ev. 1249. An exception to this rule respecting the presumption of innocence has been made in the case of the publication of a libel, the principal being presumed to have authorised the sale, when a libel is sold by his agent in his usual place of doing business. 1 Russ. on Cr. 341; 10 Johns. R. 443; Bull. N. P. 6; Greenl. Ev. § 36. See 4 Nev. & M. 341; 2 Ad. & Ell. 540; 5 Barn. & Ad. 86; 1 Stark. N. P. C. 21; 2 Nev. & M. 219.

INNOMINATE CONTRACTS, *civil law.* Contracts which have no particular names, as permutation and transaction, are so called. Inst. 2, 10, 13. There are many innominate contracts, but the Roman lawyers reduced them to four classes, namely, *do ut des, do ut facias, facio ut des,* and *facio ut facias.* Dig. 2, 14, 7, 2.

INNOTESCIMUS, *English law.* An epithet used for *letters-patent,* which are always of a charter of feoffment, or some other instrument not of record, concluding with the words *Innotescimus per presentes,* &c. Techn. Dict. h. t.

INNOVATION, change of a thing established for something new. Innovations are said to be dangerous, as likely to unsettle the common law. Co. Litt. 370, b; Ib. 282, b; certainly no innovations ought to be made by the courts, but as every thing human is mutable, no legislation can be, or ought to be immutable; changes are required by the alteration of circumstances; amendments, by the imperfections of all human institutions; but laws ought never to be changed without great deliberation, and a due consideration of the reasons on which they were founded, as of the circumstances under which they were enacted. Many innovations have been made in the common law, which philosophy, philanthropy and common sense approve. The destruction of the *benefit of clergy;* of *appeal,* in felony; of *trial by battle and ordeal;* of the right of *sanctuary;* of the privilege to *abjure the realm;* of *approvement,* by which any criminal who could in a judicial combat, by skill, force or fraud kill his accomplice, secured his own pardon; of *corruption of blood;* of *constructive treason;* will be sanctioned by all wise men, and none will desire a return to these barbarisms. The reader is referred to the case of James v. The Commonwealth, 12 Serg. & R. 220, and 225 to 236, where Duncan, J., exposes the absurdity of some ancient laws, with much sarcasm.

INNOVATION, *Scotch law.*—The exchange of one obligation for another, so that the second shall come in the place of the first. Bell's Scotch Law Dict. h. t. The same as *Novation,* (q. v.)

INNS OF COURT, *Engl. law.* The name given to the colleges of the English professors and students of the common law. The four principal inns of court are the Inner Temple and Middle Temple, (formerly belonging to the Knights Templars) Lincoln's Inn, and Gray's Inn, (anciently belonging to the earls of Lincoln and Gray). The other inns are the two Sergeants' Inns. The Inns of Chancery were probably so called because they were once inhabited by such clerks, as chiefly studied the forming of writs, which regularly belonged to the cursitors, who are officers of chancery. These

are Thavie's Inn, the New Inn, Symond's Inn, Clement's Inn, Clifford's Inn, Staple's Inn, Lion's Inn, Furnival's Inn and Barnard's Inn. Before being called to the bar, it is necessary to be admitted to one of the Inns of Court.

INNUENDO, *pleading*, is an averment which explains the defendant's meaning by reference to antecedent matter. Salk. 513; 1 Ld. Raym. 256; 12 Mod. 139; 1 Saund. 243. The innuendo is mostly used in actions for slander. An innuendo, as, "he (the said plaintiff meaning)" is only explanatory of some matter expressed, it serves to apply the slander to the precedent matter, but cannot add or enlarge, extend, or change the sense of the previous words, and the matter to which it alludes must always appear from the antecedent parts of the declaration or indictment. 1 Chit. Pl. 383; 3 Caines's Rep. 76; 7 Johns. R. 271; 5 Johns. R. 211; 8 Johns. R. 109; 8 N. H. Rep. 256. It is necessary only when the intent may be mistaken, or when it cannot be collected from the libel or slander itself. Cowp. 679; 5 East, 463. If the innuendo materially enlarge the sense of the words it will vitiate the declaration or indictment. 6 T. R. 691; 5 Binn. 218; 5 Johns. R. 220; 6 Johns. R. 83; 7 Johns. Rep. 271. But when the new matter stated in an innuendo is not necessary to support the action, it may be rejected as surplusage. 9 East, R. 95; 7 Johns. R. 272. Vide generally, Stark. on Slan. 293; 1 Chit. Pl. 383; 3 Chit. Cr. Law, 873; Bac. Ab. Slander, R; 1 Saund. 243, n. 4; 4 Com. Dig. 712; 14 Vin. Ab. 442; Dane's Ab. Index, h. t.; 4 Co. 17.

INOFFICIOUS, *in civil law*.—Those dispositions, which fathers, mothers, and other ascendants make of their property to the prejudice of their descendants, beyond the portion reserved to them by law, are called inofficious. Civ. Code of Lo. art. 2522, No. 21. Such a disposition of property is void. Vide Dig. 5, 2, 5; Inst. 2, 18, 1; Code, 3, 29; Nov. 115; Ayl. Pand. 405.

INQUIRY, WRIT OF. Vide *Writ of Inquiry*.

INQUISITION, *practice*, is an examination of certain facts by a jury impanelled by the sheriff for the purpose; the instrument of writing on which their decision is made is also called an inquisition. The sheriff and the jury who make the inquisition, are called the inquest.

INQUISITOR. A designation of sheriffs, coroners, *super visum corporis*, and the like, who have power to inquire into certain matters. The name of an officer, among ecclesiastics, who is authorised to inquire into heresies, and the like, and to punish them; an ecclesiastical judge.

INSANITY, *med. jur.*, is a continued impetuosity of thought, which for the time being *totally* unfits a man for judging and acting in relation to the matter in question, with the composure requisite for the maintenance of the social relations of life. Various other definitions of this state have been given, but perhaps the subject is not susceptible of any satisfactory definition, which shall, with precision, include all cases of insanity, and exclude all others. Ray, Med. Jur. § 24, p. 50. It may be considered in a threefold point of view: 1, a chronic disease, manifested by deviations from the healthy and natural state of the mind, such deviations consisting in a morbid perversion of the feelings, affections and habits; 2, disturbances of the intellectual faculties, under the influence of which the understanding becomes susceptible of hallucinations or erroneous impressions of a particular kind; 3, a state of mental incoherence or constant hurry and confusion of thought.

Cyclop. Practical Medecine, h. t.; Brewster's Encyclopædia, h. t.; Observations on the Deranged Manifestations of the Mind, or Insanity, 71, 72; Merl. Répert. mots Démence, Folie, Imbécilité.

The diseases included under the name of insanity have been arranged under two divisions, founded on two very different conditions of the brain. Ray, Med. Jur. ch. 1, § 33.

1. The want of, or a defective developement of the faculties. 1st. Idiocy, resulting from, 1, congenital defect; 2, an obstacle to the developement of the faculties, supervening in infancy. 2d. Imbecility, resulting from, 1, congenital defects; 2, an obstacle to the developement of the faculties, supervening in infancy.

2. The lesion of the faculties subsequent to their developements. In this division may be classed, 1st. Mania, which is, 1, intellectual, and is general or partial; 2, affective, and is general or partial. 2d. Dementia, which is, 1, consecutive to mania, or injuries of the brain; 2, senile, or peculiar to old age.

There is also a disease which has acquired the name of *Moral insanity*, (q. v.)

Insanity is an excuse for the commission of those acts which in others would be crimes, because the insane man has no intention; it deprives a man also from entering into any valid contract. Vide *Lunacy; Non compos mentis*, and Stock on the Law of Non Compotes Mentis; 1 Hagg. Cons. R. 417; 3 Addams, R. 90, 91, 180, 181; 3 Hagg. Eccl. R. 545, 598—600.

INSCRIPTION, *civil law*. It is an engagement which a person who makes a solemn accusation of a crime against another enters into, that he will suffer the same punishment, if he has accused the other falsely, which would have been inflicted upon him had he been guilty. Code, 9, 1, 10; Id. 9, 2, 16 and 17.

INSCRIPTION, *evidence*, something written or engraved. Inscriptions upon tombstones and other proper places, as rings, and the like, are held to be evidence of pedigree, Bull. N. P. 233; Cowp. 591; 10 East, R. 120; 13 Ves. 145; Vin. Ab. Ev. T. b, 87; 3 Stark. Ev. 1116.

INSCRIPTIONES. The name given by the old English law to any written instrument by which any thing was granted. Blount.

INSIDIATORES VIARUM, are persons who lie in wait, in order to commit some felony or other misdemeanor.

INSIMUL COMPUTASSENT, *practice, actions*, they accounted together. When an account has been stated, and a balance ascertained between the parties, they are said to have computed together, and the amount due may be recovered in an action of assumpsit, which could not have been done, if the defendant had been the mere bailiff or partner of the plaintiff, and there had been no settlement made, for in that case, the remedy would be an action of account render, or a bill in chancery. It is usual in actions of assumpsit, to add a count commonly called *insimul computassent*, or an *account stated*, (q. v.) Lawes on Pl. in Ass. 488.

INSINUATION, *civil law*, consisted in the transcription of an act on the public registers, like our recording of deeds. It was not necessary in any other alienation, but that appropriated to the purpose of donation. Inst. 2, 7, 2; Poth. Traité des Donations, entre vifs, sect. 2. art. 3, § 3; Encyclopédie; 8 Toull. n. 198.

INSOLVENCY, is the state or condition of a person who is insolvent, (q. v.) Insolvency may be simple

or notorious. Simple insolvency is the debtor's inability to pay his debts, and is attended by no legal badge of notoriety or promulgation. Notorious insolvency is that which is designated by some public act, by which it becomes notorious and irretrievable, as applying for the benefit of the insolvent laws, and being discharged under the same. Insolvency is a term of more extensive signification than bankruptcy, and includes all kinds of inability to pay a just debt. 2 Bell's Commentaries, 162, 5th ed.

INSOLVENT. This word has several meanings. It signifies a person whose estate is not sufficient to pay his debts. Civ. Code of Louisiana, art. 1980. A person is also said to be insolvent, who is under a present inability to answer, in the ordinary course of business, the responsibility which his creditors may enforce, by recourse to legal measures, without reference to his estate proving sufficient to pay all his debts, when ultimately wound up. 3 Dowl. & Ryl. Rep. 218; 1 Maule & Selw. 338; 1 Campb. R. 492, n; Sugd. Vend. 487, 488. It signifies the situation of a person who has done some notorious act to divest himself of all his property, as a general assignment, or an application for relief, under bankrupt or insolvent laws. 1 Peters's R. 195; 2 Wheat. R. 396; 7 Toull. n. 45; Domat, liv. 4, t. 5, n. 1 et 2; 2 Bell's Com. 162, 5th ed. When an insolvent delivers or offers to deliver up all his property for the benefit of his creditors, he is entitled to be discharged under the laws of the several states from all liability to be arrested. Vide 2 Kent, Com. 321; Ingrah. on Insolv. 9; 9 Mass. R. 431; 16 Mass. R. 53.

The reader will find the provisions made by the national legislature on this subject, by a reference to the following acts of congress, namely: Act of March 3, 1797, 1 Story, L. U. S. 465; Act of March 2, 1799, 1 Story, L. U. S. 630; Act of March 2, 1831, 4 Sharsw. Cont. of Story, L. U. S. 2236; Act of June 7, 1834, 4 Sharsw. Cont. of Story, L. U. S. 2368; Act of March 2, 1837, 4 Sharsw. Cont. of Story, L. U. S. 2536. See *Bankrupt*.

INSPECTION, *comm. law*. The examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce. The decision of the inspectors is not final; the object of the law is to protect the community from fraud, and to preserve the character of the merchandize abroad. 8 Cowen, R. 45. See 1 John. R. 205; 13 John. R. 331; 2 Caines, R. 312; 3 Caines, R. 207.

INSPECTION, *practice*. Examination. The inspection of all public records is free to all persons who have an interest in them, upon payment of the usual fees. 7 Mod. 129; 1 Str. 304; 2 Str. 260, 954, 1005. But it seems a mere stranger who has no such interest, has no right at common law. 8 T. R. 390. Vide *Trial by inspection*.

INSPECTOR. The name given to certain officers whose duties are to examine and inspect into things over which they have jurisdiction; as, inspector of bark, one who is by law authorised to examine bark for exportation, and to approve or disapprove of its quality. Inspectors of customs are officers appointed by the general government: as to their duties, see Story's L. U. S. vol. i. 590, 605, 609, 610, 612, 619, 621, 623, 650; ii. 1490, 1516; iii. 1650, 1790.

INSPEXIMUS, we have seen. A word sometimes used in letters-patent, reciting a grant, *inspeximus* such former grant, and so reciting it verbatim, it then grants such further

privileges as are thought convenient. 5 Co. 54.

INSTALLATION or INSTALMENT, is the act by which an officer is put in public possession of the place he is to fill. The president of the United States, or a governor, is installed into office, by being sworn agreeably to the requisition of the constitution and laws. Vide *Inauguration.*

INSTALMENT, *contracts*, is a part of a debt due by one contract, agreed to be paid at a time different from that fixed for the payment of the other part. For example, if I engage to pay you one thousand dollars, in two payments, one on the first day of January, and the other on the first day of July, each of these payments or obligations to pay will be an instalment. In such case each instalment is a separate debt so far that it may be tendered at any time, or the first may be sued for although the other shall not be due. Dane's Ab. vol. iii. ch. 93, art. 3, s. 11, page 493, 4; 1 Esp. R. 129; Ib. 226; 3 Salk. 6, 18; 2 Esp. R. 235; 1 Maule & Selw. 706. A debtor who by failing to pay three instalments of rent due on a lease would forfeit his estate, may, in order to save it, tender one instalment to prevent the forfeiture, although there may be two due at the time, and he is not bound to tender both. 6 Toull. n. 688.

INSTANCE, *civil* and *French law.* It signifies generally all sorts of actions and judicial demands. Dig. 44, 7, 58.

INSTANCE COURT, *Eng. law.* The English court of admiralty is divided into two distinct tribunals; the one having generally all the jurisdiction of the admiralty, except in prize cases, is called the *instance court;* the other, acting under a special commission, distinct from the usual commission given to judges of the admiralty, to enable the judge in time of war, to assume the jurisdiction of prizes, and called *prize court.* In the United States the district courts of the U. S. possess all the powers of courts of admiralty, whether considered as instance or prize courts. 3 Dall. R. 6. Vide 1 Gall. R. 563; Bro. Civ. & Adm. Law, ch. 4 & 5; 1 Kent, Com. 355, 378. Vide *Courts of the United States; Prize Court.*

INSTANT. An indivisible space of time. Although it cannot be actually divided, yet by intendment of law, it may, and be applied to several purposes; for example, he who lays violent hands upon himself commits no felony till he is dead, and when he is dead he is not in being so as to be termed a felon; but he is so adjudged in law, *eo instante*, at the very instant this fact is done. Vin. Ab. Instant, A, pl. 2; Plowd. 258; Co. Litt. 18; Show. 415.

INSTANTER, immediately, presently. This term, it is said, means that the act to which it applies, shall be done within twenty-four hours; but a doubt has been suggested by whom is the account of the hours to be kept, and whether the term instanter as applied to the subject-matter may not be more properly taken to mean "before the rising of the court," when the act is to be done in court; or, "before the shutting of the office the same night," when the act is to be done there. 1 Taunt. R. 343; 6 East, R. 587 n. (e); Tidd's Pr. (3d ed.) 508, n.; 3 Chit. Pr. 112. Vide, 3 Burr. 1809; Co. Litt. 157.

INSTIGATION, is the act by which one incites another to do something, as to injure a third person, or to commit some crime or misdemeanor, to commence a suit or to prosecute a criminal. Vide *Accomplice.*

INSTITOR, *civ. law.* A clerk in a store; an agent. He was so

called because he watched over the business with which he was charged; and it is immaterial whether he was employed in making a sale in a store, or whether charged with any other business. Institor appellatus est ex eo, quòd negotio gerendo instet; nec multum facit tabernæ sit præpositus, an cuilibet alii negotiationi. Dig. lib. 14, tit. 3, l. 3. Mr. Bell says that the charge given to a clerk to manage a store or shop is called institorial power. 1 Bell's Com. 385; Esk. Inst. B. 3, t. 3, § 46; 1 Stair's Inst. by Brodie, B. 1, tit. 11, §§ 12, 18, 19; Story, Ag. § 8.

INSTITUTE, in the Scotch law, is the person first called in the tailzie; the rest or the heirs of tailzie are called substitutes. Ersk. Pr. L. Scot. 3, 8, 8. See *Tailzie*, *Heir of*; *Substitutes*.

INSTITUTES. The principles or first elements of jurisprudence. Many books have borne the title of Institutes. Among the most celebrated in the common law, are the Institutes of Lord Coke, which, however, on account of the want of arrangement and the diffusion with which his books are written, bear but little the character of Institutes; in the civil law the most generally known are those of Caius, Justinian, and Theophilus.

The Institutes of Caius are an abridgment of the Roman law, composed by the celebrated lawyer Caius or Gaius, who lived during the reign of Marcus Aurelius.

The Institutes of Justinian are an abridgment of the Code and of the Digest, composed by order of that emperor: his intention in this composition was to give a summary knowledge of the law to those persons not versed in it, and particularly to merchants. The lawyers employed to make this book were Tribonian, Theophilus and Dorotheus. The work was first published in the year 533, and received the sanction of statute law by order of the emperor. The Institutes of Justinian are divided in four books: each book is divided into two titles, and each title into parts. The first part is called *principium*, because it is the commencement of the title; those which follow are numbered and called paragraphs. The work treats of the rights of persons, of things, and of actions. The first book treats of persons; the second, third, and the first five titles of the fourth book, of things; and the remainder of the fourth book, of actions. This work has been much admired on account of its order and scientific arrangement, which presents at a single glance the whole jurisprudence of the Romans. It is too little known and studied. Judge Cooper has published an edition with valuable notes.

The Institutes of Theophilus are a paraphrase of those of Justinian, composed in Greek by a lawyer of that name, by order of the emperor Phocas. Vide 1 Kent, Com. 538; Profession d'Avocat, tom. ii. n. 536, page 95; Introd. à l'Etude du Droit Romain, p. 124; Dict. de Jurisp. h. t.; Merl. Répert. h. t.; Encyclopédie de d'Alembert, h. t.

INSTITUTION, *eccles. law*; is the act by which the ordinary commits the cure of souls to a person presented to a benefice.

INSTITUTION, *political law*, what has been established and settled by law for the public good; as, the American institutions guaranty to the citizens all the privileges essential to freedom.

INSTITUTION, *practice*, is the commencement of an action; as, A B has instituted a suit against C D, to recover damages for a trespass.

INSTITUTION OF HEIR, *civil law*, is the act by which a testator nominates one or more persons to

succeed him in all his rights, active and passive. Poth. Tr. des Donations testamentaires, c. 2, s. 1, § 1; Civ. Code of Lo. art. 1598; Dig. lib. 28, tit. 5, l. 1; and lib. 28, tit. 6, l. 2. § 4.

INSTRUCTIONS, *comm. law, contracts.* Orders given by a principal to his agent, in relation to the business of his agency. The agent is bound to obey the instructions he has received, and when he neglects so to do, he is responsible for the consequences, unless he is justified by matter of necessity. 4 Binn. R. 361; 1 Liverm. Agency, 368. Instructions differ materially from authority, as regards third persons. When a written authority is known to exist, or, by the nature of the transaction, it is presupposed, it is the duty of persons dealing with an agent to ascertain the nature and extent of his authority; but they are not required to make inquiry of the agent as to any private instructions from his principal, for the obvious reason that they may be presumed to be secret and of a confidential nature, and therefore not to be communicated to third persons. 5 Bing. R. 442. As to the construction of letters of instruction, see 3 Wash. C. C. R. 151; 4 Wash. C. C. R. 551; 1 Liv. on Ag. 403; Story on Ag. § 74; 2 Wash. C. C. R. 132; 2 Crompt. & J. 244; 1 Knapp, R. 381.

INSTRUCTIONS, *in practice.* The statements of a cause of action, given by a client to his attorney, and, which, where such is the practice, are sent to his pleader to put into legal form of a declaration. Warr. Law Stud. 284. Instructions to counsel are their indemnity for any aspersions they may make on the opposite party, but attorneys who have a just regard to their own reputation will be cautious, even under instructions, not to make any unnecessary attack upon a party or witness. For such an unjustifiable conduct the counsel will be held responsible. Eunom. Dial. 2, § 43, p. 132. For a form of instructions, see 3 Chit. Pr. 117, and 120 n.

INSTRUMENT, *contracts*, is the writing which contains some agreement, and is so called because it is calculated to instruct of what has taken place or been agreed upon. The agreement and the instrument in which it is contained are very different things, the latter being only evidence of the existence of the former. The instrument or form of the contract may be valid, but the contract itself may be void on account of fraud. Vide Ayl. Parerg. 305; Dunl. Ad. Pr. 220.

INSUPER, *Engl. law*, is the balance due by an accountant in the exchequer, as apparent by his account: the auditors in settling his account say there remains so much *insuper* to such accountant.

INSURANCE, *contracts*, is defined to be a contract of indemnity from loss or damage arising upon an uncertain event. 1 Marsh. Ins. 104. It is more fully defined to be a contract by which one of the parties, called the *insurer*, binds himself to the other, called the *insured*, to pay him a sum of money or otherwise indemnify him, in case of the happening of a fortuitous event provided for in a general or special manner in the contract, in consideration of a premium which the latter pays or binds himself to pay him. Pardess. part 3, t. 8, n. 588. The instrument by which the contract is made is denominated a *policy*; the events or causes to be insured against, *risks or perils*; and the thing insured, the *subject* or *insurable interest*. *Marine* insurance relates to property and risks at sea; insurance of property on shore against fire, is called *fire* insurance; and the various contracts in such cases, are *fire* policies.

Insurance of the lives of individuals are called insurances on *lives*. Vide *Double Insurance; Re-insurance.*

INSURANCE AGAINST FIRE, is a contract by which the insurer, in consequence of a certain premium received by him, either in a gross sum or by annual payments, undertakes to indemnify the insured against all loss or damage which he may sustain to a certain amount, in his houses or other buildings, stock, goods or merchandise, mentioned in the policy, by fire, during the time agreed upon. 2 Marsh. Ins. B. 4, p. 784; 1 Stuart's (L. C.) R. 174; Park. Ins. ch. 23, p. 441.

The risks and losses insured against, are "all losses or damage by fire" during the term of the policy, to the houses or things insured.

1. There must be an actual fire or ignition to entitle the insured to recover; it is not sufficient that there has been a great and injurious increase of heat, while nothing has taken fire, which ought not to be on fire. 4 Campb. R. 360.

2. The loss must be within the policy, that is, within the time insured. 5 T. R. 695; 1 Bos. & P. 470; 6 East, R. 571.

3. The insurers are liable not only for loss by burning, but for all damages and injuries, and reasonable charges attending the removal of articles though never touched by the fire. 1 Bell's Com. 626, 7, 5th ed.

Generally there is an exception in the policy as to fire occasioned "by invasion, foreign enemy, or any military or usurped power whatsoever," and in some there is a further exception of riot, tumult or civil commotion. For the construction of these provisoes, see the articles *Civil Commotion* and *Usurped Power*.

INSURANCE, MARINE, *contracts*. Marine insurance is a contract whereby one party, for a stipulated premium undertakes to indemnify the other against certain perils, or sea risks, to which his ship, freight or cargo, or some of them may be exposed, during a certain voyage, or a fixed period of time. 3 Kent, Com. 203; Boulay-Paty, Dr. Commercial, t. 10. This contract is usually reduced to writing; the instrument is called a policy of insurance, (q. v.) All persons whether natives, citizens or aliens may be insured with the exception of alien enemies. The insurance may be of goods on a certain ship, or without naming any, as upon goods on board any *ship or ships*. The subject insured must be an insurable legal interest. The contract requires the most perfect good faith; if the insured make false representations to the insurer in order to procure his insurance upon better terms, it will avoid the contract, though the loss arose from a cause unconnected with the misrepresentation, or the concealment happened through mistake, neglect or accident, without any fraudulent intention. Vide Kent, Com. Lecture, 48; Marsh. Ins. ch. 4; Pardessus, Dr. Com. part 4, t. 5, n. 756, et seq.; Boulay-Paty, Dr. Com. t. 10.

INSURANCE ON LIVES, *contracts*. The insurance of a life is a contract whereby the insurer, in consideration of a certain premium, either in a gross sum or periodical payments, undertakes to pay the person for whose benefit the insurance is made, a stipulated sum, or annuity equivalent, upon the death of the person whose life is insured, whenever this shall happen, if the insurance be for the whole life, or in case this shall happen within a certain period, if the insurance be for a limited time. 2 Marsh. Ins. 766; Park on Insurance, 429. The insured is required to make a representation or declaration, previous to the policy being issued, of the age and state of health of the

person whose life is insured; and the party making it is bound to the truth of it. Park, Ins. 650; Marsh. Ins. 771; 4 Taunt. R. 763. In almost every life policy there are several exceptions, some of them applicable to all cases, others to the case of insurance of one's life. The exceptions are, 1, Death abroad or at sea; 2, Entering into the naval or military service without the previous consent of the insurers; 3, Death by suicide; 4, Death by duelling; 5, Death by the hand of justice. The last three are not understood to be excepted when the insurance is on another's life. 1 Bell's Com. 631, 5th ed. See 1 Beck's Med. Jur. 518.

INSURED, *contracts.* The person who procures an insurance on his property. It is the duty of the insured to pay the premium, and to represent fully and fairly all the circumstances relating to the subject-matter of the insurance, which may influence the determination of the underwriters in undertaking the risk, or estimating the premium. A concealment of such facts amounts to a fraud, which avoids the contract. 1 Marsh. Ins. 464; Park, Ins. h. t.

INSURER, *contracts.* One who has obliged himself to insure the safety of another's property, in consideration of a premium paid or secured to be paid to him. It is his duty to pay any loss which has arisen on the property insured. Vide Marsh. Ins. Index, h. t.; Park. Ins. Index, h. t.; Phill. Ins. h. t.; Wesk. Ins. h. t.; Pardess. Index, art. Assureur.

INSURRECTION, rebellion of citizens or subjects of a country against its government. The constitution of the United States, art. 1, s. 8, gives power to congress "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." By the act of congress of the 28th February, 1795, 1 Story's L. U. S. 389, it is provided:—

§ 1. That whenever the United States shall be invaded, or be in imminent danger of invasion, from any foreign nation or Indian tribe, it shall be lawful for the president of the United States to call forth such number of the militia of the state, or states, most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his orders, for that purpose, to such officer or officers of the militia as he shall think proper. And in case of an insurrection in any state, against the government thereof, it shall be lawful for the president of the United States, on application of the legislature of such state, or of the executive, (when the legislature cannot be convened,) to call forth such number of the militia of any other state or states, as may be applied for, as he may judge sufficient to suppress such insurrection.

§ 2. That whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, it shall be lawful for the president of the United States to call forth the militia of such state, or of any other state or states, as may be necessary to suppress such combinations, and to cause the laws to be duly executed; and the use of militia so to be called forth, may be continued, if necessary, until the expiration of thirty days after the commencement of the then next session of congress.

§ 3. That whenever it may be necessary, in the judgment of the president, to use the military force hereby directed to be called forth, the president shall forthwith, by proclamation, command such insur-

gents to disperse, and retire peaceably to their respective abodes, within a limited time.

INTAKERS, *Eng. law.* The name given to receivers of goods stolen in Scotland, who take them to England. 9 H. 5, c. 27.

INTENDED TO BE RECORDED. This phrase is frequently used in conveyancing in deeds which recite other deeds which have not been recorded. In Pennsylvania it has been construed to be a covenant on the part of the grantor to procure the deed to be recorded in a reasonable time. 2 Rawle's Rep. 14.

INTENDMENT OF LAW. The true meaning, the correct understanding, or intention of the law; a presumption or inference made by the courts. Co. Litt. 78. It is an intendment of law that every man is innocent until proved guilty, vide *Innocence;* that every one will act for his own advantage, vide *Assent;* Fin. Law, 10, Max. 54; that every officer acts in his office with fidelity; that the children of a married woman, born during the coverture, are the children of the husband, vide *Bastardy;* many things are intended after verdict, in order to support a judgment, but intendment cannot supply the want of certainty in a charge in an indictment for a crime. 5 Co. 121; vide Com. Dig. Pleader, C 25, and S 31; Dane's Ab. Index, h. t.; 14 Vin. Ab. 449.

INTENTION, a design, resolve, or determination of the mind. Intention is required in the commission of crimes and injuries; in making contracts; and wills.

1. Every crime must have necessarily two constituent parts, namely, an act forbidden by law, and an intention. The act is innocent or guilty just as there was or was not an intention to commit a crime; for example, a man embarks on board of a ship at New York, for the purpose of going to New Orleans; if he went with an intention to perform a lawful act, he is perfectly innocent; but if his intention was to levy war against the United States, he is guilty of an overt act of treason. Cro. Car. 332; Fost. 202, 203; Hale, P. C. 116. The same rule prevails in numerous civil cases; in actions founded on malicious injuries, for instance, it is necessary to prove that the act was accompanied by a wrongful and malicious intention. 2 Stark. Ev. 739.

The intention is to be proved, or it is inferred by the law. The existence of the intention is usually matter of inference; and proof of external and visible acts and conduct serves to indicate more or less forcibly the particular intention. But in some cases the inference of intention necessarily arises from the facts. *Exteriora acta indicant interiora animi secreta.* 8 Co. 146. It is a universal rule that a man shall be taken to intend that which he does, or is the necessary and immediate consequence of his act, 3 M. & S. 15; Hale, P. C. 229; in cases of homicide, therefore, malice will generally be inferred by the law. Vide *Malice,* and Jacob's Intr. to the Civ. Law, Reg. 70; Dig. 24, 18.

2. In order to make a contract, there must be an intention to make it; a person non compos mentis, who has no contracting mind, cannot therefore enter into any engagement which requires an intention; for to make a contract the law requires a fair and serious exercise of the reasoning faculty. Vide *Gift; Occupancy.*

3. In wills and testaments the intention of the testator must be gathered from the whole instrument, 3 Ves. 105; and a codocil ought to be taken as a part of the will, 4 Ves. 610; and when such intention is ascertained, it must prevail, unless

it be in opposition to some unbending rule of law. 6 Cruise's Dig. 295; Rand. on Perp. 121; Cro. Jac. 415. "It is written," says Swinb. p. 10, "that the will or meaning of the testator, is the queen or empress of the testament; because the will doth rule the testament, enlarge and restrain it, and in every respect moderate and direct the same, and is indeed the very efficient cause thereof. The will therefore and meaning of the testator ought before all things to be sought for diligently, and, being found, ought to be observed faithfully." 6 Pet. R. 68.

Vide, generally, Bl. Com. Index, h. t.; 2 Stark. Ev. h. t.; Ayl. Pand. 95; Dane's Ab. Index, h. t.; Rob. Fr. Conv. 30. As to intention in changing a residence, see article *Inhabitant*.

INTER CANEM ET LUPUM. Literally, between the dog and the wolf. Metaphorically, the twilight; because then the dog seeks his rest, and the wolf his prey. 3 Inst. 63.

INTERDICT, *civil law*, among the Romans was an ordinance of the prætor which forbade or enjoined the parties in a suit to do something particularly specified, until it should be decided definitely who had the right in relation to it. Vide *Injunction*.

INTERDICT or INTERDICTION, *eccles. law*, is an ecclesiastical censure by which divine services are prohibited either to particular persons or particular places. These tyrannical edicts, issued by ecclesiastical powers, have never been in force in the United States.

INTERDICTED OF FIRE AND WATER. Formerly those persons who were banished for some crime, were interdicted of fire and water; that is by the judgment order was given that no man should receive them into his house, but should deny them fire and water, the two necessary elements of life.

INTERDICTION, *civil law*, is a legal restraint upon a person incapable of managing his estate, because of mental incapacity, from signing any deed or doing any act to his own prejudice, without the consent of his curator or interdictor. Interdictions are of two kinds, voluntary or judicial. The first is usually executed in the form of an obligation by which the obligor binds himself to do no act which may affect his estate without the consent of certain friends or other persons therein mentioned. The latter, or judicial interdiction is imposed by a sentence of a competent tribunal, which disqualifies the party on account of imbecility, madness, or prodigality, and deprives the person interdicted of the right to manage his affairs and receive the rents and profits of his estate.

The Civil Code of Louisiana makes the following provisions on this subject:

Art. 382. No person above the age of majority, who is subject to an habitual state of madness or insanity, shall be allowed to take charge of his own person or to administer his estate, although such person shall, at times, appear to have the possession of his reason.

383. Every relation has a right to petition for the interdiction of a relation; and so has every husband a right to petition for the interdiction of his wife, and every wife of her husband.

384. If the insane person has no relations and is not married, or if his relations or consort do not act, the interdiction may be solicited by any stranger, or pronounced *ex officio* by the judge, after having heard the counsel of the person whose interdiction is prayed for, whom it shall be the duty of the judge to name, if

one be not already named by the party.

385. Every interdiction shall be pronounced by the judge of the parish of the domicil or residence of the person to be interdicted.

386. The acts of madness, insanity or fury, must be proved to the satisfaction of the judge, that he may be enabled to pronounce the interdiction, and his proof may be established, as well by written as by parol evidence; and the judge may moreover interrogate or cause to be interrogated by any other person commissioned by him for that purpose, the person whose interdiction is petitioned for, or cause such person to be examined by physicians, or other skilful persons, in order to obtain their report upon oath on the real situation of him who is stated to be of unsound mind.

387. Pending the issue of the petition for interdiction, the judge may, if he deems it proper, appoint for the preservation of the movable, and for the administration of the immovable estate of the defendant, an administrator *pro tempore*.

388. Every judgment, by which an interdiction is pronounced, shall be provisionally executed, notwithstanding the appeal.

389. In case of appeal, the appellate court may, if they deem if necessary, proceed to the hearing of new proofs, and question or cause to be questioned, as above provided, the person whose interdiction is petitioned for, in order to ascertain the state of his mind.

390. On every petition for interdiction, the costs shall be paid out of the estate of the defendant, if he shall be interdicted, and by the petitioner, if the interdiction prayed for shall not be pronounced.

391. Every sentence of interdiction shall be published three times, in at least two of the newspapers printed in New-Orleans, or made known by advertisements at the door of the court-house of the parish of the domicil of the person interdicted, both in the French and English languages; and this duty is imposed upon him who shall be appointed curator of the person interdicted, and shall be performed within a month after the date of the interdiction, under the penalty of being answerable for all damages to such persons as may, through ignorance, have contracted with the person interdicted.

392. No petition for interdiction, if the same shall have once been rejected, shall be acted upon again, unless new facts, happening posterior to the sentence shall be alleged.

393. The interdiction takes place from the day of presenting the petition for the same.

394. All acts done by the person interdicted, from the date of the filing the petition for interdiction until the day when the same is pronounced, are null.

395. No act anterior to the petition for the interdiction, shall be annulled, except where it shall be proved that the cause of such interdiction notoriously existed at the time when the deeds, the validity of which is contested, were made, or that the party who contracted with the lunatic or insane person, could not have been deceived as to the situation of his mind.

Notoriously, in this article, means that the insanity was generally known by the persons who saw and conversed with the party.

396. After the death of a person, the validity of acts done by him cannot be contested for cause of insanity, unless his interdiction was pronounced or petitioned for, previous to the death of such person, except in cases in which mental alienation manifested itself within ten days previous to the decease, or in which the proof of the

want of reason results from the act itself which is contested.

397. Within a month, to reckon from the date of the judgment of interdiction, if there has been no appeal from the same, or if there has been an appeal, then within a month from the confirmative sentence, it shall be the duty of the judge of the parish of the domicil or residence of the person interdicted, to appoint a curator to his person and estate.

398. This appointment is made according to the same forms as the appointment to the tutorship of minors.

After the appointment of the curator to the person interdicted, the duties of the administrator, pro tempore, if he shall not have been appointed curator, are at an end; and he shall give an account of his administration to the curator.

399. The married woman, who is interdicted, is of course under the curatorship of her husband. Nevertheless it is the duty of the husband, in such case, to cause to be appointed by the judge, a curator *ad litem*; who may appear for the wife in every case when she may have an interest in opposition to the interest of her husband, or one of a nature to be pursued or defended jointly with his.

400. The wife may be appointed curatrix to her husband, if she has, in other respects, the necessary qualifications.

She is not bound to give security.

401. No one, except the husband with respect to his wife, or wife with respect to her husband, the relations in the ascending line with respect to the relations in the descending line, and vice versa, the relations in the descending line with respect to the relations in the ascending line, can be compelled to act as curator to a person interdicted more than ten years, after which time the curator may petition for his discharge.

402. The person interdicted is, in every respect, like the minor who has not arrived at the age of puberty, both as it respects his person and estate; and the rules respecting the guardianship of the minor, concerning the oath, the inventory and the security, the mode of administering, the sale of the estate, the commission on the revenues, the excuses, the exclusion or deprivation of the guardianship, mode of rendering the accounts, and the other obligations, apply with respect to the person interdicted.

403. When any of the children of the person interdicted is to be married, the dowry or advance of money to be drawn from his estate, is to be regulated by the judge, with the advice of a family meeting.

404. According to the symptoms of the disease, under which the person interdicted labours, and according to the amount of his estate, the judge may order that the interdicted person be attended in his own house, or that he be placed in a bettering-house, or indeed if he be so deranged as to be dangerous, he may order him to be confined in safe custody.

405. The income of the person interdicted shall be employed in mitigating his sufferings, and in accelerating his cure, under the penalty against the curator of being removed in case of neglect.

406. He who petitions for the interdiction of any person, and fails in obtaining such interdiction, may be prosecuted for and sentenced to pay damages, if he shall have acted from motives of interest or passion.

407. Interdiction ends with the cause which gave rise to it. Nevertheless the person interdicted cannot resume the exercise of his rights, until after the definite judgment by which a repeal of the interdiction is pronounced.

408. Interdiction can only be re-

voked by the same solemnities which were observed in pronouncing it.

409. Not only lunatics and idiots are liable to be interdicted, but likewise all persons who, owing to certain infirmities, are incapable of taking care of their persons and administering their estates.

Such persons shall be placed under the care of a curator, who shall be appointed and shall administer in conformity with the rules contained in the present chapter.

410. The person interdicted cannot be taken out of the state without a judicial order, given on the recommendation of a family meeting, and on the opinion delivered under oath of at least two physicians, that they believe the departure necessary to the health of the person interdicted.

411. There shall be appointed by the judge a superintendent to the person interdicted; whose duty it shall be to inform the judge, at least once in three months, of the state of the health of the person interdicted, and of the manner in which he is treated.

To this end, the superintendent shall have free access to the person interdicted, whenever he wishes to see him.

412. It is the duty of the judge to visit the person interdicted, whenever from the information he receives, he shall deem it expedient.

This visit shall be made at times when the curator is not present.

413. Interdiction is not allowed on account of profligacy or prodigality.

Vide Ray's Med. Jur. ch. 25; 1 Hagg. Eccl. Rep. 401; *Committee; Habitual Drunkard.*

INTERESSE TERMINI, *estates*, an interest in the term. A bare lease of land does not vest any estate in the lessee, but gives him a mere right of entry in the tenement, which right is called his interest in the term or *interesse termini*. Vide Co. Litt. 46; 2 Bl. Com. 144; 10 Vin. Ab. 348; Dane's Ab. Index, h. t.

INTEREST, *estates*, is the right which a man has in a chattel real, and more particularly in a future term. It is a word of less efficacy and extent than estates, though, in legal understanding, an interest extends to estates, rights and titles which a man has in or out of lands, so that by a grant of his whole interest in land, a reversion as well as the fee simple shall pass. Co. Litt. 345.

INTEREST, *contracts*, is the right of property which a man has in a thing, commonly called *insurable interest*. It is not easy to give an accurate definition of insurable interest. The policy of commerce and the various complicated rights which different persons may have in the same thing, require that not only those who have an absolute property in ships and goods, but those also who have a qualified property therein may be at liberty to insure them. For example, when a ship is mortgaged, after the mortgage becomes absolute, the owner of the *legal* estate has an insurable interest, and the mortgagor, on account of his *equity*, has also an insurable interest. 2 T. R. 188; 1 Burr. 489; and see 1 T. R. 745; Marsh. Ins. h. t.; 6 M. & W. 224. A man may not only insure his own life for the benefit of his heirs or creditors, and assign the benefit of this insurance to others having thus or otherwise an interest in his life, but he may insure the life of another in which he may be interested. Marsh. Ins. Index, h. t.; Park, Ins. Index, h. t.; 1 Bell's Com. 629, 5th ed.; 9 East, R. 72. Vide *Insurance*.

INTEREST, *evidence*, is the benefit which a person has in the matter about to be decided and which is in issue between the parties. By the term benefit is here understood some pecuniary or other advantage,

which, if obtained, would increase his estate. This interest renders such person incompetent to be a witness in such a case. To disable a witness, his interest must be a legal, certain and immediate benefit in the cause or matter in issue, or in the record as an instrument of evidence. 1 Phil. Ev. 36; Stark. Ev. pt. 4, p. 744; and must have been acquired without fraud. 3 Camp. R. 380; 1 M. & S. 9; 1 T. R. 37. It must be a *legal* interest as contradistinguished from mere prejudice or bias, arising from relationship, friendship, or any of the numerous motives by which a witness may be supposed to be influenced. Leach, 154; 2 St. Tr. 334, 891; 2 Hawk. c. 46, s. 25. The interest must be a *present, certain, vested* interest, and not uncertain and contingent. Doug. R. 134; 1 P. Wms. 287; 3 Serg. & Rawle, 132; 4 Binn. R. 83; 2 Yeates, R. 200; 5 Johns. R. 256; 7 Mass. R. 25. A deposition of a witness, made at a time when he had no interest, who afterwards becomes interested, may be read in evidence. 1 Hoff. R. 21. The *magnitude* of the interest is altogether immaterial. 5 T. R. 174; 2 Vern. R. 317; 2 Greenl. R. 194; 11 Johns. R. 57. To the general rule that interest renders a witness incompetent, there are some exceptions; 1st. When the witness is reduced to a state of neutrality by an equipoise of interest the objection to his testimony ceases. 7 T. R. 480, 481, n.; 1 Bibb, R. 298; 2 Mass. R. 108; 2 Serg. & Rawle, 119.—2d. In some cases the law admits the testimony of one interested, from the extreme necessity of the case: upon this ground the servant of a tradesman is admitted to prove the delivery of goods and the payment of money, without any release from the master. 4 T. R. 490; 2 Litt. Rep. 27. The objection to incompetency on the ground of interest may be removed by an extinguishment of that interest by means of a release, executed either by the witness or by those who have a claim upon him, or by payment. Stark. Ev. pt. 4, p. 757. See 5 Benth. Rationale Jud. Ev. 628–692, where he combats the established doctrines of the law. Vide *Balance; Interest.*

INTEREST FOR MONEY, *in contracts*, is the compensation which is paid by the borrower to the lender or by the debtor to the creditor for its use. It is proposed to consider, 1, who is bound to pay interest; 2, who is entitled to receive it; 3, on what claim it is allowed; 4, what interest is allowed; 5, how it is computed; 6, when it will be barred; 7, rate of interest in the different states.

§ 1. *Who is bound to pay interest.* 1. The contractor himself, who has agreed, either expressly or by implication, to pay interest, is of course bound to do so.—2. Executors, administrators, assignees of bankrupts or of insolvents, and trustees, who have kept money an unreasonable length of time, and have made or who might have made it productive, are chargeable with interest. 2 Ves. 85; 1 Bro. C. C. 359; Id. 375; 2 Ch. Cas. 235; Chan. Rep. 389; 1 Vern. 197; 2 Vern. 548; 3 Bro. C. C. 73; Id. 433; 4 Ves. 620; 1 Johns. Ch. R. 508; Id. 527, 535, 6; Id. 620; 1 Desaus. Ch. R. 193, n.; Id. 208; 1 Wash. 2; 1 Binn. R. 194; 3 Munf. 198, pl. 3; Id. 289, pl. 16; 1 Serg. & Rawle, 241; 4 Desaus. Ch. Rep. 463; 5 Munf. 223, pl. 7, 8; 1 Ves. jr. 236; Id. 452; Id. 89; 1 Atk. 90; see 1 Supp. to Ves. jr. 30; 11 Ves. 61; 15 Ves. 470; 1 Ball & Beat. 230; 1 Supp. to Ves. jr. 127, n. 3; 1 Jac. & Walk. 140; 3 Meriv. 43; 2 Bro. C. C. 156; 5 Ves. 839; 7 Ves. 152; 1 Jac. & Walk. 122; 1 Pick. 530; 13 Mass. R. 232; 3

Call, 538; 4 Hen. & Munf. 415; 2 Esp. N. P. C. 702; 2 Atk. 106; 2 Dall. 182; 4 Serg. & Rawle, 116; 1 Dall. 349; 3 Binn. 121. As to the distinction between executors and trustees, see Mr. Coxe's note to Fellowes v. Mitchell, 1 P. Wms. 241; 1 Eden, 357, and the cases there collected.—3. Tenant for life must pay interest on encumbrances on the estate. 4 Ves. 33; 1 Vern. 404, n. by Raithby. In Pennsylvania the heir at law is not bound to pay interest on a mortgage given by his ancestor. 4. In Massachusetts a bank is liable independently of the statute of 1809, c. 37, to pay interest on their bills, if not paid when presented for payment. 8 Mass. 445.—5. Revenue officers must pay interest to the United States from the time of receiving the money. 6 Binney's Rep. 266.

§ 2. *Who are entitled to receive interest.* 1. The lender upon an express or implied contract.—2. An executor was not allowed interest in a case where money due to his testatrix was out at interest, and before money came to his hands, he advanced his own in payment of debts of the testatrix. Vin. Ab. tit. Interest, C. pl. 13. In Massachusetts a trustee of property placed in his hands for security, who was obliged to advance money to protect it, was allowed interest at the compound rate. 16 Mass. 228.

§ 3. *On what claims allowed.* First, on express contracts; secondly, on implied contracts; and, thirdly, on legacies.

First, on *express contracts.* 1. When the debtor expressly undertakes to pay interest, he or his personal representatives having assets, are bound to pay it. But if a party has accepted the principal, it has been determined that he cannot recover interest in a separate action. 1 Esp. N. P. C. 110; 3 Johns. 220. See 1 Campb. 50; 1 Dall. 315; Stark. Ev. pt. iv. 787.

Secondly. *On implied contracts.* 1. On money lent, or laid out for another's use. Bunb. 119; 2 Bl. Rep. 761; S. C. 3 Wils. 205; 2 Burr. 1077; 5 Bro. Parl. Ca. 71; 1 Ves. jr. 63; 1 Dall. 349; 1 Binn. 488; 2 Call, 102; 2 Hen. & Munf. 381; 1 Hayw. 4; 3 Caines's Rep. 226, 234, 238, 245; see 3 Johns. Cas. 303; 9 Johns. 71; 3 Caines's Rep. 266; 1 Conn. Rep. 32; 7 Mass. 14; 1 Dall. 349; 6 Binn. R. 163; Stark. Ev. pt. iv. 789, n. (y), and (z); 11 Mass. 504.

2. For goods sold and delivered, after the customary or stipulated term of credit has expired. Doug. 376; 2 B. & P. 337; 4 Dall. 289; 2 Dall. 193; 6 Binn. 162; 1 Dall. 265, 349.

3. On bills and notes. If payable at a future day certain, after due; if payable on demand, after demand made. Bunb. 119; 6 Mod. 138; 1 Str. 649; 2 Ld. Raym. 733; 2 Burr. 1081; 5 Ves. jr. 133; 15 Serg. & R. 264. Where the terms of a promissory note are, that it shall be payable by instalments, and on the failure of any instalment, the whole is to become due, interest on the whole becomes payable from the first default. 4 Esp. 147. Where by the terms of a bond, or a promissory note, interest is to be paid annually, and the principal at a distant day, the interest may be recovered before the principal is due. 1 Binn. 165; 2 Mass. 568; 3 Mass. 221.

4. On an account stated, or other liquidated sum, whenever the debtor knows precisely what he is to pay, and when he is to pay it. 2 Black. Rep. 761; S. C. 3 Wils. 205; 2 Ves. 365; 8 Bro. Parl. C. 561; 2 Burr. 1085; 5 Esp. N. P. C. 114; 2 Com. Contr. 207; Treat. Eq. lib. 5, c. 1, s. 4; 2 Fonb. 438; 1 Hayw. 173; 2 Cox, 219; 1 V. & B. 345;

1 Supp. to Ves. jr. 194; Stark. Ev. pt. iv. 789, n. (a).

5. On the arrears of an annuity secured by a specialty. 14 Vin. Ab. 458, pl. 8; 3 Atk. 579; 9 Watts, R. 530.

6. On a deposit by a purchaser, which he is entitled to recover back, paid either to a principal, or an auctioneer. Sugd. Vend. 327; 3 Campb. 258; 5 Taunt. 625. Sed vide 4 Taunt. 334, 341.

7. On purchase-money, which has lain dead, where the vendor cannot make a title. Sugd. Vend. 327.

8. On purchase-money remaining in purchaser's hands to pay off encumbrances. 1 Sch. & Lef. 134. See 1 Wash. 125; 5 Munf. 342; 6 Binn. 435.

9. On judgments. 14 Vin. Abr. 458, pl. 15; 4 Ball. 251; 2 Ves. 162; 5 Binn. R. 61; Ib. 220. In Massachusetts the principal of a judgment is recovered by execution; for the interest the plaintiff must bring an action. 14 Mass. 239.

10. On judgments affirmed in a higher court. 2 Burr. 1097; 2 Str. 931; 4 Burr. 2128; Dougl. 752, n. 3; 2 H. Bl. 267; Id. 284; 2 Campb. 428, n.; 3 Taunt. 503; 4 Taunt. 30.

11. On money obtained by fraud, or where it has been wrongfully detained. 9 Mass. 504; 1 Campb. 129; 3 Cowen, 426.

12. On money paid by mistake, or recovered on a *void* execution. 1 Pick. 212; 9 Serg. & Rawle, 409.

13. Rent in arrear bears interest, unless under special circumstances, which may be recovered in action, 1 Yeates, 72; 6 Binn. 159; 4 Yeates, 264; but no distress can be made for such interest. 2 Binn. 246. Interest cannot, however, be recovered for arrears of rent payable in wheat. 1 Johns. 276. See 2 Call, 249; Id. 253; 3 Hen. & Munf. 463: 4 Hen. & Munf. 470; 5 Munf. 21.

14. Where from the course of dealing between the parties, a promise to pay interest is implied. 1 Campb. 50; Id. 52; 3 Bro. C. C. 436; Kirby, 207.

Thirdly, *Of interest on legacies.* 1. *On specific legacies.* Interest on specific legacies is to be calculated from the date of the death of testator. 4 Ves. sen. 563; 6 Ves. 345; 5 Binn. 475; 3 Munf. 10.—2. A *general* legacy when the time of payment is *not* named by the testator is not payable till the end of one year after testator's death, at which time the interest commences to run. 1 Ves. jr. 366; 1 Sch. & Lef. 10; 5 Binn. 475; 13 Ves. 333; 1 Ves. 308; 3 Ves. & Bea. 183. But where only the interest is given, no payment will be due till the end of the second year, when the interest will begin to run. 7 Ves. 89.—3. Where a general legacy is given, and the time of payment is named by the testator, interest is not allowed before the arrival of the appointed period of payment, and that notwithstanding the legacies are vested; Prec. in Chan. 337. But when that period arrives, the legatee will be entitled, although the legacy be charged upon a dry reversion. 2 Atk. 108. See also Daniel's Rep. in Exch. 84; 3 Atk. 101; 3 Ves. 10; 4 Ves. 1; 4 Bro. C. C. 149, n.; S. C. 1 Cox, 133. Where a legacy is given payable at a future day with interest, and the legatee dies before it becomes payable, the arrears of the interest up to the time of his death must be paid to his personal representatives. McClel. Exch. Rep. 141. And a bequest of a sum to be paid annually for life bears interest from the death of testator. 5 Binn. 475.—4. Where the legatee is a child of the testator or one towards whom he has placed himself in *loco parentis*, the legacy bears interest from the testator's death, whether it be particular or residuary; vested, but payable at a future time, or con-

tingent, if the child have no maintenance. In that case the court will do what, in common presumption, the father would have done, provide necessaries for the child. 2 P. Wms. 21; 3 Ves. 287; Id. 13; Bac. Abr. Legacies, K 3; Fonb. Eq. 431, n. j.; 1 Eq. Cas. Ab. 301, pl. 3; 3 Atk. 432; 1 Dick. Rep. 310; 2 Bro. C. C. 59; 2 Rand. Rep. 409. In case of a child *in ventre sa mere*, at the time of the father's decease, interest is allowed only from its *birth*. 2 Cox, 425. Where maintenance or interest is given by the will, and the rate specified, the legatee will not, in general, be entitled to claim more than the maintenance or rate specified. 3 Atk. 697, 716; 3 Ves. 286, n.; and see further as to interest in cases of legacies to children, 15 Ves. 363; 1 Bro. C. C. 267; 4 Madd. R. 275; 1 Swanst. 553; 1 P. Wms. 783; 1 Vern. 251; 3 Ves. & Bea. 183.—5. Interest is not allowed by way of maintenance to any other person than the legitimate children of the testator, 3 Ves. 10; 4 Ves. 1; unless the testator has put himself in loco parentis. 1 Sch. & Lef. 5, 6. A wife, 15 Ves. 301, a niece, 3 Ves. 10, a grandchild, 15 Ves. 301, 6 Ves. 546, 12 Ves. 3, 1 Cox, 133, are therefore not entitled to interest by way of maintenance. Nor is a legitimate child entitled to such interest if he have a maintenance; although it may be less than the amount of the interest of the legacy. 1 Scho. & Lef. 5; 3 Ves. 17. Sed vide 4 John. Ch. Rep. 103; 2 Rop. Leg. 202.—6. Where an intention though not expressed is fairly inferable from the will, interest will be allowed. 1 Swanst. 561, note; Coop. 143.—7. Interest is not allowed for maintenance, although given by immediate bequest for maintenance, if the parent of the legatee, who is under moral obligation to provide for him be of sufficient ability, so that the interest will accumulate for the child's benefit, until the principal becomes payable. 3 Atk. 399; 3 Bro. C. C. 416; 1 Bro. C. C. 386; 3 Bro. C. C. 60. But to this rule there are some exceptions. 3 Ves. 730; 4 Bro. C. C. 223; 4 Madd. 275, 289; 4 Ves. 498.—8. Where a fund, particular or residuary, is given upon a contingency, so that the intermediate interest undisposed of, that is to say, the intermediate interest between the testator's death, if there be no previous legatee for life, or, if there be, between the death of the previous taker and the happening of the contingency, will sink into the residue for the benefit of the next of kin or executor of the testator, if not bequeathed by him; but if not disposed of, for the benefit of his residuary legatee. 1 Bro. C. C. 57; 4 Bro. C. C. 114; Meriv. 384; 2 Atk. 329; Forr. 145; 2 Rop. Leg. 224.—9. Where a legacy is given by immediate bequest whether such legacy be particular or residuary, and there is a condition to divest it upon the death of the legatee under twenty-one, or upon the happening of some other event, with a limitation over, and the legatee dies before twenty-one, or before such other event happens, which nevertheless does take place, yet as the legacy was payable at the end of a year after the testator's death, the legatee's representatives, and not the legatee over, will be entitled to the interest which accrued during the legatee's life, until the happening of the event which was to divest the legacy. 1 P. Wms. 500; 2 P. Wms. 504; Ambl. 448; 5 Ves. 335; Id. 522.—10. Where a residue is given, so as to be vested but not payable at the end of the year from the testator's death, but upon the legatee's attaining twenty-one, or upon any other contingency, and with a bequest over divesting the legacy, upon the legatee's dying un-

der age, or upon the happening of the contingency, then the legatee's representatives in the former case, and the legatee himself in the latter, shall be entitled to the interest that became due, during the legatee's life, or until the happening of the contingency. 2 P. Wms. 419; 1 Bro. C. C. 81; Id. 335; 3 Meriv. 335.—11. Where a residue of personal estate is given generally, to one for life with remainder over, and no mention is made by the testator respecting the interest, nor any intention to the contrary to be collected from the will, the rule appears to be now settled that the person taking for life, is entitled to interest from the death of the testator, on such part of the residue bearing interest, as is not necessary for the payment of debts. And it is immaterial whether the residue is only given generally, or directed to be laid out with all convenient speed in funds or securities, or to be laid out in lands. See 6 Ves. 520; 9 Ves. 549, 553; 2 Rop. Leg. 234; 9 Ves. 89.—12. But where a residue is directed to be laid out in land, to be settled on one for life, with remainder over, and the testator directs the interest to accumulate in the mean time, until money is laid out in lands, or otherwise invested on security, the accumulation shall cease at the end of one year from the testator's death, and from that period, the tenant for life shall be entitled to the interest. 6 Ves. 520; 7 Ves. 95; 6 Ves. 528; Ib. 529; 2 Sim. & Stu. 396.—13. Where no time of payment is mentioned by the testator, annuities are considered as commencing from the death of the testator; and consequently the first payment will be due at the end of the year from that event; if, therefore, it be not made then, interest, in those cases wherein it is allowed at all, must be computed from that period. 2 Rop. Leg. 249; 5 Binn. 475. See 6 Mass. 37.

§ 4. As to the *quantum or amount* of interest allowed. 1, During what time; 2, Simple interest; 3, Compound interest; 4, In what cases given beyond the penalty of a bond; 5, When foreign interest is allowed.

First. *During what time.* 1. In actions for money had and received, interest is allowed in Massachusetts from the time of serving the writ. 1 Mass. 436. On debts payable on demand, interest is payable only from the demand. Addis. 137. See 12 Mass. 4. The words "with interest for the same," bear interest from date. Addis. 323, 4; 1 Stark. N. P. C. 452; Ibid. 507.—2. The mere circumstance of war existing between two nations, is not a sufficient reason for abating interest on debts due by the subjects of one belligerent to another. 1 Peters's C. C. R. 524; but a prohibition of all intercourse with an enemy during war, furnishes a sound reason for the abatement of interest until the return of peace. Ib. See on this subject, 2 Dall. 132; 2 Dall. 102; 4 Dall. 286; 1 Wash. 172; 1 Call, 194; 3 Wash. C. C. R. 396; 8 Serg. & Rawle, 103; Post. § 7.

Secondly. *Simple interest.* 1. Interest upon interest is not allowed except in special cases, 1 Eq. Cas. Ab. 287; Fonbl. Eq. b. 1, c. 2, § 4, note (a); U. S. Dig. tit. Accounts, IV.; and the uniform current of decisions is against it, as being a hard, oppressive exaction, and tending to usury. 1 Johns. Ch. R. 14; Cam. & Norw. Rep. 361.

Thirdly. *Compound interest.* 1. Where a partner has overdrawn the partnership funds, and refuses, when called upon, to account, to disclose the profits, recourse would be had to compound interest as a substitute for the profits he might reasonably be supposed to have made. 2 Johns. Ch. R. 213.—2. When executors, administrators, or trustees convert

the trust money to their own use, or employ it in business or trade, they are chargeable with compound interest. 1 Johns. Ch. R. 620.—3. In an action to recover the annual interest due on a promissory note, interest will be allowed on each year's interest until paid. 2 Mass. 568; 8 Mass. 455. See as to charging compound interest the following cases: 1 Johns. Ch. Rep. 550; Cam. & Norw. 361; 1 Binn. 165; 4 Yeates, 220; 1 Hen. & Munf. 4; 1 Vin. Abr. 457, tit. Interest, (C); Com. Dig. Chancery, 3 S 3; 3 Hen. & Munf. 89. An infant's contract to pay interest on interest, after it has accrued, will be binding upon him, when it is for his benefit. 1 Eq. Cas. Ab. 286; 1 Atk. 489; 3 Atk. 613; Newl. Contr. 2.

Fourthly. *When given beyond the penalty of a bond.* 1. It is a general rule that the penalty of a bond limits the amount of the recovery. 2 T. R. 388. But in some cases the interest is recoverable beyond the amount of the penalty. The recovery depends on principles of law, and not on the arbitrary *ad libitum* discretion of a jury. 3 Caines's Rep. 49.—2. The exceptions are where the bond is to account for moneys to be received; 2 T. R. 388; where the plaintiff is kept out of his money by writs of error; 2 Burr. 1094; 2 Evans's Poth. 101, 2; or delayed by injunction, 1 Vern. 349; 16 Vin. Abr. 303; if the recovery of the debt be delayed by the obligor, 6 Ves. 92; 1 Vern. 349; Show. P. C. 15; if extraordinary emoluments are derived from holding the money, 2 Bro. P. C. 251; or the bond is taken only as a collateral security, 2 Bro. P. C. 333; or the action be on a judgment recovered on a bond, 1 East, R. 436; see also 4 Day's Cas. 30; 3 Caines's R. 49; 1 Taunt. 218; 1 Mass. 308; Com. Dig. Chancery, 3 S 2; Vin. Abr. Interest, E.—3. But these exceptions do not obtain in the administration of the debtor's assets, where his other creditors might be injured by allowing the bond to be rated beyond the penalty, 5 Ves. 329; see Vin. Abr. Interest, C. pl. 5.

Fifthly. *When foreign interest is allowed.* 1. The rate of interest allowed by law where the contract is made, may, in general, be recovered; hence where a note was given in China, payable eighteen months after date, without any stipulation respecting interest, the court allowed the Chinese interest of one per cent. per month from the expiration of the eighteen months, 1 Wash. C. C. R. 253.—2. If a citizen of another state, advance money there for the benefit of a citizen of the state of Massachusetts, which the latter is liable to reimburse, the former shall recover interest, at the rate established by the laws of the place where he lives. 12 Mass. 4. See further, 1 Eq. Cas. Ab. 289; 1 P. Wms. 395; 2 Bro. C. C. 3; 14 Vin. Abr. 460, tit. Interest, (F).

§ 4. *How computed.*—In casting interest on notes, bonds, &c. upon which partial payments have been made, every payment is to be first applied to keep down the interest, but the interest is never allowed to form a part of the principal, so as to carry interest. 17 Mass. R. 417; 1 Dall. 378.—2. When a partial payment exceeds the amount of interest due when it is made, it is correct to compute the interest to the time of the first payment, add it to the principal, subtract the payment, cast interest on the remainder to the time of the second payment, add it to the remainder, and subtract the second payment, and in like manner from one payment to another, until the time of judgment. 1 Pick. 194; 4 Hen. & Munf. 431; 8 Serg. & Rawle, 458; 2 Wash. C. C. R. 167. See 3 Wash. C. C. R. 350;

Ibid. 396.—3. Where a partial payment is made *before* the debt is due, it cannot be apportioned, part to the debt and part to the interest. As if there be a bond for one hundred dollars, payable in one year, and, at the expiration of six months, fifty dollars be paid in. This payment shall not be apportioned part to the principal and part to the interest, but at the end of the year, interest shall be charged on the whole sum, and the obligor shall receive credit for the interest of fifty dollars for six months. 1 Dall. 124.

§ 6. *When interest will be barred.*—1. When the money due is tendered to the person entitled to it, and he refuses to receive it, the interest ceases. 3 Campb. 296. Vide 8 East, 168; 3 Binn. 295.—2. Where the plaintiff was absent in foreign parts, beyond seas, evidence of that fact may be given in evidence to the jury on the plea of payment, in order to extinguish the interest during such absence. 1 Call, 133. But see 9 Serg. & Rawle, 263.—3. Whenever the law prohibits the payment of the principal, interest during the prohibition is not demandable. 2 Dall. 102; 1 Peters's C. C. R. 524. See also 2 Dall. 132; 4 Dall. 286.—4. If the plaintiff has accepted the principal he cannot recover the interest in a separate action. 1 Esp. N. P. C. 110; 3 Johns. 229. See 14 Wend. 116.

§ 7. *Rate of interest allowed by law in the different states.*

Alabama. Eight per centum per annum is allowed. Notes not exceeding one dollar bear interest at the rate of one hundred per centum per annum. Some of the bank charters prohibit certain banks from charging more than six per cent. upon bills of exchange; and notes negociable at the bank, not having more than six months to run; and over six and under nine, not more than seven per cent.; and over nine months, to charge not more than eight per cent. Aikin's Dig. 236.

Arkansas. Six per centum per annum is the legal rate of interest, but the parties may agree in writing for the payment of interest not exceeding ten per centum per annum, on money due and to become due on any contract, whether under seal or not. Rev. St. c. 80, s. 1, 2. Contracts where a greater amount is reserved are declared to be void. Id. s. 7, but this provision will not affect an innocent endorsee for a valuable consideration. Id. s. 8.

Connecticut. Six per centum is the amount allowed by law.

Delaware. The legal amount of interest allowed in this state is at the rate of six per centum per annum. Laws of Del. 314.

Georgia. Eight per centum per annum interest is allowed on all liquidated demands. 1 Laws of Geo. 270; 4 Id. 488; Prince's Dig. 294, 295.

Illinois. Six per centum per annum is the legal interest allowed when there is no contract, but by agreement the parties may fix a greater rate. 3 Griff. L. Reg. 423.

Indiana. Six per centum per annum is the rate fixed by law, (except in Union county,). On the following funds loaned out by the state, namely, Sinking, Surplus, Revenue, Saline and College funds, seven per cent.; on the common school fund, eight per cent. Act of January 31, 1842.

Kentucky. Six per centum per annum is allowed by law. There is no provision in favour of any kind of loan. See Session acts 1818, p. 707.

Louisiana. The Civil Code provides, art. 2895, as follows: Interest is either legal or conventional. Legal interest is fixed at the following rates, to wit: at five per cent., on all sums which are the object of a judicial demand, whence this is called judicial interest; and sums discounted by

banks, at the rate established by their charters. The amount of conventional interest cannot exceed ten per cent. The same must be fixed in writing, and the testimonial proof of it is not admitted. See also, art. 1930 to 1939.

Maine. Six per centum per annum is the legal interest, and any contract for more is voidable as to the excess, except in case of letting cattle, and other usages of a like nature, in practice among farmers, or maritime contracts among merchants, as bottomry, insurance or course of exchange, as has been heretofore practiced. Rev. St. T. 4, c. 69, §§ 1, 4.

Maryland. Six per centum per annum is the amount limited by law in all cases.

Massachusetts. The interest of money shall continue to be at the rate of six dollars, and no more, upon one hundred dollars for a year; and at the same rate for a greater or less sum, and for a longer or shorter time. Rev. Stat. ch. 35, s. 1.

Michigan. Seven per centum is the legal rate of interest; but on stipulation in writing, interest is allowed to any amount not exceeding ten per cent. on loans of money, but only on such loans. Rev. St. 160, 161.

Mississippi. The legal interest is six per centum; but on all bonds, notes, or contracts in writing signed by the debtor for the *bona fide* loan of money, expressing therein the rate of interest fairly agreed on between the parties for the use of money so loaned, eight per cent. interest is allowed. Laws of 1842.

Missouri. When no contract is made as to interest, six per centum per annum is allowed. But the parties may agree to any higher rate, not exceeding ten per cent. Rev. Code, § 1, p. 333.

New Hampshire. No person shall take interest for the loan of money, wares or merchandize, or any other personal estate whatsoever, above the value of six pounds for the use or forbearance of one hundred pounds for a year, and after that rate for a greater or lesser sum, or for a longer or shorter time. Act of February 12, 1791, s. 1. Provided that nothing in this act shall extend to the letting of cattle, or other usages of a like nature, in practice among farmers, or to maritime contracts among merchants, as bottomry, insurance, or course of exchange, as hath been heretofore used. Id. s. 2.

New Jersey. Six per centum per annum is the interest allowed by law for the loan of money, without any exception. Statute of December 5, 1823. Harr. Comp. 45.

New York. The rate is fixed at seven per centum per annum. Rev. Stat. part 2, c. 4, t. 3, s. 1. Monied institutions, subject to the safety-fund act, are entitled to receive the legal interest, established, or which may thereafter be established, by the laws of this state, on all loans made by them, or notes, or bills, by them severally discounted or received in the ordinary course of business; but on all notes or bills by them discounted or received in the ordinary course of business which shall be mature in sixty-three days from the time of such discount, the said monied corporations shall not take or receive more than at the rate of six per centum per annum in advance. 2 Rev. Stat. p. 612.

North Carolina. Six per centum per annnm is the interest allowed by law. The banks are allowed to take the interest off at the time of making a discount.

Ohio. The legal rate of interest on all contracts, judgments or decrees in chancery, is six per centum per annum, and no more. 29 Ohio Stat. 451; Swan's Coll. Laws, 465. A contract to pay a higher rate is good

for principal and interest, and void for the excess. Banks are bound to pay twelve per cent. interest on all their notes during a suspension of specie payment. 37 Acts 30, Act of February 25, 1839. Swan's Coll. 129.

Pennsylvania. Interest is allowed at the rate of six per centum per annum for the loan or use of money or other commodities. Act of March 2, 1723; and lawful interest is allowed on judgments. Act of 1700, 1 Smith's L. of Penn. 12. See 6 Watts, 53; 12 S. & R. 47; 13 S. & R. 221; 4 Whart. 221; 6 Binn. 435; 1 Dall. 378; 1 Dall. 407; 2 Dall. 92; 1 S. & R. 176; 1 Binn. 488; 2 Pet. 538; 8 Wheat. 355.

Rhode Island. Six per centum per annum is allowed for interest on loans of money. 3 Griff. Law Reg. 116.

South Carolina. Seven per centum per annum, or at that rate, is allowed for interest. 4 Cooper's Stat. of S. C. 364. When more is reserved, the amount lent and interest may be recovered. 6 Id. 409.

Tennessee. The interest allowed by law is six per centum per annum. When more is charged it is not recoverable, but the principal and legal interest may be recovered. Act of 1835, c. 50, Car. & Nich. Comp. 406, 407.

Vermont. Six per centum per annum is the legal interest. If more be charged and paid it may be recovered back in an action of assumpsit. But these provisions do not extend "to the letting of cattle and other usages of a like nature among farmers, or maritime contracts, bottomry or course of exchange, as has been customary." Rev. St. c. 72, s. 3, 4, 5.

Virginia. Interest is allowed at the rate of six per centum per annum. Act of 22 Nov. 1796, 1 Rev. Code ch. 209.

INTEREST, MARITIME. By maritime interest is understood the profit of money lent on bottomry or respondentia, which is allowed to be greater than simple interest because the capital of the lender is put in jeopardy. There is no limit by law as to the amount which may be charged for maritime interest. It is fixed generally by the agreement of the parties. The French writers employ a variety of terms in order to distinguish it according to the nature of the case. They call it *interest*, when it is stipulated to be paid by the month, or at other stated periods. It is a *premium* when a gross sum is to be paid at the end of the voyage, and here the risk is the principal object they have in view. When the sum is a per centage on the money lent, they call it *exchange*, considering it in the light of money lent at one place to be returned in another, with a difference in amount between the sum borrowed and that which is paid, arising from the difference of time and place. When they intend to combine these various shades into one general denomination, they make use of the term *maritime profit*, to convey their meaning. Hall on Mar. Loans, 56, n.

INTERESTED CONTRACT, *civil law*, is one in which both parties have an interest; it is put in opposition to a contract of mere benevolence; the contracts of partnership, sale, hiring, exchange or barter, are of this kind. Poth. Oblig. n. 12. *Contract.*

INTERLINEATION, *in contracts, evidence*, is writing between two lines. Interlineations are made either *before* or *after* the execution of an instrument. Those made before should be noted previous to its execution; those made after are made either by the party in whose favour they are, or by strangers. When made by the party himself, whether the interlineation be material or im-

material, they render the deed void, 1 Gall. Rep. 71, unless made with the consent of the opposite party. Vide 11 Co. 27 a; 9 Mass. Rep. 307; 15 Johns. R. 293; 1 Dall. R. 57; 1 Halst. R. 215; but see 1 Pet. C. C. R. 364; 5 Har. & John. 41; 2 L. R. 290; 2 Ch. R. 410; 4 Bing. R. 123; Fitzg. 207, 223; Cov. on Conv. Ev. 22. When the interlineation is made by a stranger, if it be immaterial, it will not vitiate the instrument, but if it be material, it will in general avoid it. Vide Cruise, Dig. tit. 32, c. 26, s. 8; Com. Dig. Fait, F 1. The ancient rule, which is still said to be in force, is that an alteration shall be presumed to have been made *before* the execution of the instrument. Vin. Ab. Evidence, Q a 2; Ib. Faits, U; 1 Swift's Syst. 310; 6 Wheat. R. 481; 1 Halst. 215; but other cases hold the presumption to be that a material interlineation was made *after* the execution of an instrument, unless the contrary be proved. 1 Dall. 67. This doctrine corresponds nearly with the rules of the canon law on this subject. The canonists have examined it with care. Vide 18 Pick. R. 172; Toull. Dr. Civ. Fr. liv. 3, t. 3, c. 4, n. 115, and article *Erasure*.

INTERLOCUTORY. This word is applied to signify something which is done between the commencement and the end of a suit or action which decides some point or matter, which however is not a final decision of the matter in issue; as, interlocutory judgments, or decrees or orders. Vide *Judgment, interlocutory*.

INTERLOPERS. Persons who interrupt the trade of a company of merchants, by pursuing the same business with them in the same place, without lawful authority.

INTERPLEADER, *practice*.—Vide *Bill of Interpleader*, and 8 Vin. Ab. 419; Doct. Pl. 247; 3 Bl. Com. 448; Com. Dig. Chancery, 3 T; 2 Story, Eq. Jur. § 800.

INTERPRETATION, is the explication of a law, agreement, will, or other instrument, which appears obscure or ambiguous. The object of interpretation is to find out or collect the intention of the maker of the instrument, either from his own words, or from other conjectures, or both. It may then be divided into three sorts, according to the different means it makes use of for obtaining its end. These three sorts of interpretations are either literal, rational, or mixed. When we collect the intention of the writer from his words only, as they lie before us, this is a *literal* interpretation. When his 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, this is *rational* interpretation; and when his words, though they do express his intention, when rightly understood, are in themselves of doubtful meaning, and we are forced to have recourse to like conjectures to find out in what sense he used them; this sort of interpretation is *mixed;* it is partly literal, and partly rational.

According to the civilians there are three sorts of interpretations, the authentic, the usual, and the doctrinal. 1. The *authentic* interpretation is that which refers to the legislator himself, in order to fix the sense of the law. 2. When the judge interprets the law so as to accord with prior decisions, the interpretation is called *usual*. 3. It is *doctrinal* when it is made agreeably to rules of science. The commentaries of learned lawyers in this case furnish the greatest assistance. This last kind of interpretation is itself divided into three distinct classes. Doctrinal interpretation is extensive, restrictive, or declaratory. 1st. It is *extensive* whenever the reason of the law has a more enlarged sense

than its terms, and it is consequently applied to a case which had not been explained. 2d. On the contrary, it is *restrictive* when the expressions of the law have a greater latitude than its reasons, so that by a restricted interpretation, an exception is made in a case which the law does not seem to have embraced. 3d. When the reason of the law and the terms in which it is conceived agree, and it is only necessary to explain them to have the sense complete, the interpretation is *declaratory*.

The term interpretation is used by foreign jurists in nearly the same sense that we use the word construction, (q. v.)

Pothier, in his excellent treatise on Obligations, lays down the following rules for the interpretation of contracts:

1. We ought to examine what was the common intention of the contracting parties rather than the grammatical sense of the terms.

2. When a clause is capable of two significations, it should be understood in that which will have some operation rather than that in which it will have none.

3. Where the terms of a contract are capable of two significations, we ought to understand them in the sense which is most agreeable to the nature of the contract.

4. Any thing, which may appear ambiguous in the terms of a contract, may be explained by the common use of those terms in the country where it is made.

5. Usage is of so much authority in the interpretation of agreements, that a contract is understood to contain the customary clauses although they are not expressed; in contractibus tacite veniunt ea quæ sunt moris et consuetudinis.

6. We ought to interpret one clause by the others contained in the same act, whether they precede or follow it.

7. In case of doubt a clause ought to be interpreted against the person who stipulates any thing, and in discharge of the person who contracts the obligation.

8. However general the terms may be in which an agreement is conceived, it only comprises those things respecting which it appears, that the contracting parties proposed to contract, and not others which they never thought of.

9. When the object of the agreement is universally to include every thing of a given nature, (une universalité de choses) the general description will comprise all particular articles, although they may not have been in the knowledge of the parties. We may state as an example of this rule an engagement which I make with you to abandon my share in a succession for a certain sum. This agreement includes every thing which makes part of the succession, whether known or not; our intention was to contract for the whole. Therefore it is decided that I cannot object to the agreement, under pretence that a considerable property has been found to belong to the succession of which we had not any knowledge.

10. When a case is expressed in a contract on account of any doubt which there may be whether the engagement resulting from the contract would extend to such case, the parties are not thereby understood to restrain the extent which the engagement has of right, in respect to all cases not expressed.

11. In contracts as well as in testaments, a clause conceived in the plural may be frequently distributed into several particular classes.

12. What is at the end of a phrase commonly refers to the whole phrase,

and not only to what immediately precedes it, provided it agrees in gender and number with the whole phrase.

For instance, if in the contract for sale of a farm, it is said to be sold with all the corn, small grain, fruits and wine that have been *got this year*, the terms, that have been *got this year*, refer to the whole phrase, and not to the wine only, and consequently the old corn is not less excepted than the old wine; it would be otherwise if it had been said, all the wine that has been got this year, for the expressian is in the singular, and only refers to the wine and not to the rest of the phrase, with which it does not agree in number.

INTERPRETER. One employed to make a translation, (q. v.) An interpreter should be sworn before he translates the testimony of a witness. 4 Mass. 81; 5 Mass. 219; 2 Caines's Rep. 155. A person employed between an attorney and client to act as interpreter, is considered merely as the organ between them, and is not bound to testify as to what he has acquired in those confidential communications. 1 Pet. C. C. R. 356; 4 Munf. R. 273; 3 Wend. R. 337. Vide *Confidential Communications.*

INTERREGNUM, *polit. law.* In an established government, the period which elapses between the death of a sovereign and the election of another is called interregnum. It is also understood for the vacancy created in the executive power, and for any vacancy which occurs when there is no government.

INTERROGATOIRE, *French law*, is an act, or instrument, which contains the interrogatories made by the judge to the person accused, on the facts which are the object of the accusation, and the answers of the accused. Poth. Proc. crim. s. 4, art. 2, § 1. Vide *Information.*

INTERROGATORIES are material and pertinent questions, in writing, to necessary points, not confessed, exhibited for the examination of witnesses or persons who are to give testimony in the cause. They are either original and direct on the part of him who produces the witnesses, or cross and counter, on behalf of the adverse party, to examine witnesses produced on the other side. Either party, plaintiff or defendant, may exhibit original or cross interrogatories. The form which interrogatories assume, is as various as the minds of of the persons who propound them. They should be as distinct as possible, and capable of a definite answer; and they should leave no loop holes for evasion to an unwilling witness. Care must be observed to put no leading questions in original interrogatories, for these always lead to inconvenience; and for scandal or impertinence, interrogatories will, under certain circumstances, be suppressed. Vide Will. on Interrogatories, *passim;* Gresl. Eq. Ev. pt. 1, c. 3, s. 1; Vin. Ab. h. t.; Hind's Pr. 317.

INTERRUPTION, is the effect of some act or circumstance which stops the course of a prescription or act of limitations. Interruption of the use of a thing is natural or civil. *Natural* interruption is an interruption in fact, which takes place whenever by some act we cease truly to possess what we formerly possessed. Vide 4 Mason's Rep. 404; 2 Y. & Jarv. 285. *Civil* interruption is that which takes place by some judicial act, as the commencement of a suit to recover the thing in dispute, which gives notice to the possessor that the thing which he possesses does not belong to him. When the title has once been gained by prescription, it will not be lost by any interruption of it for ten or twenty years. 1 Inst. 113 b. A simple acknowledgment of a debt by the debtor, is a sufficient interruption

to prevent the statute from running. Indeed whenever an agreement, express or implied, takes place between the creditor and the debtor, between the possessor and the owner, which admits the indebtedness or the right to the thing in dispute, it is considered a civil conventional interruption which prevents the statute or the right of prescription from running. Vide 3 Burge on the Confl. of Laws, 63.

INTERVENTION, *civil law*, is the act by which a third party becomes a party in a suit pending between other persons. The intervention is made either to be joined to the plaintiff, and to claim the same thing he does, or some other thing connected with it; or, to join the defendant, and with him to oppose the claim of the plaintiff, which it is his interest to defeat. Poth. Procéd. Civ. 1ere part., ch. 2, s. 6, § 3. In the English ecclesiastical courts, the same term is used in the same sense. When a third person, not originally a party to the suit or proceeding, but claiming an interest in the subject-matter in dispute, may, in order the better to protect such interest, interpose his claim, which proceeding is termed intervention. 2 Chit. Pr. 492; 3 Chit. Com. Law, 633; 2 Hagg. Cons. R. 137; 3 Phillim. R. 586; 1 Addams, R. 5; Ought. tit. 14; 4 Hagg. Eccl. R. 67; Dunl. Ad. Pr. 74; The intervener may come in at any stage of the cause, and even after judgment, if an appeal can be allowed on such judgment. 2 Hagg. Cons. R. 137; 1 Eng. Eccl. R. 480; 2 Eng. Eccl. R. 13.

INTIMATION, *civil law*, is the name of any judicial act by which a notice of a legal proceeding is given to some one; but it is more usually understood to mean the notice or summons which an appellant causes to be given to the opposite party that the sentence will be reviewed by the superior judge.

INTROMISSION, *Scotch law*, is the assuming possession of property belonging to another, either on legal grounds, or without any authority; in the latter case, it is called *vicious* intromission. Bell's S. L. Dict. h. t.

INTRUSION, *estates*, *torts*.—When an ancestor dies seised of any estate of inheritance, expectant upon an estate for life, and then the tenant dies, and between his death and the entry of the heir, a stranger unlawfully enters upon the estate, this is called an intrusion. It differs from an abatement, for the latter is an entry into lands void by the death of a tenant in fee, and an intrusion, as already stated, is an entry into land void by the death of a tenant for years. F. N. B. 203; 3 Bl. Com. 169; Archb. Civ. Pl. 12; Dane's Ab. Index, h. t.

INTRUSION, *remedies*, is the name of a writ brought by the owner of a fee simple, &c., against an intruder. New Nat. Br. 453.

INUNDATION, the overflow of waters by coming out of their bed. Inundations may arise from three causes; from public necessity, as in the defence of a place it may be necessary to dam the current of a stream which will cause an inundation to the upper lands; they may be occasioned by an invincible force, as by the accidental fall of a rock in the stream; or they may result from the erections of works on the stream. In the first case, the injury caused by the inundation, is to be compensated as other injuries done in war; in the second, as there was no fault of any one, the loss is to be borne by the unfortunate owner of the estate; in the last, when the riparian proprietor is injured by such works as alter the level of the water where it enters or where it leaves the property on which they are erected, the person injured may recover damages for the injury thus caused to his property by the inunda-

tion. 9 Co. 59; 4 Day's R. 244; 17 Serg. & Rawle, 383; 3 Mason's R. 172; 7 Pick. R. 198; 7 Cowen, R. 266; 1 B. & Ald. 258; 1 Rawle's R. 218; 5 N. H. Rep. 232; 9 Mass. R. 316; 4 Mason's R. 400; 1 Sim. & Stu. 203; 1 Coxe's R. 460. Vide Schult. Aq. R. 122; Ang. W. C. 101; 5 Ohio R. 322, 421; and art. *Dam.*

TO INURE. To take effect; as, the pardon inures.

INVASION. The entry of a country by a public enemy, making war. The constitution of the United States, art. 1, s. 8, gives power to congress "to provide for calling the militia to execute the laws of the Union, suppress insurrections and repel invasions." Vide *Insurrection.*

INVENTION. A contrivance; a discovery. It is in this sense this word is used in the patent laws of the United States. It signifies not some thing which has been found ready made, but which in consequence of art or accident has been formed: for the invention must relate to some new or useful art, machine, manufacture, or composition of matter, or some new, and useful improvement on any art, machine, manufacture, or composition of matter, not before known or used by others. Act of July 4, 1836, 4 Sharsw. continuation of Story's L. U. S. 2506; 1 Mason, R. 302; 4 Wash. C. C. R. 9. Vide *Patent.* By invention, the civilians understand the finding of some thing which had not been lost; they must either have been abandoned, or they must never have belonged to any one, as a pearl found on the sea shore. Lec. Elem. § 350.

INVENTIONES. This word is used in some ancient English charters to signify *treasure-trove.*

INVENTOR. One who invents or finds out something. The patent laws of the United States, authorise a patent to be issued to the original inventor; if the invention is suggested by another, he is not the inventor within the meaning of those laws; but in that case the suggestion must be of the specific process or machine; for a general theoretical suggestion, as that steam might be applied to the navigation of the air or water, without pointing by what specific process or machine that could be accomplished, would not be such a suggestion as to deprive the person to whom it had been made from being considered as the inventor. Dav. Pat. cas. 429; 1 C. & P. 558; 1 Russ. & M. 187; 4 Taunt. 770.

INVENTORY. A list, schedule or enumeration in writing, containing, article by article, the goods and chattels, rights and credits, and in some cases, the lands and tenements, of a person or persons. In its most common acceptation, an inventory is a conservatory act which is made to ascertain the situation of an intestate's estate, the estate of an insolvent, and the like, for the purpose of securing it to those entitled to it. When the inventory is made of goods and estates assigned or conveyed in trust, it must include all the property conveyed. In case of intestate estates, it is required to contain only the personal property, or that to which the administrator is entitled. The claims due to the estate ought to be separated; those which are desperate or bad ought to be so returned. The articles ought to be set down separately, as already mentioned, and separately valued.

The inventory is to be made in the presence of at least two of the creditors of the deceased, or legatees or next of kin, and, in their default and absence, of two honest persons. The appraisers must sign it, and make oath or affirmation that the appraisement is just to the best of their knowledge. Vide, generally, 14 Vin. Ab. 465; Bac. Ab. Execu-

tors, &c. E 11; 4 Com. Dig. 714; Ayliffe's Pand. 414; Ayliffe's Parerg. [305]; Com. Dig. Administration, B 7; 3 Burr. 1922; 2 Addams's Rep. 319; S. C. 2 Eccles. R. 322; Lovel. on Wills, 38; 2 Bl. Com. 514; 8 Serg. & Rawle, 128; Godolph. 150, and the article *Benefit of Inventory*.

TO INVEST, *contracts*. To lay out money in such a manner that it may bring a revenue; as, to invest money in houses or stocks.

INVESTITURE, *estates*, is the act of giving possession of lands by actual seisin. When livery of seisin was made to a person, by the common law he was invested with the whole fee; this, the foreign feudists and sometimes our own law writers call investiture, but generally speaking, it is termed by the common law writers, the seisin of the fee. 2 Bl. Com. 209, 313; Fearne on Rem. 223, n. (z).

INVITO DOMINO, *crim. law*. without the consent of the owner. In order to constitute larceny, the property stolen, must be taken *invito domino*, this is the very essence of the crime. Cases of considerable difficulty arise when the owner has, for the purpose of detecting thieves, by himself or his agents, delivered the property taken, whether they are larcenies or not; the distinction seems to be this, that when the owner procures the property to be taken, it is not larceny; and when he merely leaves it in the power of the defendant to execute his original purpose of taking it, in the latter case it will be considered as taken *invito domino*. 2 Bailey's Rep. 569; Fost. 123; 2 Russ. on Cr. 66, 105; 2 Leach, 913; 2 East, P. C. 666; Bac. Ab. Felony, C; Alis. Prin. 273; 2 Bos. & Pull. 508; and article *Taking*.

INVOICE, *commerce*, an account of goods or merchandise sent by merchants to their correspondents at home or abroad, in which the marks of each package, with other particulars are set forth. Marsh. Ins. 408; Dane's Ab. Index, h. t. An invoice ought to contain a detailed statement, which should indicate the nature, quantity, quality and price of the things sold, deposited, &c. 1 Pardess. Dr. Com. n. 248. Vide *Bill of Lading*; and 2 Wash. C. C. R. 113; Id. 155.

INVOICE BOOK, *commerce, accounts*, is one in which invoices are copied.

IOWA. The name of one of the territories of the United States of America. This territory was established by the act of congress of June 12th, 1838, Pamphlet Laws, 1837–1838, p. 60. This act is the fundamental law of the territory. The government is organized as follows:—

§ 1. That from and after the third day of July next, all that part of the present territory of Wisconsin which lies west of the Mississippi river, and west of a line drawn due north from the head waters or sources of the Mississippi to the territorial line, shall, for the purpose of temporary government, be and constituted a separate territorial government by the name of Iowa; and that from and after the said third day of July next, the present territorial government of Wisconsin shall extend only to that part of the present territory of Wisconsin which lies east of the Mississippi river. And after the said third day of July next, all power and authority of the government of Wisconsin, in and over the territory hereby constituted shall cease: Provided, that nothing in this act contained shall be construed to impair the rights of person or property, now appertaining to any Indians within the said territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to impair the obligations of any treaty now exist-

ing between the United States and such Indians, or to impair or any wise to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty or law, or otherwise, which it would have been competent to the government to make if this act had never been passed: Provided, that nothing in this act contained shall be construed to inhibit the government of the United States from dividing the territory hereby established into one or more other territories in such manner and at such times as congress shall, in its discretion, deem convenient and proper, or from attaching any portion of said territory to any other state or territory of the United States.

§ 2. That the executive power and authority in and over the said territory of Iowa shall be vested in a governor, who shall hold his office for three years, unless sooner removed by the president of the United States. The governor shall reside within the said territory, shall be commander-in-chief of the militia thereof, shall perform the duties and receive the emoluments of superintendent of Indian affairs, and shall approve of all laws passed by the legislative assembly before they shall take effect; he may grant pardons for offences against the laws of the said territory, and reprieves for offences against the laws of the United States, until the decision of the president can be made known thereon; he shall commission all officers who shall be appointed to office under the laws of the said territory, and shall take care that the laws be faithfully executed.

§ 3. That there shall be a secretary of the said territory, who shall reside therein, and hold his office for four years, unless sooner removed by the president of the United States; he shall record and preserve all the laws and proceedings of the legislative assembly hereinafter constituted, and all the acts and proceedings of the governor in his executive department; he shall transmit one copy of the laws and one copy of the executive proceedings, on or before the first Monday in December in each year, to the president of the United States, and, at the same time, two copies of the laws to the speaker of the house of representatives, for the use of congress. And in case of the death, removal, resignation, or necessary absence of the governor from the territory, the secretary shall have, and he is hereby authorised and required to execute and perform all the powers and duties of the governor during such vacancy or necessary absence, or until another governor shall be duly appointed to fill such vacancy.

§ 4. That the legislative power shall be vested in the governor and a legislative assembly. The legislative assembly shall consist of a council and house of representatives. The council shall consist of thirteen members, having the qualifications of voters as hereinafter prescribed, whose term of service shall continue two years. The house of representatives shall consist of twenty-six members possessing the same qualifications as prescribed for the members of the council, and whose term of service shall continue one year. An apportionment shall be made as nearly equal as practicable, among the several counties, for the election of the council and representatives, giving to each section of the territory representation in the ratio of its population, Indians excepted, as nearly as may be. And the said members of the council and house of representatives shall reside in and be inhabitants of the district for which they

may be elected. Previous to the first election, the governor of the territory shall cause the census or enumeration of the inhabitants of the several counties in the territory to be taken, and made by the sheriffs of the said counties, respectively, unless the same shall have been taken within three months previous to the third day of July next, and returns thereof made by said sheriffs to the governor. The first election shall be held at such time and place, and be conducted in such manner as the governor shall appoint and direct; and he shall at the same time, declare the number of members of the council and house of representatives to which each of the counties or districts are entitled under this act. The number of persons authorised to be elected having the greatest number of votes in each of the said counties or districts for the council, shall be declared by the said governor to be duly elected to the said council; and the person or persons having the greatest number of votes for the house of representatives, equal to the number to which each county may be entitled, shall also be declared by the governor to be duly elected: Provided, the governor shall order a new election when there is a tie between two or more persons voted for, to supply the vacancy made by such a tie. And the persons thus elected to the legislative assembly shall meet at such place, and on such day as he shall appoint; but thereafter the time, place, and manner of holding and conducting all elections by the people, and the apportioning the representation in the several counties to the council and house of representatives, according to population, shall be prescribed by law, as well as the day of the annual commencement of the session of the said legislative assembly; but no session in any year shall exceed the term of seventy-five days.

§ 5. That every free white male citizen of the United States, above the age of twenty-one years, who shall have been an inhabitant of said territory at the time of its organization, shall be entitled to vote at the first election, and shall be eligible to any office within the said territory; but the qualifications of voters at all subsequent elections, shall be such as shall be determined by the legislative assembly: Provided, that the right of suffrage shall be exercised only by citizens of the United States.

§ 6. That the legislative power of the territory shall extend to all rightful subjects of legislation; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the laws of the governor and legislative assembly shall be submitted to, and if disapproved by, the congress of the United States, the same shall be null and of no effect.

§ 7. That all township officers, and all county officers, except judicial officers, justices of the peace, sheriffs and clerks of courts, shall be elected by the people, in such manner as is now prescribed by the laws of the territory of Wisconsin, or as may, after the first election, be provided by the governor and legislative assembly of Iowa Territory. The governor shall nominate and by and with the advice and consent of the legislative council, shall appoint all judicial officers, justice of the peace, sheriffs, and all militia officers, except those of the staff, and all civil officers not herein provided for. Vacancies occurring in the recess of the council, shall be filled by appointments from the governor, which shall expire at the end of the next session of the legislative assembly; but the

said governor may appoint, in the first instance, the aforesaid officers, who shall hold their offices until the end of the next session of the said legislative assembly.

§ 8. That no member of the legislative assembly shall hold, or be appointed to, any office created, or the salary or emoluments of which shall have been increased, whilst he was a member, during the term for which he shall have been elected, and for one year after the expiration of such term; and no person holding a commission or appointment under the United States, or any of its officers, except as a militia officer, shall be a member of the said council or house of representatives, or shall hold any office under the government of the said territory.

Vide *Courts of the United States.*

IPSO FACTO, by the fact itself. This phrase is frequently employed to convey the idea that something which has been done contrary to law is void; for example, if a married man, during the life of his wife, of which he had knowledge, should marry a second woman, the latter marriage would be void *ipso facto;* that is, on that fact being proved, the second marriage would be declared void *ab initio.*

IRE AD LARGUM, to go at large; to escape, or be set at liberty. Vide *Ad largum.*

IRONY, *in rhetoric*, is a term derived from the Greek, which signifies dissimulation. It is a refined species of ridicule, which under the mask of honest simplicity or of ignorance, exposes the faults and errors of others, by seeming to adopt or defend them. In libels, irony may convey imputations more effectually than direct assertion, and render the publication libellous. Hob. 215; Hawk. B. 1, c. 73, s. 4; 3 Chit. Cr. Law, 869; Bac. Ab. Libel, A 3.

IRREGULARITY, *practice*, is the doing or not doing that in the conduct of a suit at law, which, conformably with the practice of the court, ought or ought not to be done. A party entitled to complain of irregularity, should except to it previously to taking any step by him in the cause, Lofft. 323, 333, because the taking of any such step is a waiver of any irregularity. 1 Bos. & Pull. 342; 2 Smith's R. 391; 1 Taunt. R. 58; 2 Taunt. R. 243; 3 East, R. 547; 2 New R. 509; 2 Wils. R. 380. The court will, on motion, set aside proceedings for irregularity. On setting aside a judgment and execution for irregularity, they have power to impose terms on the defendant, and will restrain him from bringing an action of trespass, unless a strong case of damages appears. 1 Chit. R. 133, n; and see Baldw. R. 246. Vide 3 Chit. Pr. 509, and *Regular and irregular Process.* In the canon law, this term is used to signify any impediment which prevents a man from taking holy orders.

IRREPLEVISABLE, *practice.* This term is applied to those things which cannot legally be replevied; for example, in Pennsylvania, no goods seized in execution or for taxes, can be replevied.

IRRESISTIBLE FORCE. This term is applied to such an interposition of human agency, as is, from its nature and power, absolutely uncontrollable; as the inroads of a hostile army. Story on Bailm. § 25; Lois des Bâtim. pt. 2, c. 2, § 1. It differs from *inevitable accident*, (q. v.); the latter being the effect of physical causes, as, lightning, storms, and the like.

IRREVOCABLE. That which cannot be revoked. A will may at all times be revoked by the same person who made it, he having a disposing mind; but the moment the testator is rendered incapable to make a will he can no longer revoke a

former will, because he wants a disposing mind. Letters of attorney are generally revocable; but when made for a valuable consideration they become irrevocable. 7 Ves. jr. 28; 1 Caines's Cas. in Er. 16; Bac. Authority, E. Vide *Authority; License; Revocation.*

IRRIGATION, the act of wetting or moistening the ground by artificial means. The owner of land over which there is a current stream, is, as such, the proprietor of the current. 4 Mason's R. 400. It seems the riparian proprietor may avail himself of the river for irrigation, provided the river be not thereby materially lessened, and the water absorbed be imperceptible or trifling. Ang. W. C. 34; and vide 1 Root's R. 535; 8 Greenl. R. 266; 2 Conn. R. 584; 2 Swift's Syst. 87; 7 Mass. R. 136; 13 Mass. R. 420; 1 Swift's Dig. 111; 5 Pick. R. 175; 9 Pick. 59; 6 Bing. R. 379; 5 Esp. R. 56; 2 Conn. R. 584; Ham. N. P. 199; 2 Chit. Bl. Com. 403, n. 7; 22 Vin. Ab. 525; 1 Vin. Ab. 557; Bac. Ab. Action on the case, F. The French law coincides with our own. 1 Lois des Bâtimens, sect. 1, art. 3, page 21.

ISLAND. A piece of land surrounded by water. Islands are in the sea or in rivers. Those in the sea are either in the open sea, or within the boundary of some country. When new islands arise in the open sea, they belong to the first occupant; when they are newly formed so near the shore as to be within the boundary of some state, they belong to that state. Islands which arise in rivers when in the middle of the stream, belong in equal parts to the riparian proprietors; when they arise mostly on one side, they will belong to the riparian owners up to the middle of the stream. Bract. lib. 2, c. 2; Fleta, lib. 3, c. 2, s. 6; 2 Bl. 261; 1 Swift's Dig. 111; Schult. Aq. R. 117; Woolr. on Waters, 38; 4 Pick. R. 268; Dougl. R. 441; 10 Wend. 260; 14 S. & R. 1. For the law of of Louisiana, see Civil Code, art. 505-507. The doctrine of the common law on this subject, founded on reason, seems to have been borrowed from the civil law. Vide Inst. 2, 1, 22; Dig. 41, 1, 7; Code, 7, 41, 1.

ISSUE, *kindred.* This term is of very extensive import, in its most enlarged signification, and includes all persons who have descended from a common ancestor. 17 Ves. 481; 19 Ves. 547; 3 Ves. 257; 1 Rop. Leg. 88; and see Wilmot's Notes, 314, 321. But when this word is used in a will, in order to give effect to the testator's intention it will be construed in a more restricted sense than its legal import conveys. 7 Ves. 522; 19 Ves. 73; 1 Rop. Leg. 90. Vide Bac. Ab. Curtesy of England, D; 8 Com. Dig. 473; and article *Legatee*, II. § 4.

ISSUE, *pleading.* An issue is defined to be a single, certain, and material point, issuing out of the allegations or pleadings of the plaintiff or defendant. Co. Litt. 126, a; Bac. Abr. Pleas, G; though in common acceptance it signifies the entry of the pleadings. 1 Chit. Pl. 630. An issue should be upon a single and certain point, Com. Dig. Pleader, R 4; but it is not necessary that such point should consist of a single fact. 1 Burr. 316. And that point must be a material one. Com. Dig. Pleader, R 8. The issue also should not be on a negative pregnant, but it may be upon a disjunctive. Com. Dig. Pleader, R 7. There are several kinds of issues in pleading, which are enumerated below.

ISSUE IN FACT, *pleading*, takes place when the parties are at issue in their pleadings as to a matter of fact. This issue is to be tried by a jury. Issues in fact are general or special.

ISSUE IN LAW, *pleading*, takes place when one of the parties demurs to the pleadings of the other, and there is a joinder in the demurrer; in such case the facts being admitted, the court decide the law of the case, which is the matter in dispute between the parties.

ISSUE, SPECIAL, *pleading*. When the defendant takes issue upon any one substantial part of the declaration, and rests the weight of his cause upon it, he is said to take a special issue, in contradiction to the general issue, which denies and puts in issue the whole of the declaration. Com. Dig. Pleader, R 1, 2.

ISSUE, FEIGNED, *practice*. When in a court of equity any matter of fact is strongly contested, the court usually directs the matter to be tried by a jury, especially such important facts as the validity of a will, or whether A is the heir at law of B. But as no jury is summoned to attend this court, the fact is usually directed to be tried in a court of law upon a *feigned issue*. For this purpose an action is brought in which the plaintiff by a fiction declares that he laid a wager for a sum of money with the defendant, for example, that a certain paper is the last will and testament of A; then avers it is his will, and therefore demands the money; the defendant admits the wager but avers that it is not the will of A, and thereupon that issue is joined, which is directed out of chancery to be tried; and thus the verdict of the jurors at law determines the fact in the court of equity. These feigned issues are frequently used in the courts of law, by consent of the parties, to determine some disputed rights without the formality of pleading, and by this practice much time and expenses are saved in the decision of a cause. 3 Bl. Com. 452. The consent of the court must also be previously obtained, for the trial of a feigned issue; without such consent it is a contempt, which will authorise the court to order the proceeding to be stayed, 4 T. R. 402, and punish the parties engaged. See *Fictitious action*.

ISSUE, INFORMAL, *pleading*. An informal issue is where a material allegation is traversed in an improper or inartificial manner; and this and the other preceding mistakes are aided by verdict by the 32 Hen. 8, c. 30; Gilb. C. B. 147; 2 Saund. 319.

ISSUE, IMMATERIAL, *pleading*. An immaterial issue is where a material allegation in the pleadings is not traversed, but an issue is taken on some other point, which, though found by the verdict will not determine the merits of the cause, and would leave the court at a loss for which of the parties to give judgment. 2 Saund. 319, n. 6; Gilb. C. P. 147; 1 Lev. 32; Com. Dig. Pleader, R 18.

ISSUE, GENERAL, *pleading*. The general issue denies in direct terms the whole declaration; as in personal actions, where the defendant pleads *nil debet*, that he owes the plaintiff nothing; or *non culpabilis*, that he is not guilty of the facts alleged in the declaration; or in real actions, where the defendant pleads *nul tort*, no wrong done, or *nul disseisin*, no disseisin committed. These pleas and the like are called general issues because by importing an absolute and general denial of all the matters alleged in the declaration, they at once put them all in issue. Formerly the general issue was seldom pleaded, except where the defendant meant wholly to deny the charge alleged against him; for when he meant to avoid and justify the charge, it was usual for him to set forth the particular ground of his defence as a special

plea, which appears to have been necessary to apprize the court and the plaintiff of the particular nature and circumstances of the defendant's case, and was originally intended to keep the law and the fact distinct. And even now it is an invariable rule that every defence which cannot be specially pleaded, may be given in evidence at the trial upon the general issue, so the defendant is in many cases obliged to plead the particular circumstances of his defence specially, and cannot give them in evidence on that general plea. But the science of special pleading having been frequently perverted to the purposes of chicane and delay, the courts have in some instances, and the legislature in others, permitted the general issue to be pleaded, and special matter to be given in evidence under it at the trial, which at once includes the facts, the equity, and the law of the case. 3 Bl. Com. 305, 6,

ISSUES, *Eng. law.* The goods and profits of the lands of a defendant against whom a writ of *distringas* or *distress infinite* has been issued, taken by virtue of such writ, are called *issues.* 3 Bl. Com. 280; 1 Chit. Cr. Law, 351.

ISTHMUS. A tongue or strip of land between two seas. Glos. on Law, 37, book 2, tit. 3, Dig.

ITEM, also; likewise; in like manner; again; a second time. These are the various meanings of this Latin adverb. V. *Construction.* In law it is to be construed conjunctively, in the sense of *and*, or *also*, in such a manner as to connect sentences: if therefore a testator bequeath a legacy to Peter payable out of a particular fund, or charged upon a particular estate, *item* a legacy to James, James's legacy as well as Peter's will be a charge upon the same property. 1 Atk. 436; 3 Atk. 256; 1 Bro. C. C. 482; 1 Rolle's Ab. 844; 1 Mod. 100; Cro. Car. 368; Vaugh. 262; 2 Rop. on Leg. 349; 1 Salk. 234. Vide *Disjunctive.*

ITER. A foot way. Vide *Way.*

ITINERANT, travelling or taking a journey. In England there were formerly judges called *Justices itinerant*, who were sent with commissions into certain counties to try causes.

J.

JACTITATION OF MARRIAGE, *Eng. eccl. law*, is the boasting by an individual that he or she has married another, from which it may happen that they will acquire the reputation of being married to each other. The ecclesiastical courts may in such cases entertain a libel by the party injured; and, on proof of the facts, enjoin the wrongdoer to perpetual silence; and, as a punishment, make him pay the costs. 3 Bl. Com. 93; 2 Hagg. Cons. R. 423; Id. 285; 2 Chit. Pr. 459.

JAIL. A prison; a place appointed by law for the detention of prisoners. A jail is an inhabited dwelling-house within the statute of New York, which makes the malicious burning of an inhabited dwelling-house to be arson. 8 John. 115; see 4 Call, 109. Vide *Gaol; Prison.*

JEOFAILE, this is a law French phrase, which signifies, I am in an error; I have failed. There are certain statutes, called statutes of *amendment* and *jeofails*, because where a pleader perceives any slip in the form of his proceedings, and acknowledges the error, (jeofaile,) he

is at liberty by those statutes to amend it. The amendment, however, is seldom made, but the benefit is attained by the court's overlooking the exception. 3 Bl. Com. 407; 1 Saund. 228, n 1; Doct. Pl. 287; Dane's Ab. h. t.

JEOPARDY, peril, danger. This is the meaning attached to this word used in the act establishing and regulating the post office department. The words of the act are, "or if, in effecting such robbery of the mail the first time, the offender shall wound the person having the custody thereof, or put his life in jeopardy by the use of dangerous weapons, such offender shall suffer death." 3 Story's L. U. S. 1992. Vide Baldw. R. 93–95. The constitution declares that no person shall "for the same offence, be twice put in jeopardy of life and limb." The meaning of this is, that the party shall not be tried a second time for the same offence after he has once been convicted or acquitted of the offence charged, by the verdict of a jury, and judgment has passed thereon for or against him; but it does not mean that he shall not be tried for the offence, if the jury have been discharged from necessity or by consent, without giving any verdict; or, if having given a verdict, judgment has been arrested upon it, or a new trial has been granted in his favour; for, in such a case, his life and limb cannot judicially be said to have been put in jeopardy. 4 Wash. C. C. R. 410; 9 Wheat. R. 579; 6 Serg. & Rawle, 577; 3 Rawle, R. 498; 3 Story on the Const. § 1781. Vide 2 Sumn. R. 19. This great privilege is secured by the common law. Hawk. P. C., B. 2, c. 35; 4 Bl. Com. 335. This was the Roman law, from which it has been probably engrafted on the common law. Vide Merl. Rép. art. *Non bis in idem*. Qui de crimine publico accusationem deductus est, says the Code, 9, 2, 9, ab alio super eodem crimine deferri non potest. Vide article *Non bis in idem*.

JERGUER, *Engl. law*. An officer of the custom-house, who oversees the waiters. Techn. Dict. h. t.

JETTISON or JETSAM, is the casting out of a vessel, from necessity, a part of the lading; the thing cast out also bears the same name; it differs from flotsam in this, that in the latter the goods float, while in the former they sink, and remain under water; it differs also from ligan, (q. v.) The jettison must be made for sufficient cause, and not from groundless timidity. It must be made in a case of extremity, when the ship is in danger of perishing by the fury of a storm, or is labouring upon rocks or shallows, or is closely pursued by pirates or enemies. If the residue of the cargo be saved by such sacrifice, the property saved is bound to pay a proportion of the loss. In ascertaining such average loss, the goods lost and saved are both to be valued at the price they would have fetched at the place of delivery, on the ship's arrival there, freight, duties and other charges being deducted. Marsh. Ins. 546; 3 Kent, Com. 185 to 187; Park, Ins. 123; Poth. Charte-partie, n. 108, et suiv; Boulay-Paty, Dr. Com. tit. 13; Pardessus, Dr. Com. n. 734; 1 Ware's R. 9.

JOB. By this term is understood among workmen, the whole of a thing which is to be done. In this sense it is employed in the civil code of Louisiana, art. 2727, "to build by a plot, or to work by the job," says that article, "is to undertake a building for a certain stipulated price." See Durant. du Contr. de Louage, liv. 3, t. 8, n. 248, 263; Poth. Contr. de Louage, n. 393, 394; and *Deviation*.

JOBBER, *commerce*. One who

buys and sells articles for others. Stock-jobbers are those who buy and sell stocks for others; this term is also applied to those who speculate in stocks on their own account.

JOCALIA, jewels; this term was formerly more properly applied to those ornaments which women, although married, call their own. When these *jocalia* are not suitable to her degree, they are assets for the payment of debts. 1 Roll. Ab. 911. Vide *Paraphernalia.*

JOINDER OF ACTIONS, *practice.* The putting two or more causes of action in the same declaration. It is a general rule, that in real actions there never can be but one count. 8 Co. 86, 87; Bac. Ab. Action, C; Com. Dig. Action, G. A count in a real, and a count in a mixed action, cannot be joined in the same declaration; nor a count in a mixed action, and a count in a personal action; nor a count in a mixed action with a count in another, as ejectment and trespass.

In mixed actions, there may be two counts in the same declaration; for example, waste lies upon several leases, and ejectment upon several demises and ousters. 8 Co. 87 b; Poph. 24; Cro. Eliz. 290; Ow. 11.

In personal actions, the use of several counts in the same declaration is quite common. Sometimes they are applied to distinct causes of actions, as upon several promissory notes; but it more frequently happens otherwise, that when various counts are introduced, they do not really relate to different claims, but are adopted merely as so many different forms of propounding the same question. The joinder in action depends on the *form* of action, rather than on the subject-matter of it; in an action against a carrier, for example, if the plaintiff declare in assumpsit, he cannot join a count in trover, as he may if he declare against him in case. 1 T. R. 277; but see 2 Caines's R. 216; 3 East, R. 70. The rule as to joinder is, that when the same plea may be pleaded, and the same judgment given on all the counts of the declaration, or when the counts are all of the same nature, and the same judgment is to be given upon them all, though the pleas be different, as in the case of debt upon bond and simple contract, they may be joined. 2 Saund. 117, c. When the same form of action may be adopted, the plaintiff may join as many causes of action as he may choose, though he acquired the rights affected by different titles; but the rights of the plaintiffs, and the liabilities of the defendant, must be in his own character, or in his representative capacity, exclusively. A plaintiff cannot sue, therefore, for a cause of action in his own *right*, and another cause in his character as *executor*, and join them; nor can he sue the defendant for a debt due by himself, and another due by him as executor.

In criminal cases, different offences may be joined in the same indictment, if of the same nature, but an indictment may be quashed, at the discretion of the court, when the counts are joined in such a manner as will confound the evidence. 1 Chit. Cr. Law, 253-255. In Pennsylvania it has been decided that when a defendant was indicted at one session of the court for a conspiracy with another to cheat a third person, and at another sessions of the same court he was indicted for another conspiracy to cheat another person, the two bills might be tried, by the same jury, against the will of the defendant, provided he was not thereby deprived of any material right, as the right to challenge; whether he should be so tried or not seems to be a matter of discretion with the court. 5 S. & R. 59; 12 S. & R. 69. Vide *Separate Trial.*

Vide generally, 2 Saund. 117, b. to 117, c.; Com. Dig. Action, G; 2 Vin. Ab. 38; Bac. Ab. Actions in General, C; 13 John. R. 462; 10 John. R. 240; 11 John. R. 479; 1 John. R. 503; 3 Binn. 555; 1 Chit. Pl. 196 to 205; Arch. Civ. Pl. 172 to 176; Steph. Pl. Index, h. t.; Dane's Ab. h. t.

JOINDER IN DEMURRER.—When a demurrer is offered by one party, the adverse party joins with him in demurrer, and the answer which he makes is called a joinder in demurrer. Co. Litt. 71 b.

JOINDER OF ISSUE, *pleading*, is the act by which the parties to a cause, arrive at that stage of it in their pleadings, that one asserts a fact to be so, and the other denies it. For example, when one party denies the fact pleaded by his antagonist, who has tendered the issue thus, "And this he prays may be inquired of by the country," or "And of this he puts himself upon the country," the party denying the fact may immediately subjoin, "And the said A B, does the like;" when the issue is said to be joined.

JOINT EXECUTORS. It is proposed to consider, 1, the interest which they have in the estate of the deceased; 2, how far they are liable for each other's acts; 3, the rights of the survivor.

§ 1. Joint executors are considered in law as but one person, representing the testator, and therefore the acts of any one of them which relate either to the delivery, gift, sale, payment, possession or release of the testator's goods, are deemed, as regards the persons with whom they contract, the acts of all. Bac. Abr. h. t.; 11 Vin. Abr. 358; Com. Dig. Administration, B 12; 1 Dane's Abr. 583; 2 Litt. (Kentucky) R. 315; Godolph. 314; Dyer, 23, in marg.; 16 Serg. & Rawle, 337.

§ 2. As a general rule, it may be laid down that each executor is liable for his own wrong, or *devastavit* only, and not for that of his colleague. He may be rendered liable, however, for the misplaced confidence which he may have reposed in his co-executor. As if he signs a receipt for money, in conjunction with another executor, and he receives no part of the money, but agrees that the other executor shall retain it, and apply it to his own use, this is his own misapplication, for which he is responsible. 1 P. Wms. 241, n. 1; 1 Sch. & Lef. 341; 2 Sch. & Lef. 231; 7 East, R. 256; 11 John. R. 16; 11 Serg. & Rawle, 71; Hardr. 314; 5 Johns. Ch. R. 283; and see 2 Bro. C. C. 116; 3 Bro. C. C. 112; 2 Penna. R. 421; Fonb. Eq. B. 2, c. 7, s. 5, n. (k).

§ 3. Upon the death of one of several joint executors, the right of administering the estate of the testator, devolves upon the survivor. 3 Atk. 509; Com. Dig. Administration, B 12; Hamm. on Parties, 148.

In Pennsylvania, by legislative enactment, it is provided, "that when testators may devise their estates to their executors to be sold, or direct such executors to sell and convey such estates, or direct such real estate to be sold, without naming or declaring who shall sell the same, if one or more of the executors die, it shall or may be lawful for the surviving executor to bring actions for the recovery of the possession thereof, and against trespassers thereon; to sell and convey such real estates, or manage the same for the benefit of the persons interested therein. Act of 12th of March, 1800, 3 Sm. L. 433.

JOINT STOCK BANKS, *in England*, are a species of *quasi corporations*, or companies regulated by deeds of settlement; and, in this respect, they stand in the same situation as other unincorporated bodies. But they differ from the latter in this,

that they are invested by certain statutes with power and privileges usually incident to corporations. These enactments provide for the continuance of the partnership notwithstanding a change of partners. The death, bankruptcy, or the sale by a partner of his share, do not affect the identity of the partnership, it continues the same body, under the same name, by virtue of the act of parliament, notwithstanding these changes. 7 Geo. 4, c. 46, s. 9.

JOINT TENANTS, *estates*, are two or more persons to whom are granted lands or tenements to hold in fee simple, fee tail, for life, for years, or at will. 2 Black. Com. 179. The estate which they thus hold is called an estate in joint tenancy. Vide *Estate in joint tenancy; Jus accrescendi; Survivor.*

JOINT TRUSTEES, two or more persons who are entrusted with the performance of a thing. Unlike joint executors, joint trustees cannot act separately, but must join both in conveyances and receipts, for one cannot sell without the others, or receive more of the consideration-money or be more a trustee than his partner. The trust having been given to the whole, it requires their joint act to do any thing under it. They are not responsible for money received by their co-trustees, if the receipt be given for the mere purposes of form. But if receipts be given under circumstances purporting that the money though not received by both was under the control of both, such a receipt shall charge, and the consent that the other shall misapply the money, particularly where he has it in his power to secure it, renders him responsible. 11 Serg. & Rawle, 71. See 1 Sch. & Lef. 341; 5 Johns. Ch. R. 283; Fonbl. Eq. B. 2, c. 7, s. 5; Bac. Abr. Uses and Trusts, K; 2 Bro. Ch. R. 116; 3 Bro. Ch. R. 112. In the case of the Attorney-General v. Randall, a different doctrine was held. Ib. pl. 9.

JOINTRESS or JOINTURESS. A woman who has an estate settled on her by her husband, to hold during her life, if she survive him. Co. Litt. 46.

JOINTURE, *estates*, is a competent livelihood of freehold for the wife, of lands and tenements; to take effect in profit or possession, presently after the death of the husband, for the life of the wife at least. Jointures are regulated by the statute of 27 Hen. 8, c. 10, commonly called the statute of *uses*. To make a good jointure, it must be attended with the following circumstances; namely, 1, it must take effect, in possession or profit, immediately from the death of the husband; 2, it must be for the wife's life, or for some greater estate; 3, it must be limited to the wife herself, and not to any other person in trust for her; 4, it must be made in satisfaction for the wife's whole dower, and not of part of it only; 5, the estate limited to the wife must be expressed or averred to be, in satisfaction of her whole dower; 6, it must be made before marriage. A jointure attended with all these circumstances is binding on the widow, and is a complete bar to the claim of dower; or rather it prevents its ever arising. But there are other modes of limiting an estate to a wife, which Lord Coke says are good jointures within the statute, provided the wife accepts of them after the death of the husband. She may, however, reject them, and claim her dower. Cruise, Dig. tit. 7; 2 Bl. Com. 137; Perk. h. t. In its more enlarged sense, a jointure signifies a joint estate, limited to both husband and wife. 2 Bl. Com. 137. Vide 14 Vin. Ab. 540; Bac. Ab. h. t.

JOUR. This is a French word signifying day. It is used in our

old law books, as *tout jours*, forever. It is also frequently employed in the composition of words, as, *journal*, a day-book; *journeyman*, a man who works by the day; *journey's account*, (q. v.)

JOURNAL, *mar. law*, is the book kept on board of a ship or other vessel, and which contains an account of the ship's course, with a short history of every occurrence during the voyage. Another name for Log Book, (q. v.) Chit. Law of Nat. 199.

JOURNAL, *comm. law*, is a book used among merchants in which the contents of the waste book are separated every month, and entered on the debtor and creditor side, for more convenient posting in the ledger.

JOURNAL, *legislation*, is an account of the proceedings of a legislative body. The constitution of the United States, art. 1, s. 5, directs that "each house shall keep a journal of its proceedings; and from time to time publish the same, excepting such parts as may in their judgment require secrecy." Vide 2 Story, Const. 301. The constitutions of the several states contain similar provisions. The journal of either house is evidence of the action of that house upon all matters before it. 7 Cowen, R. 613; Cowp. 17.

JOURNEYS ACCOUNT, *Eng. practice*. When a writ abated without any fault of the plaintiff, he was permitted to sue out a new writ, within as little time as he possibly could after abatement of the first writ, which was *quasi* a continuance of the first writ, and placed him in a situation in which he would have been, supposing he had still proceeded on that writ. This was called *journeys account*. This mode of proceeding has fallen into disuse, the practice now being to permit that writ to be quashed, and to sue out another. Vide Termes de la Ley, h. t.; Bac. Ab. Abatement, Q; 14 Vin. Ab. 558; 4 Com. Dig. 714.

JUDGE. A public officer lawfully appointed to decide litigated questions according to law. This, in its most extensive sense, includes all officers who are appointed to decide such questions, and not only judges properly so called, but also justices of the peace, and jurors who are judges of the facts in issue. See 4 Dall. 229; 3 Yeates, R. 300. In a more limited sense, the term judge signifies an officer who is so named in his commission, and who presides in some court.

Judges are appointed or elected in a variety of ways in the United States; they are appointed by the president by and with the consent of the senate; in some of the states they are appointed by the governor; the governor and senate, or by the legislature. In the United States and some of the states, they hold their offices during good behaviour; in others, as in New York, during good behaviour or until they shall attain a certain age; and in others for a limited term of years.

Impartiality is the first duty of a judge; before he gives an opinion or sits in judgment in a cause, he ought to be certain he has no bias for or against either of the parties; and if he has any the slightest interest in the cause he is disqualified from sitting as judge; *aliquis non debet esse judex in propria causa*; 8 Co. 118; 21 Pick. Rep. 101; 5 Mass. 92; 13 Mass. 340; 6 Pick. R. 109; and when he is aware of such interest he ought himself to refuse to sit on the case. It seems it is discretionary with him whether he will sit in a cause in which he has been of counsel. 2 Marsh. 517; Cooke, 164; see 2 Binn. 454; but the delicacy which characterizes the judges in this country generally forbids their sitting in such a cause. He must not

only be impartial, but he must pay a blind obedience to the law, whether good or bad. He is bound to declare what the law is, and not to make it; he is not an arbitrator, but an interpreter of the law. It is his duty to be patient in the investigation of the case, learned in considering it, and firm in his judgment. He ought, according to Cicero, "never to lose sight that he is a man, and that he cannot exceed the power given him by his commission; that not only power but public confidence has been given to him; that he ought always seriously to attend not to his wishes but to the requisitions of the law, of justice and religion." Cic. pro Cluentius.

While acting within the bounds of his jurisdiction, the judge is not responsible for any error of judgment or mistake he may commit as a judge. Co. Litt. 294; 2 Inst. 422; 2 Dall. R. 160; 1 Yeates, R. 443; 2 N. & McC. 168; 1 Day, R. 315; 1 Root, R. 211; 3 Caines, R. 170; 5 John. R. 282; 9 John. R. 395; 11 John. R. 150; 3 Marsh. R. 76; 1 South. R. 74; 1 N. H. Rep. 374; 2 Bay, 1, 69; 8 Wend. 468; 3 Marsh. R. 76; when he acts corruptly, he may be impeached. 5 John. R. 282; 8 Cowen, R. 178; 4 Dall. R. 225.

Vide Com. Dig. Courts, B 4, C 2, E 1, P 16—Justices, I 1, 2, and 3; 14 Vin. Ab. 573; Bac. Ab. Courts, &c. B; 1 Kent, Com. 291; Ayl. Parerg. 309; Story, Const. Index, h. t. See U. S. Dig. Courts, I, where will be found an abstract of various decisions relating to the appointment and powers of judges in different states. Vide *Equality; Incompetency.*

JUDGE ADVOCATE, is an officer who is a member of a court martial. His duties are to prosecute in the name of the United States, but he shall so far consider himself as counsel for the prisoner, after the prisoner shall have made his plea, as to object to leading questions to any of the witnesses, or any question to the prisoner, the answer to which might tend to criminate himself. He is further to swear the members of the court before they proceed upon any trial. Rules and Articles of War, art. 69, 2 Story, L. U. S. 1001.

JUDGMENT, *practice*, is the decision or sentence of the law, given by a court of justice or other competent tribunal, as the result of proceedings instituted therein, for the redress of an injury. The language of judgments, therefore, is not that "it is decreed," or "resolved," by the court; but "it is considered," (consideratum est per curiam) that the plaintiff recover his debt, damages, possession, and the like, or that the defendant do go quit. This implies that the judgment is not so much the decision of the court, as the sentence of the law pronounced and decreed by the court, after due deliberation and inquiry. There are four kinds of judgments in civil cases, namely: 1. When the facts are admitted by the parties, but the law is disputed; as in case of judgment upon demurrer. 2. When the law is admitted, but the facts are disputed; as in case of judgment upon a verdict. 3. When both the law and the facts are admitted by confession; as in the case of cognovit actionem, on the part of the defendant; or nolle prosequi, on the part of the plaintiff. 4. By default of either party in the course of legal proceedings, as in the case of judgment by nihil dicit, or non sum informatus, when the defendant has omitted to plead or instruct his attorney to do so, after a proper notice; or in cases of judgment by non-pros, non-suit, or, as in case of non-suit, when the plaintiff omits to follow up his proceedings. These four species of judgments, again, are either interlocutory

or final. Vide 3 Black. Com. 396; Bingh. on Judgm. 1. For the lien of judgments in the several states, vide *Lien*.

JUDGMENT, ARREST OF, *practice*; this takes place when the court withhold judgment from the plaintiff on the ground that there is some error appearing on the face of the record, which vitiates the proceedings. In consequence of such error, on whatever part of the record it may arise, from the commencement of the suit to the time when the motion in arrest of judgment is made, the court are bound to arrest the judgment. It is, however, only with respect to objections apparent on the record, that such motions can be made. They cannot, in general, be made in respect to formal objections. This was formerly otherwise, and judgments were constantly arrested for matters of mere form. 3 Bl. Com. 407; 2 Reeves, 448; but this abuse has been long remedied by certain statutes passed at different periods, called the statutes of amendment and jeofails, by the effect of which, judgments, in the present day, cannot, in general, be arrested for any objection of form. Steph. Pl. 117; see 3 Bl. Com. 393; 21 Vin. Ab. 457; 1 Sell. Pr. 496.

JUDGMENT, IN ASSUMPSIT, when in favour of the plaintiff, is that he recover a specified sum, assessed by a jury, or on reference to the prothonotary, or other proper officer, for the damages which he has sustained, by reason of the defendant's non-performance of his promises and undertakings, and for full costs of suit. 1 Chitty's Pl. 100. When the judgment is for the defendant, it is that he recover his costs.

JUDGMENT, IN ACTIONS ON THE CASE FOR TORTS, when for the plaintiff, is that he recover a sum of money ascertained by a jury, for his damages occasioned by the committing of the grievances complained of, and the costs of suit. 1 Ch. Pl. 147. When for the defendant, it is for costs.

JUDGMENT OF CASSETUR BREVE OR BILLA, *practice*, is in cases of pleas in abatement where the plaintiff prays that his "writ" or "bill" "may be quashed, that he may sue or exhibit a better one." Steph. Pl. 130, 131, 128; Lawes, Civ. Pl.

JUDGMENT BY CONFESSION, *practice*. When instead of entering a plea, the defendant chooses to confess the action; or, after pleading, he does, at any time before trial, both confess the action and withdraw his plea or other allegations; the judgment against him, in these two cases, is called a judgment by *confession* or *by confession relictâ verificatione*. Steph. Pl. 130.

JUDGMENT, CONRADICTORY. By this term is understood, in the state of Louisiana, a judgment which has been given after the parties have been heard, either in support of their claims, or in their defence. Code of Pract. art. 535; 11 L. R. 366, 569. A judgment is called contradictory to distinguish it from one which is rendered by default.

JUDGMENT IN COVENANT, when for the plaintiff, is that he recover an ascertained sum for his damages, which he has sustained by reason of the breach or breaches of the defendant's covenant, together with costs of suit. 1 Chitty's Plead. 116, 117. When for the defendant, the judgment is for costs.

JUDGMENT, IN DEBT, when for the plaintiff, is that he recover his debt, and, in general, nominal damages for the detention thereof; and in cases under the 8 and 9 Wm. III. c. 11, it is also awarded, that the plaintiff have execution for the damages sustained by the breach of

a bond, conditioned for the performance of covenants; and that plaintiff recover full costs of suit. 1 Chitty's Pl. 108, 9. In some penal and other particular actions the plaintiff does not, however, always recover costs. Espinasse on Pen. Act. 154; Hull. on Costs, 200; Bull. N. P. 333; 5 Johns. R. 251. When the judgment is for the defendant, it is generally for costs. In some penal actions however, neither party can recover costs. 5 Johns. R. 251.

JUDGMENT BY DEFAULT, *practice*, is a judgment rendered in consequence of the non-appearance of the defendant, and is either by *nil dicit*, vide *Judgment by nil dicit*, or by *non sum informatus*, vide *Judgment by non sum informatus*. This judgment is interlocutory in assumpsit, covenant, trespass, case, and replevin, where the sole object of the action is damages; but in debt, damages not being the principal object of the action, the plaintiff usually signs final judgment in the first instance. Vide Com. Dig. Pleader, B 11 and 12—E 42; 7 Vin. Ab. 429; Doct. Pl. 208; Grah. Pr. 631; Dane's Ab. Index, h. t.; 3 Chit. Pr. 671 to 680; Tidd's Pr. 563; 1 Lilly's Reg. 585; and article *Default*.

JUDGMENT, IN DETINUE, when for the plaintiff, is in the alternative, that he recover the goods, or the value thereof, if he cannot have the goods themselves, and his damage for the detention and costs. 1 Ch. Pl. 121, 2; 1 Dall. R. 458.

JUDGMENT IN ERROR, *practice*, is a judgment rendered by a court of error, on a record sent up from an inferior court. These judgments are of two kinds, of affirmance and reversal.—1. When the judgment is for the defendant in error, whether the errors assigned be in law or in fact, it is "that the former judgment be affirmed, and stand in full force and effect, the said causes and matters assigned for error notwithstanding, and that the defendant in error recover $ — for his damages, charges and costs which he hath sustained," &c. 2 Tidd's Pr. 1126; Arch. Forms, 221. —When it is for the plaintiff in error, the judgment is that it be reversed or recalled. It is to be *reversed* for error in law, in this form, that it "be reversed, annulled and altogether holden for nought." Arch. Forms, 224. For error in fact the judgment is *recalled, revocatur*. 2 Tidd, Pr. 1126.

JUDGMENT, FINAL, *practice*. A final judgment is one which puts an end to the suit. When the issue is one in *fact*, and is tried by a jury, the jury at the time that they try the issue, assess the damages, and the judgment is final in the first instance, and is *that the plaintiff do recover the damages assessed*. When an interlocutory judgment has been rendered, and a writ of inquiry has issued to ascertain the damages, on the return of the inquisition the plaintiff is entitled to a final judgment, namely, *that he recover the amount of damages so assessed*. Steph. Pl. 127, 128.

JUDGMENT, INTERLOCUTORY, *practice*. When the action sounds in damages, and the issue is an issue in law, or when any issue in fact not tried by a jury is decided in favour of the plaintiff, then the judgment is that the plaintiff ought to recover his damages without specifying their amount; for, as there has been no trial by jury in the case, the amount of damages is not yet ascertained. The judgment is then said to be interlocutory. To ascertain such damages it is the practice to issue a writ of inquiry. Steph. Pl. 127; when the action is founded on a promissory note, bond, or other

writing, or any other contract by which the amount due may be readily computed, the practice is, in some courts, to refer to the prothonotary or clerk to assess the damages. There is one species of interlocutory judgment which establishes nothing but the inadequacy of the defence set up; this is the judgment for the plaintiff on demurrer to a plea in abatement, by which it appears that the defendant has mistaken the law on a point which does not affect the merits of his case; and it being but reasonable that he should offer, if he can, a further defence, that judgment is that he do answer over, in technical language, judgment of respondeat ouster, (q. v.) Steph. Plead. 126; Bac. Ab. Pleas, N 4; 2 Arch. Pr. 3.

JUDGMENT OF NIL CAPIAT PER BREVE, OR PER BILLAM, *practice.* When an issue arises upon a declaration or peremptory plea, and it is decided in favour of the defendant, the judgment is, in general, *that the plaintiff take nothing by his writ, (or bill,) and that the defendant go thereof without day*, &c. This is called a judgment of *nil capiat per breve*, or *per billam*. Steph. Pl. 128.

JUDGMENT BY NIL DICIT, *practice*, is one rendered against a defendant for want of a plea. The plaintiff obtains a rule on the defendant to plead within a time specified, of which he serves a notice on the defendant or his attorney; if the defendant neglect to enter a plea within the time specified, the plaintiff may sign judgment against him.

JUDGMENT OF NOLLE PROSEQUI, *practice*, is a judgment entered against the plaintiff, where after appearance and before judgment he says, "he will not further prosecute his suit." Steph. Pl. 130; Lawes Civ. Pl. 166.

JUDGMENT NON OBSTANTE VEREDICTO, *practice*, is a judgment rendered in favour of the plaintiff, *without regard to the verdict* obtained by the defendant. The motion for such judgment is made where after a pleading by the defendant in confession and avoidance, as, for example, a plea in bar, and issue joined thereon, and verdict found for the defendant, the plaintiff on retrospective examination of the record, conceives that such plea was bad in substance, and might have been made the subject of demurrer on that ground. If the plea was itself substantially bad in law, of course the verdict, which merely shows it to be true in point of fact, cannot avail to entitle the defendant to judgment; while on the other hand the plea being in confession and avoidance, involves a confession of the plaintiff's declaration, and shows that he was entitled to maintain his action. In such case, therefore, the court will give judgment for the plaintiff, *without regard to the verdict;* and this, for the reasons above explained, is called a judgment *upon confession*. Sometimes it may be expedient for the plaintiff to move for judgment non obstante, &c. even though the verdict be in his own favour; for if in such case as above described, he takes judgment as *upon the verdict*, it seems that such judgment would be erroneous, and that the only safe course is to take it *as upon confession*. 1 Wils. 63; Cro. Eliz. 778; 2 Roll. Ab. 99. See also Cro. Eliz. 214; 6 Mod. 10; Str. 394; 1 Ld. Raym. 641; 8 Taunt. 413; Rast. Ent. 622; 1 Wend. 307; 2 Wend. 624; 5 Wend. 513; 4 Wend. 468; 6 Cowen, R. 225. See this Dict. *Repleader*, for the difference between a repleader and a judgment non obstante veredicto.

JUDGMENT BY NON SUM INFORMATUS, *practice*, is one

which is rendered, when instead of entering a plea, the defendant's attorney says he is not informed of any answer to be given to the action. Steph. Pl. 130.

JUDGMENT OF NON PROS, (from non prosequitur,) *practice*, is one given against the plaintiff, in any class of actions, for not declaring, or replying, or surrejoining, &c. or for not entering the issue.

JUDGMENT OF NONSUIT, *practice*, is one against the plaintiff, which happens when, on trial by jury, the plaintiff, on being called or demanded, at the instance of the defendant, to be present while the jury give their verdict, fails to make his appearance. In this case no verdict is given, but the judgment of *non suit* passes against the plaintiff. So if after issue is joined, the plaintiff neglects to bring such issue on to be tried in due time, as limited by the practice of the court, in the particular case, judgment will be also given against him for this default; and it is called judgment *as in case of non-suit*. Steph. Pl. 131. After suffering a non-suit the plaintiff may commence another action for the same cause for which the first had been instituted. In some cases, plaintiffs having obtained information in what manner the jury had agreed upon their verdict before it was delivered in court, have, when the jury were ready to give in such verdict against them, suffered a non-suit for the purpose of commencing another action and obtaining another trial. To prevent this abuse the legislature of Pennsylvania have provided by the act of the 28th of March, 1814, 6 Reed's L. 208, that "whenever on the trial of any cause, the jury shall be ready to give in their verdict, the plaintiff shall not be called, nor shall he then be permitted to suffer a non-suit."

JUDGMENT QUOD COMPUTET. The name of an interlocutory judgment is an action of account render that the defendant *do account*, quod *computet*. Vide 4 Wash. C. C. R. 84; 2 Watts, R. 95; 1 Penn. R. 138.

JUDGMENT QUOD RECUPERET, *practice*. When an issue in *law*, other than one arising on a dilatory plea, or an issue in *fact*, is decided in favour of the plaintiff, the judgment is *that the plaintiff do recover*, which is called a judgment *quod recuperet*. Steph. Pl. 126; Com. Dig. Abatement, I 14, I 15; 2 Arch. Pr. 3. This judgment is of two kinds, namely, interlocutory or final.

JUDGMENT, IN REPLEVIN, is either for the plaintiff or defendant.

§ 1. For the plaintiff. 1. When the declaration is in the *detinuit*, that is, where the plaintiff declares, that the chattels "were detained until replevied by the sheriff," the judgment is that he recover the damages assessed by the jury for the taking and unjust detention, or for the latter only, where the former was justifiable, as also his costs. 5 Serg. & Rawle, 133; Ham. N. P. 488.

2. If the replevin is in the *detinet*, that is, where the plaintiff declares, that the chattels taken are "yet detained," the jury must find, in addition to the above, the value of the chattels, (assuming that they are still detained) not in a gross sum, but each separate article; for the defendant perhaps will restore some, in which case the plaintiff is to recover the value of the remainder. Ham. N. P. 489; Fitz. N. B. 159, b; 5 Serg. & Rawle, 130.

§ 2. For the defendant. 1. If the replevin is *abated*, the judgment is, that the writ or plaint abate, and that the defendant (having avowed) have a return of the chattels.

2. When the plaintiff is *nonsuited*, the judgment for the defendant, at common law, is, that the chattels be restored to him, and this, without his first assigning the purpose for which they were taken, because by abandoning his suit, the plaintiff admits that he had no right to dispossess the defendant by prosecuting the replevin. The form of this judgment is simply "to have a return," without adding the words "to hold irreprevisable." Ham. N. P. 490. As to the form of judgments in cases of non-suit under the 21 Hen. 8, c. 19, and 17 Car. 2, c. 7, see Ham. N. P. 490, 491; 2 Ch. Plead. 161; 8 Wentw. Pl. 116; 5 Serg. & Rawle, 132; 1 Saund. 195, n. 3; 2 Saund. 286, n. 5. It is still in the defendant's option, in these cases, to take his judgment *pro retorno habendo* at common law. 5 Serg. & Rawle, 132; 1 Lev. 255; 3 T. R. 349.

3. When the avowant succeeds upon the merits of his case, the common law judgment is, that he "have returnable irreprevisable," for it is apparent that he is by law entitled to keep possession of the goods. 5 Serg. & Rawle, 135; Ham. N. P. 493; 1 Chit. Pl. 162. For the form of judgments in favour of the avowant, under the last mentioned statutes, see Ham. N. P. 494, 5.

JUDGMENT OF RESPONDEAT OUSTER, *practice*. When there is an issue in law, arising on *dilatory plea*, and it is decided in favour of the plaintiff, the judgment is only that the defendant answer over, which is called a judgment of *respondeat ouster*. The pleading is accordingly resumed, and the action proceeds. Steph. Pl. 126; see Bac. Abr. Pleas, N 4; 2 Arch. Pr. 3.

JUDGMENT OF RETRAXIT, *practice*, is one where after appearance and before judgment, the plaintiff enters upon the record that he "withdraws his suit;" in such case judgment is given against him. Steph. Pl. 130.

JUDGMENT, IN TRESPASS, when for the plaintiff, is that he recover the damages assessed by the jury, and the costs. For the defendant that he recover the costs.

JUDGMENT, IN TROVER, when for the plaintiff, is that he recover damages and costs. 1 Ch. Pl. 157. For the defendant, the judgment is, that he recover his costs.

JUDICATURE, is the state of those employed in the administration of justice, and in this sense it is nearly synonymous with judiciary. This term is also used to signify a tribunal; and sometimes it is employed to show the extent of jurisdiction, as, the judicature is upon writs of error, &c. Com. Dig. Parliament, L 1; and see Com. Dig. Courts, A.

JUDICIAL, belonging or emanating from a judge as such. Judicial sales, are such as are ordered by virtue of the process of courts. 1 Supp. to Ves. jr. 129, 160; 2 Ves. jr. 50. A judicial writ is one issued in the progress of the cause, in contradistinction to an original writ. 3 Bl. Com. 282. Judicial decisions, are the opinions or determinations of the judges in causes before them. Hale, H. C. L. 68; Willes's R. 666; 3 Barn. & Ald. 122; 4 Barn. & Adol. 207; 1 H. Bl. 63; 5 M. & S. 185. Judicial power, the authority vested in the judges. The constitution of the United States declares, that "the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the congress may from time to time ordain and establish." Art. 3, s. 1. By the constitutions of the several states, the judicial power is vested in such courts as are enumerated in each respectively. *See the names of the several states.* There is nothing in the constitution of the United States

to forbid or prevent the legislature of a state from exercising judicial functions. 2 Pet. R. 413; and judicial acts have occasionally been performed by the legislatures. 2 Root, R. 350; 3 Greenl. R. 334; 3 Dall. R. 386; 2 Pet. R. 660; 16 Mass. R. 328; Walk. R. 258; 1 New H. Rep. 199; 10 Yerg. R. 59; 4 Greenl. R. 140; 2 Chip. R. 77; 1 Aik. R. 314. But a state legislature cannot annul the judgments, nor determine the jurisdiction of the courts of the United States, 5 Cranch. R. 115; 2 Dall. R. 410; nor authoritatively declare what the law is, or has been, but what it shall be. 2 Cranch, R. 272; 4 Pick. R. 23. Vide Ayl. Parerg. 27; 3 M. R. 248; 4 M. R. 451; 9 M. R. 325; 6 M. R. 668; 12 M. R. 349; 3 N. S. 551; 5 N. S. 519; 1 L. R. 438; 7 M. R. 325; 9 M. R. 204; 10 M. R. 1.

JUDICIAL MORTGAGE. In Louisiana, is the lien resulting from judgments, whether these be rendered on contested cases, or by default, whether they be final or provisional, in favour of the person obtaining them. Civ. Code of Lo. art. 3289.

JUDICIAL SALE, is a sale made by authority of some competent tribunal, by an officer authorised by law for the purpose. The officer who makes the sale, conveys all the rights of the defendant, or other person against whom the process has been issued, in the property sold. Under such a sale there is no warranty, either express or implied, of the thing sold. 9 Wheat. 616. When real estate is sold by the sheriff or marshal, the sale is subject to the confirmation of the court, or it may be set aside. See 4 Wash. C. C. R. 45; Wallace, 128; 4 Wash. C. C. R. 322.

JUDICIAL WRITS, *Eng. practice.* The capias and all other subsequent writs to the original writ, not issuing out of chancery, but from the court into which the original was returnable, and being grounded on what had passed in that court in consequence of the sheriff's return, were called *judicial* writs, in contradistinction to the writs issued out of chancery, which were called *original* writs. 3 Bl. Com. 282.

JUDICIARY. What is done while administering justice; the judges taken collectively, as, the liberties of the people are secured by a wise and independent judiciary. See *Courts*, and 3 Story, Const. B. 3, c. 38.

JUDICIUM DEI. The judgment of God. The English law formerly impiously called the judgments on trials by ordeal, by battle, and the like, the judgments of God.

JUNIOR, younger. This has been held to be no part of a man's name, but an addition by use, and a convenient distinction between a father and son of the same name. 10 Mass. R. 203; 1 Pick. R. 388; 7 John. R. 549; 2 Caines, 164.

JUNIPERUS SABINA, *med. jur.* This plant is commonly called savine. It is used for lawful purposes in medicine, but too frequently for the criminal intent of producing abortion, generally endangering the life of the woman. It is usually administered in powder or oil. The dose of oil for lawful purposes for a grown person is from two to four drops. Parr's Med. Dictionary, article Sabina. Foderé mentions a case where a large dose of powdered savine had been administered to an ignorant girl, in the seventh month of her pregnancy, which had no effect on the fœtus. It was, however, near taking the life of the girl. Foderé, tome iv. p. 431. Given in sufficiently large doses, 4 or 6 grains in the form of powder, kills a dog in a few hours, and even its insertion in a wound has the same effect. Orfila, Traité des Poisons, tome iii. p. 42. For a form of in-

dictment for administering savine to a woman quick with child, see 3 Chit. Cr. Law, 798. Vide 1 Beck's Med. Jur. 316.

JURAMENTUM JUDICIALE, a term in the civil law. The oath called *juramentum judiciale* is that which the judge, of his own accord, defers to either of the parties. It is of two kinds, 1st, That which the judge defers for the decision of the cause, and which is understood by the general name *juramentum judiciale*, and is sometimes called suppletory oath, *juramentum suppletorium*. 2d. That which the judge defers in order to fix and determine the amount of the condemnation which he ought to pronounce, and which is called *juramentum in litem*. Poth. on Oblig. P. 4, c. 3, s. 3, art. 3.

JURAT, *practice*. That part of an affidavit where the officer certifies that the same was "sworn" before him. The jurat is usually in the following form, namely: "Sworn and subscribed before me on the —— day of ——, 1842, J. P. justice of the peace." In some cases it has been holden that it was essential that the officer should sign the jurat, and that it should contain his addition and official description. 3 Caines, 128; but see 6 Wend. 543; 12 Wend. 223; 2 Cowen, 552; 2 Wend. 283; 2 John. 479; Harr. Dig. h. t.; Am. Eq. Dig. h. t.

JURATA, is a certificate placed at the bottom of an affidavit, declaring that the witness has been sworn or affirmed to the truth of the facts therein alleged. Its usual form is "sworn (or affirmed) before me, the —— day of ——, 18—." The *Jurat*, (q. v.)

JURATS, *officers*, in some English corporations, jurats are officers who have much the same power as aldermen in others. Stat. 1 Ed. 4; stat. 2 & 3 Ed. 6, c. 30; 13 Ed. 1, c. 26.

JURIDICAL. Signifies regular, done in conformity to the laws of the country, and the practice which is there observed.

JURIDICAL DAYS, dies juridici. Days in court on which the law is administered.

JURISCONSULT, is one well versed in jurisprudence, a jurist; one whose profession it is to give counsel on questions of law.

JURISDICTION, *practice*, is a power constitutionally conferred upon a judge or magistrate to take cognizance of and decide causes according to law, and to carry his sentence into execution. The tract of land or district within which a judge or magistrate has jurisdiction, is called his territory, and his power in relation to his territory is called his territorial jurisdiction. Every act of jurisdiction exercised by a judge without his territory, either by pronouncing sentence or carrying it into execution, is null. An inferior court has no jurisdiction beyond what is expressly delegated. 1 Salk. 404, n.; Gilb. C. P. 198; 1 Saund. 73; 2 Lord Raym. 1311; and see Bac. Ab. Courts, &c., C, et seq.; Bac. Ab. Pleas, E 2.—Jurisdiction is original, when it is conferred on the court in the first instance, which is called *original jurisdiction*, (q. v.); or it is *appellate*, which is when an appeal is given from the judgment of another court. Jurisdiction is also *civil*, where the subject-matter to be tried is not of a criminal nature; or *criminal*, where the court is to punish crimes. Some courts and magistrates have both civil and criminal jurisdiction. It is the law which gives jurisdiction; the consent of parties, cannot, therefore, confer it, in a matter which the law excludes. 1 N. & M. 192; 3 M'Cord, 280; 1 Call, 55; 1 J. J. Marsh. 476; 1 Bibb, 263; Cooke, 27; Minor, 65; 3 Litt. 332; 6 Litt. 303; Kirby, 111; 1

Breese, 32; 2 Yerg. 441; 1 Const. R. 478. But where the court has jurisdiction of the matter, and the defendant has some privilege which exempts him from the jurisdiction, he may waive the privilege. 5 Cranch, 288; 1 Pet. 449; 8 Wheat. 699; 4 W. C. C. R. 84; 4 M'Cord, 79; 4 Mass. 593; Wright, 484. See Hardin, 448; 2 Wash. 213. Courts of inferior jurisdiction must act within their jurisdiction, and so it must appear upon the record. 5 Cranch, 172; Pet. C. C. R. 36; 4 Dall. 11; 2 Mass. 213; 4 Mass. 122; 8 Mass. 86; 11 Mass. 513; Pr. Dec. 380; 2 Verm. 329; 3 Verm. 114; 10 Conn. 514; 4 John. 292; 3 Yerg. 355; Walker, 75; 9 Cowen, 227; 5 Har. & John. 36; 1 Bailey, 459; 2 Bailey, 267. But the legislature may by a general or special law provide otherwise. Pet. C. C. R. 36. Vide 1 Salk. 414; Bac. Ab. Courts, &c., C, D; Id. Prerogative, E 5; Merlin Rép. h. t.; Ayl. Par. 317, and the art. *Competency*. As to the force of municipal laws beyond the territorial jurisdiction of the state, see Wheat. Intern. Law, part. 2, c. 2, § 7, et seq.; Story, Confl. of Laws, c. 2; Huberus, lib. 1, t. 3; 13 Mass. R. 4; Pard. Dr. Com. part. 6, t. 7, c. 2, § 1; and the articles *Conflict of Laws; Courts of the United States*.

JURISPRUDENCE, is the science of the law. By science here is understood that connexion of truths founded on principles either evident in themselves, or capable of demonstration; a collection of truths of the same kind, arranged in methodical order. In a more confined sense jurisprudence is the practical science of giving a wise interpretation to the laws, and to make a just application of them to all cases as they arise. In this sense it is the habit of judging the same question in the same manner, and by this course of judgments forming precedents. 1 Ayl. Pand. 3; Toull. Dr. Civ. Fr. tit. prel. s. 1, n. 1, 12, 99; Merl. Rép. h. t; 19 Amer. Jurist, 3.

JURIST, one well versed in the science of the law. The term is usually applied to students and practitioners of law.

JUROR, *practice*, from *juro*, to swear; a man who is sworn or affirmed to serve on a jury. Jurors are selected from citizens, and may be compelled to serve by fine; they generally receive a compensation for their services; while attending court they are privileged from arrest in civil cases.

JURY, a body of men selected according to law, for the purpose of deciding some controversy. This mode of trial by jury was adopted soon after the conquest of England by William, and was fully established for the trial of civil suits in the reign of Henry II. Crabb's C. L. 50, 51. Juries are either grand juries, (q. v.) or petit juries. The former having been treated of elsewhere, it will only be necessary to consider the latter. A petit jury consists of twelve citizens duly qualified to serve on juries, impannelled and sworn to try one or more issues of facts submitted to them, and to give a judgment respecting the same, which is called a verdict. Each one of the citizens so impannelled and sworn is called a juror. Vide *Trial*.

The constitution of the United States directs, that "the trial of all crimes, except in cases of impeachment, shall be by jury;" and this invaluable institution is also secured by the several state constitutions. The constitution of the United States also provides that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. Amendm. VII.

JUS. Law or right. This term is applied in many modern phrases.

JUS ACCRESCENDI. The right of survivorship. At common law when one of several joint tenants died, the entire tenancy or estate went to the survivors, and so on to the last survivor, who took an estate of inheritance. This right, except in estates held in trust, has been abolished by statute in Alabama, Delaware, Georgia, Illinois, Indiana, Kentucky, Michigan, Missouri, Mississippi, New York, North Carolina, Pennsylvania, South Carolina, Tennessee, and Virginia. Griff. Reg. h. t.; 1 Hill. Ab. 439, 440. In Connecticut, 1 Root, Rep. 48; 1 Swift's Dig. 102; and Louisiana, this right was never recognized. See 11 Serg. & R. 192; 2 Caines, Cas. Err. 326; 3 Verm. 543; 6 Monr. R. 15; and *Estate in common; Estate in joint tenancy.*

JUS AD REM, *property, title.* This phrase is applied to designate the right a man has in relation to a thing; it is not the right in the thing itself, but only against the person who has contracted to deliver it. It is a mere imperfect or inchoate right. 2 Bl. Com. 312; Poth. Dr. de Dom. de Proprieté, ch. prél. n. 1. This phrase is nearly equivalent to *chose in action.* 2 Wooddes. Lect. 235; see 2 P. Wms. 491; 1 Mason, 221; 1 Story, Eq. Jur. § 506; 2 Story, Eq. Jur. § 1215; Story, Ag. § 352; and *Jus in re.*

JUS AQUÆDUCTUS, *civil law.* The name of a servitude which gives to the owner of land the right to bring down water through or from the land of another, either from its source or from any other place. Its privilege may be limited as to the time when it may be exercised. If the source fails, the servitude ceases, but revives when the water returns. If the water rises in, or naturally flows through the land, its proprietor cannot by any grant divert it so as to prevent it flowing to the land below. 2 Roll. Ab. 140, l. 25; Lois des Bât. part. 1, c. 3, s. 1, art. 1. But if it had been brought into his land by artificial means, it seems it would be strictly his property, and that it would be in his power to grant it. Dig. 8, 3, 1 & 10; 3 Burge on the Confl. of Laws, 417. Vide *Rain water; River; Water-course.*

JUS CLOACÆ, *civil law.* The name of a servitude which requires the party who is subject to it, to permit his neighbour to conduct the waters which fall on his grounds over those of the servient estate.

JUS DELIBERANDI. The right of deliberating which in some countries where the heir may have *benefit of inventory*, (q. v.) is given to him to consider whether he will accept or renounce the succession. In Louisiana he is allowed ten days before he is required to make his election. Civ. Code, art. 1028.

JUS DUPLICATUM, *property, title.* When a man has the possession as well as the property of any thing, he is said to have a double right, *jus duplicatum.* Bract. l. 4, tr. 4, c. 4; 3 Bl. Com. 189.

JUS GENTIUM, the *law of nations*, (q. v.) Although the Romans used these words in the sense we attach to *law of nations*, yet among them the sense was much more extended. Falck, Encyc. Jur. 102, n. 42.

JUS GLADII. Supreme jurisdiction. The right to absolve or condemn a man to death.

JUS MARITI, *Scotch law*, is the right of the husband to administer, during the marriage, his wife's goods and the rents of her heritage.

JUS PERSONARUM. The right of persons. A branch of the law which embraces the theory of the different classes of men who exist in a state, and which have been formed by nature or by the society; it includes particularly the theory of the ties of families, of the legal form and the

juridical effects as to the relations among them. The Danes, the English, and the learned in this country, class under this head the relations which exist between men in a political point of view. Blackstone, among others, has adopted this classification. There seems a confusion of ideas when such matters are placed under this head. Vide Bl. Com. Book, 1.

JUS POSTLIMINII, *property, title.* The right to claim property after re-capture. Vide *Postliminy;* Marsh. Ins. 573; 1 Kent, Com. 108; Dane's Ab. Index, h. t.

JUS PROJICIENDI, *civil law.* The name of a servitude; it is the right which the owner of a building has of projecting a part of his building towards the adjoining house, without resting on the latter. It is extended merely over the ground. Dig. 50, 16, 242, 1; Dig. 8, 2, 25; Dig. 8, 5, 8, 5.

JUS PROTEGENDI, *civil law.* The name of a servitude; it is a right by which a part of the roof or tiling of one house is made to extend over the adjoining house. Dig. 50, 16, 242, 1; Dig. 8, 2, 25; Dig. 8, 5, 8, 5.

JUS IN RE, *property, title.* It is the right which a man has in a thing, by which it belongs to him. It is a complete and full right. Poth. Dr. de Dom. de Prop. n. 1. This phrase of the civil law corresponds to convey the same idea as *thing in possession*, does with us. 4 Wooddes. Lect. 235; vide 2 P. Wms. 491; 1 Mason, 221; 1 Story, Eq. Jur. § 506; 2 Story, Eq. Jur. § 1215; Story, Ag. § 352; and *Jus ad rem.*

JUS RELICTA, *Scotch law*, is the right of a wife, after her husband's death, to a third of movables, if there be children; and to one-half, if there be none.

JUS RERUM. The right of things. This treats of the juridical relations which bear upon the objects of external nature. Its principal object is to ascertain how far a person can have a permanent dominion over a specified portion of nature, and how that dominion is acquired. Vide Bl. Com. Book 2.

JUS STRICTUM. A Latin phrase which signifies that the law is to be interpreted without any modification, and in its utmost rigour.

JUSTICE is the constant and perpetual disposition to render every man his due. Just. Inst. B. 1, tit. 1. Toullier defines it to be the conformity of our actions and our will to the law. Dr. Civ. Fr. tit. prel. n. 5. In the most extensive sense of the word, it differs little from virtue, for it includes within itself the whole circle of virtues. Yet the common distinction between them is that which considered positively and in itself, is called virtue, when considered relatively and with respect to others, has the name of justice. But justice being in itself a part of virtue, is confined to things simply good or evil, and consists in a man's taking such a proportion of them as he ought. Justice is either distributive or commutative.

Distributive justice is that virtue whose object is to distributive rewards and punishments to each one according to his merits, observing a just proportion by comparing a person or a fact with another, so that neither equal persons have unequal things, nor unequal persons things equal. Tr. of Eq. 3, and Toullier's learned note, Dr. Civ. Fr. tit. prel. n. 7, note.

Commutative justice is that virtue whose object it is to render to every one what belongs to him, as nearly as may be, or that which governs contracts. To render commutative justice, the judge must make an equality between the parties, that no one may be a gainer by another's loss. Tr. Eq. 3.

Toullier exposes the want of utility and exactness in this division of distributive and commutative justice, adopted in the *compendium* or abridgments of the ancient doctors, and prefers the division of *internal* and *external* justice; the first being a conformity of our *will*, and the latter a conformity of our *actions* to the law: their union makes perfect justice. Exterior justice is the object of jurisprudence; interior justice is the object of morality. Dr. Civ. Fr. tit. prél. n. 6 et 7.

According to the Frederician code, part 1, book 1, tit. 2, s. 27, justice consists simply in letting every one enjoy the rights which he has acquired in virtue of the laws. And as this definition includes all the other rules of right, there is properly but one single general rule of right, namely, *Give every one his own.*

See generally, Puffend. Law of Nature and Nations, B. 1, c. 7, s. 89; Elementorum Jurisprudentiæ universalis, lib. 1, definito, 17, 3, 1; Gro. lib. 2, c. 11, s. 3; Ld. Bac. Read. Stat. Uses, 306; Treatise of Equity, B. 1, c. 1, s. 1.

JUSTICES, judges. Officers appointed by a competent authority to administer justice. They are so called because in ancient times the Latin word for judge was *justitia*. This term is in common parlance used to designate justices of the peace.

JUSTICES IN EYRE, were certain judges, established if not first appointed, A. D. 1176, 22 Hen. 2. England was divided into certain circuits, and three justices in eyre, or justices itinerant, as they were sometimes called, were appointed to each district, and made the circuit of the kingdom once in seven years for the purpose of trying causes. They were afterwards directed by Magna Carta, c. 12, to be sent into every county once a year. The itinerant justices were sometimes mere justices of assise or dower, or of general gaol delivery, and the like. 3 Bl. Com. 58, 9; Crabb's Eng. Law, 103, 4. Vide *Eire*.

JUSTICES OF THE PEACE, are public officers invested with judicial powers for the purpose of preventing breaches of the peace, and bringing to punishment those who have violated the law. These officers, under the constitution of the United States and some of the states, are appointed by the executive; in others they are elected by the people, and commissioned by the executive. In some states they hold their office during good behaviour, in others for a limited period.

At common law justices of the peace have a double power in relation to the arrest of wrong-doers; when a felony or breach of the peace has been committed in their presence, they may personally arrest the offender, or command others to do so; and in order to prevent the riotous consequences of a tumultuous assembly, they may command others to arrest affrayers, when the affray has been committed in their presence. When the magistrate is not present when a crime is committed, before he can take a step to arrest the offender, an oath or affirmation must be made before him by some person cognizant of the fact, that the offence has been committed, and that the person charged is the offender, or there is probable cause to believe that he has committed the offence. The constitution of the United States directs, that "no warrants shall issue, but upon probable cause, supported by oath or affirmation." Amendm. IV. After his arrest, the person charged is brought before the justice of the peace, and after hearing he is discharged, held to bail to answer to the complaint, or, for want of bail, committed to prison.

In some, perhaps all the United States, justices of the peace have jurisdiction in civil cases, given to them by local regulations. In Pennsylvania their jurisdiction in cases of contracts, express or implied, extends to one hundred dollars.

Vide, generally, Burn's Justice; Graydon's Justice; Bache's Manual of a Justice of the Peace; Com. Dig. h. t.; 15 Vin. Ab. 3; Bac. Ab. h. t.; 2 Sell. Pr. 70; 2 Phil. Ev. 239; Chit. Pr. h. t.; Amer. Dig. h. t.

JUSTICIAR or JUSTICIER. A judge or justice; the same as justiciary, (q. v.)

JUSTICIARII ITENERANTES, *Eng. law*, were formerly justices who were so called because they went from county to county to administer justice. They were usually called justices in eyre, to distinguish them from justices residing at Westminster, who were called *justicii residentes*. Co. Litt. 293. Vide *Itenerant*.

JUSTICIARII RESIDENTES, *Eng. law*, were justices or judges who usually resided in Westminster; they were so called to distinguish them from justices in eyre. Co. Litt. 293. Vide *Justiciarii Itenerantes*.

JUSTICIARY, *officer*, another nome for a judge. In Latin he was called *justiciarius*, and in French *justicier*. Not used. Bac. Ab. Courts and their jurisdiction, (A).

JUSTIFIABLE HOMICIDE,—*crim. law*, is the killing of a human being in consequence of an imperious duty prescribed by law, as hanging a man lawfully sentenced to be hung; or it is when the killing is owing to some unavoidable necessity induced by the act of the party killed, without any manner of fault in the party killing. 1 East, P. C. 219; Hawk. B. 1, c. 28, s. 1, n. 22.

JUSTIFICATION, *pleading*, is the maintaining and showing a good and legal reason in court why a party charged did the thing he is called upon to answer for. Vide for justification in cases of slander, Com. Dig. Pleader, 2 L 3 to 2 L 7; in cases of trespass, 15 East, R. 615, note (e); 2 Lill. Ab. 134; 15 Vin. Ab. 31; Dane's Ab. Index, h. t. When the plea of justification is supported by evidence, it is a bar to the action. But a foreign minister cannot waive his privilege or immunities, and his submission or consent to an arrest is no justification. U. S. v. Benner, 1 Bald. 240. Vide *Excuse*.

JUSTIFICATORS. A kind of compurgators, or those who by oath justified the innocence or oaths of others, as in the case of wagers of law.

JUSTIFYING BAIL, *practice*, is the production of bail in court, who there justify themselves against the exception of the plaintiff.

K.

KENTUCKY. The name of one of the new states of the United States of America. This state was formerly a part of Virginia, and the latter state, by an act of the legislature, passed the 18th day of December, 1789, "consented that the district of Kentucky, within the jurisdiction of the said commonwealth, and according to its actual boundaries at the time of passing the act aforesaid, should be formed into a new state." By the act of Congress of February 4, 1791, 1 Story's L. U. S. 168, congress consented that after the first day of June, 1792, the district of Kentucky should be formed into a new state, separate from and inde-

pendent of the commonwealth of Virginia. And by the second section, it is enacted, that upon the aforesaid first day of June, 1792, the said new state, by the name and style of the State of Kentucky, shall be received and admitted into the Union, as a new and entire member of the United States of America.

The constitution of this state was adopted the 17th day of August, 1799. The powers of the government are divided into three distinct departments, and each of them is confided to a separate body of magistracy, to wit: those which are legislative to one; those which are executive, to another; and those which are judiciary, to another.

1st. The legislative power is vested in two distinct branches; the one styled the house of representatives, and the other the senate; and both together, the general assembly of the commonwealth of Kentucky. 1. The house of representatives is elected yearly, and consists of not less than fifty-eight nor more than one hundred members. 2. The members of the senate are elected for four years. The senate consists of twenty-four members at least, and for every three members above fifty-eight, which shall be added to the house of representatives, one member shall be added to the senate.

2. The executive power is vested in a chief magistrate, who is styled the governor of the commonwealth of Kentucky. The governor is elected for four years. He is commander-in-chief of the army and navy of the commonwealth, except when called into actual service of the United States. He nominates, and with the consent of the senate, appoints all officers, except those whose appointment is otherwise provided for. He is invested with the pardoning power, except in certain cases, as impeachment and treason. A lieutenant-governor is chosen at every election for governor, in the same manner, and to continue in office for the same time as the governor. He is, ex officio, speaker of the senate, and acts as governor when the latter is impeached, or removed from office, or dead, or refuses to qualify, resigns, or is absent from the state.

3d. The judicial power, both as to matters of law and equity, is vested in one supreme court, styled the court of appeals, and in such inferior courts as the general assembly may, from time to time erect and establish. The judges hold their office during good behaviour.

KEY, *estates*. A wharf at which to land or load goods from or in a vessel. This word is now generally spelled *Quay*, from the French, *quai*.

KEYAGE, a toll paid for loading and unloading merchandize at a key or wharf.

KEY. An instrument made for opening a lock. The keys of a house are considered as real estate, and descend to the heir with the inheritance. When the keys of a warehouse are delivered to a purchaser of goods locked up there, with a view of effecting a delivery of such goods, the delivery is complete. The doctrine of the civil law is the same. Dig. lib. 41, t. 1, l. 9, § 6; and lib. 18, t. 1, l. 74.

KEELAGE, the right of demanding money for the bottom of ships resting in a port or harbour. The money so paid, is also called *keelage*.

KEELS. This word is applied, in England, to vessels employed in the carriage of coals. Jacob, L. D.

KIDNAPPING. The forcible and unlawful abduction and conveying away of a man, woman, or child, from his or her home, without his or her will or consent, and sending such person away, with an intent to deprive him or her of some right. This is an offence at common law.

KILDERKIN. A measure of capacity, equal to eighteen gallons. See *Measure*.

KINDRED, relations by blood. Nature has divided kindred of every one into three principal classes. 1 His children and their descendants; 2, his father, mother and other ascendants; 3, his collateral relations, which include, in the first place, his brothers and sisters and their descendants; and, secondly, his uncles, cousins and other relations of either sex, who have not descended from a brother or sister of the deceased. All kindred then are descendants, acendants or collaterals. A husband or wife of the deceased, therefore, is not his or her kindred. 14 Ves. 372; vide Wood's Inst. 50; Ayl. Parerg. 325; Dane's Ab. h. t.; Toll. Ex. 382, 3; 2 Chit. Bl. Com. 516, n. 59; Poth. Des Successions, ch. 1, art. 3.

KING. The chief magistrate of a kingdom, vested usually with the executive power.

The following table of the reigns of English and British kings and queens, commencing with the Reports, is added to assist the student in many points of chronology.

	Accession.
Henry III.,	1216
Edward I.,	1272
Edward II.,	1307
Edward III.,	1327
Richard II.,	1377
Henry IV.,	1399
Henry V.,	1413
Henry VI.	1422
Edward IV.,	1461
Edward V.,	1483
Richard III.,	1483
Henry VII.,	1485
Henry VIII.,	1509
Edward VI.,	1547
Mary,	1553
Elizabeth,	1558
James I.,	1603
Charles I.,	1625
Charles II.,	1660
James II.,	1685
William III.,	1689
Anne,	1702
George I.,	1714
George II.,	1727
George III.,	1760
George IV.,	1820
William IV.,	1830
Victoria,	1837

Vide article *Reports*.

KING'S BENCH. The name of the supreme court of law in England. It is so called because formerly the king used to sit there in person, the style of the court being still *coram ipso rege*, before the king himself. During the reign of a queen, it is called the Queen's Bench, and during the protectorate of Cromwell, it was called the Upper Bench. It consists of a chief justice, and three other judges who are, by their office, the principal coroners and conservators of the peace. 3 Bl. Com. 41.

This court has jurisdiction in criminal matters, in civil causes, and is a supervisory tribunal to keep other jurisdictions within their proper bounds. 1. Its *criminal* jurisdiction extends over all offenders, and not only over all capital offences but also over all other misdemeanors of a public nature; it being considered the *custos morum* of the realm. Its jurisdiction is so universal that an act of parliament appointing that all crimes of a certain denomination shall be tried before certain judges, does not exclude the jurisdiction of this court, without negative words. It may also proceed on indictments removed into that court out of the inferior courts by certiorari. 2. Its *civil* jurisdiction against the officers or ministers of the court entitled to its privilege, 2 Inst. 23; 4 Inst. 71; 2 Bulstr. 123; and against prisoners for trespasses. In these last cases a declaration may be filed against them

in debt, covenant or account; and this is done also upon the notion of a privilege, because the common pleas could not obtain or procure the prisoners of the king's bench to appear in their court. 3. Its supervisory powers extend, 1, to issuing writs of error to inferior jurisdiction, and affirming or reversing their judgments; 2, to issuing writs of mandamus to compel inferior officers and courts to perform the duties required of them by law. Bac. Ab. Court of King's Bench.

KIRBY'S QUEST. An ancient record remaining with the remembrancer of the English Exchequer, so called from being the inquest of John De Kirby, treasurer to Edw. I.

KINTLIDGE, *merc. law.* This term is used by merchants and seafaring men to signify a ship's ballast. Merc. Dict.

KNAVE. A false dishonest, or deceitful person. This signification of the word has arisen by a long perversion of its original meaning. To call a man a knave has been held to be actionable. 1 Rolle's Ab. 52; 1 Freem. 277.

KNIGHT'S FEE, *old Eng. law*, is an uncertain measure of land, but, according to some opinions is said to contain six hundred and eighty acres. Co. Litt. 69 a.

KNIGHT'S SERVICE, *Engl. law*, was a tenure of lands. Those who held by knight's service were called "milites qui per loricas terras suos defendunt;" soldiers who defend the country by their armour. The incidents of knight's service were homage, fealty, warranty, wardship, marriage, reliefs, heriots, aids, escheats, and forfeiture. Vide *Socage.*

KNOWINGLY, *pleadings.* The word "knowingly," or "well knowing," will supply the place of a positive averment in an indictment or declaration, that the defendant knew the facts subsequently stated; if notice or knowledge be unnecessarily stated, the allegation may be rejected as surplusage. Vide Com. Dig. Indictment, G 6; 2 Stra. 904; 2 East, 452; 1 Chit. Pl. *376. Vide *Scienter.*

KNOWLEDGE. Information as to a fact. Many acts are perfectly innocent when the party performing them is not aware of certain circumstances attending them; for example, a man may pass a counterfeit note and be guiltless if he did not know it was so; he may receive stolen goods if he was not aware of the fact that they were stolen. In these and the like cases it is the guilty knowledge which makes the crime. See as to the manner of proving guilty knowledge, Archb. Cr. Pl. 110, 111. Vide *Animal; Dog; Ignorance; Scienter.*